Institutiones Administrationis

Journal of Administrative Sciences

Volume 1. (2021)
No. 1

SZÉCHENYI EGYETEM
UNIVERSITY OF GYŐR

Institutiones Administrationis

Journal of Administrative Sciences

European Union and Central and Eastern Europe

Vol. 1. No. 1. 2021

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Published by UNIVERSITAS-Győr Nonprofit Ltd.,
Egyetem tér 1. 9026 Győr, Hungary
Responsible for publishing: Eszter Tóth

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UNIVERSITY OF GYŐR

DOI: 10.54201/iajas.v1i1.2

Institutiones Administrationis - Journal of Administrative sciences

FIRST ISSUE

EDITORIAL

Upon the founding of the journal, we wish to continue and at the same time completely renew the content and operation of the highly successful cooperation in the science of public administration that we started in 2016 when we established the Public Governance Administration and Finances Law Review (with the generous support of Wolters Kluwer and then the University of Public Service, for which we would like to express our thanks once again).

Our primary goal was, and still is, to create a major forum for public administration, administrative law scholars, academics and key professionals of the "Visegrad countries" as part of a thriving and meaningful collaboration.

The time elapsed since 2016 has clearly shown that administrative law and public administration have become so complex in the context of the global world economy and modern state functioning that they can only be developed in a truly meaningful way through joint effort and comprehensive academic and research cooperation. Yet it has also become obvious that there is very strong demand for this kind of cooperation. Not only did excellent public administration theorists from the faculties of law in Hungary join forces to develop public administration studies in line with our times, but in the other Visegrad countries there was also a general interest in such joint work, and even a resolve in this context that surprised us. The public administration scholars of the individual countries have taken up this cause without any "comments or questions", thereby establishing an excellent network of contacts, which is not only unique but also very fruitful for the development of administrative law and jurisprudence.

Several significant results have already been achieved as part of this framework, including the conferences on Understanding Public Bureaucracy (2018) and Pandemic and Governance (2020), and the volume of studies entitled European Financial Law in Times of Crisis of the European Union (2019). As this international cooperation has developed and strengthened, more and more research networks have joined, such as the Information and Organization Center for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe, an institute affiliated to the Bialystok Law Faculty.

These successes also justify the foundation of this international academic journal; in fact, it is precisely these successes and experiences that made it increasingly imperative that this cooperation – while moving away from the constitutional law issues of governance, government, and public finance – focus on public administration and its intrinsic theoretical foundations. In this way, we can define our scientific objectives and the scientific field of research of this community in an appropriate and clear manner.

The successes achieved so far have also made it necessary to place this new scientific periodical in a broader context, to further emphasise the excellent human and professional cooperation that has been established, and to provide the latter with a "framework" and "organisation" by creating the Central and Eastern European Association for Public Administration, based in Győr. This association manages our scientific journal, and within this organisational structure we can raise the standards and organisation of the journal and the events of this great cooperation to an even higher level; besides, as

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a non-governmental organisation, we can develop public administration research, education and academic work in the Visegrad countries much more effectively.

The National Media and Infocommunications Authority is the primary supporter of the foundation of the journal and the Association as well, for which we express our thanks.

We are confident that together we will be able to achieve these goals, whilst also enjoying ourselves. In other words, we want this effort to be not only hard work, but also a collaboration in which every stakeholder is happy and willing to participate. In any case, we now have every opportunity to achieve our goal thanks to the excellent network of contacts already in place, and we have now received almost all the professional, human and financial support we need to realise these goals and achieve success.

Gábor Hulkó - András Lapsánszky
Editors-in-Chief

DOI: 10.54201/iajas.v1i1.3

Regulation of social media's public law liability in the Visegrad States

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Abstract: Social media and media platforms have fundamentally changed the traditional ways of social communication, expression and declaration, as well as access to information. The novelty and social significance of social media poses challenges that legislation can only follow after some delay. The speed of technological development outpaces the improvement of legal regulation, which, in the most necessary cases, tries to deal with the situation in a reactive manner. This study examines the trends and tendencies in the regulation of social media, focusing mainly on its responsibility and liability for user-uploaded content, for content removal and possible administrative or other interventions in the Visegrad states.

Keywords: social media, media regulation, social media liability, public law responsibility

1. INTRODUCTION

Given the technological capabilities of internet communication and the constitutional foundations of social media, the question of whether state regulation or self-regulation, national or global regulation is appropriate for social networks is not yet clear. State action is limited by the system of jurisdictions, and in the case of global self-regulation of service providers, there are no rule-of-law guarantees for the restriction of fundamental rights, while in many cases they are arbitrary.[1]

In the state regulation of social media, it is worth distinguishing between two problems: *one is the assessment of disputes and the legal liability between users, while the other is the issue of the legal liability of platforms.* When settling disputes between users, it is typical for the examined countries that users can sue each other in the usual way, offline, or they can make an accusation in the conventional way if they suspect that a crime has been committed. The legal procedures are the same, but the specifics of communication on the social media platform must be considered when investigating an infringement.[2] *The regulation of the liability regime for content on social media platforms is described below.*

2. THE EUROPEAN UNION FRAMEWORK

The European Union's rules have attempted to regulate the internet from two directions: *regulating certain internet-based services*, and *regulating*

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the internet in general. Beyond the areas harmonised by EU law, Member States may adopt national rules, but this should not be an unjustified obstacle to the free movement of services within the Union.

The European Union regulatory framework is based on Directive 2010/13/EU on audiovisual media services (hereinafter referred to as: AVMSD),[3] the primary objectives of which are the functioning of the single European market for audiovisual media services and consumer protection. The AVMSD was amended based on Directive 2018/1808/EU,[4] *extending the scope of the AVMSD to "video-sharing platforms"* and *audiovisual content shared on social media services*. Based on the amendment, the regulation of audiovisual content shared via social media was extended. Rules on the content of audiovisual advertisements, the protection of children and, in accordance with Article 21 of the Charter of Fundamental Rights, the content against which service providers are obliged to act are enshrined: hate speech, support for terrorism, denial of genocide, child pornography. This Directive *still does not impose an obligation on platform providers to filter general content, but it obliges them to establish effective procedures for reporting and handling incoming complaints.*

In addition to the AVMSD, Directive 2000/31/EC of the European Parliament and of the Council on electronic commerce (hereinafter referred to as: e-Commerce Directive)[5] contains provisions on e-services. The *purpose* of this Directive is to ensure the free movement of information society services, in particular electronic commerce services, between Member States in the internal market. The e-Commerce Directive *does not impose a monitoring obligation* on hosting providers. Under Article 14, which governs the liability of hosting providers for content, the liability of the provider *cannot be established* if it does not have actual knowledge of the illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. Action against hosting providers is available to consumers under the e-Commerce Directive and they can take legal action in the courts of their own country to remove offensive content. However, the e-Commerce Directive also states that the courts or administrative authorities of the Member States may, in accordance with the legal systems of the Member States, oblige the provider to terminate or prevent the infringement and that Member States may adopt rules on the removal of information or termination of access. Significant progress has been made in applying the two directives and in the liability for the content of global service providers with a code of conduct against online racial and xenophobic manifestations, as established by the *Commission and the four major companies (Facebook, Microsoft, Twitter, YouTube)* in May 2016. The purpose of the *Code of Conduct is to deal quickly with requests for cancellation*. Under the Code of Conduct, companies remove illegal content from their platforms that they consider to be in breach of their internal rules, Community guidelines and national legislation transposing EU law on racism and xenophobia. *Applications will be reviewed and removed within 24 hours, but in compliance with the principle of freedom of speech. Instagram, Dailymotion, Snapchat and Jeuxvideo have meanwhile joined the code.*

3. REGULATION IN HUNGARY

In Hungary, there is no law in force regulating social media explicitly and exclusively. In the system of regulation, the classical regulatory elements that are independent of the specifics of social media can be identified and can be properly applied to the platforms of social media as well. *General legislation therefore applies to communication on social media platforms, including, in particular, the common rules on data protection, copyright, protection of the right to privacy, public policy and criminal law.* The 2018 amendment to the AVMSD (see above) was implemented in the Hungarian legal system.

As in the other countries examined in this study – in terms of legal theory – *two areas can be distinguished* in the special state regulations on so-

cial media: one is to *settle disputes between users of social media interfaces*, and the other is the *issue of the legal liability of platforms*. An important issue for the regulation of the latter is that the platform is not the primary provider of the infringing opinion, but only gives an opportunity for others to communicate. However, in line with the European legal approach, they must be involved in the removal of infringing content, failing which they will be held liable for that content. State regulation this way also involves platform providers in the redress system, which thus have to decide on the legality of the content in question, and with this step, platform providers become important actors in the application of law and enforcement, as well as having a significant influence on the freedom of expression on the platform. Accordingly, a central element in the Hungarian regulation on social media is that the service provider establishes an interface for user content, i.e. it does not operate as a content provider or media service provider.[6]

The Hungarian regulation makes a distinction between *media content providers* (e.g. media service providers or publishers of media products which produce their own content and their responsibilities[7] are regulated by media administration rules[8]), *video-sharing platform providers* (for which the AVMSD – as transposed into national law – applies) and *social media platforms* (see below). With regard to social media, the *provisions of Act No. 108 of 2001 on certain issues of electronic commerce services and information society services*[9] *apply* (hereinafter referred to as: e-Services Act Hungary), which follow the regulatory principles of the e-Commerce Directive.

According to the Hungarian regulations, *social media platforms qualify as intermediary service providers*, more specifically hosting providers, and they can also be classified as search service providers based on their additional functions.[10] Accordingly, the service provider is responsible for the illegal content it provides, but in the case of social media platforms, this is a liability rule that applies to their own content. *Intermediary service providers are not responsible for the content and information communicated by others in the presence of the conditions provided by law*, and are not obliged to check the information stored, transmitted or made available.[11]

Among the rules applicable to social media platform operators as hosting providers, the provisions aimed at ensuring the removal of infringing information as soon as possible and the prevention of access should be highlighted. As part of this, the procedure and conditions of the notification removal procedures are regulated in particular detail, on the basis of which the copyright owner or the legal representative of the minor may take action to remove copyright infringements and content infringing upon the personal rights of minors. The purpose of this type of procedure is to offer those concerned an alternative to lengthy, cumbersome court proceedings to determine the infringement and (typically) put an end to the infringing situation, which enables right-holders to restrict access to the infringing information and remove the infringing content. It is important that this form of procedure merely precedes, but does not preclude, the possibility of recourse to the courts, and that the relevant rules apply only to the relationship between the service provider and the injured party, not in any court proceedings.

Exemption from liability for infringing content on social media is subject to a notice-removal procedure.[12] *If the intermediary service provider acts in connection with the removal, making it inaccessible, it shall not be liable for the infringement caused by the removal of the information or failure to provide access.*[13] Hungarian law regulates in detail the conditions for exemption from liability for each type of intermediary service provider. *The service provider shall not be liable for the information provided by the recipient if a) it is not aware of any unlawful conduct in connection with the information or that the information infringes the rights or legitimate interests of anyone; b) as soon as it becomes aware of it, it shall immediately take action to remove the information or refuse access.*[14] The provisions governing the exemption of intermediary service providers from liability for information held, transmitted or made available are therefore based on the fact that, on the one hand, intermediary service providers are

not liable if their activities involve the technical, automatic and passive dissemination of information to the public, and on the other hand, if the service providers become aware of the infringing nature of the content and take immediate action to remove it. *In this respect, the Hungarian legislation provides a similar exemption from liability for service providers offering search services and application services.*

4. REGULATION OF THE CZECH REPUBLIC AND SLOVAKIA

4.1. FUNDAMENTAL PRINCIPLES

The fundamental principles of the liability of social media providers in both the Czech Republic and Slovakia are based on essentially the same philosophy. The starting point is freedom of expression and constitutional rules on access to information.[15] With regard to the system of legal sources, the 2018 amendment to the AVMSD has not been implemented in the legal order of either country yet.

The general rule of the liability regime in both countries is to distinguish between online and offline "forums", i.e. *the medium through which the expression of opinion takes place is not relevant*. In a general approach, several aspects of the legal responsibility for expressing an opinion can be distinguished on online interfaces. In the case of the *private law aspect* of an infringement, a right of privacy is typically violated: it may be an interference with personal data, a violation of human dignity, privacy or defamation. These cases are typically disputes between individuals that are ultimately decided by a court. *From a public law point of view*, we can distinguish between administrative-type violations and related administrative sanctions, and in more serious cases, criminal acts and penalties. Administrative-type infringements in the Czech Republic and Slovakia typically include personal data protection and conflicts of expression, in which case the data protection authority acts in public proceedings and may impose administrative measures and fines. The subject of these proceedings is the protection of personal data, but it does not exclude the possibility of enforcing damages in a civil law procedure. Similarly, in other administrative sectors, the conflict of freedom of expression with other rules and prohibitions may appear. Examples include *restrictions on election campaigns* or *restrictions related to media law*. A further public-law restriction on freedom of expression is the framework established by criminal law, in particular the facts that fall into the category of "hate speech". Czech and Slovak law do not use the term hate speech, the current criminal law rules place it under other criminal acts (incitement against the community, use of an authoritarian symbol, incitement to violence, etc.). *In summary, in Czech and Slovak law, in the case of legal liability, it is necessary to examine what infringement it is for, what legal entity is liable for it, and what regulatory area it affects*.

Czech and Slovak legislation do not define the concept of illegality or infringement, either in relation to e-services or social media. According to this, an infringement is considered to be an infringement under Czech – and Slovak – law. To remove infringing content and an infringement suffered online, an individual can, as a general rule, *go to court*.

In some branches, such as the protection of personal data and the protection of copyright, there is an administrative supervisory body, so administrative intervention is also conceivable under sectoral legislation. In the event of a suspected criminal offence, the *investigating authorities may act*. The regulations do not differentiate between infringements committed in the 'online' and 'offline' space, i.e. the nature of the medium is irrelevant in relation to the legal means available. There is *no special government body set up in any of the two countries* to control or monitor content on the internet. There are *no special fines*, or other types of sanction, for the operation of social media providers.

Social media liability is *not specifically regulated* in the Czech and Slovak legal systems. The

Czech Republic *regulates* the internet and social media *only tangentially*, this issue is *regulated by Act No. 480 of 2004 on certain information society services* (hereinafter referred to as: Czech e-Services Act).[16] The Slovak regulation is based on *Act No. 22 of 2004 on electronic commerce* (hereinafter referred to as: Slovak e-Services Act).[17] Both laws transposed the rules of the e-Commerce Directive into national law – *i.e. these laws were not created specifically to regulate social media*.

4.2. CHARACTERISTICS OF THE CZECH REGULATION

Under Czech law, a *"service provider"*[18] is *liable for content that is displayed or transmitted by it if* a) the service provider was aware or became aware of the infringement and at the same time, b) the service provider did not remove the infringing content. *As a general rule, the service provider can thus be held liable if it has not acted after becoming aware of the infringement.* However, a special rule differing from this one is that the service provider is liable in all cases if the content is produced directly by it, or it has a significant influence on the content, i.e. if it *directly or indirectly has a decisive influence on the user's activities*.[19] This is typically the case for news portals and online newspapers or magazines, which, as publishers, are responsible for the content of the news they publish.

The service provider has *no obligation to search for active content (content tracking)*,[20] in this regard the regulation contains an explicit provision guaranteeing that service providers *cannot be held liable* for active content tracking – except in the case of online news portals or newspapers. *The Czech law does not contain any public law incentives regarding the non-removal of illegal content*, it is a provision without sanctions.

In the Czech Republic, two trends have emerged in recent years regarding the obligation of social platforms to intervene. *This calls for the accountability and responsibility of social media* on the grounds that service providers (i.e. social platforms) are able to control the source of the threat (i.e. the situation is under their control) and at the same time easily remedy the threat of harm to the best of their ability.[21] With regard to the legal liability of social media, in addition to the provisions of the Czech e-Services Act, the provisions of the Civil Code on liability can also be applied in principle.[22] According to the general rule of the latter, given that it is a system based on private law, the 'enforcement' of liability presupposes that the conduct in question causes actual (real) damage. In addition, § 2900 of the Czech Civil Code regulates the so-called obligation to prevent *(prevenční povinnost)*, according to which, if the circumstances of the case or private habits so dictate, everyone must act in such a way as to avoid unreasonable damage to the liberty, life, health or property of another person. Furthermore, pursuant to § 2091 of the Czech Civil Code, in the protection of others, anyone who has created a dangerous situation or is in control of the situation or is otherwise justified by another relationship between legal entities is obliged to intervene to eliminate the emergency. In addition, the same general duty of prevention applies to a person who, to the best of their opportunity or ability, can easily remedy a situation threatening damage. This is what Czech law calls the obligation to intervene *(zakročování povinnost)*, which is intended to prevent future damage.[23]

According to the other approach, service providers (and also social media) cannot be obliged by regulation of certain information society services to *actively monitor content*,[24] which, as a special rule *(lex specialis)*, precedes the general provisions of the civil code *(lex generalis)*.[25] Consequently, the obligation to prevent and intervene should apply to service providers differently from the general one.[26]

4.3. CHARACTERISTICS OF THE SLOVAK REGULATION

Under Slovak law, the service provider's liability for content is significantly limited and practically

excluded. According to the law, the *service provider is not responsible for transmitted information if the provision of the service consists only of the transmission of information in the electronic communications network or the provision of access to the electronic communications network*, and at the same time the service provider has not: a) initiated the transmission, b) selected the recipient of the information; and c) compiled or modified the information. Furthermore, the service provider *shall not be liable* for information stored in the memory of the electronic devices used for information retrieval at the request of the user, *provided that the service provider is not aware of the illegal content of the stored information and it takes immediate action to put an end to the user's unlawful conduct;* in the case of such information, the service provider shall be liable only if the user acts on its instructions. To summarise, *the service provider is responsible for the content it stores or transmits: a) if it has become aware of its illegality and has not acted against it, or b) if the service provider has had a significant influence on the compilation of the information.* With these provisions, the legislator transposes Article 14 of the e-Commerce Directive into Slovak law with virtually no substantive changes.

It follows from the above that the largest group of service providers cannot be held liable – or only in a very cumbersome way – for the information it stores or transmits. Exceptions to this are news portals (online newspapers, magazines), online radios and "televisions", i.e. all service providers who produce their own information or news or have a significant influence on it. In the case of such providers, the forums are moderated – that is, posts that violate rights or public morality are removed following the rulings of the European Court of Human Rights of 10 October 2013 in Delfi AS v. Estonia's[27] verdict.

According to the Slovak regulations, a *service provider has no obligation to monitor content, moreover the regulations explicitly prohibit the service provider from searching in data transmitted or saved by the users.* Nevertheless, if it becomes aware of the illegality of such information, it shall remove such or at least prevent access to it; the court may order the service provider to remove the information even if the service provider is not aware of the illegality. Thus, searching in user information is generally excluded, so the service provider *has no obligation to actively search for content (content tracking).*

Apart from political statements and newspaper reports,[28] there is *no common legal or scientific position* on the *obligation for social platforms to intervene in Slovakia*, with the exception of the Slovak e-Services Act mentioned above. In the literature, a court case, *Stacho v. Klub Strážov*,[29] appears in this regard, in which a comment on a website that violates the human dignity of a specific individual (i.e. not an article, but a reader's post) was disputed. The plaintiff sought an *apology from the operator of the website, the removal of the post and damages of EUR 5,000*; the court in the second instance ruled in favour of the plaintiff only regarding the removal of the post, and dismissed the remainder of the action (in accordance with the provisions of the Slovak e-Services Act).

5. REGULATION IN POLAND

The issue of social media regulation in Poland has been on the agenda for years. Many journalists have complained[30] that Facebook, in their view, has arbitrarily blocked their profiles or deleted content they shared. On 23 September 2019, the President of the National Media Council filed a lawsuit in the Warsaw District Court *(Sąd Okręgowego w Warszawie)* against Facebook,[31] alleging that the social media provider violated its constitutionally guaranteed freedom of expression by restricting the accessibility of the content it posted. With this lawsuit, the difficulties of handling disputes and objections against Facebook became clear. The Warsaw District Court had to serve the action in Ireland, as their subsidiary there is responsible for its European operations.

In December 2020, the Polish Ministry of Justice announced its intention[32] to regulate social media service providers, which it complied with initially with a Draft on the protection of freedom

of speech on online social networks[33] from February 2021 (hereinafter referred to as: the Draft). The purpose of this Draft is to protect freedom of expression in online social media, so it basically focuses on *ensuring freedom of expression*.

The Draft regulates social (internet) media services with *at least 1 million registered users*, for the purpose of strengthening the protection of human rights on these platforms[34] and the supervision of social media services.[35] The *personal scope* of the regulation is thus explicit and 'narrow', *in contrast to*, for example, *Ireland or the United Kingdom*, which is planning to regulate, where social media regulation also covers a much wider range of internet services. Article 3 of the Bill includes the social media service *(internetowy serwis społecznościowy)* and the service provider *(usługodawca)* among the definitions. According to this, a *social media service* is an electronic service within the meaning of the Electronic Services Act that allows users to share content that is intended for another user or the public (and has at least 1 million registered users).[36] A *provider* is a social media provider that provides an interface for information posted by users (and has at least 1 million registered users).[37]

The *planned regulation introduces* the *supervision* of service providers, their *responsibility for content*; obligations of service providers to guarantee freedom of expression and access to accurate information; the rules for a user-initiated *complaint handling mechanism* to be operated by service providers. The *complaint handling mechanism* should cover both the reporting of illegal content (content control) and the reporting of violations of freedom of expression (censorship). A negative decision on *content control* can be challenged by the user in civil or criminal *court* (the user must be notified of the possibility by the service provider). In the event of a negative decision related to *censorship*, *within 7 days* of the decision the user may appeal to a *new body* envisaged by the Bill, the *Freedom of Speech Council* (see below) for the supervision of social media.

The Draft establishes a *new administrative body*, called the *Freedom of Speech Council (Rada Wolności Słowa)* (hereinafter referred to as: the Council),[38] *for the supervision of social media service providers*. According to Article 4, *the Council shall respect freedom of expression, the right to information, the right to disseminate information, the freedom of expression of religious views, belief and philosophical views, and free communication with regard to social media*. The Council consists of a President with the status of Secretary of State and four members. The term of office of the members of the Council is 6 years (renewable for another 6 years), they are elected by the National Assembly with 3/5 of the votes (at least half of the deputies must be present).[39] The President of the Council directs its work, represents the Council, and performs other tasks specified by law and the rules of procedure *(regulaminie działania)*. On a proposal from the President, the Council may appoint a Vice-President or delegate certain presidential tasks to a member.[40] The Council takes decisions and issues resolutions (including on organisational matters), which are signed by the President of the Council, and the President of the Council may issue a regulation.[41] Decisions of the Council are taken by open simple majority voting with at least 3 members present (the presence of the President is obligatory). In the event of a tie, the chairman shall have the casting vote. *The decisions and resolutions of the Council are final.*

A service provider and a service provider's representative who fail to implement a decision of the Council or fail to comply with other obligations prescribed by law may be fined between 50,000 and 50,000,000 zlotys (11,000 – 11,000,000 euros). In the case of fines, the Council considers *five* aspects: the gravity of the service provider's involvement (influence) in spreading (making) fake news, the *extent* of the breach of the public interest, the frequency of past defaults, and the *amount of fines* imposed for similar infringements.

The obligations of service providers are set out in detail, of which the *general reporting obligations* should be emphasised, which are aimed at enhancing transparency. Under this general reporting obligation[42] a service provider who receives more than 100 notifications (complaints) in a calendar

year for making illegal content available, restricting content or user profiles, has to make a report *(sprawozdania)* in Polish every six months (within 1 month of the end of each semester) on how to handle notifications. The report should be made available in a *visible, direct and permanent manner* on the social media interface. Furthermore, the Draft does *not* impose a general content monitoring obligation on service providers, but upon the *notification* of *illegal content (treści o charakterze bezprawnym)* and upon the instructions of the prosecutor, content that constitutes a criminal offence *(treści o charakterze przestępnym)* must be removed.

The Polish Draft *contains specific social media regulation*, which has a specific subject-matter and material scope (for social media providers only), precise definitions, clearly defined procedures and creates a *new administrative body* for the supervision of social media and introduces several new legal institutions to protect personal rights. However, it does not address the issue of the *enforceability of legal provisions and possible fines*, and it imposes an obligation by requiring the service provider to appoint a representative *domiciled* or with an *established place of business in Poland*, which may infringe EU law. According to the critics[43] of the draft regulation, the Draft as an instrument of social media regulation in this form is pointless: it is not the task of the state to intervene in public debates at this level, freedom of expression requires the least invasive legal means and should focus on violating individual rights in individual cases.

6. CONCLUSIONS

Legislation and state administration need to respond to the new challenges of social media and media platforms through continuous innovation, covering all regulatory areas concerning online platforms, in particular in the area of freedom of expression and speech. It is also questionable to what extent and in what way this issue can be regulated exclusively within Member States legislation. As part of the European Digital Strategy,[44] the Commission announced a reform of *European rules for the Internet* in December 2020, presenting two packages of legislation, the *Digital Services Act (DSA)*,[45] and the *Digital Markets Act (DMA)* amending the e-Commerce Directive.

The draft of the DSA submitted by the Commission, including representatives of the companies concerned, regulates in detail the liability of service providers, maintaining the principle set out in the e-Commerce Directive that *service providers are not subject to monitoring, and that content is primarily the responsibility of the uploader.* The draft regulates the concept of *illegal content* as well as the *concept of online platform* as an innovation. The DSA also regulates the *procedure for reporting illegal content* and the complaint-handling process for content removed by service providers, allowing for court proceedings too. The draft also includes the possibility for national courts / authorities in the Member States to request the removal of offensive content from service providers. A separate chapter also regulates the rules for *very large online platforms*.

The future regulation of Community platforms is difficult to predict with certainty in advance, given that, in addition to the issues outlined above, other operational aspects of Community platforms may raise regulatory needs. One such important issue could be, for example, the *profiling of users*,[46] on the basis of which a user behaviour profile is created, or the comparison of these profiles with the statistics of other users. One of the consequences of this may be the "*filter bubble*",[47] which can enclose the user in a consumer (or even belief) circle, significantly reducing the amount of information that is easily accessible or available to the user, thereby affecting "freedom of opinion and the freedom to know and communicate information and ideas".[48] Another important issue, also in the context of profiling, is the *protection of personal data* (including, for example, consumer habits, beliefs, sexual preferences, etc.), more specifically the fact that the free use of social platforms is apparent, as the users "pay" with their data.[49] Such use of data is currently not specifically regulated, although it is difficult to imagine a monitoring tool other than public action in this area

due to inequalities between social platforms and users. The need for regulation is also justified by the fact that social media wants to remain active in the data and information market, as this is its main source of revenue. In a briefing in February 2021,[50] Facebook wrote about the desire to reduce *political content* in the *news feed* of certain user groups, which also raises more questions than it answers: what counts as political content; what does the concept of "reduce" mean (more precisely, how much less); whether the reduction of political content only applies to certain political content, or equally to all political content; how many users are affected, etc.

The legal regulation of social media has become one of the main subjects – if not the main subject – of the information society in recent years, and it also represents a complex and mostly unresolved issue for the legal systems of the Visegrad states. As a closer examination shows, none of the V4 states have a complex or effective system of social media regulation. Aside from the Polish Draft on the protection of freedom of speech on online social networks, there is currently no publicly available draft regulation or other official regulation concept in the remaining Visegrad states, despite the regulation of social media seeming inevitable in the future.

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DOI: 10.54201/iajas.v1i1.4

Taxation of novel tobacco products with excise duty

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Abstract: Under EU law, certain excise goods are subject to excise duty. However, EU Member States may also levy this tax on products other than excise goods. One of such products are innovative tobacco products. These products are becoming more and more popular on the European and world market. In Poland, these products are considered excise goods. The aim of the article is to analyze and evaluate the applicable legal solutions regulating the issue of taxation with excise duty on innovative tobacco products, in the light of EU and Polish law.

Keywords: tax, excise duty, innovative tobacco products, EU law

1. INTRODUCTION

In Poland, excise duty is regulated in the Act of 6 December 2008 on excise duty,[1] according to which excise goods and passenger cars are subject to excise duty. Pursuant to Art. 2 section 1 point 1 of the aforementioned act, excise goods are energy products, electricity, alcoholic beverages, tobacco products, dried tobacco, electronic cigarette liquid and novel products specified in Annex 1 to the Excise Duty Act. Novel tobacco products are relatively new products, enjoying more and more interest on the European and global market. The aim of the article is to analyse and evaluate the applicable regulations on excise duties for this type of excise goods, in light of EU and Polish law.

2. DEFINITION AND SPECIFICITY OF NOVEL TOBACCO PRODUCTS

According to the definition provided for in Art. 2 point 14 of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the statutory, executive and administrative regulations of the Member States on the manufacture, presentation and sale of tobacco products and related products and repealing Directive 2001/37/EC,[2] "novel tobacco product" means a tobacco product that is not a cigarette, roll-your-own tobacco, pipe tobacco, waterpipe tobacco, cigar, cigarillo, chewing tobacco, nasal or oral tobacco, which is placed on the market after 19 May 2014. However, in light of Art. 2 section 1 point 36 of the EDA, novel products are products which are: a) a mixture containing tobacco or dried tobacco, b) a mixture referred to in point (a). a, and containing a separate liquid for electronic cigarettes – other than the products referred to in Article 1. 98 sec. 1 and Art. 99a sec. 1, which deliver the aerosol without burning the mixture.

It follows from the above regulation that novel products are products that are a mixture containing tobacco or dried tobacco, as well as products consisting of both a mixture containing tobacco or dried tobacco, and containing a separate liquid for electronic cigarettes, which deliver an aerosol without burning the mixture. Therefore, novel products are products other than cigarettes, smoking tobacco, cigars, cigarillos or dried tobacco, in which no combustion process takes place. At

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the same time, it should be emphasised that the above definition does not include devices used to heat these mixtures.[3] These devices are necessary for the use of this type of product. In the case of novel products, the combustion process does not take place, and the cartridge in the form of a specially prepared mixture is heated in an electronic device designed for this purpose; as a result, no smoke is emitted, but an aerosol instead.

Manufacturers of heated tobacco indicate that the aerosol produced when the mixture is heated contains much fewer harmful substances than cigarette smoke. This is also confirmed by research conducted by various institutions specialising in research on the harmfulness of tobacco products. Among other things, the authorisation decisions issued by the US Food and Drug Administration (FDA) in favour of the IQOS tobacco heating device indicated that the IQOS tobacco heating system,[4] which does not burn tobacco, only heats it, significantly reduces the production of harmful chemicals compared to cigarette smoke. In addition, IQOS aerosols contain significantly lower levels of potential carcinogens and toxic chemicals that can damage the respiratory or reproductive systems.

3. HARMONISATION OF EXCISE DUTY ON NOVEL TOBACCO PRODUCTS

Excise duty is subject to harmonisation under EU law. Tax harmonisation is a process as a result of which the tax systems of various Member States are subject to unification so that tax issues do not affect the flow of goods, services and factors of production between these countries.[5] The basic legal act regulating excise duty taxation in the territory of the European Union is Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.[6]

However, the EU legislator did not decide to introduce uniform rules of taxation for novel tobacco products with an excise duty. It should be pointed out here that novel products, like electronic cigarettes and liquids for electronic cigarettes, are not subject to harmonised excise duty at the EU level with regard to the structure and rates of excise duty, as well as the production and movement of excise goods.[7] These products are not subject to the harmonisation of taxation with excise duty pursuant to Council Directive 2008/118/EC, so EU Member States are not obliged to tax novel products with excise duty.[8] Novel products are not considered tobacco products within the meaning of the aforementioned directive. Likewise, Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco[9] does not regard these products as tobacco products.

The issue of taxing novel tobacco products with excise duty was also not addressed in Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast),[10] which will apply to excise duty in the territory of the European Union from 13 February 2023 (Directive 2008/118/EC will expire on that date). Article 1 section 1 point c of Directive 2020/262 recognises as excise goods only tobacco products within the meaning of Directive 2011/64/EU, which, as already indicated, does not recognise novel tobacco products as tobacco products.

Nevertheless, it should be noted that work is currently underway in the European Union to amend the excise duty directive in the field of novel products as well. In the information sent by the Chancellery of the Prime Minister to the Sejm and the Senate of the Republic of Poland on the participation of the Republic of Poland in the work of the European Union in January-June 2020 in the field of excise duty, it was indicated that the Council's work in the period in question focused on the transformation of the tobacco directive 2011/64/EU on the structure and rates of excise duty applied to manufactured tobacco, and consultations continued with Member States on the draft amendment to the Alcohol Directive 92/83/EEC on the harmonisation of the structure of excise duties on alcohol and alcoholic beverages. The Croatian

Presidency presented draft conclusions regarding Council Directive 2011/64/EU in response to the Evaluation Report, which were agreed and then adopted as a document on 2 June 2020.[11]

In its conclusions, the Council points out that changes to Directive 2011/64/EU are necessary for the proper functioning of the internal market and to ensure a high level of health protection across the EU. In the Council's assessment, the current provisions of Directive 2011/64/EU have become less effective because their scope is no longer sufficient or too narrow to meet current and future challenges for certain products such as e-cigarette nicotine liquids, heated tobacco products and other types of next-generation tobacco products that enter the market. Therefore, there is an urgent need to modernise the EU regulatory framework to meet the current and future challenges of the functioning of the internal market by harmonising the definition and taxation of novel products, including tobacco-substitute products, whether they contain nicotine or not – in order to avoid legal uncertainty and regulatory differences in the EU, take relevant good practices and experience gained by Member States in this field into account, and Directive 2011/64/EU, including the objective of defining different types of tobacco product with different characteristics and their method of use.[12]

4. STRUCTURE OF TAXATION OF NOVEL TOBACCO PRODUCTS WITH EXCISE DUTY IN POLAND

Currently, an increasing number of European Union Member States tax novel products with excise duty (e.g. Italy, Romania, Slovenia, Latvia, Hungary, France and Great Britain). In Poland, taxation with excise duty on novel products was introduced under the Act of 12 December 2017 amending the Excise Duty Act,[13] which entered into force on 1 February 2018. General provisions on the taxation of excise goods with excise duty apply to novel products, including those relating to the subject of taxation, the emergence of a tax obligation, taxation of shortages, properties of tax authorities, registration of entities, tax declarations and excise duty payment deadlines.

The basis for taxing novel products is their quantity expressed in kilograms (Article 99c section 3 of the EDA). It should be noted here that adopting the weight of the tobacco mixture contained in the product as the tax base for excise duty is a justified and rational solution. Novel products can appear in various forms, ranging from a roll of tobacco, through loose tobacco to be placed in a heating device, to hybrid products, where, apart from the heated tobacco, there is also a liquid with nicotine or producing a characteristic flavour. The adoption of the weight of the mixture as the tax base also significantly facilitates its calculation and collection.

The excise duty rate on novel products amounts to PLN 155.79 for each kilogram and 32.05% of the weighted average retail selling price of smoking tobacco (Article 99c section 4 of the EDA). For the purposes of determining the excise duty rate on novel products, the weighted average retail selling price of smoking tobacco is used, calculated based on data for the first 10 months of the year preceding the calendar year for which the weighted average retail selling price of smoking tobacco is calculated (Article 99c section 6 of the EDA). In the justification to the draft of the aforementioned act, it was indicated that the excise duty rate for novel products was set at the same level as for smoking tobacco, due to the fact that novel products contain tobacco and consumers use them to deliver nicotine to the body. The only difference is that for the novel products, the weighted average retail selling price of smoking tobacco was used directly as one of the ingredients, and not the maximum retail price, as is the case for smoking tobacco. This is aimed at avoiding the obligation of producers to print the maximum retail price on the unit packaging, because the novel products are characterised by a great variety of technical solutions and shapes, which in some cases could make it impossible to print such a maximum price on the packaging. Moreover, such a legislative solution will make it possible to

automatically adjust the rate for novel products to market realities, as the weighted average retail selling price of smoking tobacco is determined annually on the basis of market data from the year preceding the calendar year, and published by way of an announcement.[14]

It is worth emphasising here that most European countries have decided to tax novel products with a lower excise duty rate than traditional cigarettes. The same applies in Poland. The basic rate of excise duty on cigarettes is PLN 228.10 for 1000 pieces, and 32.05% of the maximum retail price, with the minimum excise duty on cigarettes being 100% of the total amount of excise duty calculated on the price equal to the weighted average retail selling price of cigarettes (Art. 99 sections 2 and 4 of the EDA). This distinction seems to be fully justified, since numerous scientific studies indicate that the novel products are potentially less harmful to health. Undoubtedly, tax policy and the level of taxation should take this circumstance into account. One of the main goals of imposing excise duty is to increase the tax burden on those areas of activity that society wants to limit. Taxation with excise duty is designed to reduce the demand for products selected by the state that have a harmful effect on human health (e.g. tobacco products or alcoholic beverages) or pollute the environment (e.g. petroleum products).[15t]

5. CONCLUSIONS

As mentioned above, work is currently underway within the European Union to amend the scope of the directive regulating the general principles of excise taxation. One of the objectives of the planned amendment is to make novel tobacco products subject to excise duty tax by EU Member States. At the same time, the need in this respect to harmonise the definition and method of taxation for this type of excise goods is emphasised, which should be carried out taking good practices and experience gained so far by the Member States into account. It should also be noted that when establishing the principles for taxing novel tobacco products, one should not only define this type of goods as an excise category separate from tobacco products, based on the attribute of not burning tobacco, but also – due to the lower harm to health – set the rate of excise duty on these products at a level significantly lower than that of traditional tobacco products (cigarettes).

Notes

1 Journal Of Laws of 2020, item 722; hereinafter referred to as EDA (Excise Duty Act)

2 Journal of Laws EU.L.2014.127.1.

3 Individual tax ruling of the Director of National Treasury Information of April 8, 2020, No. 0111-KDIB3-3.4013.11.2020.2.JS, http://sip.mf.gov.pl.

4 FDA permits sale of IQOS Tobacco Heating System through premarket tobacco product application pathway; https://www.fda.gov/news-events/press-announcements/fda-permits-sale-iqos-tobacco-heating-system-through-premarket-tobacco-product-application-pathway

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5 M. Piłatowski, *Harmonisation of taxes in the EU in the era of economic changes,* Scientific Journal of the University of Szczecin 2012, No. 52.

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11 Information for the Sejm and Senate of the Republic of Poland on the participation of the Republic of Poland in the work of the European Union in January-June 2020; www.senat.gov.pl.

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DOI: 10.54201/iajas.v1i1.5

The Supreme Administrative Court of the Slovak Republic – the First Step Towards a Modern Justice System[1]

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Abstract: The article provides an overview of the ongoing comprehensive judicial reform in the Slovak Republic, focusing mostly on the creation of the Supreme Administrative Court, which will become the highest judicial authority in the field of administrative justice. It will also act as a disciplinary court for general court judges, prosecutors and other statutory professions. This is one of the first steps in what will be a huge undertaking – the complete reform of the Slovak justice system.

Keywords: judicial reform, administrative justice, supreme administrative court, administrative acts, administrative courts

1. INTRODUCTION

The Supreme Administrative Court of the Slovak Republic was formally established on 1 January 2021 as part of the Judicial Map reform. The primary aim of this ongoing reform is to improve the efficiency and quality of Slovak courts by optimising the judicial map and the specialisation of judges, simplifying judicial proceedings, introducing the Supreme Administrative Court, changing the composition of the Judicial Council of the Slovak Republic and the Constitutional Court of the Slovak Republic, improving technological advancements in the judiciary, data analytics and agile project management, introducing electronic payment orders, changing the selection process of judges, verifying judicial competence, and much more. It is a huge undertaking, and a comprehensive reform of the judiciary that is crucial to improve the efficiency of the courts and the quality of their services. This should, eventually, lead to the restoring and maintenance of public confidence in the judiciary. In a democracy, the judiciary should be viewed as the upholder of legality and justice. However, in recent years, many surveys have shown that the citizens of the Slovak Republic do not have any trust in the quality of the judicial system. This set of reforms seeks to remedy this fundamental deficit with systemic changes. There has been a tremendous societal demand for this reform, which is still in its initial stages and will undoubtedly undergo some tweaks until its final form. The preparation of the reform was extensive, and it follows the recommendations of the experts of the Council of Europe. This study provides an overview of one of the first steps of this winding road towards a modern, transparent and efficient judiciary – the creation of the Supreme Administrative Court of the Slovak Republic.

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2. THE LEGISLATIVE PROPOSALS

On 9 December 2020, the National Council of the Slovak Republic approved the government's bill amending the Constitution of the Slovak Republic,[2] as well as the government bill on judicial reform.[3] These bills proposed including the Supreme Administrative Court in the system of courts, which would share equal status with the Supreme Court in the hierarchy of general courts. For this reason, it was therefore proposed to amend all the provisions of the Constitution concerning the Supreme Court.

In the Slovak Republic, there will be two highest courts, with the Supreme Administrative Court being the highest court in the area of administrative justice, and the Supreme Court being the highest court in the area of civil, commercial and criminal matters. In addition to the general jurisdiction of the Supreme Administrative Court in the field of administrative justice, it was proposed that the constitutional jurisdiction of this court should include disciplinary jurisdiction over judges of general courts and, to the extent prescribed by law, other legal professions. Following the establishment of the Supreme Administrative Court and its position as a disciplinary court for judges of general courts, it is proposed to eliminate the constitutional competence of the Judicial Council to create disciplinary chambers, as this regulation will become obsolete.

In terms of the procedure for establishing the Supreme Administrative Court, it was proposed that the Supreme Administrative Court be established on the effective date of the Act (1 January 2021), but would not actually start operating until 1 August 2021. This preparatory period should ensure that all the acts necessary to ensure the proper functioning of this court are carried out, in particular, supplying the Supreme Administrative Court with judges and appointing its management. Simply put, the legislation expected that the staffing of the Supreme Administrative Court should take place first, and only after this process would the Supreme Administrative Court start operating. Based on this, the positions at the Supreme Administrative Court will be filled through a public external selection process, instead of the automatic transition of the Administrative College of the Supreme Court, as many had expected. Until the Supreme Administrative Court begins to carry out its activities, its powers will be exercised by the bodies established based on existing regulations, i.e. the Supreme Court, the Constitutional Court and the Disciplinary Chambers.

The proposed constitutional change responded to the establishment of the Supreme Administrative Court aiming to introduce a mechanism for resolving possible conflicts of jurisdiction between the Supreme Court and the Supreme Administrative Court. Given the existence of the two highest judicial bodies within the administrative judiciary, it seems desirable that the power to settle conflicts of jurisdiction between them be vested in the body which is above those institutions. Therefore, it was proposed that jurisdictional disputes between the Supreme Court and the Supreme Administrative Court be resolved by the Constitutional Court. In this context, it should be pointed out that in the case of a jurisdictional dispute between the Supreme Court and the Supreme Administrative Court, this will in fact be a dispute as to whether or not the case belongs to the administrative judiciary.

Based on the aforementioned bill, the establishment of the Supreme Administrative Court would take place in two steps. The first step is to adopt legislation establishing this court, the second step is to start its activities. This is why the date when the Supreme Administrative Court will start operating is not the same as the date of establishment of the Supreme Administrative Court. The start of the activities of the Supreme Administrative Court shall be established by law. Given that the Supreme Administrative Court would not have judges on the date of its establishment, as the vacancies of this court would only be filled gradually thereafter, it was proposed that the first President of the Supreme Administrative Court be nominated not by the judges of this court, but from all judges of the general courts. This is therefore

a different one-off rule, which would not apply to the next President of the Supreme Administrative Court, who will be chosen from among the judges of the Supreme Administrative Court.

3. THE CREATION OF THE COURT

The proposed changes outlined above were accepted, and as a result, the system of general courts will cease to be a single-top pyramid – the Supreme Administrative Court will join the Supreme Court as the two supreme authorities in the hierarchy of the judiciary. In the event of a dispute between them regarding competence, the Constitutional Court of the Slovak Republic will decide on which court has jurisdiction. Within the hierarchy of courts, the Supreme Administrative Court will share equal status as the Supreme Court of the Slovak Republic, with the Supreme Administrative Court being the highest judicial instance in the field of administrative justice and it will also be a disciplinary court for judges of general courts, prosecutors and other legal professions.

According to the aforementioned amendment of the Constitution of the Slovak Republic, as per Art. 143 (1) of the Constitution of the Slovak Republic,[4] the system of courts will consist of the Supreme Court of the Slovak Republic, the Supreme Administrative Court of the Slovak Republic and other courts. The effective date of this amendment to the Constitution of the Slovak Republic, as well as the Judicial Reform Act, is 1 January 2021, this being the date the Supreme Administrative Court is established. The Court will officially begin its activities on 1 August 2021, and at the time this article is submitted, the selection process of the judges is ongoing. The creation of the Slovak administrative judiciary is greatly inspired by the Czech model that has been in place since 2003, whereas in most cases, in the first instance the administrative judiciary will be performed by specialised administrative chambers of regional courts, making it a partially separate model.

The Supreme Administrative Court will be managed by the President of the Court and the Vice-President of the Court. The President and Vice-President of the Supreme Administrative Court will be appointed by the President of the Slovak Republic from among the judges of the Supreme Administrative Court for five years, based on the proposal of the Judicial Council of the Slovak Republic. The proposal for the appointment of the President of the Supreme Administrative Court and the Vice-President of the Supreme Administrative Court shall be submitted to the President by the Judicial Council based on the results of the elections held at a public meeting of the Judicial Council.

The election of the President of the Supreme Administrative Court was announced by the President of the Judicial Council in January, with a deadline for submitting proposals for candidates by 1 February 2021 – the only candidate was the President of the District Court in Žilina, Jaroslav Macek, who resigned. Subsequently, on 1 March 2021, the President of the Judicial Council announced the re-election of the candidate for the post of President of the Supreme Administrative Court, to be held on 20 April 2021, with a deadline for submitting proposals by 19 March 2021. Persons eligible to nominate applicants were members of the Judicial Council, the professional organisation of judges, and the Minister of Justice.

The President of the Supreme Administrative Court can only be a judge who has practised law for at least 15 years, or a person who is not a judge but meets the following conditions:

- is a citizen of the Slovak Republic and has reached the age of 40,
- is eligible for election to the National Council of the Slovak Republic,
- has no criminal record,
- holds a university degree in law,
- has practised law for at least 15 years,
- is of full legal capacity,
- is medically fit to perform the function of the chairman of the Supreme Administrative Court.

In the second round of applications, the only candidate running for the position of President of the Supreme Administrative Court was Pavol Naď, former judge of the Košice regional court and later a judge of the Supreme Court. He has since been elected by

the Judicial Council to serve as the first president of the newly established Supreme Administrative Court. All of the 17 council members present voted for Pavol Naď, who has since been appointed by the President of the Slovak Republic, Zuzana Čaputová.[5]

The legislator understood that in order to ensure the efficient functioning of the Supreme Administrative Court it was necessary to make sure a sufficient number of judges would work there.

The original notion was that the judges of the Administrative College of the Supreme Court of the Slovak Republic would automatically transfer to the Supreme Administrative Court. This was not accepted, so the decision that the judges would be selected during a public selection process was announced by the President of the Judicial Council on 9 March 2021. This decision led to a boycott of the selection procedure by most judges, with debates following whether the Supreme Administrative Court should be open to judges only 29 positions were announced, candidates could apply until 6 April 2021. The applicants had to meet the following conditions:

- be a citizen of the Slovak Republic and have reached the age of 40,
- hold a university degree in law,
- have practised law for at least 10 years,
- are of full legal capacity,
- are medically fit to perform the function of a judge,
- have moral integrity,
- hold permanent residence in the Slovak Republic,
- meet the prerequisites for judicial competence.

34 judges applied in the first round of applications, and 31 of them met the prerequisites based on the Judicial Council's assessment. The selection procedure verified the expertise, general overview, ability to think creatively, speed of thinking, verbal expression and decision-making ability of the candidates. The selection procedure was carried out in a public hearing, at which each of the candidates had the opportunity to speak for no more than 20 minutes without the participation of the other candidates. During this time, the candidates introduced themselves and stated the reasons for applying for the position of judge, their previous work experience, the scope of their publishing activities and the most significant professional results achieved. The members of the Judicial Council then asked the candidates various questions. The total hearing time could not exceed one hour. After the public hearing of all the candidates, the Judicial Council voted on each candidate individually. Eight candidates were successful.

The Judicial Council announced a second and third round of applications to try and fill the 29 spots, at the time of writing this article we only have the results of the first round. It is already clear, however, that while most judges decided to boycott the first round of application, their initial hesitation disappeared, and many of them decided to apply in the subsequent rounds of the selection process.

Public debate surrounded many aspects of the selection, mostly whether any supreme court should be open to candidates with previous experience in judiciary, or holding a law degree and having experience in practising law as an attorney, prosecutor or even as an academic should be sufficient to apply for such a position. When the intent to introduce a selection process was announced, the judges of the Supreme Court addressed the members of the National Council of the Slovak Republic in an open letter, in which they welcomed the establishment of the Supreme Administrative Court, but at the same time they expressed their concerns about the disruption of decision-making in the agenda of the administrative judiciary, which so far falls within the competence of the administrative college of the Supreme Court. They considered it highly desirable to transfer the current staffing of the administrative college of the Supreme Court to the Supreme Administrative Court, which would have ensured the continuity of decision-making in this important area. They requested that these be amended directly by law, while the status of the chairman of the senate would also be moved and retained – for comparison, they presented a model from the Czech Republic, where they chose this procedure when forming the Supreme Administrative Court of the Czech Republic. They also proposed the re-

tention and transfer of assistant judges and the administrative apparatus, preserving the current salary assessments. Their suggestion was that the staffing of the Supreme Administrative Court should be ensured via the automatic transition of the entire administrative college of the Supreme Court and their agenda, any remaining spots could subsequently have been supplemented by other applicants subject to a selection process. This recommendation, however, was not followed, and all the positions were subject to a public selection process, with no possibility of automatic transfer.

4. COMPETENCES OF THE NEWLY ESTABLISHED COURT

Besides the staffing, eligibility and other organisational matters, another area that had to be resolved was the competences of the newly established court. The competence, hearings and decisions of the Plenum of the Supreme Administrative Court is regulated by the new §24d of Act no. 757/2004 Coll. on Courts and on Amendments to Certain Acts.[6] The Supreme Administrative Court will become the highest judicial authority in the field of administrative justice in the Slovak Republic. It will also act as a disciplinary court for general court judges, prosecutors and other statutory professions. An understandable consequence of establishing the Supreme Administrative Court will also be a change in the internal organisation of the Supreme Court, which will no longer have an administrative college. With the establishment of the Supreme Administrative Court and the dissolution of the Administrative College at the Supreme Court, in addition to deciding on the disciplinary liability of judges and prosecutors the Supreme Administrative Court will gain competence in the area of deciding on the constitutionality and legality of elections of local authorities, and the dissolution and suspension of political parties.

The Supreme Administrative Court will be the highest instance for administrative justice matters in the Slovak Republic. The establishment of the Supreme Administrative Court is also associated with an extension of the jurisdiction of courts within the general judiciary, since in accordance with the new provision of Art. 142 (2) of the Constitution of the Slovak Republic, the Supreme Administrative Court will also decide on:

a) the constitutionality and legality of elections to local self-government bodies,
b) the dissolution or suspension of the activities of a political party or political movement,
c) the disciplinary liability of judges, prosecutors and, if the law so provides, other legal professionals.

It is this last competence that, from a functional point of view, represents the greatest novelty in relation to the agenda ensured today by the Supreme Court through its administrative college. At the same time, it is an agenda that is probably associated with the highest expectations, but also concerns in some sense.

The President of the Supreme Administrative Court will be able to establish colleges with the prior consent of the Plenum of the Supreme Administrative Court. Their competence and decision-making will be regulated by §24e of Act no. 757/2004 Coll. on Courts and on Amendments to Certain Acts.[7]

The Senate of the Supreme Administrative Court will consist of three judges, one of whom will be the President of the Senate. When deciding on ordinary or extraordinary appeals against decisions of the chambers of the Supreme Administrative Court, the senate will consist of a president and four judges. The Rules of Procedure before the courts may stipulate that the Chamber of the Supreme Administrative Court should also consist of a larger number of judges. The Senate must always be composed of an odd number of judges; this does not apply to disciplinary proceedings. The President of the Senate manages and organises the activities of the Senate.

5. CONCLUSION

The current justice system is not merely the product of the reforms of 2020/2021. It was built on the foundations unique to this region due to its

history, and thus stands on the historic tradition of Hungarian and later Czechoslovak administrative justice.

The first steps towards building an administrative justice system in this territory were taken in 1861 through the adoption of the Provisional Judicial Rules by the Judex Curial Conference.[8] Act XLIII of 1883 on the Financial Administrative Court established an independent financial court based in Budapest, which essentially started the preparatory work for realising general administrative jurisdiction, leading to Act XXVI of 1896 establishing the Hungarian Royal Administrative Court. The Hungarian Royal Administrative Court was a supreme court with two departments: the general administrative department and the financial department. This court, based on the French model, existed till 1949, but for Slovakia its relevance was significant only until 1918. With the establishment of the Czechoslovak Republic, the Supreme Administrative Court was created, which served as the final instance in administrative matters. The Supreme Administrative Court ceased to exist in 1952, with most of its agenda passed to the prosecutor's discretion. After this, we cannot really speak about an independent system of administrative justice up until the Velvet Revolution in 1989. The year of the revolution, however, brought about a revival of administrative justice in Czechoslovakia through a number of legislative changes. General courts had jurisdiction in administrative matters and the Administrative College of the Supreme Court was created with no specialised administrative courts. Deliberations on the creation of a specialised administrative court emerged from time to time, but the real change came decades later: we are witnessing it now with the creation of the Supreme Administrative Court of the Slovak Republic. While in many ways the current reforms are inspired by the Czech model, in some respects the legislator chose a different path, following the recommendations of the Council of Europe and many renowned experts, creating a unique system that has all the potential to fulfil the need for an efficient administrative judiciary. While it is obvious that the current reform is based on historical traditions and implements solutions from other countries as well, it is still a unique reform tailored to fit the needs of Slovakia. While many countries have vast experience with a Supreme Administrative Court, one-size-fits-all solutions do not exist in the sphere of justice. Therefore, it is a positive development that the proposed judicial reform and specifically the introduction of the Supreme Administrative Court considers the specifics of the country: size, political framework, institutional governance, procedural laws, legal and cultural context within which every policy has to be designed and implemented. Therefore, the proposed changes to the judicial system are likely to fulfil the strategic goal – creating a transparent, efficient and modern judicial system that warrants the trust of the citizens it serves.

Notes

1 This work was supported by the Slovak Research and Development Agency under the contract No. APVV 16-0521.

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6 Act no. 757/2004 Coll. on Courts and on Amendments to Certain Acts. Available online: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/757/ [cit. 12.05.2021]

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DOI: 10.54201/iajas.v1i1.6

Opportunities for central (regional) government to intervene in decisions and operations of local governments in Hungary

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Abstract: The regulation of the relationship between central and local government in Hungary has undergone significant transformation in the last decade. The government has robust tools to control local activities, just these tools are rarely applied by the supervising authorities. The main transformation of this relationship can be observed in the field of public services. The formerly municipality-based public service system was transformed into a centrally organised and provided model, thus the role of local governments in Hungary has decreased. The centralisation process was strengthened by reforms during the COVID-19 pandemic.

Keywords: centralisation, decentralisation, legal supervision, central government, municipalities, Hungary

1. EVOLUTION OF HUNGARIAN LEGAL SUPERVISION OF MUNICIPALITIES

1.1. THE BEGINNING: REGULATION BEFORE THE DEMOCRATIC TRANSITION

A continental (mainly German) municipal model was followed by Hungary before World War II. The legal supervision of municipalities evolved during the second half of the 19th century. The local municipalities (communities) were supervised by county self-governments, and the counties were supervised by county governors *(főispán)* who were appointed by the Government. Before 1907, the decisions of the county governor could be appealed to the Minister of Interior, so there was no judicial control. In 1907 a new court mechanism was introduced, the warranty complaint, thus the decisions of the county governor could be revised by the Hungarian Royal Administrative Court.

This system remained in place until the end of World War II. After World War II, a Soviet-type system was introduced in 1950, and the self-governance of the counties and municipalities were abolished by Act I of 1950 on the Councils. This system was partially changed in 1971. Act I of 1971 on the Councils (the third act on the councils) revamped the system. The partial self-governance of the councils was recognised by the new Act, although they remained local agencies of the central government as well. Therefore, the county

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councils and the local councils were not directed by the central government, their actions and decisions were supervised. The decisions and actions of the counties were supervised by an organ of the Council of the Ministers (Office for County and Local Councils of the Council of Ministers) and the decisions and operation of the local councils were supervised by the county councils. Although there was supervision, the decisions of the supervisory authorities could not be revised by the courts. A transitional model evolved: it was not a pure Soviet-type model, but it was different from the liberal models, as well.

1.2. THE REGULATION OF THE DEMOCRATIC TRANSITION (1990-2010)

In 1990, with the Amendment of the Constitution of the Republic of Hungary and the new Act on Local Self-governments (Act LXV of 1990, hereinafter: Ötv) the former councils were replaced by self-governments. The concept of the Ötv was based on the European Charter of Local Self-Governments, but the rights and autonomies of the local self-governments were even broader. The 'fundamental rights' of the local self-governments were regulated by Section 44/A of the Constitution,[1] the Hungarian regulation was based on the approach of inherent (local government) rights, similar to the Jeffersonian concept of local self-governments.[2]

The control of the legality of local government actions was based on the French model, on the reformed French municipal model of the Loi Defferre.[3] This task was fulfilled from 1990 to 1994 by the Republic's Commissioner (whose office was organised at regional level), from 1994 to 2006 by the County Administrative Offices and from 2007 to 31 December 2008 by the Regional Administrative Offices.[4] The supervising bodies could not suspend the implementation of the local government decisions, they could only initiate a review procedure at the Constitutional Court. This was an exclusive of right of these bodies. The Constitutional Court had the right to annul local government decrees. Besides this, on the grounds of unconstitutionality, an *actio popularis* could be filed by anyone against unconstitutional local government decrees. Other local government decisions could be contested/challenged at the (ordinary) courts.[5] Beyond the individual acts ruling on subjective rights and obligations according to the Administrative Procedure Act, self-government decisions could only be litigated by the head of the (county) administrative office as the supervising authority after an unsuccessful notification procedure. Decisions, including local government resolutions, could be annulled in these processes by the courts.

Although the regulation on legal supervision and the judicial review was up-to-date, several dysfunctions occurred in practice. The main reasons for this were the extra-legal problem of scarce resources. On the one hand, the legality control units within central government agencies were quite small: only about 300-350 posts were created for this task.[6] An average legality controller had to control all the issues of 10 municipalities. The central government agency – according to the adapted French model – could only initiate a judicial review of local government decisions. The competence for annulment lay with the courts (local government resolutions) or with the Constitutional Court of the Republic of Hungary (local government decrees). These bodies could also suspend the implementation of decisions. The courts and the newly organised Constitutional Court had significant resource problems: the procedures were often delayed, which hampered the efficiency of the legal protection.[7]

A weak tools for the prevention of the omission of the municipal bodies were introduced by the municipal system of the Democratic Transition: Act XXXII of 1989 on the Constitutional Court stated that an action is missed by a public body and the Constitution and especially the fundamental rights are infringed by the omission, the omission could be stated by the Constitutional Court and it obliges to terminate it.[8]

Similarly, as an *ultima ratio* of the supervision system, the dissolution of a municipal council (officially called a 'body of representatives' in Hungary, and as an 'assembly' in the counties, the capital and towns with county status – after the Democratic Transition) by the Parliament was institutionalised. If the Constitution was permanently infringed by the activity of a body of representatives (essentially the council) of a municipality, this body could be dissolved by the Parliament. This procedure was very complicated, full of guarantees. The procedure had to be initiated by the Government, with the initiative based on the legal supervision of the county agency of the Government. This initiative had to be commented on by the Constitutional Court, giving its opinion. After that the Parliament decided, but in the parliamentary debate the municipality could take part. It was a very rare tool in the Hungarian system, only 2 municipal bodies were dissolved between 1990 and 2010 (there were 5 municipal terms and more than 3200 municipalities in Hungary).

The legal supervision, as well as the judicial and constitutional review of the local government decisions, required a reform which was achieved by the Fundamental Law of Hungary and subsequently Act CLXXXIX of 2011 on Local Self-Governments of Hungary (hereinafter: Mötv).

2. TRANSFORMATION OF THE HUNGARIAN SYSTEM

2.1. TRANSFORMATION OF LEGAL SUPERVISION

In 2011, a shared competence system was introduced by Article 24 and Article 25 (2) c) of the Fundamental Law and by Section 136 of the Mötv. Since then, the right to review the legality of local government decrees belongs to the Local Government Senate of the Curia, Hungary's supreme court, which can annul local government decrees if regulations of an act of Parliament or of decrees by central government bodies are violated. A local government decree can be annulled by the Constitutional Court if it is unconstitutional. The delimitation of the powers of these two bodies was uncertain, but Decision 3097/2012 of the Constitutional Court (published on 26 July) stated that the constitutional complaint or motion can only be decided by the Constitutional Court if it refers exclusively to a breach of the Fundamental Law. If there is also a question of legality, not only of constitutionality, the Constitutional Court's lack of competence is declared and the complaint or motion is transferred to the Curia. This regulation was partially transformed after 2017. The Constitutional Court stated its competence in cases where not only the Fundamental Law but other Acts of Parliament are infringed, if fundamental rights are seriously harmed by the municipal decree [Decision 7/2017 (published on 18 April)].[9]

The legal supervision of local government decisions is performed by the County (Capital) Government Offices. Their competence is regulated by the Mötv. and by Act CXXV of 2018 on the Administration of the Government.[10] The ombudsman can examine the legality and harmony with fundamental rights of local government decrees as well. The judicial review of a local government decree can thus be initiated either by the county (capital) government offices or by the ombudsman. The procedures of the Curia can be initiated by the judge of a litigation too, if the illegality of a local government decree that should be applied in the case is probable. An *a posteriori* constitutional review of the Constitutional Court can be initiated by the judge of the given court case, by the ombudsman and by the Government of Hungary. The latter is based on the notice of the Government Representative (head of the county or capital government office) and on the proposal of the minister responsible for the legal supervision of local governments (now the Minister leading the Prime Minister's Office).

The *omission procedure* is a new element of the system. As I mentioned, the previous model institutionalised a weak tool. In the new model, the Curia can declare that a local govern-

ment failed to adopt a decree. If a resolution or service provision has been missed by the municipality, the responsibility belongs to the designated county (and Budapest) courts (8 of the 20 county courts), which have administrative branches (these courts actually operate on a regional level). The procedure has been regulated by Act I of 2017 on the Code of Administrative Court Procedure since 2018. A case can only be initiated by the county government office if a municipal decree has not been passed, and it can be initiated by the county government office and by the party assuming an individual infringement.[11] In Hungarian public law, the authorisation for adopting a decree can stem from an obligation of the legislator. Although the local governments also have original legislative powers, several important subjects of these original powers are listed by the Mötv. An omission procedure is justified by the failure to adopt a decree in these fields. Similarly, the county government offices can provide the omitted services and adopt a missing resolution as well.

Prima facie, full legal protection is provided to individuals by this new model of judicial and constitutional review. If we take a closer look at the regulation, several lacunas can be noticed. The main problem is that individuals affected cannot initiate the judicial review of a local government decree directly. As mentioned above, only the judge of the case, the ombudsman and the county government office, may submit a request to the Curia. The procedure aims to safeguard public interest first of all, while safeguarding subjective rights and positions only applies as a secondary aim. Although individuals can submit a constitutional complaint to the Constitutional Court against the decisions of the courts, the success of these procedures is highly doubtful, as a local government decree rarely violates the Fundamental Law only, without being contrary to lower sources of law. Unconstitutional local government decrees often violate an act of Parliament or a decree of a central government body, and – if the constitutional complaint is based on the unconstitutionality of the applied decree – the decree cannot be reviewed by the Constitutional Court for lack of competence.[12] Only the Curia is authorised by the new constitution and by the Court Act to conduct a judicial review of the legality of local government decrees. Other hindrances can stem from the strict legal requirements of the admission procedure of the Constitutional Court.[13] Thus a decision on the merits of the complaint rarely occurs.[14]

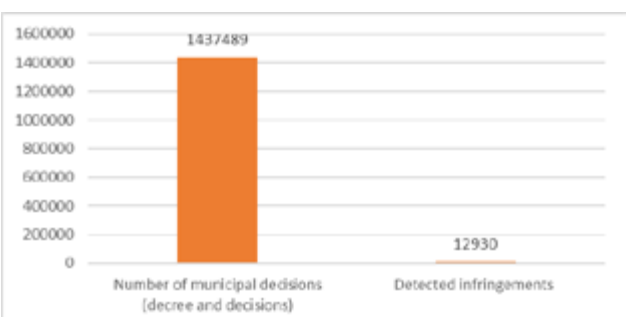
Therefore the main problem stems from the lack of a remedy similar to the constitutional complaint for local government decrees, which would be necessary because of the shared competence of norm control in this field. The judicial review procedure of the Curia cannot be initiated directly by an individual; individuals can merely – and not bindingly – ask the county government office, the ombudsman or the judge of the given case to ask the Curia for a revision of the legality of the contested local government decree. If an individual submits a direct application to the Curia to annul a local government decree, or if the Constitutional Court transfers such a complaint to the Curia because of the shared competence, the application or the complaint will be rejected due to the lack of standing.[15]

Until 2020, the local government body could not contest the decision of the Curia before the Constitutional Court. This changed with an amendment of Act CLI of 2011 on the Constitutional Court in 2019, thus municipalities have the right to submit a constitutional complaint against court decisions (including decisions of the Curia) that infringe their competences. It is not clear, and because of the novelty of the regulation a standing practice has not evolved, whether the municipalities can or cannot submit successful applications against the decisions of the Curia based on an infringement of competences, if they do not agree with the decisions of the court. So far there has been one single complaint against the resolution of the Curia, and it was rejected based on the logic of the regulation before the 2019 Amendment. In this case, a local government appealed the resolution of the Curia, and

the Constitutional Court rejected the complaint. In the practice of the Constitutional Court, the local government cannot submit a constitutional complaint because it can only be submitted on the grounds of a violation of fundamental human rights. According to the interpretation of the Constitutional Court, local governments have no fundamental rights, they just have "competences protected by the Constitution". There is no means of contesting, no effective complaint[16] against decisions which infringe the self-governance of the local governments.[17] This practice – which does not recognise the right to submit a constitutional complaint – is a strong limitation to the autonomy of local governments because their competences are only partially protected. As I mentioned, this regulation changed in early 2020, but there has not been any relevant case based on the amended regulation, therefore its impact cannot yet be estimated.

It is clear that the legal regulation on the control of local government decision-making was significantly transformed after 2012. If we look at the actual practice, these procedures are rarely used by the supervising authorities. First of all, the supervising authorities have limited resources – similarly to before. Therefore, they detected a low number of infringements during their activities (see Figure 1).

Figure 1 – Number of municipal decrees, other municipal decisions and infringements of local decisions detected by county / capital government offices in 2019 (Source: OSAP 2019)



If an infringement is detected, the municipalities are mainly cooperative: the majority of the calls for legality are accepted by the municipal bodies: only 1.58% of the calls were rejected in 2019 (see Figure 2)

Figure 2 – Legal notices in 2019 (Source: OSAP 2019)

Because of the lack of the resources and the large number of municipal decisions, the focus of legal supervision activity of the county government offices was transformed. As I mentioned earlier, the *a priori* tools were institutionalised in the early 1990s. Legal supervision in Hungary now focuses on *preventing* infringements.[18] The main tool of the county government offices for this prevention is the professional aid (assistance) to the municipal bodies (see Figure 3)

Figure 3 – Professional aid and legal notices of the county (capital) government offices in 2019 (Source: OSAP 2019)

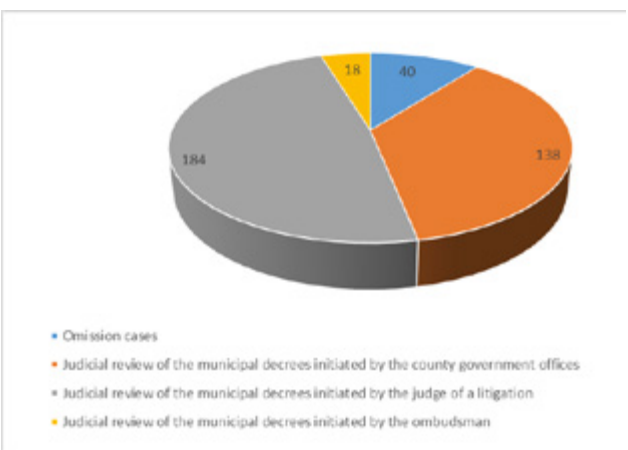
Therefore, the role of court cases has remined very restricted, and the majority of these cases are not submitted by the county (capital) government offices, but by the judges of litigations and the ombudsman. Hence court cases are mainly based on the protection of subjective rights (private interests) and not on the protection of public interests (see Table 1 and Figure 4).[19]

Table 1 Judicial review procedures of the Curia from 2012 to 2020

Year	Mainly protection of public interest		Protection of public and private interests	
	Omission cases	Judicial review of municipal decrees initiated by county government offices	Judicial review of municipal decrees initiated by judges of litigation	Judicial review of municipal decrees initiated by the ombudsman
2012	5	34	10	0
2013	6	27	24	3
2014	13	10	9	1
2015	2	14	26	9
2016	0	24	22	1
2017	4	9	22	2
2018	4	6	21	1
2019	3	8	27	1
2020	3	6	23	0

Source: the author, based on Municipal Decree decisions of the Curia, see: https://kuria-birosag.hu/hu/onkugy)

Figure 4 – Judicial review procedures of the Curia from 2012 to 2020 (in total)



2.2. NEW TOOLS FOR CENTRAL GOVERNMENT TO INTERVENE: DELIMITATION OF FINANCIAL AUTONOMY OF THE MUNICIPALITIES

The paradigm of the relationship between central and local government was radically transformed by the new Hungarian Constitution, by the Fundamental Law.[20] The former regulation was based on the passive role of the central government, but now it has responsibilities which provide it with strong and active intervention into local affairs.

First of all, as I mentioned, a missed decision can be made up by the County Government Offices. Although these procedures are rare (3-6 each year), it provides for the possibility of the central intervention.

Secondly, if an obligation based on international law or European Law is jeopardised by the municipalities, the Government can do it instead. The main reason was that several omissions and in-

fringements of the municipalities caused procedures against (the central government of) Hungary at the European Court of Justice. To prevent these procedures, the Government has the possibility to take municipal decisions instead.[21] Although it is clear that the political question doctrine could be applied for these cases, the resolution of the government can be sued by the municipalities.

During the 2000s, municipal debt was a great challenge. The new Municipal Code, the Mötv. and the Act on the Economic Stability of Hungary have regulations to prevent municipal indebtedness. First of all, municipalities are not permitted to plan an annual operational deficit in their budget, deficits can be planned only for investments and developments. Secondly, permission of the Government is required for municipal borrowing (in principle). These resolutions cannot be sued by the municipalities. The investment decisions of municipalities are subject to significant control by the (central) government. This control is strengthened by the centralisation of the national management of the EU Cohesion Funds. Since the majority of local investments and developments are co-funded by the EU cohesion funds, the central control is strengthened by the centralised management.[22] These tendencies were encouraged by the ASP system, which is a centrally monitored application centre for local budgeting and spending.

3. TRANSFORMATION OF MUNICIPAL TASKS: STRONG CENTRALISATION AFTER 2011/12

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 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 governments: e.g. inpatient health care was a compulsory task of the counties, primary care was under the authority of the municipalities. According to government statements there were serious problems before 2010 in these sectors. The local governments lacked sufficient budgetary resources to maintain their institutions effectively and transparently, therefore only the state administration could provide these public services at a unified high level of quality. Government decision-makers deemed that only central government control is able to ensure equal opportunities in these sectors.[23] The Government established agency-type central bodies and their territorial units to maintain institutions (e.g. schools, hospitals and nursing homes) in the aforementioned three fields:

- health care: National Institute for Quality- and Organisational Development in Healthcare and Medicines (reorganised in 2015 as the National Health Care Service Centre);
- primary and secondary education: Klebelsberg Centre and the Directorates for the School Districts for the maintenance of service providers;
- vocational education: National Office of Vocational Education and Training and Adult Learning and the (regional) Vocational Training Centres;
- social care and child protection: General Directorate of Social Affairs and Child Protection.

Agencies are widely used types of non-ministerial central administration. These bodies are usually independent from Government to some extent, and are entitled to make rules and individual decisions too. Their main advantage is that they concentrate on a few specific tasks, while the ministries can develop policies and adopt rules at a higher level.[24] Furthermore, agencies as buffer organisations can provide a much more flexible framework of human resource management during personnel downsizing campaigns, which are rather frequent in Hungary.[25] In spite of their (respective) autonomy, agencies often carry out political tasks and frequently operate under tight governmental or ministerial control.[26]

Another very important aspect of centralisation is the organisational power[27] of the Government and

the minister overseeing these 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 Executive to implement its program in certain sectors and in general. For this purpose, the Government must have an appropriate and well-constructed administrative system. The transformation can be observed by an analysis of the annual budget of the Ministry of Human Capacities, which is now responsible for the centralised service provision.[28]

Table 2 – Total expenditures (in HUF million)29 of the budgetary chapter directed by the Ministry of Human Capacities

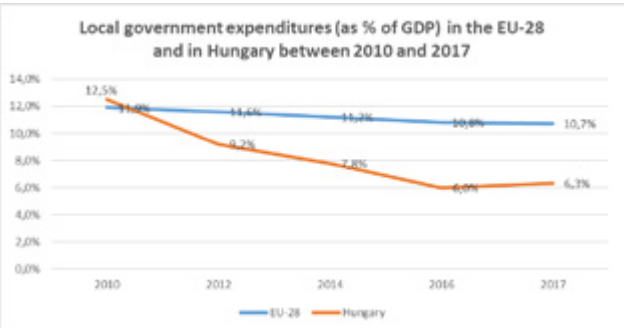
Year	Total expenditures (in HUF million) of the budgetary chapter directed by the Ministry of Human (formerly National) Capacities*
2011	1,535,370.6
2012	1,949,650.5
2013	2,700,363.9
2014	2,895,624.8
2015	3,049,902.2
2016	3,011,947.7

* The inflation rate was 3.9% in 2011, 5.7% in 2012, 1.7% in 2013, and -0.9% in 2014 based on the data of the Hungarian Central Statistical Office.[30]

Source: Act CLXIX of 2010 on the Budget of the Republic of Hungary, Act CLXXXVIII of 2011, Act CCIV of 2012, Act CCXXX of 2013, Act C of 2014 and Act C of 2016 on the Central Budget of Hungary

In short, the maintenance agencies in these three sectors are rather tightly subordinated to the Government and more directly to the Minister of Human Capacities. This influence expands to the territorial units. Thus, the role of the municipalities has been significantly weakened, which is clear based on the municipal expenditures.[31] In 2010 the municipal expenditures were 12.5% of GDP and in 2017 only 6.3% (in the EU-28, municipal expenditures were 11.9% of GDP in 2010 and 10.7% in 2017) (see Figure).

Figure 5 – Local government expenditures (as % of GDP) in the EU-28 and in Hungary between 2010 and 2017



Source: Eurostat[32]

This process has been strengthened by legislation after the COVID-19 pandemic. The regulation on local taxation was amended, and the shared revenues from the vehicle tax have been centralised, while the most important local tax, local business tax, has been reduced for small and medium enterprises, thus local revenues were reduced and national incomes became more centralised.

4. CONCLUSIONS

The regulation on the relationship between central and local government in Hungary has undergone significant transformation in the last decade. Although the government has robust tools to control local activities, the main transformation can be observed in the field of the public services. The former municipality-based public service system was transformed into a centrally organised and provided model, thus the role of local governments in Hungary has decreased.

Notes

1 Nagy, M. & Hoffman, I. (eds.) (2014) *A Magyarország helyi önkormányzatairól szóló törvény magyarázata. Második, hatályosított kiadás* (Budapest: HVG-Orac), 32-34.

2 Jefferson stated that the right of local communities to self-governance is an inherent right, not a right which is devolved by the central government (Bowman and Kearney 2011: 235-236).

3 Marcou, G. & Verebélyi, I. (eds.) (1994) *New Trends in Local Government in Western and Eastern Europe* (Brussels: International Institutes of Administrative Sciences), 238.

4 From 1 January 2009 to 1 September 2010, due to a constitutional court decision there were no bodies which could control the legality of decrees of local governments. The main reason for this was that the regionalisation of the Administrative Offices was not performed by an act adopted by a qualified (two-third) majority, and therefore this Act was declared unconstitutional by the Constitutional Court of Hungary. Given the lack of the two-thirds majority of the then governing parties and the strong opposition against the regionalisation the Parliament could not adopt the required act. Qualified majority acts are a speciality of the Hungarian law (Jakab and Sonnevend, 2013, 110.).

5 Rozsnyai, K. (2010) *Közigazgatási bíráskodás Prokrusztész-ágyban* (Budapest: ELTE Eötvös Kiadó), 122-128.

6 Hoffman, I. (2009) Önkormányzati közszolgáltatások szervezése és igazgatása (Budapest: ELTE Eötvös Kiadó), 368-370.

7 Hoffmanné Németh, I. & Hoffman, I. (2005) Gondolatok a helyi önkormányzatok törvényességének ellenőrzéséről és felügyeletéről, *Magyar Közigazgatás*, 55(2), 98-102.

8 Fábián, A. & Hoffman, I. (2014): Local Self-Governments, In: Patyi, A. & Rixer, Á. (eds.) *Hungarian Public Administration and Administrative Law* (Passau: Schenk Verlag), 321.

9 In the case building of the minarets and the practices of the muezzins were banned by the municipal decree, by which not only the constitutional regulations on the freedom of faith, but the regulations of the Act on Freedom of Faith and the regulations of the Act on Protection of the Built Environment (the municipalities do not have competences on the ban of these religious buildings) were infringed. According to the former regulation, the case – which was initiated by the ombudsman – should have been transferred to the Curia (the Supreme Court of Hungary), because not only the rules of the Fundamental Law were infringed by the local regulation. The Constitutional Court decided the case and quashed the regulation. In the justification the competence of the Constitutional Court was based on the serious infringement of the fundamental rights of the citizens and the required high level of their protection.

10 Fábián, A. & Hoffman, I. (2014): Local Self-Governments, In: Patyi, A. & Rixer, Á. (eds.) *Hungarian Public Administration and Administrative Law* (Passau: Schenk Verlag), 346-347.

11 Hoffman, I. & Kovács, A. Gy. (2018) Mulasztási per In: Barabás, G., F. Rozsnyai, K. & Kovács, A. Gy. (eds.) *Kommentár a közigazgatási perrendtartáshoz* (Budapest: Wolters Kluwer Hungary), 694.

12 See for example the Resolution No. 3097/2012. (published on 26th July) of the Constitutional Court, the Resolution No. 3107/2012. (published on 26th July) and the Resolution No. 3079/2014. (published on 26th March) of the Constitutional Court.

13 See for example the Resolution No. 3315/2012. (published on 12th November) of the Constitutional Court in which the Constitutional Court rejected the complaint because the decision of the local government could be appealed. The Constitutional Court rejected the complaint for the same reason in the Resolution No. 3234/2013 (published on 21st December)

14 For example the Constitutional Court accepted the complaint in the Resolution No. 3121/2014 (published on 24th April) but dismissed it because the local government decree which regulated the fees, the licences and the appearance of the taxis of Budapest was declared constitutional.

15 See the grounds of appeal of the Resolution of the Local Government Court of the Kúria No. Köf. 5054/2012/2.

16 Such an effective remedy is the German Kommunlaverfassungsbeschwerde which can be submitted for the infringement of the local government competences guaranteed by the Grundgesetz (Umbach and Clemens 2012: 1625-1632).

17 See Resolution No. 3123/2014. (published on 24th April) of the Constitutional Court.

18 Hoffman, I. & Rozsnyai, K. (2015) The Supervision of Self-Government Bodies' Regulation in Hungary, Lex localis – Journal of Local Self-Government, 13(3), 496-497.

19 In 2012 and 2013 the significant number of the cases initiated by the county government offices were based on the transfer of pending cases from the Constitutional Court tot he Curia.

20 Fazekas, J. (2014) Central administration, In: Patyi, A. & Rixer, Á. (eds.) *Hungarian Public Administration and Administrative Law* (Passau: Schenk Verlag), 292.

21 Fábián, A. & Hoffman, I. (2014): Local Self-Governments, In: Patyi, A. & Rixer, Á. (eds.) *Hungarian Public Administration and Administrative Law* (Passau: Schenk Verlag), 346.

22 Hoffman, I. (2018) *Bevezetés a területfejlesztési jogba* (Budapest: ELTE Eötvös Kiadó), 100.

23 These governmental statements are summarised in the Rapporteur's Justification of Act CLIV of 2011 on the Consolidation of the Self-governments of Counties and the Rapporteur's Justification of Act CXC of 2011 on Public Education.

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

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

26 On politicisation see ibid.

27 Böckenförde, E.-W. (1964) *Die Organisationsgewalt im Bereich der Regierung. Eine Untersuchung um Staatsrecht der Bundesrepublik Deutschland* (Berlin: Duncker & Humblot), Fazekas, J. (2014) Central administration, In: Patyi, A. & Rixer, Á. (eds.) *Hungarian Public Administration and Administrative Law* (Passau: Schenk Verlag) 290-291.

28 Hoffman, I., Fazekas, J. & Rozsnyai, K. (2016) Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-municipal Associations in the last Decades, Lex localis – Journal of Local Self-Government, 14(3), 468-469.

29 In January 2020 1 EUR is about 360 HUF and 1 RUB is about 4 HUF.

30 http://www.ksh.hu, (January 5, 2016).

31 Hoffman, I. (2018) Challenges of the Implementation of the European Charter of Local Self-Government in the Hungarian Legislation, Lex localis – Journal of Local Self-Government, 16(4), 929-938., 972.

32 http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tec00023&language=en (June 4, 2021)

DOI: 10.54201/iajas.v1i1.7

Communications as a networked public service – What is left of public service in a liberalised competitive market?

ANDRÁS LAPSÁNSZKY *

Abstract: The study includes the results of detailed research on what public service means among networked services. In this context, by means of a comprehensive analysis it defines the main conceptual elements, characteristics and the distinguishing criteria of public services from other services. The study groups the types of public service on a theoretical basis. Using communications as an example, it demonstrates what state, public interest and public service elements remain in the market of these services, in the competitive market environment, after the liberalisation of public services. The main question examined is whether any public service content is necessary for the functioning of market competition on the basis of consumers, public policy, the state, the provision of services and market considerations, or whether liberalisation solves everything by placing a public supply system into market competition and privatising it. The research concludes that in all cases and types the public interest operation of the "former public service" still requires certain public service elements, which the study presents along scientific grounds.

Keywords: networked public service, liberalisation, privatisation, state property, communications

1. PUBLIC SERVICE FOUNDATIONS OF NETWORK INDUSTRIES

The growing role of the state in economic and social policy was a perceptible process in the 20th century and is still experienced today. The concept of public services developed at the beginning of this process with the significant transformation of the role of the state and public administration at the beginning of the 20th century, along with a fundamental change in structure and content. The basic goals of public services at that time were to eliminate and correct the failures and negative effects of market competition, and to preserve and strengthen the equilibrium of the market.

The first scholarly study and systematisation of public services is linked to Arthur Cecil Pigou (1910s, 1920s).[1] John Maynard Keynes' work and theory as well as his economic model broadened the spectrum and operation of public services. According to Keynesianism, the development of public services and new job opportunities in the field of public services can have a positive effect on the economy as a whole.[2]

Public services became important in the 1920s and 1930s in the context of regulation and state inter-

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vention, as it was then that the public sector began to be more pronounced in the public macroeconomic policy that suppressed economic cycles.[3] This perception grew stronger after the Second World War, when, as the welfare state expanded, the system of public services became more extensive in Western Europe through nationalisations in the public sector, and turned exclusive in Central and Eastern Europe within the socialist state system and economy. In the 1950s, Paul A. Samuelson studied and developed the formalised theoretical foundations of the public good and public goods (related to public finances and state finances).

In developed market economies, the growing role of the "welfare state" and the extensive public service system have highlighted that together with the correction of the market, ensuring its equilibrium and successfully eliminating market weaknesses and failures, the state also limits and hinders the advantages and operation of market competition, i.e. the efficient use and allocation of resources in the welfare state is not optimal. In centrally planned economic systems, the "monopoly" of public services – i.e. by forcing the private economy into the public sector and via nationalisations essentially all economic services became part of the public sector, and therefore public services did not differ from other services – clearly had a negative effect on efficiency, and market conditions were alien to this system.

Based on the above duality of the functioning of the welfare state, and the successes and failures of state intervention in the economy, the proper design of the boundary between the market and the state has become an important question, to which several answers have been provided: Parallel to the theoretical systems for the correction and prudent reform of the welfare state, the views urging a complete structural change in the public service system, which called for widespread privatisation and liberalisation, also strengthened.[4]

Based on the historical outlook, it is clear there is no consensus on the extent to which state influence in the provision of public services leads to the best result from a socio-economic point of view.

Similarly, there is no comprehensive consensus on the definition of public services, and the concept does not take on meaning with one single and exclusive definition.

According to the general and broad definition, public services are activities in which, in addition to reaching a large number of consumers, the state plays a role in the production of goods, the financing of the service or in the regulation of the market in some form. Albeit in varying proportions, both the public and private sectors can participate in providing public services.[5]

In a similar approach, a public service is a service in which the nature of the community and the fact that the task of organising the services in that category falls to the public sector are decisive. It follows that these services must still be provided if they are not economical in economic terms.[6]

According to a different definition, public services are defined as the provision of tasks that – under given conditions – require community organisation and serve common social needs.[7] This definition does not consider performing tasks in the absence of the service's economic efficiency to be a conceptual element.

According to a further definition, public service activities are activities which create new economic value and are connected to the production of pure or mixed public goods and related services, and which do not include activities carried out by the state in possession of public authority. The most important public services are manifested as a fundamental right in the constitutions of individual countries. Any service is legally classified as a public service by the state through a specific procedure, and this service is provided, financed or regulated by the state.[8] This definition is to be treated with caution in that it does not consider a public authority activity to be a public service, and it must be defined as such by law to be classified as a public service. As we will see later, under this definition certain non-market public services, such as justice, do not fall within the scope of the concept, while the services and legal institutions of communications – with public-service content but not formally classified as such – are also excluded from the concept.

According to the System of National Accounts (SNA) issued by the United Nations Statistical Commission, the characteristics of public services are that

(a) they can be used equally by all members of the community or by a particular group of the community, (b) they are generally used passively and do not require a specific agreement or the active participation of those concerned, c) there is no competition between consumers to obtain the service.[9]

Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities provides a legal definition of public services, pursuant to Section 3 (1) (d) of the Act "public service means a service provided under an obligation to contract aiming to satisfy the fundamental needs of the population, in particular the provision of electricity, natural gas, heat, water, waste water and waste treatment, sanitation, postal, and telecommunication services, and public passenger transport provided by scheduled vehicles". [The term is used by the law in two places among the substantive rules: public service organisations (including electronic communications service providers) are also obliged to adhere to the requirement of equal treatment, and equal access to public services must be given special attention when preparing a local equal opportunities program. (Sections 4, 31).]

The basic content of public services and the criteria for distinguishing them from private services can be summarised as follows:

a) Depending on the type of service, the state strives for the fullest possible provision with various regulatory guarantees and obligations, even by providing a replacement service.
b) There is a service obligation determined by legal regulations, from which the service provider is usually only exempted in the case of guaranteed and detailed reasons.
c) If the conditions of use specified by law apply, the applicant cannot be excluded from the service; this must also be ensured in the legal regulation.
d) The service provider is obliged to provide the service at a generally affordable price, without discrimination and on a continuous basis.
e) In the case of some public services, even market operation and affordable prices are excluded, i.e. it is impossible to operate the service according to market aspects (for example, social administration, health care).
f) The service is of a general nature and closely related to the basic needs of the community, and to the exercise of a fundamental constitutional right or human right, as well as to the functioning and development of the economy.
g) A specific system of liability, quality and other requirements, security and strategic elements shall apply to the service.

The different definition of public services and their separation from other (private) services can be traced back to the fundamental question of which services at a certain level of socio-economic and public policy development require the operation of a public supply mechanism within the state framework or guaranteed by the state.[10] This, of course, presents a different picture for each age and country, so the range of public services is not constant and uniform. As an example of communications and universal service, while in most developed states this is just a goal, a small Pacific island nation, Niue, has been the world's first "wifi nation" to provide free wireless internet access to its entire population since 2003, primarily from the registration fees for the .nu top level domain, and then from the license fee for the domain. By comparison, only seven years later did Finland include – fixed – broadband access in its universal service, for the first time in Europe.[11]

With regard to the performance of tasks within the state framework and the provision of non-state public services regulated by the state, we can distinguish between the service and regulatory nature of the state.

According to the distinction between the service-providing and the regulatory state, in the former model each public service is provided through the state or its own administrative bodies, or through public institutions and utilities, public companies or state-owned private entities connected to public administration. In these cases, the state is responsible for providing the service. The provision of certain public services by private organisations is also possible in the concept of the service state, typically in the form of an agreement or contract containing special elements of public law.

According to the model of the regulating state, the task of the state is to organise public services and

create the appropriate regulatory environment, not to provide public services directly. In this case, the state must ensure that the service in question is available and accessible (on an equal footing), primarily through the regulation of competition and services. The principle of equal access in legal regulation is primarily manifested by the so-called universal service.[12]

2. CLASSIFICATION OF PUBLIC SERVICES

Public services can be grouped in several ways. The first classification criterion is the form of ownership. According to the categories formed on this basis, we distinguish between:

h) public services provided by state and municipal actors,
a) public services provided by private actors, and
b) those provided in a mixed model (even in sub-sectors such as the contracted service of private bus companies in local public transport).

In terms of funding, there are:

a) public services financed by the state or local government,
b) public services financed by consumers or customers, and
c) public services with mixed funding.

According to the range of users, public services can be used by a) everyone and anyone or b) specific consumers and customers.[13]

With regard to the division according to the form of ownership, it should be noted that in terms of the content of public services and the performance of state tasks, the type of ownership structure is only a relative criterion for demarcation. This is because services cannot be classified as having a public service content solely based on whether the service in question is provided and runs in the context of state ownership, public ownership, private ownership or mixed ownership. Namely, public tasks and market public services today are generally provided by private organisations under the framework of their legal obligations in this context, and state-owned companies providing public services (such as the Hungarian Post Office) can also carry out profit-oriented activities (provided that their portfolio is treated separately from their public service and universal service activities).

In the case of division according to form of ownership and financing, the ownership structure of the service organisation and the service can be separated. The ownership structure of the service provider is not decisive in terms of the public service nature of the activity – the content of the public service appears and must be examined in the state ownership, state monopoly, public service regulation and foreclosure of competition on the market. This is because if the state ownership, monopoly and elimination of competition for the service remain unchanged, the privatisation of the public service provider per se does not trigger a definite change in the market or "public sector structure". Thus, "liberalisation" ("releasing" the provision of services onto the market) and "privatisation" (making the organisation providing the services privately owned) are not synonymous, and the public service organisation, company and the state task – the public service – can be privatised independently.[14]

Communications services, and more specifically universal services – which undoubtedly have a public service content – are typically provided by private companies. The universal service in communications is a service provided by private actors (market participants) in terms of ownership, and a mixed system in terms of its financing (consumers pay for the service and the state compensates for part of the uneconomical provision of services). This service can be used by consumers and subscribers.

Public services can also be paired with categories of statistics or public finance for the classification of public administration activities. The Classification of the Functions of Government (COFOG)[15] lists and groups government functions.[16] In this system, economic functions include, but are not limited to, postal services, telecommunications and the internet; the latter two categories correspond to electronic communications.

Public services can also be sorted by the way they are distributed. The mechanism for distributing public services, i.e. delivering them to consumers and ensuring their consumption, is basically done in two ways. Some public services reach the consumer through non-market mediation. These are typically administrative public services provided by public administration organisations, provided that there are and have been efforts to use market-based instruments in administrative-bureaucratic distribution processes to improve the efficiency of these services. The distribution of other public services is ensured by the market mechanism – however, public service markets are generally imperfectly competitive.[17]
This division is essentially the separation of public services into market (economic) and non-market public services, which is one of the generally accepted and established classification systems. The basis of the division is the extent to which the market mechanisms prevail in connection with the given public service and its provision.

Among non-market public services, the market is not typical, the services that can be classified here are not the subject of a sale or exchange, and – in their purest form – the individual cannot be excluded from their consumption. The purest form and separated group of non-market public services is pure public goods. These are publicly consumed goods, no one can be completely excluded from their consumption, and their use is usually possible at no additional cost to any other individual (there are no additional costs for extending the service to additional persons). Classic examples of non-market-based pure public goods are national defence, certain environmental activities (such as measuring air pollution), disaster management and certain public health services. Public goods are thus types of goods and services that are indivisibly provided by the state for the benefit of the whole community, abstracted from specific, individual and market-based consumption needs, and if the provision of public goods is organised and maintained by the state, they are available without individual specific use.[18] Individual consumption of public goods cannot be measured accurately, for example, just as someone cannot be excluded from the "defence service", nor can it be measured "to what extent" the army protected one or the other in a war situation, etc.
Depending on the level of social and economic development, guaranteed health, education, social and welfare support, administrative and public order services as well as justice are not pure public goods, but also not market-based public services. Within the framework of the rule of law, one might think, for example, that justice is a basic public service that enriches the range of pure public goods. However, this service, as well as the other mentioned examples, are provided on the basis of legal regulations, so in the absence of legal guarantees, individuals can in principle be physically excluded from their consumption. It should be noted, for example, that while health and social services can be provided by the market sector in private care (private doctor, private social or nursing home, etc.), in the case of administrative and judicial activities, the introduction of market processes is inconceivable due to the public authority content of these activities.
The transitional group between pure public goods and private goods is the range of club goods or artificially scarce goods, where the possibility of exclusion from consumption applies, but the optimal size of artificial scarcity is usually more than one person. Club goods include a common laundry room in a multi-occupational dwelling, a swimming pool, or a cinema screening.

Public market services are services that can be used continuously by all members of a larger community under the same (or similar) conditions, which have been (and are) of course typically provided in a monopoly, stemming from the service infrastructure. From the perspective of the public service operation, one essential feature of the service is that it has public service content and is subject to public law-based regulation, state intervention and community control.
Access by the community, by all members of society, does not mean that everyone has the same quality of access to the public service on the market, but the service provider cannot discriminate against consumers or areas that can only be served uneconomically, nor can it deny them the ser-

vice, and its lower standard can only be based on objective economic, technical, technological, etc. circumstances and rationality (for example, an electronic communications service provider is not obliged to install a local loop with an optical cable on a farm far from the municipality if this is technically or economically irrational, but it is required to provide a simpler, universal service, a copper pair connection, even if it is not economical).

To ensure and develop the provision of market public services, the state has more direct means at its disposal if the service provider is state-owned, however, due to the equivalence of the efficiency and operation of state-owned companies with the performance of private sector companies, the optimal framework for the provision and development of public services is not always provided by the state-owned company. The privatisation of a state-owned company and the liberalisation of the service provision do not eliminate the public service content of a service, the essential question in this regard is whether the public interest in the provision of public services is not harmed during the provision of services by private companies, or whether the provision of services within the private and market spheres is more efficient, economical, etc. compared to the performance of public tasks.

In communications, the issue of service provision by public or private companies has already been decided – for the benefit of the latter, the universal electronic communications service, which qualifies as a market public service, is also provided by market participants. In many other industries, the market public service and universal service are still provided by state-owned companies.

3. PUBLIC SERVICES IN THE EUROPEAN UNION

The European Union is based on the idea of free trade and provision of services between Member States. In one approach, the development of the European Community can be interpreted as the fulfilment of this economic "unification" (customs union, common market, internal market, single market), the four fundamental freedoms.

The oldest root of the European Union is therefore economic, and competition throughout the Union is one of the main objectives of European cooperation and its institutional system, among other political and other objectives.

Accordingly, in the legal sources, documents and "way of thinking" of the European Union, public services also appear as an impeding – but accepted – factor of competition on the market. This approach can also be seen in the wording, in the name of the concept that most closely corresponds to public services in EU terminology. In the EU, the term "public service" is rarely used,[19] the Community counterpart of this concept being service of general interest, which refers to a general interest which overrides the "omnipotence" of competition[20] – and the classification of the interest as a public interest and a need to be satisfied through a public service is a matter for the Member States. Equivalence is approximate in the sense that public service is not 100% synonymous with service of general interest and, similarly, a combination of a market public service – a service of general economic interest and a non-market public service – and a service of general, non-economic interest or nature is only based on a high degree of similarity, there is no complete conceptual agreement.

Article 1 of Protocol (No 26) of the TFEU contains an interpretative provision on services of general economic interest:

"The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."

This cannot be considered a legal definition or a definition of content, nor is it referred to as such in the European Union documents. In secondary legislation and other sources, services of general economic interest are defined as services of public economic interest to which a Member State imposes public service obligations. These are market services within the scope of services of general interest.[21]

According to the general information available on the European Union's website, services of general interest are services which are classified as public services by the authorities of the Member States and which are therefore subject to specific public service obligations. Services of general interest fall into one of three categories: economic (e.g. post), non-economic (e.g. police, justice) and social (e.g. employment and social housing services). Social services of general interest can be both economic and non-economic.[22]
The European Commission defines services of general interest as services which are considered to be of general interest by the national, regional or local authorities of the Member States and are therefore subject to a specific public service obligation. The concept covers both economic activities and non-economic services. The latter are not subject to specific EU legislation and are not subject to the internal market and competition rules of the TFEU. However, certain aspects of organising these services may be covered by other general rules of the TFEU, such as the principle of non-discrimination. Economic services of general interest are economic activities that result in the creation of public goods that would not be produced by the market without public intervention (or only under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access).[23]
It is clear that the use of words and concepts of services of general interest / services of general economic interest in literature and in EU materials is not completely uniform. Attempts have been made to resolve this at EU level, but a clear demarcation of categories and a fully consistent use of concepts are still noticeable by their absence. However the services of general interest "outside" the services of general economic interest are referred to (i.e. as services of general interest or services of general non-economic interest), it is important that they do not fall within the scope of EU law, they are not governed by Community law.

There are no explicit provisions on services of general interest, i.e. non-economic interest, in the primary sources of law of the European Community, including the Treaties establishing the European Communities and the TFEU. Services of general (non-economic) interest are therefore not covered by internal market, competition law and state aid rules. "Economic interest", on the other hand, makes the scope of services of general economic interest ("market") and services of non-economic ("non-market") general interest less precise and difficult to distinguish, as services of general non-economic interest, including non-profit services, also assume economic and commercial activity. Therefore, the basis for distinguishing between services of general economic interest and services of general interest (non-market) is to be found in the "service-determining significance" of the economic interest within the given service, in the content, purpose and operation of the economic activity, and in the role of the market structure related to the service.

In the field of communications, this examination is not necessary for the universal service as it is mandatory for Member States to introduce it under EU law. However, in other cases outside the EU obligation, the content of the general economic interest, i.e. the public service content, depends on the discretion of the Member State. Depending on the division of competences set out in national law, Member States' authorities have considerable discretion (discretionary power) at national, regional or local level to determine what constitutes a service of general economic interest [(market) public service]. There are limits to this discretion imposed by EU law in harmonised sectors (such as communications). Where EU harmonisation rules only apply to certain specific services, Member States have a wide margin of discretion in defining ancillary services as services of general economic interest. As mentioned above, in the electronic communications sector, for example, Member States are

obliged to introduce universal service obligations under EU law, but have the discretionary power to define electronic communications services as services of general economic interest in addition to the provisions of the relevant Directive (i.e. the European Electronic Communications Code).

The fact that services of general non-economic interest are not covered by EU law may lead Member States to classify their public services as such, and not as services of general economic interest. Whether the incorrect classification happens because of this interest or because of an error caused by demarcation or classification difficulties, the European Commission is entitled to determine the application of internal market and competition rules with regard to services of economic interest classified "incorrectly". In such a case, the service may be considered to be of general economic interest by the Member State under the conditions set out in the relevant Union provisions.

The Commission and the Court of Justice of the European Union also have the power to act if the classification of a service as a service of general economic interest is based on a "manifest error". In the field of communications (or related audiovisual fields due to convergence), the inclusion of activities involving advertising, e-commerce, the use of premium rate telephone numbers (IDs) in games of chance, sponsorship or sales promotions (merchandising) as public service activities in the audiovisual sector is clearly one such discretionary error.[24]

4. STATE PROPERTY AND SERVICES MAINTAINED IN COMMUNICATIONS MARKET COMPETITION

In the history of communications prior to privatisation and liberalisation, the content of public services was clearly identifiable:
The most characteristic communication services provided by the natural monopoly – and most widespread in terms of volume – was the fixed telephone service. Fixed telephones and the infrastructure of the fixed telephone network formed the basis and provided the key content for the market segment of the public telecommunications system (public telecommunications market service). Other market communications services either developed later on, in the period of liberalisation and privatisation, and were in demand then (such as the proliferation of radiotelephone services and equipment) or were services of lesser importance for consumer, community and individual use – such as scientific research, meteorological and defence-related services. For a long time, there was no alternative or substitute service to the fixed telephone service, which stemmed from the fact that until the last third of the 20th century – based on the level of technological development and the very limited capacity provided by bandwidth and technical possibilities – the fixed telephone network was an indivisible network that could not be extended in parallel. In this respect it was a public utility network. The inability to develop a parallel network meant infrastructure-based competition did not arise, network sharing and access to alternative service providers were impossible, and therefore service-based competition was excluded. The so-called value-added and ancillary services provided over a fixed telephone network were mainly related to fixed telephone services (such as caller ID) and had no effect on the structure of the communications market.

The public service nature of the fixed telephone service was not based on the fact it was provided by the state, a public company or a public utility – although this did reflect reality in Europe at the time – because, as seen above, the public service content of a service is not determined by the person providing the service or its ownership background, etc. The public service content is to be found in the nature of the service, and the fixed telephone service was classified as such, also because it could not be substituted. Consequently, the fact that communications have been transferred from the public to the private sector under conditions of market competition via liberalisa-

tion and privatisation does not automatically lead to a change or cessation of the public service content or nature of a given communications service. Below I examine which communication services, legal institutions and areas of communications regulation have public service content today, following the extensive and successful liberalisation worldwide. The – surviving – public service content of the liberalised communication market and communication service system is particularly evident in the following areas, legal institutions and regulations.

It should be emphasised that the most important element of public service content following the liberalisation, privatisation and structural reform of communications is that if the market mechanism, the structure of market competition, is not able to operate the whole service system efficiently or its "essential" sub-area at the given level of economic and social development, then the enforcement and regulation of public service guarantees becomes inevitable.
When examining the legal institutions and regulations presented below, I am seeking the public service aspects, content and nature, so – apart from the universal service and broadcasting for example – it is not the classification or non-classification of the given legal institution as a public service that matters (which in most cases is not applicable based on the content of the legal institution or regulation), but its relationship with the public service.

4.1. THE UNIVERSAL SERVICE

In connection with the universal electronic communications service, I would like to begin by quoting the preamble to the Code: *"A fundamental requirement of universal service is to ensure that all consumers have access at an affordable price to an available adequate broadband internet access and voice communications services, at a fixed location."* [recital (214)]. Public service content is the provision for all consumers and the adequacy and appropriate price of the service. The mandatory content of the service is the adequate fixed voice and broadband internet access service under the Code, which leaves it to the Member States to ensure that it is also provided to citizens "on the move" as part of the universal service. The universal service is regulated by the European Electronic Communications Code, and in Hungarian legislation in Act C of 2003 on Electronic Communications (hereinafter referred to as: Electronic Communications Act); further provisions, such as the designation of the universal service provider, are contained in the Decree of the President of the NMHH.
Under the rule of the Electronic Communications Act in force until 20 December 2020, in addition to the services that are part of the universal service, the universal service provider providing the universal electronic communications service – and the company qualifying as the designated universal postal service provider – was obliged to provide domestic telegram services. This service did not constitute the content of the universal electronic communications service, however, the universal electronic communications service provider was obliged to provide it in a way that is accessible to all [Section 125 (2) of the Electronic Communications Act, until 20 December 2020)]. The amendment of the law carried out when implementing the Code also expresses how variable the scope of universal service is, i.e. the domestic telegram service has become marginally important, and its public service content has "disappeared".[25]

4.2. FINITE RESOURCES

4.2.1. SPECTRUM MANAGEMENT

Radio frequency spectrum is a limited finite natural[26] resource. Its use does not also mean its "consumption", because it is not exhausted when used, it does not decrease, and it does not run out (so a frequency band freed up can be reused). The seemingly large radio spectrum is limited due to the possibilities of the available technology, the diversity of radio services and uses, the demand for spectrum they generate, the different frequency bands and the wave propagation and operating constraints of geographical areas and topograph-

ical differences, etc. The limited nature of this resource is alleviated by the fact that a frequency band used in a given area can be used elsewhere at the same time after a certain distance. Improper, unplanned use of the radio spectrum, or if the spectrum is not used, will result in a waste of resources.

Considerations and decisions on frequency use options must lie in the public interest, of which national security, public security, the protection of life, health and property, the national economy, including the communication services, the productive and service sectors (especially traffic and transport) and public interest aspects of information, education sport and entertainment play a key role among the components of public interest in terms of frequency use.[27] Radio spectrum is the exclusive property of the state[28] and, according to recital (107) and Article 45 of the Code, is a scarce public resource with significant social, cultural and economic market value.

Based on the above, the public service content of spectrum management can be identified most generally in the fact that the state-owned finite resource is distributed in accordance with the public interest. Setting spectrum management solely on market conditions is precluded by the limited nature of the spectrum and its state ownership.

Spectrum management can be divided into civilian and non-civilian spectrum management subsystems. In civilian spectrum management, the purpose of the frequency use is to achieve economic benefits, usually via an electronic communications activity or the provision of a service. For this reason, the use of frequencies for civilian purposes may also be referred to as commercial use of frequencies (this is the common term in the official terminology of Western Europe, overseas and the European Union).

A special type of civilian frequency use is broadcasting,[29] the use of radio spectrum for broadcasting purposes. At present, television programmes and channels (audiovisual media services) are broadcast in Hungary using digital technology, and the digital switchover (in terrestrial broadcasting as well as on other platforms) has taken place. In the vast majority of cases, radio media services are still broadcast using analogue technology, in some cases in simulcast mode, i.e. in addition to analogue broadcasting, the media service is available on a digital platform too (e.g. internet platform or digital cable TV network, IPTV network; the spread of digital terrestrial radio broadcasting: DAB, DAB+ is yet to come).

The public service aspects of broadcasting are related to the type and content of the distributed media service. A well-defined type of media service is the public media service. One of the aims of the public media service is to broadcast socially and culturally comprehensive content for "everyone" (addressing as many social strata and culturally distinct groups and individuals as possible). In view of this objective, as well as its other objectives set out in the media regulation,[30] it can be concluded that the public media service provider provides a public service.[31]

In Hungary, the operation of the DVB-T digital terrestrial broadcasting network and its free broadcasting for consumers – which has replaced free analogue broadcasting – satisfies a basic social need (by distributing certain media services of "elementary" television channels, i.e. public media services and media service providers with significant powers of influence), based on which it can be considered a service with public service content.

Public service radios are distributed in Hungary via both analogue and digital broadcasting, which can also be considered a service with public service content. The digital broadcasting of public service radios has taken place in and around Budapest, and approximately 38 % of the population has the opportunity to listen to digital radio broadcasts with a suitable device.

In non-civilian spectrum management, the purpose of the frequency use is to support the performance of important state tasks. In domestic practice, these state duties comprise tasks of national defence, national security, police (including general police, counter-terrorism, and internal crime prevention and detection), professional disaster management, correctional services, customs and financial investigation, and government communication services.[32] The scope of non-civilian

spectrum management organisations is defined by law. This includes: a) defence forces, b) the national security services, c) domestic crime prevention and detection body, d) the counter-terrorism body, e) the general police body, f) the professional disaster management body, g) the correctional services body, h) the customs and investigative bodies of the National Tax and Customs Administration, and i) the government communications provider for the closed law enforcement network, the K-600/KTIR Communication and Information System and the unified digital radio communication system.[33]

The performance of national defence and law enforcement tasks is considered a (non-market) public service, therefore the related spectrum management can be considered as having public service content, and even as pure public goods. Government communications services (some of which fall within the domain of spectrum management) are covered in point 4.3.

4.2.2. IDENTIFIER MANAGEMENT

Electronic communication identifiers in general, and numbering, play a significant role in the proper transmission of information within and between networks. Identifiers are a prerequisite for the operation of services, as they ensure distinctions can be made between networks, service systems and, in particular, subscribers. Differentiation can be based on numbers, names and addresses. The name and address are alphanumeric identifiers that can contain numbers, letters and symbols, while the number indicates a name or address, but consists of digits only. The name basically means the identification and distinction of the final destination of the information transmission, and the address is the identification applied at management level in the telecommunication network.[34] The IP address, email address and domain name are not considered identifiers.

Identifiers (numbers or a series of characters) can be expanded indefinitely in principle, but identifiers are considered a finite resource, firstly because expanding and changing the range of identifiers involves huge costs in practice and requires extensive technical requirements and developments. Secondly, identifiers are based on international coordination and number and address ranges allocated in international organisations based on agreed numbering plans. And thirdly, the economic, business interest and pecuniary rights related to numbers and addresses are increasingly important aspects among identifiers.[35]

Identifiers, like radio spectrum, are the sole property of the state.[36] Their regulation, distribution and management also affect the usability of electronic communications infrastructure, the quality of services, consumer satisfaction and the economic interests of service providers. The public service aspect of identifier management is based, on the one hand, on the simple fact that the universal service as a telephone service provided as a public service also requires a telephone number. However, this in itself does not yet underpin the public service content. The public service content of identifier management is that the responsible management of these state-owned finite resources is a condition for the operation of communications and the assertion of the related public interest, which would be endangered by the distribution of identifiers on a market basis only without special state regulation or intervention.

4.2.3. NUMBER PORTABILITY

Due to its connection with identifiers, the legal institution of number portability is covered here.

Number portability is a means of facilitating a change in provider, allowing a subscriber to retain an existing subscriber number if they wish to use the subscriber service from another electronic communications service provider. Number portability must be requested by the subscriber and is free of charge. The cost-based fee for the portability, which may be determined by the transferring service provider, shall be paid by the receiving service provider to the transferring service provider.

Number portability is a means of stimulating competition that ensures that the economic interests associated with call numbers are upheld. Stimulating competition can be considered a general public interest and goal, but the public service

content and aspect of number portability beyond this cannot be identified.

4.3. GOVERNMENT AND CENTRALISED COMMUNICATION SERVICES

A government communications activity is an electronic communications activity related to a government network,[37] and a government communications service is an electronic communications service provided to users specified by law using a government network that is physically or logically separate from the public communications network.

Government communications activities may be performed by government communications service providers and those entitled to perform separate communications activities.[38] The government communications service provider in Hungary is the National Infocommunications Service Company Ltd. (hereinafter referred to as: NISZ Zrt.) and the Pro-M Professional Mobile Radio Company Ltd. in relation to the unified digital radio communication system.[39]

The Minister responsible for e-government concludes a public service contract with the government communications service provider on behalf of the Government, the minimum content of which is to define the scope of government communications services and government communications networks covered by the contract.[40] The service catalogue and the public service task map of the service provider are available on the website of NISZ Zrt. for the entitled parties.[41]

The National Telecommunications Backbone Network (hereinafter referred to as: NGT) provides electronic communications services not satisfied by another government network for users obliged to use a government communications service.[42] NGT is operated by MVM NET Zrt. The company operates based on three pillars: it ensures the internal technological telecommunications network of the Hungarian Independent Transmission Operator Company Ltd. (MAVIR) serving its transmission system management activities. In addition, the MVM NET network ensures, among other things, the trouble-free operation of the telecommunications system used to serve the government network, e-government, the Hungarian parliamentary, local government and European Parliament elections, as well as several critical government services. The third pillar is provided by the fact that MVM NET utilises the free capacities of its national telecommunications backbone network to provide telecommunications services to its wholesale customers.[43]

The scope of centralised IT and electronic communications services is defined by law,[44] and these are provided by NISZ Zrt. and IdomSoft Informatikai Zártkörűen Működő Részvénytársaság (central providers) to the ministries and the Government Office of the Prime Minister. NISZ Zrt. uses the "most ordinary" electronic communications services (fixed and mobile telephones, internet) from market service providers. The Minister responsible for e-government and the central provider enter into a public service contract for the tasks, in which the parties fix the scope of the required services, their basic professional and technical content and the duration of their performance and provision. A working group may be set up to define the tasks covered by the contract and to monitor their performance.[45]

Government and centralised communications services are related to the operation of the state, they serve it, therefore their public service content is clear and requires no further explanation.

4.4. ASYMMETRIC COUNTERBALANCING OF MARKET POWER, SIGNIFICANT MARKET POWER

Symmetric regulation applies equally to all market participants, regardless of their market power, whereas asymmetric obligations apply to mar-

ket participant(s) with significant market power and are imposed by the regulatory authority in the context of a market analysis procedure. The obligations for the global wholesale communications market constitute a special set of obligations which all electronic communications service providers may be subject to (symmetrical), yet which are not imposed by law, but by a regulation (asymmetrical).
The procedure for defining and analysing the market, identifying service providers with significant market power[46] (hereinafter: SMP providers) and imposing obligations on them is one of the market regulation procedures. SMP providers may be subject to one or more obligations primarily in relation to the wholesale market and services. If the objectives of effective competition and electronic communications regulation would not be achieved through wholesale obligations, obligations could also be imposed on retail services (e.g. obligation to set a maximum retail price, prohibition of unjustified tying).
State intervention in market competition through asymmetric or ex-ante regulation is based on the need to enforce the public interest in the operation of communications services and the sector in a liberalised market environment, by means other than general competition law.
Ensuring the choice of intermediary was a specific SMP obligation related to the fixed telephone service in the communications regulation. The legal institution has lost its importance due to the development of market competition, so it has been removed from the scope of regulation both at the EU and domestic level.[47]

In the framework of market-based public services, the most effective common method of state intervention and economic administration is price regulation, which significantly limits the pricing of the economic organisation.[48] Price regulation undoubtedly has a public service content, and is an essential tool, i.e. one that allows public intervention to affect the value of the services.
Price regulation is therefore a regulatory tool that can directly affect the level of charges for basic and related ancillary services. This regulatory option implies the use of different price control tools and cost accounting obligations, since cost-orientation and the controllability of charges allow for the application of a number of specific pricing methods in the context of obligations: These include the method of benchmarking using cost models based on the price of another service provider, as well as the method of retail minus, RM, based on the price of the related retail service. Two large groups of cost models are used in the price regulation system of electronic communications: the so-called Fully Distributed Costs (FDC) method and the Long Run Incremental Costs (LRIC) method.
Pursuant to the Hungarian electronic communications regulations, the regulatory authority may impose a cost-recovery and price regulation obligation on certain interconnection and access services as a SMP obligation.

With regard to retail prices (subscriber fees), it should be noted that in the field of electronic communications in Hungary there is no regulatory price within the framework of the universal service, while in public service sectors such as gas or electricity services, services and products are officially priced. Here, the two-element pricing method[49] (fixed basic fee and variable fee element according to consumption), price cap regulation and price discrimination[50] (typically peak and off-peak charging) are still common price regulation and public service pricing methods.

4.5. INTEROPERABILITY, STANDARDISATION, INTERFACES

The condition for the uniformity and interoperability of networks is standardisation and the use of interfaces.
Standardisation is an institution that defines a complete set of communications networks, technologies, terminals and other devices, which has become fully international in the field of communications, moving away from national frameworks. The application of standards can significantly facilitate the market entry and market

activities of service providers, and the application of harmonised standards in the network and service is also a significant advantage in market and economic competition processes.

Through the interfaces, not only can the implementation of interconnection and access to networks be ensured more efficiently, but based on the interfaces, both new and old technologies and services can be applied side by side in existing and continuously evolving network systems.[51] This finding applies to so-called network interfaces, another type of interface in communications regulation is the subscriber interface, the network interface on which the service provider provides the user with subscriber access to the electronic communications network.

Thus, without standardisation and the use of (network) interfaces, the operation and cooperation of communication networks would not be ensured and the public interest here would be damaged, and all this clearly realises the public service content of these communication service components.

4.6. COMMUNICATIONS TRACK-LINE AND TRACK-TYPE STRUCTURES

Special types of structure include electronic communications structures. A track-line and track-type electronic communications structure is formed by the cladding, support, protection and signalling structures of the wired connection of the electronic communications network.[52] The public service aspect of the regulation of these communications structures is that the coercive content of the universal service (affordable fixed telephony and fixed broadband internet access) requires a track-line network, while under the Code, optional services falling within the scope of universal service at the discretion of a Member State require a track-type network. Moreover, the regulation of track-line or track-type structures of the communication infrastructure is vital for the proper functioning of the communication.

4.7. COMMUNICATIONS DATA PROTECTION, DATA PROCESSING, SAFETY OF COMMUNICATIONS

The general data protection regulation and the sectoral and communications regulation of protecting and processing of personal data derive from the fundamental right to the protection of personal data. In this respect, what this field has in common with public services is that in many cases the latter can also be traced back to a fundamental right (for example, health care and defence can be derived from the right to life).

In addition, an element that can be considered to have a public service content due to its relationship with a public service can be identified in the communications data protection regulation: the obligation to retain data. The purpose of communications providers' data retention obligations for law enforcement, national security and defence purposes is to ensure that the investigating authority, prosecutor's office, court and the national security service can request data in order to perform their statutory tasks, i.e. the retention and provision of data are necessary for the provision of public services – justice, national security.

It should be noted that the European Union, similarly to the uniform EU rules on general data protection,[53] is working on developing directly applicable data protection rules in the field of electronic communication[54] According to the European Commission's proposal for a regulation on privacy and electronic communications, the regulation applies to the processing of electronic communications data in connection with the provision and use of electronic communications services and to data relating to end users' terminals. The proposal does not contain any specific provisions on data retention. Therefore, Member States are free to apply or establish national data retention frameworks, such as those on targeted retention measures, provided that they comply with Union law, taking into account the relevant case-law of the Court of Justice.[55]

Notes

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19 For example, mentioned only once in the Treaty on the Functioning of the European Union (TFEU), in Article 93.

20 Of course, the European Union has long been more than just an economic union, and this is also reflected in the relevant (primary) EU sources of law in the context of services of general economic interest. According to Article 14 of the TFEU: "(...) given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. (...)", and pursuant to Article 37 of the Charter of Fundamental Rights of the European Union: "the Union recognises and respects access to services of general economic interest (...) in order to promote the social and territorial cohesion of the Union".

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23 Commission Staff Working Document – Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 22.https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_hu.pdf (downloaded on 11 August 2020).

24 Communication from the Commission on the application of State aid rules to public service broadcasting

25 According to data of the Central Statistical Office, the number of telegrams recorded by the post office fell to less than half between 2016-2019 (from 83,000 to 31,000 per year): https://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_onp005.html (downloaded on 15 April 2021). The relevant data of the uniform infocommunications, media and motion picture statistical database (http://ehmmsa.nmhh.hu/, 15 April 2021) (which also includes telegrams recorded by the universal electronic communications service provider) show a similar volume and trend.

26 The scarce communication resources can be divided into two main parts. Radio frequencies (or, in a sense, identifiers) are scarce resources on a natural basis, and scarce resources based on technology are those whose rights of ownership or use are suitable for preventing competitors from entering the market, or squeezing them from the market/competition. Technically, the communication network infrastructure itself is a finite resource. Beke, N., Choma, A., Mádi, I., Pálinkás, J, & Zágonyi, L.: *A hírközlési piaci verseny, a hírközlési szolgáltatók közötti viszonyrendszer, a hírközlési nagykereskedelmi piac és a hálózati infrastruktúra igazgatása.* [Market competition in telecommunication, the relationship between telecommunication service providers, the wholesale market of telecommunication and the management of network infrastructure.] In: Lapsánszky (ed.): op. cit. 30, (2013) pp. 266-267.

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28 Section 4 (1) k) of Act CXCVI of 2011 on National Assets.

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30 Section 83 of Act CLXXXV of 2010 on Media Services and the Mass Media.

31 This is also supported by the fact that the public media service provider itself (Duna Médiaszolgáltató Nonprofit Zrt.) designates its basic task under Section 98 (1) of the Media Services and Mass Media Act – the achievement of public service objectives – as the public service in the disclosure list made available in fulfilment of its obligation under the regulation on electronic freedom of information. http://dunamsz.hu/kozerdeku/?lang=hu_hu# (downloaded on 15 April 2021).

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36 Section 4 (1) k) of Act CXCVI of 2011 on National Assets.

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38 Those entitled to separate communications activities and the networks operated by them are listed in Annex 2 of Government Decree 346/2010 (XII.28) on Government Networks, for example: in the case of the military national security operations network, the Military National Security Service.

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40 Section 5 of Government Decree 346/2010 (XII.28) on Government Networks.

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52 Section 188 (105) of the Electronic Communications Act.

53 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).

54 The European Commission's proposal: Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

55 Article 2 and explanatory memorandum 1.3. of the Proposal for a Regulation on Privacy and Electronic Communications.

DOI: 10.54201/iajas.v1i1.8

Rifts and deficits – lessons of the historical model of Hungary's administrative justice

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Abstract: The establishment of independent administrative courts at the beginning of 2020 was repealed by Parliament, including the underlying constitutional provisions, it is still the ordinary courts (including the Supreme Court – Curia) that handle legal disputes of administrative nature. The article introduces the historical model of Hungary's administrative justice (between 1884 and 1949), emphasising its limited use as an example for the current challenges. We cannot speak of continuous historical evolution. It is more accurate to talk about fragments or fragmented short time periods. The changes and reform plans from 27 February 1884 (the "birthday" of Hungary's administrative justice) are analysed in the article. The different proposals from the jurisprudence and the only administrative court itself are explained in detail. The role similar to the constitutional courts aspired by the administrative court is also examined. An important declaration from all of the judges of the administrative court (in 1947), according to which the court would not apply legal regulations violating a person's natural and inalienable rights listed in the Act I of 1946, is also analysed.

Keywords: Administrative justice in Hungary, lower administrative courts, royal administrative court, historical model of judicial review of administrative acts, unrealised extension of the administrative court's powers, protection of fundamental rights by the administrative court.

1. INTRODUCTORY THOUGHTS

1.1. Since Hungary's transition to democracy in 1989, hardly any area (or institution) of the country's public law and state administration has been subject to such vicissitudes as administrative justice. Even the Constitutional Court declared in its Decision no. 22/2019 (VII. 5.): "Restoring the independence of the administrative court system has been continuously debated by the profession since Hungary's transition to democracy."[1] It is indeed difficult to keep track of all the changes that have affected the organisation, powers and procedures of judicial control over administrative decisions, and of judicial protection against public administration, in the past 30 years.[2] The establishment of independent administrative courts at the beginning of 2020 could have been the most sweeping of these changes, but Parliament repealed the underlying constitutional provisions, the act dedicated to administrative courts, and also the law stipulating the relevant transitional regulations.[3] So the planned change was blocked: it is still ordinary courts (including the Curia) that handle legal disputes of an administrative nature. But for 65 years, initially a Financial Court and then an Administrative Court were in operation at the highest judicial level. The institution and activity of a separate administrative court are considered major achievements of Hungary's historical constitution. It is now widely known that the abolition of the Administrative Court in 1949 was one of the measures leading to the communist dictatorship.

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1.2. Any semblance of dedicated administrative justice ended when the administrative and labour courts, which had been relatively independent, were disbanded as of 31 March 2020.[4] The "mock mixed" system introduced in 2012-13[5] had shown at least a few signs of separate administrative courts (albeit under a shared roof with labour courts). But the new forums that emerged after 1 April 2020 unfortunately maintained one of the most problematic solutions of the planned separate administrative court system: county/capital courts are charged with handling first-instance administrative cases based on regional/territorial competences. Furthermore, the residents of 12 counties must travel rather far, i.e. outside the county of their residence, if they want to launch administrative court procedures, which have become a common legal remedy in the wake of the transformation of public administration procedures. In addition, two courts (the Metropolitan Court and the Budapest Regional Court) are located in the capital city, which means that there are only six courts with divisions dedicated to administrative cases outside Budapest.

In view of what has become constant experimentation by the legislator, the question arises as to whether the origins and historical models of administrative justice in Hungary can provide useful examples. In other words: are any of the lessons and experiences learned while organising and establishing administrative courts nationwide still valid? This is the subject of the following short overview, with which I hope to contribute to the constant quest in the area of Hungary's administrative justice.

2. HISTORICAL MODEL OF HUNGARY'S ADMINISTRATIVE JUSTICE – AN EXAMPLE OF LIMITED USE

2.1. The historical model of Hungary's administrative justice, which evolved between 1884 and 1949, is of limited use as an example for the current challenges. In fact, it is difficult to speak of continuous historical evolution; it would be more accurate to talk about fragments or short time periods. If we wanted to find a date of origination, that would be 27 February 1884, the day that could be called the birthday of Hungary's administrative justice. That is when the Royal Hungarian Financial Administrative Court convened for the first time, marking the start of the era in Hungary's state and legal history when administrative decisions could be overruled and judgements could be passed on the lawfulness of such decisions via court procedures. That is why we must go back to 1884 when examining the forerunners and development of administrative justice.[6]

It is easy to work out that the above date was 15 years after the drafting of Act IV of 1869 on exercising judicial powers. Fifteen years elapsed before the National Assembly, the political decision-makers of that time, gathered the courage to allow judicial control over one part of a single administrative area (financial administration). This could be one of the lessons of the history of Hungary's administrative justice: the passing of the laws that governed the powers of Hungary's administrative judges was an extremely slow process, and this was often burdened with major compromises. After the launch of financial administrative justice, it took another decade or more for a general administrative court and judicial procedures to be introduced.

2.2. The basic problem, i.e. the total lack of first-instance (or lower) administrative courts, had emerged back in 1883-84. This phenomenon lingered for 150 years, as no independent, dedicated administrative courts were set up then, or between the two world wars, or after 1990. Both the Financial and the Administrative Court operated as separate courts at the same level as the Curia, the country's highest court. But they had no lower-ranked organisations, and there was no preceding administrative procedure by other ("ordinary") courts. The first-instance proceeding was the only procedure by a central court. The bill aimed at establishing an administrative

court had referred to lower courts, but the National Assembly removed that reference during the debate of the bill. The powers of the court were listed exhaustively, i.e. the administrative areas not specifically listed were not subject to judicial protection by the new court. The administrative court was not authorised to judge police, law enforcement or construction activities, or property protection issues, so its tools for legal protection were limited.

Comparing the first administrative court with current institutional requirements confirms that the old institution simply could not be copied or adopted in our age. Hungary had no written constitution then, so there was no itemised catalogue of fundamental rights until Act I of 1946. The country was not a party to the European and international system for protecting human rights, so no supranational court or community of states was active in this regard. There was no code of administrative procedures. (Just consider how easy it is to consult any procedural act, but these were not available back then.) There was no regulated public administration system, which also means that public administration was subordinated to law through this single court only, even though its powers were strongly limited.

As another important difference, a Constitutional Court or similar institution was missing throughout the historical era, whereas Hungary's administrative justice after 1990 is unconceivable without the role of the Constitutional Court, which passed a number of important decisions besides declaring an omission and abolishing the previous act on administrative procedures, which had limited any judicial review. I refer especially to Decision 39/1997 (VII. 1.) by the Constitutional Court, which confirmed that a court was authorised to review administrative deliberations. But besides this decision, which provided for legal remedies against administrative rulings, the Constitutional Court has passed at least 10 further imperative decisions which forced or allowed Parliament to establish or strengthen the conditions of administrative justice from time to time.

2.3. Without an actual Constitutional Court, the old administrative court had to (or could) assume an *ersatz* Constitutional Court's role. This role was tested in 1947 when a Court's Statement (or Declaration) was issued in support of the human rights defined in the preamble to Act I of 1946 on Hungary's form of government as a republic (the so-called "small Constitution"). The administrative court would probably have been disbanded anyway (as happened in all countries occupied by the Soviet Union), but its stalwart resistance expressed by the above-mentioned declaration of support for the protection of rights probably hastened its abolition, which finally came in 1949. It should be emphasised again that there was no lower (first-instance) administrative judicial system; we need to bear this in mind when examining the new administrative court structure set up in 2018 and postponed in the following year, because this was the first time when independent first-instance administrative courts could have been established in Hungary's legal history. Consequently, it is not the era of the Austro-Hungarian Monarchy or the time between the two world wars which can serve as a prelude, but rather the period between 2013[7] and 2020, when mixed administrative and labour courts were in operation.

3. AN UNREALISED LOWER ADMINISTRATIVE COURT

The concentration of administrative justice at a single level (without lower courts) did not result from any theoretical consideration but from a momentary political concession. The method of defining these courts' powers and the limited scope of those powers were fervently opposed by contemporary lawyers.[8]

The 52-year history of the Administrative Court (1897-1949) was characterised by numerous reform proposals and plans. These plans "do not cast a shadow on the original achievement of the organisation of administrative justice, but merely indicate that changing times, circumstances and needs necessitate modifications of both a temporary and final nature", as the president of the

court noted, taking a rather lenient stance towards the deficiencies of the system.[9] But the reform plans failed, and the "guiding principles" of the act on the establishment of the court, along with its fragmented structure, *were maintained* until its abolition. This is not surprising because the idea and institution of administrative justice were not very popular in political circles, and the government was not really interested in the legal issues involved.[10] Despite a continuous, albeit limited extension of its powers, the court continued to operate in the same system. Its powers were defined in an exhaustive listing, there was no second-instance procedure, and the court operated at the highest level (besides the Royal Curia). It was separated from both public administration and general courts; half of the judges were qualified in public administration, while the other half were judges. The decisions of the court were final and meritorious, and it was authorised to overrule the examined administrative decisions. Still, I consider the following overview important because I am convinced that *matters of principle* or practical solutions may be found that could, at some point in time, affect the understanding or structuring of current administrative justice in Hungary.

3.1. First and foremost, the issue of *lower administrative courts* (or the lack thereof) should be discussed. Several theories have been devised to patch up the incomplete structure of the administrative court and extend the legal protection provided by it, and various governments promised reforms over the decades. Besides other considerations, the establishment of lower courts was necessitated by the *excessive workload* on the single administrative court. The extension of the court's powers started in the years following its inception, so the sole administrative judicial forum became increasingly overburdened. As the court was the only one of its kind, the legislator's options for legal protection were the following: granting a right to complain (file a suit) before this forum, or not granting such a right at all. Consequently, many *cases of minor importance* were assigned to the administrative court, and much of the time of this prestigious and hugely costly court was spent with petty disputes about taxes and duties. The burdens were exacerbated by the "appeal" nature of the procedures. As the parties to a lawsuit could raise new facts in their complaints (petitions or responses in today's legal parlance), many cases were tabled by the court without any preparation, and a long evidencing procedure was required before a decision could be made.[11] Besides unburdening the only judicial forum, another reason for the establishment of lower courts involved the high number of case types excluded from administrative legal protection (despite the continuous extension of the court's powers). These case types could not have been handled in the structure of a single high-level court.[12] Accepting the need to define the court's jurisdiction through general principles (as had been touted by legal experts for decades) "*would inevitably have pointed towards the necessity for organising lower courts*".[13] A two-tier setup would also have promoted the simplification of the system of administrative forums, and specifically the simplification of an appeal system, because thorough procedural regulations could have prevented the cases handled by lowest-ranking authorities at the first instance from being elevated to the highest forums via various legal remedies.[14]

3.2. The proposals for establishing lower courts *evolved* gradually. The initial idea, already included in the original bill (referred to as the *Hieronymi proposal* after its originator), had called for not quite independent bodies of mixed and rather suspicious composition; later proposals advocated the establishment of councils of qualified lawyers equipped with all the guarantees of judicial independence. Unfortunately, all of these ideas were discarded, so several proposals before the decade preceding World War 2 eschewed the idea of lower courts and intended to reform the structure or procedures of the existing administrative court in order to overcome the difficulties caused by the excess workload and a huge backlog of cases. The original *Hieronymi proposal* had called for two judicial levels, each passing meritorious judgements. One first-instance administrative court was to be set up in each county seat and each major city with the authority of full self-government, including Budapest. A higher (second-instance,

final) royal administrative court for the entire territory of the country was to be established in Budapest. The first-instance courts would not have been actual judicial bodies characterised by independence, stability and legal qualifications, but would have been more closely related to public administration.[15] Their close ties to public administration were evidenced by the fact that they would have been chaired by the local Lord Lieutenant (*főispán* in Hungarian) or, in the case of Budapest, the mayor, while their members would have included the deputy lieutenant (or, in larger cities and Budapest, the local/district mayor), the local chief attorney, as well as three ordinary and three substitute members elected from the members of local municipalities. The cases would have been presented by the local chief attorney.[16] The most fervently opposed idea was to appoint the Lord Lieutenant, representative of the government and central public administration, as the head of the first-instance court, even though the originator of the proposal considered this indispensable; the Lord Lieutenant wielded significant administrative powers without actually being a public administration officer.[17]

3.3. Care should be exercised when comparing a past legal institution or organisation with the requirements of our age; such historical structures should rather be examined in the context of their own era. I refer to an oeuvre from 1912, in which *Sándor Benedek* came up with a plan that was similar to the original bill: the lower courts organised around greater *local municipalities* would be chaired by the highest-ranking officer of the municipality. The local attorney would serve as the deputy chairman, and the cases would be presented by an administrative officer. The membership of the court would consist of two judges and two lay members (from the public administration committee). The reasons for the dysfunctional operation were analysed in detail[18] (in a study also published in 1912) by *Gyula Wlassics*, who was then the president of the Court. He attributed the rejection of the *Hieronymi* proposal to a lack of trust in the organisation, and to a disregard of the guarantees involved in judicial procedures. He noted that hardly any of the states that had served as examples upon and after drafting the act on administrative courts (France, and German states) had a similarly specialised body of independent first-instance judges. In fact, Austria's court was the only single-instance entity; its powers had been defined in a general manner, but it handled a much lower number of cases thanks to its authorisation to annul decisions, and because it was compulsory in Austria to go through all steps of the public administration procedure before a lawsuit could be launched.[19] In view of the Hungarian court's huge backlog of financial cases, Wlassics proposed setting up lower financial administrative courts and increasing the number of judges in the public administration department of the Court. He did not dare propose a comprehensive organisation reform because, as he wrote, "our public life is used to seeing such a major reform introduced together with sweeping reforms of public administration in general". And there was little chance of the latter. In addition, President Wlassics promoted the idea of mixed courts established next to regional courts, with the involvement of financial and municipal officials, and chaired by independent judges. Naturally, non-judicial members would work "under the protective shield" of judicial independence, and could only be held accountable pursuant to the law on judicial responsibility.[20]

3.4. *István Egyed* contributed to the topic with valuable aspects that are still relevant today. He discarded the idea of lower courts organised purely bureaucratically (administratively) within the public administration system. He also argued against charging municipal bodies (and specifically so-called administrative committees) with the task of adjudicating administrative cases. Finally, he also arrived at the proposal to set up *mixed courts*. He considered an organisation of many members unsuitable for the task, as it would have lacked certain basic traits of judicial operation. A court's activity involves constant and regular work by qualified persons characterised by a high degree of interest, dedication and expertise. Professor Egyed also rejected the idea of charging the country's ordinary courts with first-instance administrative cases, partly because of the different nature and specific procedures of

such lawsuits, partly due to the sheer volume of the relevant substantive law, and also because the judges of ordinary courts did not know the conditions in that area of justice. In a modern state, the work of judges has grown beyond the simple and routine application of itemised law. "In the vast areas of administrative law, too, judges can work well if they have obtained specific knowledge of the diverse branches of the field, and have gained insight into the special spirit of administrative law; judges who are familiar with continuous work and life in public administration."[21] From a multitude of options, Professor Egyed preferred *mixed courts* with a heavy reliance on the judicial element. However, he proposed organisationally separate courts (similar to the single existing administrative court). One third of a court's members would be qualified judges, one third would be public administration officers, and one third would be members elected by municipal bodies for a relatively long period. The courts were to be set up next to regional high courts. He proposed delegating to administrative courts only cases which have reached the stage of litigation, instead of the cases in the multi-stage administrative appeal procedure of that time. The cases would be delegated to the courts based on their general (not exhaustively listed) powers, including those that involved deliberation (and an infringement of interest). As István Egyed proposed maintaining single-instance justice, the higher court would deal with legal remedies only.[22] But this proposal, which took almost all aspects into consideration and offered several options, was not implemented either, primarily due to World War 1.

3.5. In 1923, Interior Minister *Iván Rakovszky* (who was later appointed president of the administrative court) compiled a general plan of *three-person* lower administrative courts next to regional high courts, mostly along the lines drawn by István Egyed. As one significant difference, the cases would be presented to the judges by an active public administration officer assigned by the Interior Minister. This idea was heavily criticised. According to Minister Rakovszky's proposal, the new courts were to be established next to regional high courts, and their presidents and vice presidents would be persons who have held high public administration offices for at least three years. Besides the chairman, the council would have one member of a higher judicial rank, as well as a legally qualified member elected by the local self-government, who would be a local resident.[23] These new entities were to be inserted into the system of administrative legal remedies, with limited opportunities to appeal to the higher court.[24] Not surprisingly, this proposal was not implemented either. It is equally not a surprise in the history of Hungary's administrative justice that the National Assembly *instructed the Interior Minister* (in a resolution adopted by both Houses) to table a bill for the establishment of lower administrative courts. Before that happened, *Zoltán Magyary*, who worked on streamlining and reorganising public administration in general, proposed establishing one lower administrative court in Budapest, as he considered the expected volume of cases too low for several lower courts across the country. He also proposed continuing to extend judicial legal protection to further legal disputes, i.e. to increase the powers of the court.[25]

The bill ordered by the National Assembly was drafted in the Finance Ministry in 1932. Independent lower administrative courts were to be established at regional high courts (i.e. in Budapest, Szeged, Győr, Pécs and Debrecen). Half of their members were to be judges, while public administration officers were to comprise the other half. All of them would have enjoyed full judicial independence. The cases were to be handled by three-person councils. One major innovation that went against the rules in effect (which stipulated that a court procedure could only be initiated against a second-instance administrative decision) was that a complaint against a first-instance administrative decision would also have been allowed.[26] Together with this bill, the National Assembly discussed what was later promulgated as Act XVI of 1933 on the continued reorganisation of public administration. According to that law, the public administration procedure and all forums were to become two-instance, and it was not allowed to contest or initiate the review of a second-instance resolution passed based on an appeal. The legisla-

tors trusted that such reviews would be replaced by complaints filed to lower administrative courts. But the government did not put the act into force (the authorisation for which was granted in section 43), partly because the establishment of lower courts was postponed; Interior Minister Ferenc Keresztes-Fischer attributed the delay to nothing but the lack of funds in the central budget.[27] Specifically, payroll costs could not be financed; the act called for the appointment of judges and support staff for the new administrative courts. However, the change would also have resulted in savings: assigning public administration disputes to lower courts and abolishing administrative reviews would have caused a significant reduction in the administrative headcount, especially in ministries, which were the most expensive to operate. And if lower courts had not been organised as first-instance entities (i.e. if it had been impossible to appeal against their rulings to the higher courts), then the cases relegated to them from the administrative court would have resulted in some headcount reduction at that higher level (the administrative court).[28]

3.6. However, the purported or actual lack of budgetary funds may not have been the only reason. The establishment of lower courts was also opposed within the existing administrative court, the staff of which thought that changing their entity's organisation and procedures would be sufficient to improve its performance and speed, thus avoiding a transfer of powers to lower courts.

According to one of these proposals, the cases were to be categorised; some of them would be handed by five-person councils, others by three-person councils, and again others in newly proposed single-judge proceedings. As this proposal would also have required a certain headcount increase, the new judges were to be ranked lower (as "only" court of appeal judges). Single-judge jurisdiction would not have been an exclusive solution; a single judge could have submitted a case requiring further discussion to the president of the judicial council; in fact, the case could have been transferred to a three- or five-person council with the president's consent. And the president of the judicial council would have been authorised to overrule the judgements made by a single judge. This proposal was heavily criticised for being rough around the edges, but even more for the single-judge procedure, which was claimed to lack the benefits of case handling by a council ("two heads are better than one"). Logically, it would also have precluded the intended involvement of both administrative and judicial expertise, which was deemed important upon the establishment of the Administrative Court.[29]

A second noteworthy idea made the restructuring (or, to be more specific, the completion) of the Administrative Court conditional on general public administration and judicial reforms. The argument was that the burdens on the Court had to be alleviated internally, primarily through a headcount increase, until the final structure of regional / high courts emerged.[30] The establishment of first-instance courts was supported by another expert's opinion that was close to Hieronymi's original plan: a lower administrative court was to serve as the first-instance court before an administrative court of appeal, i.e. all legal disputes were to start at that lower level. This view rejected the institutionalisation of parallel powers (i.e. that certain legal disputes could be started at the upper level).[31]

4. THE UNREALISED EXTENSION OF THE SOLE ADMINISTRATIVE COURT'S POWERS

4.1. When the legal profession discussed the original bill proposing the establishment of the Administrative Court, two basic deficiencies concerning the powers of the upcoming new court were already apparent. It was clear even then that full legal protection and an unconditional rule of law would have required a general, principle-based definition of the court's powers. The exhaustive listing of powers was also recognised as very limited, with many case types omitted which should have been subject to judicial legal protection and

the judicial review of administrative functions for the enforcement of an individual's important universal rights. The limited and very fixed nature of the court's powers is proven by the fact that the author of the original bill, *Károly Némethy*, had already considered it possible at a lawyers' meeting in 1894 that cases related to nationality, guardianship, military and industrial administration could also be handled by the Administrative Court. He argued that these additional fields involved many serious breaches of universal rights, more than the violations resulting from the "petty police measures" [sic!][32] proposed by Győző Concha. Fifty years later, these case types were in fact listed elsewhere, not in the actual definition of the court's extended powers, but rather in *János Martonyi*'s proposal made in 1940. Realising the constant but hopeless battle waged by the proponents of the Administrative Court's general powers, Professor Martonyi proposed adding all possible legal disputes to the Court's jurisdiction. In 1944, he listed the main case types to be added, and the first four items on the list turned out to be the same as those proposed by Némethy in the 1890s.[33] More than 100 legal amendments to the Court's powers over 50 years had not been enough to delegate those important case types to the Administrative Court.

4.2. So what were the "new" case types proposed for several decades? First of all, cases involving *nationality*. It is important to note that János Martonyi did not propose transferring all such administrative decisions to the Court. He proposed omitting decisions based on wide-ranging deliberation, such as those about (re)naturalisation, dismissals, etc. He primarily intended to add court decisions that were a quasi-automatic method to obtain or lose one's citizenship (based on family lineage, legitimation, marriage, etc.). Naturally, he was not the only one to propose that extension of the court's powers; at the Lawyers' Meeting of 1928, both keynote speakers (the above-quoted István Egyed and administrative court judge Viktor Majzik) had proposed the same.[34]

Concerning *military* matters, Martonyi made a very careful proposal in the looming shadow of WW2: he advocated omitting decisions about compulsory military service (where the previous proposal was for them to be handled by the Administrative Court), and recommended only including cases which were connected to compensation for the use of military services in times of peace. He also proposed adding to the Court's jurisdiction all guardianship and trusteeship cases, as well as all local business regulation matters, apart from cases requiring discretionary deliberation or the issuance of "closed" business licences.

Furthermore, Martonyi identified five other case types to be handled by the Administrative Court. The first involved the compensation payable for expropriation by the state or a public institution, which were defined by ordinary courts at that time. Secondly, Martonyi proposed transferring to the Administrative Court disputes about indemnification payable for damage caused to external persons by public (state or municipal) officials, because such damage was always based on the violation of substantive administrative law or procedural rule. Also, in view of the close connection, the Administrative Court was to handle cases of recourse (arising from vicarious liability) by state or local entities to their members at fault. Martonyi further proposed including claims arising from the silence of public administration. Thirdly, disputes about other taxes (not specifically listed in the definition of the Administrative Court's powers) were to be added. Fourthly, village municipalities were to be allowed to submit "warranty claims" to the Court. And fifthly, disputes about the remunerations of state employees were to be handled by the Administrative Court.

Referring to the different nature of disciplinary cases involving public officials and violations by police officers compared to administrative lawsuits and administrative review functions, Martonyi did not propose transferring these case types to the Court. Regarding disciplinary cases, he considered it sufficient to rely on the existing disciplinary court within the Interior Ministry, established via Act XXX of 1929. As to offences by policemen, he differentiated between administrative justice (i.e. reviewing – annulling or changing

– an administrative entity's unlawful decisions) and procedures aimed at punishing or preventing misdemeanours that endangered or violated order or the system of public administration.[35] In contrast to the above, the president of the Court supported the addition of public officials' disciplinary procedures to the Court's jurisdiction; in fact, he proposed adding disputes about debts that could be collected like taxes but were not payable to the state or autonomous bodies.[36]

In connection with other organisational reforms, further proposals have been made to speed up the Administrative Court's procedures and reduce its backlog of unresolved cases. Logically, these ideas involved reducing the Court's powers, while maintaining judicial legal protection. Obviously, the cases involved were to be reassigned to various levels of ordinary courts. Such matters included road toll issues, cases about care in public hospitals, as well as lawsuits about the wages of household servants and about communities of house owners (as clearly private law issues).[37]

But the powers of the Administrative Court were not reduced based on such principles – with continued judicial legal protection – until after WW2, and neither were the Court's exhaustively listed powers extended. Courts' jurisdictions changed considerably after 1945; analysing these changes requires a wider historical context, so below I touch upon issues of constitutional jurisdiction only.

4.3. The issue of protecting the Constitution gained traction in the years following World War 2, along with the question of the Administrative Court's powers from the perspective of constitutional law. János Csorba, the last President of the Court, devoted his inauguration speech to this question,[38] even though the Administrative Court had never operated as a Constitutional Court in a modern sense; its primary responsibility was not the maintenance of legality or the actual enforcement of the norms that the legal system had set for itself. The Administrative Court's authorisation to directly evaluate the validity of administrative laws was limited to municipal self-government rights, and did not extend to Acts of Parliament but only to government or ministerial decrees. In terms of its objective and results, this authorisation was not meant to have been conferred for *norm control*; it was not aimed at assessing the lawfulness of legal norms, but protected the self-government rights of municipalities from actions by the government (and its entities), regardless of the form of those actions (resolution, measure, ordinance). This activity was not limited to decrees.[39] In connection with other powers of the Court, it was authorised for indirect norm control only.

The Administrative Court was not authorised for norm control, concerning the content of laws, procedures or jurisdictions.[40] Thus the Administrative Court was not a Constitutional Court (even though it aspired to fulfil that function) from the perspective of independently adjudicating the validity of norms. Nevertheless, its role in protecting the Constitution and its importance in public law (beyond mere public administration) was often emphasised.[41]

4.4. The Court's role in public law and the protection of the Constitution was created by its administrative jurisdiction, because judicial legal protection against public administration was of constitutional significance in itself. Despite the incomplete power of the Court, institutionally guaranteed judicial legal protection played a crucial role in subordinating public administration to the law, and in establishing the rule of law. Another important role of the Court was the possibility, albeit limited, of a sort of indirect norm control. It was indirect because the lawfulness of a norm could not be directly reviewed. And it was limited due to the partial (incomplete) nature of the Court's powers, as the Court was only authorised to preliminarily review cases which were assigned to its jurisdiction by law (or another authorised source of law). Also, as the Court's decisions were effective between the parties (*inter partes*) only, they had no effect (possibly involving the development of law) beyond the case at hand and the parties thereto. It is this *limited, accidental and indirect* review opportunity that the Court wished to use to obtain a true Constitutional Court's powers, which the Administrative Court's meeting of 17

February 1947 actually laid claim to. According to an "assembly agreement" (a declaration from all of the judges of the court) accepted at the full session, the Court would not apply legal regulations violating a person's natural and inalienable rights listed in the preamble to Act I of 1946 on the republic as Hungary's form of government;[42] legal regulations listing human rights were to be considered normative instead.[43] The full session of the Court stated that all legal regulations or provisions that conflicted the above rights *would lose effect without being specifically revoked*. The reason is that those rights were enacted concurrently with defining the system of government; also, the legislators stated that enforcing those rights was the objective of the overall system of government.[44] However, the Court had no express competence to pass such a decision; maybe that is why it was called an "assembly *agreement*". The Court also did not have express competence to declare in the justification of the above-mentioned position statement that, based on its authorisation granted in Section 19 of Act IV of 1869, it would not apply the legal regulations that went against the preamble to Act I of 1946 in the cases *to be adjudicated in future*, but would instead enforce nothing but man's natural and inalienable rights in its judgements.

4.5. After that "assembly agreement", Court President János *Csorba* perceived the Court to be a Constitutional Court that assumed a position equal to the legislative and executive powers.[45] Very optimistically, President Csorba opined that the Court had already been charged with the task of safeguarding human rights, which would lead it to "the pinnacle of the pyramid of Hungary's constitution", to assume a position equal to the other branches of power. This indicates clear ambitions of power.[46]

But the Administrative Court's resemblance to a Constitutional Court may also have been based on legally defined *direct powers* besides an implied, interpreted jurisdiction. These were primarily powers related to the self-government rights of municipalities, as well as to election-related authorisations. The authorisation to dispense justice concerning the election of local municipal officers had already been listed among the Court's original powers; but 20 years had to go by until, in 1907, municipalities received judicial protection against decisions by central state entities that limited their rights. The weight of administrative justice was further increased when, in 1925, the power to adjudicate matters related to the election of members of the National Assembly was transferred from the Curia to the Administrative Court. This authorisation was used boldly, with a commitment to the spirit and rule of law. Resisting attempts at limiting democracy, the Court stripped many ministers, state secretaries and National Assembly representatives of their mandates obtained unlawfully or aggressively.[47]

This latter power, i.e. the authorisation to adjudge cases related to the election of National Assembly members, was the first to be withdrawn in 1945, when it was transferred to a newly established Election Court. One member of that entity was assigned by the Justice Minister, but the majority of the members (the "election judges") were delegated by competing political parties. This marked the end of independent election justice in Hungary for a long time.[48] And a few years later, in 1949, the Administrative Court itself was disbanded.

5. LESSONS TO BE LEARNED (IF ANY)

What lesson can be learned from the above historical overview? Sometimes, the only lesson is that there is no lesson, apart from the fact that history sometimes repeats itself. It is also clear that the organisation and powers of administrative justice have posed major challenges to Hungary's legislators in all eras, and these challenges have not really been resolved. What can be concluded, though, is that an independent Administrative Court has always championed individual and even constitutional rights, and it has always served as an important tool for legal protection against public administration. Its reinstatement would have enhanced the rule of law instead of weakening it. It is a pity that Hungary's society and the law-seeking public are once again deprived of experiencing that.

Notes

1 Indokolás (Justification) [48]

2 For a detailed overview of the changes, see: PATYI András: A magyar közigazgatási bíráskodás elmélete és története [The Theory and History of Administrative Justice in Hungary] Dialóg Campus, Budapest, 2019; chapters III and IV, pp. 159-321.

3 Act CXXXI of 2018 on the entry into force of the Act on Administrative Courts and Certain Transitional Regulations was repealed pursuant to Section 1 of Act LXI of 2019 on postponing the entry into force of the Act on Administrative Courts, i.e. Act CXXX of 2018, which was thus added to the *corpus juris* as a duly legislated and promulgated act that did not take effect. As to the provisions concerning administrative courts in the Fundamental Law, they were annulled by the eighth amendment to the Fundamental Law on 12 December 2019. This marked a return to the changes introduced in the seventh amendment.

4 Pursuant to Section 197/A (1) of Act CLXI of 2011 on the organisation and administration of courts, as stipulated in Section 88 of Act CXXVII of 2019 on amending certain acts in connection with the introduction of single-instance official procedures.

5 Herbert KÜPPER: Magyarország átalakuló közigazgatási bíráskodása [Hungary's Transforming Administrative Justice], MTA Law Working Papers, 2014/59, Hungarian Academy of Sciences, TK JTI, Budapest, ISSN 2064-4515, http://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf, p. 11.

6 "The newly appointed judges first convened on 27 February 1884, and ruled on 98 cases in the rest of the year."
STIPTA, István: A pénzügyi közigazgatási bíróság archontológiája [Archontology of the Financial Administrative Court], FORVM Acta Juridica et Politica, volume VII, issue 1, Szeged, 2017, p. 104. For further thorough analysis, see: STIPTA, István: A pénzügyi közigazgatási bíróság bíráinak rekrutációja (1884-1896) [Recruiting Judges for the Financial Administrative Court (1884-1896)]. In: Ünnepi kötet Dr. Zakar András egyetemi tanár 70. születésnapjára. [Volume for the 70th Birthday of University Professor Dr. András Zakar] Acta Universitatis Szegediensis. Acta Juridica et Politica. Tomus LXXX. Szeged, 2017, pp. 279-290.

7 Section 191 (1) of Act CLXI of 2011 on the organisation and administration of courts: "Administrative and labour courts as well as regional administrative and labour colleges shall start their operations on 1 January 2013."

8 Concerning the establishment of the Court, see: Patyi, András: *Közigazgatási bíráskodásunk modelljei. Tanulmány a magyar közigazgatási bíráskodásról* [*Models of Administrative Justice: a Study of Administrative Justice in Hungary*] (Budapest: Logod Bt, 2002), pp. 18-33, and: Stipta, István: A közigazgatási bíráskodás előzményei Magyarországon [Antecedents to Administrative Justice in Hungary]. Jogtudományi Közlöny, 1997/3, pp. 117-125; Stipta, István: A pénzügyi közigazgatási bíráskodás hazai előtörténete [Preludes to Financial Administrative Justice in Hungary] Szeged, Officina ny. 1997. 34, [2] p. /Acta Universitatis Szegediensis de Attila József nominatae. Acta juridica et politica. Tomus 52. Fasc. 9./; Schweitzer, Gábor: Közigazgatás - igazságszolgáltatás - jogállamiság, avagy a közigazgatási bíráskodás kezdetei Magyarországon. [Public Administration – Justice – Rule of Law, or the Beginnings of Administrative Justice in Hungary] Állam- és Jogtudomány 1996-97/1-2[98], pp. 21-35. Stipta István: Az 1875. évi osztrák közigazgatási bíróság hatása a magyar közigazgatási jogvédelemre [Effect of Austria's Administrative Court of 1875 on Administrative Legal Protection in Hungary] In: Emlékkönyv Szabó Andrásnak [Memorial Book for András Szabó], 1998, pp. 353-362

9 PUKY Endre: A negyven éves közigazgatási bíróság multja és jövője [The Past and Future of the 40-year-old Administrative Court] Budapest, Pallas, 1937, p. 11

10 MÁRTONFFY Károly's presentation. In: A Közigazgatási Bíróság reformja - a Magyar Jogászegylet közigazgatási szakosztályában tartott előadások és hozzászólások [Reforming the Administrative Court – presentations and comments in the Public Administration section of the Hungarian Association of Lawyers] Jogászegyleti Szemle. 1947, 2nd issue, p. 7

11 EGYED István: Az alsó fokú közigazgatási bíráskodás [Lower Administrative Justice], Budapest, 1916, Székesfőváros Házinyomdája, p. 4

12 Ibid.: p. 5, WLASSICS Gyula: Bírói szervezeti és hatásköri kérdések [Issues of Judicial Organisation and Powers], Jogállam. 1909, pp. 1-14, Presented by: DICZIG Alajos: Az alsófokú közigazgatási bíráskodás kérdése [The Question of Lower Administrative Justice] (Klny. "Pénzügyi Fogalmazók Lapja", 1936, issues 7 and 8), Kecskemét, 1936, p. 5

13 EGYED 1916.: p. 6 (highlighted in the original)

14 MARTONYI János: A közigazgatás reformja és a közigazgatási bíróságok [Public Administration Reforms and Public Administration Courts] (In: Dolgozatok a közigazgatási reform köréből [Studies of Public Administration Reforms]), 1940, Budapest, Dunántúl Pécsi Egyetemi Könyvkiadó és Nyomda, p. 146

15 NÉMETHY Károly: A közigazgatási bíróság szóló törvényjavaslatáról [On the Bill Presented by the Administrative Court Inde-

pendently] Presentation in the Hungarian Lawyers' Association on 21 January 1894. Magyar Jogászegyleti értekezések, volume X, book 7, Budapest, 1894. Franklin, p. 6.

16 NÉMETHY Károly: A közigazgatási bíróságokról szóló törvény magyarázata [Explanation of the Act on Administrative Courts], Budapest, 1897. Pesti Könyvnyomda Rt, p. 7.

17 CONCHA Győző: A közigazgatási bíróság törvényjavaslatáról [On the Bill Tabled by the Administrative Court]. In: Magyar Jogászegyleti értekezések, volume X, book 8, Budapest, 1894, Franklin, p. 28

18 WLASSICS Gyula: Reformjavaslat a közigazgatási bíráskodásról [Proposal to Reform Administrative Justice], Jogállam, volume XI, 1912: pp. 32-41

19 Ibid.: p. 37

20 Ibid.: pp. 40, 41

21 EGYED 1916: pp. 24, 25

22 Ibid.: pp. 29-33

23 MARTONYI 1940.: p. 158

24 DICZIG 1936.: p. 6, MARTONYI János: Az ötvenéves közigazgatási bíróság [The 50-year-old Administrative Court]. Városi Szemle, 1947, volume XXXIII, p. 192

25 MARTONYI ibid. The work referred to: MAGYARY Zoltán: A magyar közigazgatás racionalizálása (a m. kir. miniszterelnök úr elé terjesztett javaslat) [Streamlining Hungary's Public Administration (proposal to the Royal Hungarian Prime Minister)] Budapest, Egyetemi Ny., 1930.

26 MARTONYI 1940.: p. 148

27 Proposal and the Prime Minister's speech presented by: DICZIG 1936, p. 7, MARTONYI 1940, p. 159

28 MARTONYI 1940, p. 152. Knowing the habit of bureaucratic structures to expand and their aversion to any loss of power, the author himself had his doubts about the anticipated headcount reduction.

29 DICZIG 1936, p. 13: Further simplification proposals included the introduction of a limited obligation to have an attorney, the charging of procedural costs in the case of unfounded complaints against taxes and duties, and levying fines on such plaintiffs.
Ibid. p. 14: The idea of introducing *reformatio in peius* was raised, along with – as a last-resort solution – decreasing the powers of the Court by examining the facts of a case and excluding discretional and petty cases.
MARTONYI 1940: p. 154.

30 Ibid.: p. 160; DICZIG, 1936, p. 15.

31 VÖRÖS Ernő – LENGYEL József: A közigazgatási bírósági törvény magyarázata, a Közigazgatási Bíróság újabb anyagi jogi, hatásköri és eljárási joggyakorlata általános közigazgatási, adó és illetékügyekben [Explanation of the Act on Administrative Justice – Recent Legal Practices Employed by the Administrative Court Regarding Substantive Law, Jurisdiction, and Procedures in Cases Related to General Public Administration, Taxes and Duties] Volumes 1-2, Budapest [1935]. Published by the authors, p. 2

32 NÉMETHY Károly's comment made at a meeting of the Lawyers' Association, 1894: pp. 16-17

33 MARTONYI János: Közigazgatási bíráskodásunk továbbfejlesztése [Advancing Our Administrative Justice], Budapest, 1944, Attila Nyomda, pp. 8-9

34 Ibid.

35 Ibid: pp. 10-12

36 PUKY Endre: A negyven éves közigazgatási bíróság multja és jövője [Past and Future of the 40-year-old Administrative Court]. Budapest, Pallas, 1937, p. 8

37 Ibid.: p. 12; MARTONYI 1944: p. 13

38 CSORBA János: The administrative court as a protector of the Constitution. The President's inaugural speech given on 18 June 1945 at a full session of the Administrative Court in the meeting hall of the House of Representatives. Budapest, 1945, Officina Ny.

39 According to Section 1 of Act LX of 1907 (in current spelling): "Over and above the cases listed in chapter II of Act XXVI of 1896 on Hungary's Royal Administrative Court, that Court shall conduct a procedure against any resolution, decision or measure by a minister (government) or any entity thereof that is injurious to a territorial self-government, on the grounds of a violation of the lawful powers of that self-government or its bodies or entities, or on the grounds of exercising an authority's rights unlawfully against that self-government, or on the grounds of violating a law or other statute, unless the case at hand has been assigned to an ordinary court."

40 According to the second sentence in Section 19 of Act IV of 1869, a judge "shall not question the validity of duly promulgated laws".

41 PUKY 1937, p. 9: The author raises the possibility of changing the Court's name to a more traditional Hungarian phrase ("*Közjogi Szék*", approximately meaning "Court of Public Law"). (This idea is similar to a draft Constitution compiled by former Governor and President Lajos Kossuth in Kütahya, Turkey, in which Kossuth proposed setting up a court named the "Constitutional Guard Court".); PUKY Endre: The Holy Crown Doctrine and administrative justice (speech delivered by Endre Puky, president of the Royal Hungarian Administrative Court, at the year-opening full session of the Administrative Court on 13 January 1941), Magyar Közigazgatás, volume LIX, issue 1941/3, pp. 16-20; CSORBA János, 1945, p. 14; MÁRTONFFY Károly's lecture, 1947, p. 5; EGYED István's comment in: Reforming the Administrative Court (lectures delivered and comments made in the administrative section of the Hungarian Lawyers' Association), Jogászegyleti Szemle, 1947, issue 2, p. 24, MARTONYI János: ibid., p. 49; SZABÓ József: ibid., p. 58.

42 "The republic guarantees its citizens the natural and unalienable rights of man" [...] "The following especially are natural and inalienable rights of citizens: personal freedom; the right for human life without oppression, fear and depravity; the free expression of thoughts and opinions; the freedom of religion; the freedom of association and assembly; the right to property, personal safety, work, a decent livelihood, and free culture; and the right to participate in governing the life of the state and the local governments." "No citizen shall be deprived of these rights without a legal procedure, and Hungary shall guarantee these rights to all citizens universally and to an equal extent, without any distinction, as part of a democratic state structure."

43 Position statement by the Administrative Court in the defence of human rights. Pénzügy és Közigazgatás, 1947. pp. 96-97.

44 Ibid. p. 96

45 CSORBA János: A hegyoldalról [From the Hillside], in: Magyar Közigazgatási Bíróság ötven éve (1897-1947) [Fifty Years of Hungary's Administrative Court (1897-1947)], Budapest, [1947] Közigazgatási Bíróság, p. 3

46 Ibid.: p. 4

47 Ibid.

48 According to Section 53 (1) of Act VIII of 1945 on the election of the National Assembly: "The validity of the elections shall be decided by the Election Court. The Justice Minister shall appoint one member of the Election Court from the members of the Hungary's Curia, one from the members of the Administrative Court, and one from the members of the National Council of People's Tribunals, with one additional member assigned by each political party participating in the elections. A person nominated to the National Assembly shall not be a member of the Election Court." Article (2) made it clear that the new entity's leadership could not rely on the Administrative Court: "The President of the Election Court shall be a judge appointed from the National Council of People's Tribunals."

DOI: 10.54201/iajas.v1i1.9

Restriction of access to the Supreme Administrative Court to reduce its burden (via expanding the institution of inadmissibility of a cassation complaint in the Czech Republic)

LUKÁŠ POTĚŠIL *

Abstract: The article deals with the current change in the concept of a cassation complaint filed with the Supreme Administrative Court of the Czech Republic. The Supreme Administrative Court's core activity is deciding on cassation complaints. They challenge previous final decisions of regional courts in the administrative judiciary. An amendment was adopted in February 2021. Since April 2021, it has been introducing (or rather substantially expanding) a certain "filter" of cassation complaints. This "filter" consists of restricting access to the Supreme Administrative Court, aimed at reducing the Supreme Administrative Court's workload through cassation complaints. The essence of this "filter" is that it will be easier for the Supreme Administrative Court to reject a cassation complaint without dealing with it on the merits and in detail. The article briefly describes the realities of the Czech administrative judiciary and the reasons that led to this relatively controversial solution. The key reason was the growing number of cassation complaints and the related length of proceedings before the Supreme Administrative Court. The paper focuses on the analysis of the new legislation and an evaluation of the advantages and disadvantages it brings.

Keywords: administrative justice; Supreme Administrative Court; Code of Administrative Justice; cassation complaint; inadmissibility of cassation complaint

1. INTRODUCTION

The general purpose of administrative justice is to provide judicial protection for the rights of persons against (negative) consequences of the activity or inaction of public administration. For this protection to be effective, it needs to be timely. This applies both to courts of first instance and higher courts, including the highest courts, which

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usually decide on remedies. The length of proceedings can be affected by several factors, one of which is the number of things a given court has to hear and decide.

This paper focuses on access to the Supreme Administrative Court of the Czech Republic (hereinafter "SAC") through cassation complaints. The article first introduces the general judiciary in the Czech Republic and especially the institution of cassation complaints. The next part of the paper notes some statistical data. These prove the burden of cassation complaints on the SAC. It follows that this is a real problem that needs to be addressed. The article goes on to describe in detail the institution of inadmissibility of a cassation complaint. This is a "filter" or "sieve" aimed at restricting access to the SAC in non-essential cases. The inadmissibility of a cassation complaint can help to eliminate the burden of the SAC from a number of recurring and insignificant cases. The institution of inadmissibility was first adopted in 2005 with the aim of reducing the burden of the SAC exclusively in the so-called asylum agenda. This institution was expanded with an amendment in 2021 to a wider number of cassation complaints/agendas of administrative justice. As it is too early to evaluate this new legislation, I intend to point out the possible advantages and disadvantages of the solution currently chosen. Although not completely unknown, it has not yet been applied to a greater extent. The last part of the article includes the overall conclusion and possible recommendations de lege ferenda.

2. ADMINISTRATIVE JUSTICE AND CASSATION COMPLAINTS

Administrative justice in the Czech Republic is primarily regulated in Act No. 150/2002 Coll., The Code of Administrative Justice (hereinafter referred to as the "CAJ"). This Act entered into force on 1 January 2003.

From a functional point of view, according to Section 2 CAJ, the administrative judiciary provides protection for public rights. Administrative justice in the Czech Republic is based on the implementation of an ex post judicial review of public administration. It rests on the dispositional principle and has an obvious protective character. The administrative judiciary (with a few exceptions)[1] does not decide on the merits of cases. On the contrary, it reflects the principle of cassation. In this respect, it is a traditional concept of administrative justice applied in our territory since the second half of the 19th century.[2]

The organisation of administrative justice consists of 8 regional courts (these are not independent, but are part of the general judiciary) and the SAC (which is completely independent and is based in Brno). Regional courts are basically[3] courts of first instance. In regional courts, either the senates (rule) or specialised single judges decide (exception, but relatively common). The SAC is primarily responsible for conducting proceedings and deciding on cassation complaints.

A cassation complaint challenges the previous (final) decision of the regional court. By its nature, a cassation complaint is the only remedy (apart from the really limited possibility of reopening certain proceedings), yet at the same time an extraordinary remedy in the administrative judiciary. Hence, there should be no legal right[4] to file a cassation complaint and a substantive hearing, submitting one should not be an easy and widely accessible opportunity.

Pursuant to Section 102 of the CAJ, any previous final decision of a regional court in an administrative court may be challenged by a cassation complaint, unless this is excluded. The legal regulation of a cassation complaint is based on a general clause, which is accommodating for cassation complaints. This is quite paradoxical, given that it is conceived as an extraordinary remedy. This solution was chosen with the aim of building established case-law, based on which it would subsequently be possible to restrict access to the SAC in the form of cassation complaints. The substance of the cassation complaint has remained unchanged since 2003, yet partial changes may have occurred.

The grounds on which a cassation complaint may be lodged are set out relatively broadly in Section 103 of the CAJ and include both legal and factual issues, which is not usually typical[5] of top judicial au-

thorities. In fact, they constitute no reason to limit the possibility of lodging a cassation complaint.

By contrast, Section 104 of the CAJ exhaustively stipulates in which cases a cassation complaint cannot be filed.[6]

A cassation complaint is usually subject to the payment of a court fee of CZK 5,000 (EUR 200) and the party who lodged the cassation complaint must be represented by a lawyer if they do not have the appropriate legal training. These provisions constitute the main conditions of the cassation complaint procedure. However, even in conjunction with the 2-week time-limit for lodging a cassation complaint, they do not constitute a significant obstacle to lodging cassation complaints or to the SAC being overwhelmed. If the aim is to reduce cassation complaints while reducing SAC congestion, tools other than these should be sought. The driving conditions must be set so as not to constitute denegatio iustitiae.

As is apparent from the facts indicated above, a cassation complaint is conceived as an extraordinary remedy, but in fact it is closer to an ordinary appeal, both thanks to a general clause and the wide list of grounds for lodging it. The exhaustive list of cases in which a cassation complaint is inadmissible is also relatively narrow.

The original CAJ text of 2002 did not contain any provisions aimed at restricting access to the SAC and reducing its congestion. This did not happen until a few years later in 2005. This method was later followed by a change in 2021, which extended the implementation of the solution and will be described later in the text.

3. THE SUPREME ADMINISTRATIVE COURT AND ITS BURDEN

To focus on the issue of restricting access to the SAC in the Czech Republic, it is necessary to elaborate on the nature of the SAC and what is expected of it. Although the SAC is provided for in the Constitution, it does not define its tasks.[7]

The provision of Section 12 par. 1 CAJ establishes the core task of the SAC. It is to ensure the unity and legality of decisions of regional courts via decisions on cassation complaints. This follows on from the SAC's position as the supreme judicial body in the administrative judiciary.

W. Piątek[8] dealt with the issue in question using the Supreme Polish and Austrian Administrative Court as examples, while his general starting points and conclusions can also be used in the case of the SAC. Thus to a certain extent we can contrast the right to appeal and interest in the legality and unity of decision-making with the speed and quality of decision-making as well as respect for the meaning and purpose of supreme courts. In the case of the supreme judicial authorities it is possible to restrict access to them to the extent that they do not necessarily have to deal with every case. After all, that would be a denial of their meaning. Such a solution is not in conflict with international treaties[9] and the constitutional order.[10]

If the purpose of the SAC is to ensure the unity and legality of the decisions of regional courts, the SAC does not have to review most of the issued decisions of the regional courts. The same result can be achieved in other ways without necessarily being extremely burdened by the SAC.

The core duty of the SAC is to decide on cassation complaints. It should be noted, however, that cassation complaints have accounted for around 90% of SAC's agenda in the last 3 years. It is therefore a dominant agenda, not an exclusive or sole one. If we look for possible causes of SAC congestion, this might be one of them. The fact that the SAC must also address other agendas (in fact and in law, but not entirely simple ones), such as disciplinary proceedings with judges, prosecutors and bailiffs, the agenda of elections, political parties, conflicts of competence, or the recent review of most of the measures taken in the COVID-19[11] pandemic since March 2021, inevitably means that the SAC's attention is not focused exclusively on cassation complaints. The fact this is "only" a 10% share in the overall SAC agenda does not significantly change this. As I have already said, these are often very complicated cases.

W. Piątek and L. Potěšil[12] address the possible causes of the overcrowding of the Czech SAC, in-

cluding a comparison with a similar situation in Poland, and possible solutions. For the purposes of this paper, it is sufficient to provide an overview of the statistics on the number of cassation complaints filed and the number of cassation complaints resolved / decided for each year of operation of the SAC.

Table 1 - Number of filed and settled cassation complaints (2003 - 2020)

Year	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
filed	1502	4722	4550	3622	3006	2891	2524	2213	2388	2955
settled	565	2859	4233	4121	4128	3147	2931	2300	2313	2547
Year	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**Q1 2021**	
filed	2849	2647	2886	3246	3902	4109	4261	4037	912	
settled	2864	2704	2915	2954	3442	3489	3880	3785	1002	

The table shows that the number of cassation complaints has been unbalanced since the SAC began to adjudicate. We can record both a period of growth (2004-2005) and decline (2009-2011) in cassation complaints. In the last few years, the number of cassation complaints has been rising again. However, it has not yet reached the record numbers from 2004 and 2005.

The table shows that since 2016 the SAC has not been able to handle the same number of cassation complaints it has challenged.[13] This leads to an increase in so-called unfinished work and an extension of the length of proceedings.[14] In 2020, however, there was a decrease in the number of filed cassation complaints compared to the previous two years. I think this was due to the COVID-19 pandemic, which undoubtedly slowed down not only the performance of public administration, but also the performance of administrative justice. Only the next few years will they prove whether it was a one-off decline or a permanent trend.

At this juncture, I would like to point out that even in the past, the supreme (but then the only) judicial bodies operating in the administrative judiciary were overwhelmed. This was the case both in the Administrative Court in Vienna, as pointed out by A. Zumbini,[15] and in the Czechoslovak Supreme Administrative Court in Prague.[16] To some extent, it can be argued that congestion is a generic characteristic of supreme judicial bodies in administrative justice. However, this is not something that should be worth following and it is unfortunate that history is starting to repeat itself in this negative respect.

To the detriment of the case, historical experience cannot be used when considering the limitation of the SAC burden. The SAC is a court of second instance, while the Vienna Administrative Court and the Supreme Administrative Court in Prague were administrative courts of first instance. Before the consequences of the adopted changes to reduce congestion could appear, WWI/WWII started, or the administrative judiciary was abolished. For these reasons, more detailed inspiration or a historical comparison are not entirely appropriate, but can serve as a warning.

4. CASSATION COMPLAINT AND ITS INADMISSIBILITY

As can be seen from the table above, the number of cassation complaints was relatively high in the first years of SAC's adjudication. This was due to two reasons. The first was certainly that the cassation complaint was a novelty and made it possible to challenge a previous decision of the regional courts, which was not possible before. The second reason was that the proportion of cassation complaints in asylum matters was relatively high in those years. Through these complaints, stays were legalised purely on purpose. The reason for this was that the alien and asylum regulations changed and the country joined the EU on 1 May 2004, and these facts led to a larger number of court proceed-

ings, including cassation complaints. The high number of cassation complaints from 2004 and 2005 was mainly due to the asylum agenda, which accounted for up to half of the total cassation complaints.[17] It should be added that the success of these cassation complaints was negligible.[18]

With effect from 12 October 2005, the legislator "solved" this problem by introducing a "filter" or restrictions in the form of so-called inadmissibility in the case of cassation complaints, exclusively and only for the area of asylum.[19] According to the new Section 104a CAJ, if the cassation complaint in asylum matters did not significantly exceed the complainant's own interests in terms of its significance, the SAC was to reject it with a resolution for inadmissibility. At the same time, special 5-member chambers were created (instead of the standard 3-member ones), which were to assess inadmissibility. The number of members of the senate was reduced again to three from 1 January 2012, as a higher number of senate members does not automatically mean greater fairness and better decisions,[20] but a rule was introduced that a decision rejecting a cassation complaint for inadmissibility must be unanimous. If unanimity on the assessment of the inadmissibility of the cassation complaint was not reached, the cassation complaint had to be assessed on the merits. The legislation even allowed for a decision finding inadmissibility not to state the reasons. In defence of the SAC, it should be said that, except for isolated cases, the decisions always justified the inadmissibility of a cassation complaint. However, these justifications were usually characterised in a slightly different way.

The essence of the inadmissibility lay in the selection of cases with a certain judicial overlap.[21] It leaves it to the SAC to decide for itself which cassation complaints (in the area of asylum) it will deal with on the merits.[22] In its decision the SAC further specified the conditions of (in)admissibility. Four reasons were formulated, which can be considered cases where the cassation complaint significantly exceeds the complainant's own interests and therefore passes through the "filter". These are a) legal issues not yet resolved by case-law, b) inconsistency of case-law in resolving legal issues, c) the need to change existing case-law and d) fundamental legal errors in the decision of the regional court. In other cases, the significance of the cassation complaint does not substantially exceed the complainant's own interests, which is why there is no reason for the SAC to explore it in detail.

The literature states that "the institute of inadmissibility has helped to reduce the idea of older cassation complaints, but since 2010 at the latest, due to a change in the composition of cassation complaints, this is a significantly minority agenda".[23] The famous migration wave/crisis in 2015 and 2016 did not change anything.

For the SAC, in rejecting the cassation complaint it is essential in terms of inadmissibility whether the cassation complaint, by its significance, substantially exceeds the complainant's own interests. It should have wider implications and significance than for one's own or a single case. The reduction of the SAC burden was also to be achieved by changing the way the decision was reasoned. If a cassation complaint is rejected for inadmissibility, it is crucial whether there is previous case-law. The aim of the justification is to approach the case as a typical case, which has already been resolved by the SAC in the past and is not a controversial legal issue or a significant procedural error of the regional court. In SAC's practice, such resolutions were relatively brief and did not involve a substantive assessment of the opposition, but, in principle, made reference to an earlier decision and a statement of how these cases had previously been assessed. It should be noted that the form of rejection for inadmissibility required a slightly different style. Quite often, the form and content of the grounds for refusal of inadmissibility were, in essence, a decision on the merits.[24] After all, "in many cases, the judgment on the inadmissibility of a cassation complaint cannot be dispensed with without a preliminary judgment on the merits, from which the inadmissibility is inferred on the basis of an analogy with previously resolved case types."[25]

The institution of inadmissibility of a cassation complaint was repeatedly found by the Constitutional Court to be constitutionally compliant.[26] Although the institution of the inadmissibility of a cassation complaint was already criticised when it was received, and later too, it has persisted to the

present day, and has been significantly expanded.[27] Z. Kühn states that "inadmissibility is not there for judges to make their work easier. It is there for all parties to the proceedings to ensure that SAC judges spend their energy on matters of genuine case-law, on matters of general scope. Only in this way will the SAC really fulfill its role, i.e. unify the case-law of the regional courts and provide addressees of legal norms with answers to complex questions about the interpretation of the law."[28]

5. EXTENSION OF THE INADMISSIBILITY OF THE CASSATION COMPLAINT IN 2021

As early as 11 July 2018, an amendment to the CAJ was submitted to Parliament for approval. Its sole purpose was to extend the inadmissibility of a cassation complaint to all cases of cassation. The main reason for submitting it was the growing number of cassation complaints. However, this amendment was not submitted as a so-called governmental amendment, but as a parliamentary amendment.[29] Thus, there were critical voices pointing to the fact that the data were not sufficiently processed in terms of evaluating the causes and impacts of the new legislation.[30] It should be noted that these critical voices are justified. Although the aim is to address the SAC load, the causes of this load, which are unfortunately unknown, are ignored. There are therefore several reasons for the increase in the number of cassation complaints,[31] and it is thus questionable whether extending the inadmissibility of the cassation complaint would be an appropriate solution.

During the legislative process in 2020, the submitted proposal was amended. The change meant the inadmissibility of a cassation complaint would not be spread across the board, but limited to an agenda entrusted to specialised single judges, not to senates in the regional court.

Only after 3 years of negotiations was Act No. 77/2021 Coll. issued on 19 February 2021. It amends the CAJ by extending the institution of inadmissibility of a cassation complaint to all cases in which a specialised single judge acted and decided before a regional court.[32] This so-called single-judge agenda is subject to a "sieve" in the form of the inadmissibility of a cassation complaint. By contrast, if it is a decision of the regional court senate, the rule of inadmissibility is not applicable. The legal regulation is based on the thesis that single-judge decision-making is reserved for matters that are simpler in fact and in law. Personally, I consider this conclusion to be controversial and problematic, but I cannot deny a certain degree of truth.

From a technical point of view, changing the legislation is relatively simple. Since it is expanding an institution that has applied for more than 15 years, and case-law has developed, there is no need to expect major complications. On the other hand, the question is – in all the possible cases to which the inadmissibility of the cassation complaint will relate – whether previous case-law has already been established, the existence of which is based on the inadmissibility of the cassation complaint. After all, the asylum agenda generated a different set of objections than it will now.

6. SUMMARY

In conclusion I would like to comment on the pros and cons of the new legislation, dealing first with the problematic aspects.

The first set of problems with the new legislation is that it is not clear what is causing the SAC congestion. Therefore, extending the inadmissibility of a cassation complaint may or may not serve the purpose. If the increase is mainly due to senate decisions of the regional courts, then the new legislation will hardly bring the desired relief. The problem is that the split between the senate and single-judge agenda is not elaborated, in the regional courts but especially in the case of cassation complaints with the SAC. It is not clear whether the new legislation will cover 40% of cassation complaints or only 10% of cassation complaints.

The method for submitting and adopting this CAJ amendment can also be deemed problematic. It is no secret that the SAC was directly involved in its creation. At the same time, I believe that if the aim were indeed to address the reduction of SAC con-

gestion, other tools could have been used, such as extending the exhaustive list of cases for which a cassation complaint cannot be lodged at all.

I believe the SAC would not have to examine cassation complaints in cases of non-appointment or exemption from court fees. It could be argued whether it should be possible to lodge cassation complaints against a decision of a regional court to discontinue proceedings, which is typically triggered by procedural reasons (non-payment of a court fee) or, in some cases, the rejection of the application.

It is debatable whether the inadmissibility of the cassation complaint will make it possible to reduce the burden on the SAC. Previous experience is insufficient in this respect.

The advantage of the adopted solution is that it leaves the concept of a cassation complaint, as it was originally created, without significant interference. It will be the existence of previous SAC case-law that will justify the rejection of the cassation complaint as inadmissible. SAC thus retains a choice as to whether, and to which cassation complaints, it will pay more attention. Another advantage is that an institution has been chosen that was previously introduced to the CAJ and is now being expanded. It is not starting from scratch: what to build on and a number of problem areas have already been resolved.

Personally, I understand the currently accepted solution as the second test sample, where the first was the inadmissibility of the cassation complaint for the asylum agenda. Now it is a so-called single-judge agenda. I believe that if the legislation proves successful there will probably be a general extension of the cassation complaint to all cases.

However, for the new legislation on cassation complaints and inadmissibility to fulfil its intended purpose of reducing the SAC burden, the SAC itself needs to reconsider its cautious approach to justifying negative decisions and focus on reasoning in order to respect the concept of inadmissibility. At the same time, I believe it is necessary to examine the cause of the overcrowding not only of the SAC, but of the entire administrative judiciary, and to start debates over its completely new form in terms of organisation and functionality.

The current legislation does not solve the problem of SAC congestion.

Notes

1 One special example is the so-called moderating law of the court, which according to Section 78 of the CAJ allows the administrative court to reduce the sentence imposed by the administrative body, or abandon it altogether.

2 Cf. Act No. 36/1876 Coll., which introduced administrative justice. This law prevailed until 1952.

3 For example, for proceedings on jurisdictional actions, or in some specialised areas, such as recent executive measures taken in the COVID-19 epidemic pursuant to Section 13 (1) of the so-called Pandemic Act No. 94/2021 Coll., on extraordinary measures during the COVID-19 disease epidemic.

4 Šimíček, V. Přijatelnost kasační stížnosti ve věcech azylu – jedna z cest k efektivitě práva. Soudní rozhledy, 2005, nr. 19, p. 693.

5 Kühn, Z. a kol. Soudní řád správní. Komentář. Praha: Wolters Kluwer ČR, 2019, p. 956.

6 A cassation complaint pursuant to Section 104 of the CAJ may not be filed against a decision of a regional court in electoral matters, against a decision of a regional court on the costs of proceedings, or only against its reasoning. Nor can a cassation complaint be filed against a decision of a regional court which only regulates the conduct of proceedings, or against a decision which is only temporary in nature.

7 Art. 91 of the Constitution.

8 Piątek, W. Access to the Highest Administrative Courts: between the Right of an Individual to Have a Case Heard and the Right of a Court to Hear Selected Cases. Central European Public Administration Review, nr. 18(1), 2020, pp. 1-23.

9 Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

10 Art. 36 (2) of the Charter of Fundamental Rights and Freedoms.

11 171 of them were submitted from the end of March to 21 May 2021.

12 Piątek, W., Potěšil, L. A Right to Have One's Case Heard within a Reasonable Time before the Czech and the Polish Supreme Administrative Courts – Standards, the Reality and Proposals for the Future. Utrecht Law Review, 17(1), 2021, pp. 20-32. DOI: http://doi.org/10.36633/ulr.586

13 As the Ministry of Justice's annual report for 2019 states (a newer one has not yet been published), "*in recent years we have seen*

steady and increasing growth in the idea. In 2016–2018, the court was thus unable to settle its idea, which significantly exceeded the number of settled cases, and logically resulted in rapid growth in the number of pending cases. In 2018, the growth of incoming things slowed down, but did not stop. The number of incoming cases thus significantly exceeded the number of settled cases, and there was an increase in the number of pending cases. This growth stems from the growth of the idea and the number of cases handled in the first instance. A similar conclusion applies to the year 2019, with a significant increase in the number of settled cases and the difference between incoming and settled items thus narrowing." https://www.justice.cz/documents/12681/719244/Ceske_soudnictvi_2019_vyrocni_stat_zprava.pdf/28174b8b-c421-440b-9a17-1f48cfc50efc

14 In 2018, the length of proceedings at the SAC was 178 days. http://nssoud.cz/Informace-poskytnuta-dne-26-unora-2019/art/22655?tre_id=210

15 Zumbini, A. 2019. Standards of Judicial Review on Administrative Action developed by the Austrian Verwaltungsgerichtshof in the Austro-Hungarian Empire. The Common Core of European Administrative Law. Available online: www.coceal.it

16 Mazanec, M. Správní soudnictví. Praha: Linde Praha, 1996, p. 32.

17 Kühn, Z. a kol. Soudní řád správní. Komentář. Praha: Wolters Kluwer ČR, 2019, p. 956.

18 Jemelka, L. a kol. Soudní řád správní. Komentář. Praha: C. H. Beck, 2013, p. 938.

19 It should be noted that the original intention was to completely rule out the cassation complaint. In the end, this option was modified in favour of the new institution of inadmissibility of the cassation complaint, which may place more emphasis on the unpretentiousness of the cassation complaint and its nature as an extraordinary remedy.

20 Jemelka, L. a kol. Soudní řád správní. Komentář. Praha: C. H. Beck, 2013, p. 940.

21 Kühn, Z. a kol. Soudní řád správní. Komentář. Praha: Wolters Kluwer ČR, 2019, p. 957.

22 Judgment of the SAC of 26 April 2006, file no. No. 1 Azs 13/2006, 933/2006 Coll. NSS.

23 Kühn, Z. a kol. Soudní řád správní. Komentář. Praha: Wolters Kluwer ČR, 2019, p. 957.

24 Z. Kühn states that "*while until 2010 the average judgment did not differ much in length from the average decision on inadmissibility - in 2014 the substantive decision was almost twice as long as the decision on inadmissibility*". According to him, this is due to an increase in the reasoning of substantive decisions, rather than a shortening of the resolution on inadmissibility (srov. Kühn, Z. a kol. Soudní řád správní. Komentář. Praha: Wolters Kluwer ČR, 2019, p. 964). From my own practice, I would add that there were frequent resolutions rejecting the inadmissibility of a cassation complaint on two sides, which I think may be sufficient.

25 Šimíček, V. a kol. Soudní řád správní. Komentář. Praha: Leges, 2014, p. 1019.

26 Cf. resolution of 9 November 2006, file no. No. I. ÚS 597/06.

27 Cf. e.g. Kučera, V. K institutu nepřijatelnosti kasační stížnosti. Právní zpravodaj, nr. 11, 2005, pp. 7-9, Šiškeová, S., Lavický, P., Nad novou úpravou řízení o kasační stížnosti v azylových věcech. Právní rozhledy, nr. 19, 2005, pp. 693-703, Šimíček, V. Přijatelnost kasační stížnosti ve věcech azylu – jedna z cest k efektivitě práva. Soudní rozhledy, nr. 6, 2006, pp. 201-205, Filipová, J. Některé vybrané problémy právní úpravy přístupu k Nejvyššímu správnímu soudu, Časopis pro právní vědu a praxi, nr. 2, 2011, p. 148 and latter, Bobek, M., Molek, P. Nepřijatelná kasační stížnost ve věcech azylových; srovnávací pohled. Soudní rozhledy, 2006, nr. 5, p. 205 a latter, Žondrová, S. Nepřijatelnost kasační stížnosti ve věcech azylu v rozhodovací praxi Nejvyššího správního soudu, Správní právo, 2007, nr. 6, p. 408 and latter. Bobák, M, Hájek, M. Nepřijatelnost dle § 104a s. ř. s., smysluplný krok nebo kanón na vrabce? In Molek, P., Kandalec, P., Valdhans, J. Dny práva 2014 - Days of Law 2014. Brno: Masarykova univerzita, 2015, pp. 47-76, or Adamec, M. a kol. Soudní řád správní. Kritická analýza. Praha: Auditorium, 2019, pp. 113-116.

28 Kühn, Z. a kol. Soudní řád správní. Komentář. Praha: Wolters Kluwer ČR, 2019, p. 964.

29 This means, among other things, that the standard commenting procedure of central administrative authorities was not held on the proposal, and the proposal was not discussed by expert advisory bodies of the government, in which representatives of theory and practice are also present.

30 https://jinepravo.blogspot.com/2020/05/epidemie-na-nejvyssim-spravnim-soudu.html

31 For example, a larger number of bigger decisions in regional courts, or is there an agenda that produces a larger number of cases?

32 Pursuant to Section 31 (2) of the CAJ, these are cases of pension insurance, sickness insurance, job seekers and their unemployment benefits and retraining benefits in accordance with employment, social care, assistance with material needs and state social support, foster care benefits, in matters of misdemeanors, for which the law stipulates the rate of a fine, the upper limit of which is CZK 100,000, international protection, non-issuance of a short-stay visa, decision on administrative deportation, decision on obligation to leave the territory, decision on the detention of foreigners, decision on the extension of detention as well as other decisions which result in a restriction of the alien's personal liberty, as well as in other matters in which a special law so provides.

DOI: 10.54201/iajas.v1i1.10

Impact of Anti-Crisis Shield on the running of the limitation period for tax liabilities in Poland

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Abstract: This article studies the impact of the Anti-Crisis Shield on the running of the limitation period for tax liabilities in Poland. The main purpose of the article is to analyse whether regulations enacted in relation to introducing the state of epidemic in Poland resulted in the suspension of the running of the limitation period for tax liabilities. The Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them directly stipulates that the running of time limits set forth in provisions of administrative law shall be suspended. First of all, arguments for the autonomy of tax law are presented. This allows for the hypothesis that tax law is an autonomous branch of law – separate from administrative law, leading to the conclusion that there are no grounds to assume that the Anti-Crisis Shield suspended the running of the limitation period for tax liabilities. Secondly, the retroactive effect of regulations of the Anti-Crisis Shield is analysed.

Keywords: Anti-Crisis Shield, limitation, suspension of the running of the limitation period, autonomy of tax law

1. INTRODUCTION

The coronavirus has influenced not only the everyday lives of citizens around the world, but also the shape of the law. Individual countries took up the challenge to find a legal solution to fight this unexpected enemy. In Poland, the coronavirus had an influence in material and procedural terms, among others.

In accordance with Article 15zzr section 1 of the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them[1] during the period of a risk of epidemics and a state of epidemic, time limits "provided for by administrative law" shall not start, and if started, shall be suspended. The aforementioned provision only remained binding until 16 May 2020, but despite applying for a limited period only, it caused some confusion, the effects of which will be felt long into the future. This is because the literal text of the provision could imply that the Shield does not refer directly to the limitation period in tax law, while a systemic and teleological interpretation may lead to a completely different conclusion. This is due to the question of the legislator allowing for the extension of the time limit, e.g. for handling a matter or issuing a decision imposing a liability, but at the same time failing to modify the limitation period of liability.

This article pertains to the impact of the Anti-Crisis Shield on the time limits provided for by administrative law. The main purpose of the article is to resolve doubts as to whether the Anti-Crisis Shield actually influenced the suspension of the

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limitation period for tax liabilities. The scientific methods used are analysis, induction, deduction and description.

2. THE ANTI-CRISIS SHIELD

Due to the risk of SARS CoV-2 spreading it was necessary to introduce special solutions that would allow actions complementing basic regulations to be taken to minimise the risk to public health. The Anti-Crisis Shield defines, in particular, the principles and procedures for preventing and combating infection and the spread of an infectious disease caused by SARS-CoV-2, including the principles and procedures for taking anti-epidemic and preventive measures to neutralise the sources of infection and cut the paths of disease spread, both tasks of public administration bodies in the field of preventing and combating this disease.

Under the so-called the Anti-Crisis Shield and other legal acts, including regulations of the Council of Ministers, numerous changes were introduced to the tax regulations currently in force. These changes were made on the basis of both individual taxes and general tax law. For example, the entry into force of significant changes was postponed, for instance in the field of VAT reporting as well as tax rates. As part of the solutions directly supporting activities aimed at reducing the risks associated with the SARS-CoV-2 virus, preferences for taxpayers were also provided. The anti-crisis solutions for income taxpayers affected by SARS-CoV-2 include, among others, the possibility to delay paying tax and submitting tax declarations as well as preparing and submitting financial statements for 2019, preferences in settling tax losses related to the pandemic, and facilities for small entrepreneurs regarding the settling of advances for corporate income tax.

The solutions introduced should be favourable for taxpayers in most cases. However, the exceptional circumstances, including the pace of the introduced changes, means that some changes should be critically assessed. One of them is undoubtedly the suspension of the limitation periods. The indicated regulation does not refer directly to tax law, as it directly points to the terms of administrative law. However, such an interpretation may turn out to be contrary to the aims of the legislator.

3. THE SUSPENSION AND INTERRUPTION OF THE LIMITATION PERIOD

The limitation of tax liabilities means that after a specified period, the tax liability, although unpaid, expires together with the interest for late payment.[2] After the expiry of the limitation period by law, the liability relationship between the taxpayer and the tax creditor ceases to exist without the need to issue any decisions. Although unsatisfied, the creditor – State Treasury or municipality – no longer has grounds to enforce the tax liability. The voluntary fulfilment of this obligation by the taxpayer leads to an overpayment, which is refundable. The limitation of tax liabilities simultaneously serves the implementation of two important constitutional values: the need to maintain a budget balance, and the need to stabilise social relations by extinguishing long-standing tax liabilities. The limitation of tax liabilities, although not regulated *expressis verbis* in the Constitution, is therefore based on constitutionally protected values. Both the introduction of a statute of limitations in tax law and the determination of the date on which it will occur is left to the discretion of the legislator. The legislator may choose between different limitation structures, establishing separate time limits for carrying out activities verifying the compliance of taxpayers with their obligations and setting separate time limits for the debt collection procedure. However, these deadlines cannot be too short, as they would exclude the implementation of the principle of universality and tax fairness, nor may they remain too long, making the statute of limitations an illusory institution. The limitation mechanism established in tax law may not induce taxpayers to evade tax and treat the statute of limitations instrumentally, in terms of a tool allowing them to avoid paying the tax after

some time. The rule is to pay taxes, and not expect that the tax liability will be time-barred.

According to the Tax Ordinance,[3] the tax liability limitation period is 5 years beginning from the end of the calendar year in which the tax payment deadline expired. Polish tax law exhaustively enumerates the exceptional situations when the period of limitation for liabilities is longer than 5 years. Pursuant to the Tax Ordinance:

A new limitation period does not commence or an existing limitation period is suspended:

1) from the issue date of a decision granting tax relief until the due date to pay deferred tax or tax arrears, the last tax instalment or the last instalment of tax arrears;
2) from the date a regulation enters into force on extending the time limit to pay tax, issued by the minister in charge of public finance, until the end of the extended time limit;
3) by declaration of bankruptcy (a suspended limitation period resumes on the day after the decision to end or discontinue bankruptcy proceedings becomes final);
4) as a result of applying an enforcement measure which a taxpayer was notified about. A suspended limitation period resumes on the day after the enforcement measure is applied;
5) if a tax liability can be determined or established on the basis of a double taxation agreement or another international agreement to which the Republic of Poland is party, and the establishment or determination of that liability amount by a tax authority depends on whether the authorities of another state provide sufficient information;
6) on the day when proceedings commence in a case involving a fiscal crime or fiscal offence the taxpayer has been notified of, if the crime or offence is related to a failure to settle the liability;
7) on the day when a complaint against a decision concerning that liability is filed with an administrative court;
8) on the day when a request is filed with a general court to determine whether a legal relationship or law exists or not;
on the day when a decision to accept security is delivered, or an order to establish security in accordance with the provisions on administrative enforcement proceedings is delivered;
on the day when confirmation about joining the security in the cases defined in the Act of 17 June 1966 on Enforcement Proceedings in Administration (Journal of Laws of 2019, item 1438, as amended) is served;
on the day when the Head of the National Tax Administration requests an opinion from the Anti-Avoidance Board.

In each case, the circumstances indicated above should be considered exceptional situations.

Apart from the limitation period, the Ordinance introduces the so-called interruption of the limitation period. Following each interruption of limitation, it shall commence anew.

In accordance with the provisions of the Ordinance, the limitation period is interrupted by a declaration of bankruptcy. After the limitation period is interrupted, it runs again from the day after the decision on the end or discontinuation of bankruptcy proceedings becomes final. The limitation period is also interrupted as a result of an enforcement measure notified to the taxpayer. After the limitation period is interrupted, it runs again from the day after the enforcement measure is applied.

4. AUTONOMY OF TAX LAW

In the context of identifying consequences of Article 15zzr of the Anti-Crisis Shield coming into force, it is crucially important to try answering the question whether, when using the notion of "administrative law," the legislator really only meant administrative law, or extended "administrative law" to include tax law as well.

Before examining the issue of mutual relationships between tax law and other branches of law, especially at the linguistic level, it is necessary to examine the position of tax law in the legal

system, especially whether it is an autonomous branch thereof. Both theoretical and practical issues are of decisive importance in this case.[4] This is because autonomy consists in the fact that it is possible to identify common features of a group of tax norms that allow them to be distinguished from other norms and have an impact on the creation, application and interpretation of law.[5]

Tax law belongs to public law,[6] i.e. to the branches of law where the public interest prevails. It is worthwhile recalling that tax law, being part of financial law, has been undergoing significant transformation in Poland for some time, aimed at separating tax law, making a separate branch of law, having its own legal norms, principles and the subject and method of regulation, as well as specific legal relationships. The criteria for the subject and method of legal regulation will be vitally important in the separation of tax law.[7] In this law, the method of regulating social relationships is the administrative and legal method based on power and subordination.[8] For a very long time, tax law was an integral part of financial law. There was the concept of financial law as generally understood, meaning budget law in a narrow sense, the law of budget spending and the law of budget revenues. The last one included, inter alia, tax law.[9] The autonomy of tax law in the legal system – as the whole set of norms regulating financial relationships – was approved earlier. It is worthwhile recalling that treating tax law as part of financial law seems archaic. This is because it does not take into account the importance of particular areas of financial law in practice. Consequently, this author assumes that the classification recognising tax law as a separate branch of law, equal to budget law, is more adequate.[10] Financial law structures also emerged[11] including the broadly understood budget law as a separate section, with tax law being its only component.[12]

The following criteria had a decisive influence on the separation of tax law from the norms of financial law: the subject of the norms, the structure of norms, features of social relationships regulated by these norms, the manner of implementing these relations, the purpose of their establishment.[13] Moreover, it is also possible to identify legislative autonomy – this is because tax law norms are included in separate legal acts.[14] The degree of development of tax law is also confirmed by the existence of an extensive general part, having its own tradition, the separation of a system of authorities and procedures, and a professional group – tax advisers.[15] Additionally, the function of tax law norms, their legal character, as well as the social and economic role affect the interpretation to such an extent that it is possible to refer to tax law interpretation principles.[16]

Summing up the aforementioned deliberations, it should be concluded that tax law, which constitutes a separate branch of law, shows autonomy involving the development of solutions and institutions in a relatively independent way. The limits of the autonomy of tax law are determined by the basic principles of the legal system, which are included in the Constitution of the Republic of Poland and which pertain to freedoms, rights and obligations of persons and citizens, sources of law, including statute as an exclusive basis of tax matters, and the legislative procedure.[17] They are obligatory rules in the process of the administration of law. Moreover, it is necessary to take into account the need to maintain the necessary consistency and internal integration of the legal system. This is because tax law is an element of this system and should be harmonised with other branches thereof. From a substantive point of view, this means that tax law cannot be inconsistent with other branches of law or interfere with their functioning, whereas formally it means the need to adjust the legal language.

Against the background of deliberations pertaining to the autonomy of tax law, it is worthwhile emphasising its relationships with other areas of law. Each of them shows separate features appropriate to the functions performed. Norms can usually be classified into one of the areas of law – private (e.g. civil) or public (e.g. administrative). In the context of the matter under consideration, it is worthwhile noting relationships between tax law and administrative law in particular.

Tax law is related to administrative law at the systemic level.[18] This is because norms defining the organisation and operating principles of tax administration authorities constitute a system following the example of solutions used in other departments of public administration. Additionally, tax law applies notions typical for administrative law (e.g. public administration authority, supervision, subordination). Mutual relationships between the two indicated branches of law are confirmed by the fact that in the years 1981-1997, provisions of the Code of Administrative Procedure, i.e. general administrative procedure, applied to tax proceedings.

Despite its administrative origin, tax law is a branch of law separate from administrative law. This is confirmed by the fact that the legislator knows the "tax law" notion and uses it in other legal acts, e.g. provisions of the Tax Ordinance. Moreover, in provisions of the Tax Ordinance, the legislator included a legal definition of the notion of "tax law provisions". Consequently, the legislator is undoubtedly aware of this notion.

5. APPLICATION OF THE ANTI-CRISIS SHIELD DIRECTLY FOR THE INSTITUTION OF TAX LAW

It is worthwhile noting that the authors of the Anti-Crisis Shield, in other provisions of the Act, refer separately to the institutions of administrative law and tax law, which confirms that the legislator distinguishes between these branches of law. In Article 15zzs section 1 of the Shield, the legislator makes a distinction between "administrative proceedings" (point 6) and "proceedings and inspections carried out based on the Tax Ordinance" (point 7), which supports the hypothesis that the legislator distinguishes between tax law and administrative law in provisions of the Shield.[19]

Consequently, taking into account the structure of provisions of the Shield, it seems that the legislator is aware of the autonomy of tax law from other branches of law. Consequently, it is justified to assume that if the legislator had intended to suspend the running of periods under substantive law in tax matters, this issue would have been explicitly regulated in the provisions of the Shield. Article 15zzr section 1 refers only to the running of periods under substantive law in administrative matters, therefore it cannot be presumed that this provision also covers periods under tax law.

The correctness of the aforementioned hypothesis seems to be confirmed by the introduction of Article 15zzj to the Shield as well, according to which the submission of the annual PIT tax return for 2019 and payment of the tax due after the expiry of the statutory time limit, but before 1 June 2020, will not result in penal fiscal sanctions.

It is worthwhile noting that if the running of substantive law periods in tax matters had been suspended based on Article 15zzr section 1 of the Shield, no sanctions could have been imposed on the taxpayer for failure to pay tax by the end of April this year. It seems that in the case of a broad interpretation of Article 15zzr section 1 of the Shield, also covering the suspension of the running of periods under tax law, the time limits for paying taxes would also be suspended. Thus, the introduction of Article 15zzj to the Shield would have been pointless and contrary to the principle requiring the creation of regulations by a rational legislator.

Taking into account the text of the Anti-Crisis Shield, it is therefore justified to assume that the running of substantive law periods in tax matters was not suspended by provisions of the Shield. Firstly, tax law is a branch of law separate from administrative law with its own autonomy. Secondly, the legislator introduced provisions in the Shield suggesting that at least some periods under tax law (tax payment periods) were not suspended. Consequently, taking into account the fact that the legislator acts reasonably, it is impossible to agree with the opinion that Article 15zzr of the Shield would also regulate the issue of the running of substantive law periods in tax matters – if it was the legislator's intention, the legislator would, without any doubt, explicitly present its intentions in this respect.

Article 15zzr was annulled with "Shield 3.0" coming into force, while the running of periods under substantive law in administrative matters was restarted. Pursuant to Article 68 of the Act of 14 May 2020 amending some acts in the area of protective activities in connection with the spread of the SARS-CoV-2,[20] these periods will start running again 7 days after the effective date of the act. Consequently, deliberations regarding the scope of application of Article 15zzr remain valid despite the provision itself being annulled. Annulling Article 15zzr does not nullify the legal effects of the suspension. This is because periods covered by that provision remained suspended for a certain time, which will ultimately have an impact on the expiration of the particular period.

This is especially important in the context of the running of limitation periods of tax liabilities – assuming that Article 15zzr also applies to time limits under tax law, the limitation periods of tax liabilities would have been suspended based on the provisions of the Shield, which means that the limitation period of tax liabilities should be extended by the period of suspension.

One of the functions of the limitation period for tax liabilities is related to its guarantee nature. After the expiry of the limitation period, the taxpayer can be sure that they will not face any consequences in the form of paying the tax. In particular, provisions pertaining to the length of the limitation period, including suspending the running of the limitation period for tax liabilities, have the nature of a guarantee. This shows that, bearing in mind the principle that doubts should be resolved in favour of the taxpayer, it cannot be concluded that the circumstances justifying the suspension of running the limitation period may not be expressed directly.

6. RETROSPECTIVE EFFECT OF LIMITATION PROVISIONS

Against the background of the issues discussed, it is important to determine how long the Anti-Crisis Shield applies for. It clearly refers to "a state of risk of epidemics and a state of epidemic announced due to COVID-19." The state of risk of epidemics was announced on 14 March 2020, and the Anti-Crisis Shield 1.0 came into force on 31 March 2020; just from the provisions of Article 15zzr, and considering the explicit reference to the period of a risk of epidemics, it follows that it should apply retrospectively.[21] At this point, it is worthwhile analysing how the retroactive effect of the act could affect suspending the running of the limitation period if the legislator had concluded that the reference to the statute of limitations in administrative law should also be understood to include tax law.

The retroactive effect of an act in such a way is expressly provided for in Section 51 (2) of the Regulation of 20 June 2002 of the Council of Ministers on the principles of legislative techniques: "Provisions of the act other than those to which the final provisions gave retroactive effect, and having retroactive effect resulting from their content and relating to events or states of affairs, which arose before the effective date of the act, shall be formulated in a way that clearly indicates these events or states of affairs." Also, in accordance with the Act of 10 July 2000 on the publication of normative acts and some other legal acts (Journal of Laws of 2019, item 1461), it is possible to give retroactive effect to a normative act if the principles of a democratic state ruled by law do not prevent it (Article 5).

Consequently, assuming that Article 15zzr of the Anti-Crisis Shield could also apply to the limitation of tax liabilities, it is only necessary to analyse whether it can be assumed that it suspends the running of the period of limitation before the Shield came into force. This question cannot be answered in the affirmative. Although it is theoretically and legally possible, as shown above, the additional condition related to the compliance of such a solution with the Constitution raises serious doubts. First of all, it should be noted that the limitation of tax liabilities is an institution that results in positive consequences for the taxpayer. This is because the expiry of the limitation peri-

od results in the extinguishing of the tax liability. Consequently, the statute of limitations is a desirable institution in terms of the taxpayer's legal situation – it causes the liability to expire. The application for confirming or refunding an overpayment, as described in Article 78 section 2 of the Tax Ordinance, is an exceptional situation where the statute of limitations may have negative consequences for the taxpayer.

7. CONCLUSION

The pace of legislative works on the Anti-Crisis Shield was very fast, and at the same time involved large-scale changes. Due to a combination of these two elements, the quality of the resulting regulations is questionable. Despite the short time since their introduction, widely different opinions have emerged as to their normative content. The status of the issue as to whether the Anti-Crisis Shield suspended the running of the limitation of period for tax liabilities is similar. The very fact that based on Article 15zzr section 1 of the Shield it is impossible to answer this question unequivocally reflects the legislative level of the provision in question. Without any doubt, the situation that developed in March 2020 made it necessary to look for specific legal solutions aimed at providing a quick reaction to the crisis, given that the state stopped functioning. For example, in the Anti-Crisis Shield, the legislator decided on the possibility of delaying the payment of personal income tax without any negative consequences, and decided to extend the time limit for issuing an individual ruling. Actions taken by the legislator, their main intention and the coronavirus context may indicate the intent to suspend the running of tax liability limitation periods, but the wording of the provisions in the Anti-Crisis Shield does not allow us to conclude that the running of the limitation period was actually suspended. Suspending the running of the limitation period for tax liabilities is disadvantageous for taxpayers (with some exceptions), as it extends the period during which the taxpayer is obliged to pay tax. Consequently, particular caution should be exercised when trying to extend such a period. Taking into account the basic principles of interpretation of legal acts and the legislator's rationality principle, we cannot presume that in Article 15zzr of the Shield the legislator also meant tax law when referring to the notion of administrative law. The accuracy of this hypothesis is also confirmed by the fact that the Anti-Crisis Shield contains provisions directly referring to tax law, and thus it is justified to assume that where there is no direct reference to tax law, the legislator does not allow such a reference.

Notes

1 Hereinafter referred to as: the Anti-Crisis Shield.

2 The Act of 29 August 1997 Tax Ordinance, Journal of Laws of 2020, item 1325 as amended. Art. 70.

3 The Act of 29 August 1997 Tax Ordinance, Journal of Laws of 2020, item 1325 as amended. Art. 70.

4 Nykiel, W. (1999). Autonomia prawa podatkowego – wybrane zagadnienia [Tax law autonomy – selected issues]. In: T. Dębowska-Romanowska, A. Jankiewicz (Eds.), *Konstytucja. Ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl* [*Constitution. structure, state financial system. Commemorative Book in Honour of Natalia Gail].* Publishers of the Constitutional Tribunal. p. 397.

5 Lang, W., Wróblewski, J., Zawadzki, S. (1979), *Teoria państwa i prawa* [*Theory of state and law]. State Scientific Publishing House.* p. 369.

6 Bell, J.S. (2008). *Comparative administrative law.* In: M. Reimann, R. Zimmerman (Eds.), *The Oxford handbook of comparative law*, Oxford Handbooks, DOI:10.1093/oxfordhb/9780199296064.013.0040.

7 Borszowski, P. (2004). *Elementy stosunku prawnego zobowiązania podatkowego* [*Elements of the legal relationship of tax liability]. Zakamycze.* p. 28.

8 Mastalski, R. (2000). Prawo podatkowe [*Tax law]* (*Prawo podatkowe*), Beck. p. 17.

9 Kurowski, L. (1976). Wstęp do nauki prawa finansowego [Introduction to the financial law science], State Scientific Publishing House. p. 26.

10 Brzeziński, B. (1995). *Zarys prawa finansów publicznych* [*Outline of public finance law].* Scientific Society of Organization and Management House of the Organizer. p. 19.

11 Kosikowski, C., Ruśkowski, E. (1993). *Finanse i prawo finansowe [Finance and financial law].* Temida. p. 42. For many years, it was pointed out that the conclusion that financial law is a separate branch of law, deriving from administrative law, should not be debatable.

12 Brzeziński, B. (1996). *Prawo podatkowe. Zarys wykładu [Tax law. Outline of lecture*]. Scientific Society of Organization and Management House of the Organizer. p. 35.

13 Nykiel, W. (1999). Autonomia prawa podatkowego – wybrane zagadnienia [Tax law autonomy – selected issues]. In: T. Dębowska-Romanowska, A. Jankiewicz (Eds.), *Konstytucja. Ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl* [*Constitution. structure, state financial system. Commemorative Book in Honour of Natalia Gail].* Publishers of the Constitutional Tribunal. p. 398.

14 Mastalski, R., (2003). *Autonomia prawa podatkowego a spójność i zupełność systemu prawa [Autonomy of tax law vs. consistency and completeness of the system of law].* Przegląd Podatkowy [Tax Review], p. 12.

15 Mariański, A. (2009). *Rozstrzyganie wątpliwości na korzyść podatnika. Zasada prawa podatkowego [Resolution of doubts in favour of taxpayer. Tax law rule].* Oficyna. p. 13.

16 Brzeziński, B. (2002). *Szkice z wykładni prawa podatkowego* [*Outline of interpretation of tax law].* Center of Counseling and Personnel Improvement. p. 9.

17 The Act of 2 April 1997 The Constitution of the Republic of Poland, Journal of Laws, no. 78, item 483. Art. 30-76.

18 Dzwonkowski, H. (2010). *Prawo podatkowe* [*Tax law].* Beck. p. 25.

19 Wincenciak, M. (2019). *Przedawnienie w polskim prawie administracyjnym* [Statute of limitations in Polish administrative law]. Wolters Kluwer. p. 31.

20 Journal of Laws of 2020, item 875.

21 This regulation was revoked by Regulation of 20 March 2020 of the Minister of Health on announcing a state of epidemics in the territory of the Republic of Poland, Journal of Law, item 491, as amended.

DOI: 10.54201/iajas.v1i1.11

Expulsion of aliens, non-refoulement and issues related to (administrative) discretion[1]

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Abstract: One of the outcomes of the 2015–2016 migration crisis in the EU is the urgent need perceived to enhance the effectiveness of forced return procedures, including administrative expulsion. However, given the core human rights obligation of non-refoulement, the push for effectiveness needs to be balanced against procedural safeguards preventing "overly effective" proceedings. The example of the Czech Republic shows that an institutional arrangement could significantly undermine the effectiveness of the proceedings when paired with undue conduct of the administration, such as the improper risk of a refoulement assessment. The article argues that the key to effectiveness does not necessarily lie with speedy procedures, but rather with a pragmatic design of the procedures, as can be concluded from a comparison of the Czech and German approaches.

Keywords: expulsion, non-refoulement, administrative discretion, forced return, migration

The so-called "migration crisis" of 2015/2016 constitutes a significant series of events that changed the discourse on migration in Europe and transformed the political landscape in many countries.[2] Populist voices on the right, centre and left of the spectrum claimed they would *take back* control of migration issues.[3] The post-crisis discourse is dominated by safety issues (see e.g. Nagy, 2016) and clearly shows a reduced willingness to retain legal possibilities for immigration of any kind, clearly emphasising the effectiveness of return procedures.[4] With this emphasis, since 2016 EU bodies have been trying to strike a common compromise on a new package of migration legislation that will replace the "failed" current system centred on the Dublin III Regulation (Regulation 604/2013). Due to the lack of common ground, the Common European Asylum System reform has stalled for months, and now, in the midst of yet another crisis caused by a pandemic, it seems to be forgotten. While they are not making headlines any longer, the problems of the migration policies persist.

Faced with staggeringly low numbers of successful return operations, one of the key demands to be incorporated into the reform is the effectiveness of return operations. This requirement should not be understood as an easy equation: the more returnees, the bigger success. The growing demand for (forced) returns of irregular migrants, or migrants who, for some reason, have lost their permit to stay, must be squared with respect for human rights and international refugee law. Both do not cease to apply just because of public senti-

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ment.[5] The core of the human rights' obligation, when it comes to forced returns, is the prohibition of *non-refoulement* as a principle stemming from right to life and freedom from torture, inhuman and degrading treatment, thereby governing who can be and who must not be expelled from a state's territory. Therefore, we could alter the equation: the more returns performed with due respect of human rights, the better the effectiveness of the return procedure. Arguably, such a view was incorporated into the EU secondary legislation (cf. recitals 8, 11 and 24 of the Return Directive 2008/115/EC) and should be further strengthened by the reform.

From a different point of view, the principle of *non-refoulement* forms a formidable barrier for a state's free discretion in migration matters that is claimed by states in international fora. (This is, in itself, a kind of paradox. States claim to have absolute discretion. Yet many would like to take back control of immigration matters from the EU. By doing so they do not realise states are considerably limited by another set of obligations – respect for human rights.) The fact states are bound by this principle with little leeway for discretion makes it a suitable object for analysing the effectiveness of the return procedure, focusing on how a state can ensure the smooth conduct of administrative expulsion proceedings in a way that would at the same time fulfil the *non-refoulement* guarantee. In part 1 of the article, we outline the normative content of the said principle (1.1) and follow its "absolute" character and its implication for expulsion proceedings (1.2). We argue that fully executing the principle of *non-refoulement* in administrative practice depends not only on its implementation in the legal system (part 2), but it might also be circumvented by the institutional arrangement of authorities that should guarantee its application in individual cases and by the regulatory design of administrative proceedings (part 3). We conduct a case study of the Czech Republic, relying on its national law and national courts' case-law. Due to EU-wide legal bases, some of the legal issues bear cross-border relevance. However, we include a comparative standpoint and try to assess whether German law suffers from the same shortcomings, or if it might offer some inspiration (part 4).

1. NON-REFOULEMENT IN EXPULSION CASES: CORE BACKSTOP

1.1. NON-REFOULEMENT AS AN INTERNATIONAL HUMAN RIGHTS CONCEPT

In this part of the paper, we attempt to outline the relevance and content of the *non-refoulement* principle, as developed in the case-law of the European Court of Human Rights (ECtHR) by interpreting the European Convention on Human Rights (ECHR). The concept of *non-refoulement* is linked to case-law dealing with expulsion of aliens. This term needs further explanation. When using the term expulsion in this part of the paper, we follow a definition of the ECtHR embedded in its case-law and adopted on the basis of the Explanatory Report to Protocol no. 7 to the ECHR: expulsion is "any measure compelling the departure of an alien from the territory but does not include extradition" (European Treaty Series no 117). However, it is important to bear in mind that the ECtHR's definition is far reaching and autonomous, independent of national definitions; its aim is to cover return procedures of many kinds, following a range of proceedings (See e.g. *M.A. and others v. Lithuania*, no. 59793/17, 11 December 2018). Yet, apart from this general discussion, we limit ourselves to expulsion in the narrower meaning anchored in Czech national law: by expulsion we mean an act of voluntary departure or, more often, forced removal of an alien and an entry ban for a specified period that is based on an administrative decision on return issued in administrative proceedings. In other words, the narrower meaning of expulsion refers to the Return Directive (2008/115/EC).

The ECtHR adopted an attitude of deference to states' migration policies in expulsion cases. "A state is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there" (*Üner v. Netherlands*, no. 46410/99, 18 October 2006, § 54). This approach is mirrored in other case-law of international courts, case-law of national courts and doctrine (see ICJ's *Liechtenstein v. Guatemala*, Read, J., dissenting, pp. 46-47; Czech Constitutional Court [CCC] Ruling no. Pl. ÚS 10/08, 12 May 2005).[6] Despite the fact that the entry, stay and departure (termination of stay) of aliens remains a matter of a state's jurisdiction, or the exercise of its free, sovereign powers, it seems impossible to overestimate the impact of the "subject to its treaty obligation" condition. States are still obliged to secure the full range of ECHR rights and freedoms to everyone under their jurisdiction. As the body of the ECtHR case-law has shown, the expulsion of an individual might be blocked if it breaches a right or freedom protected under the ECHR. That could occur both in the country that expels, as well as in the country of return. However, not all ECHR rights and freedoms have the intrinsic, fundamental value for democratic society that leads to the prohibition of *refoulement*. In fact, the ECtHR takes a pragmatic approach declaring that states do not have a duty to provide the ECHR rights to everyone, making use of other provisions in relation to *refoulement* very scarce.[7]

A prominent ECHR provision to be considered when assessing compliance of expulsion with the human rights obligation is found in Article 3, or respectively Articles 2 and 3 considered together. Starting with the ruling *Soering v. UK*, the ECtHR takes the stance that *extradition* "may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country" (*Soering v. UK*, no. 14038/88, 7 July 1989, § 91). Therefore, in order to prevent liability for breach of Art. 3 in the receiving state, states must assess the conditions in the receiving country against Art. 3 of the ECHR, and allow for extradition only when no real risk of a breach exists. The applicability of the same approach for cases concerning expulsion was confirmed in *Cruz Varas v. Sweden* (no. 15576/89, 20 March 1991) and *Vilvarajah v. UK* (13163/87, 30 October 1991). Hence, the ECHR, to a large extent, echoes Art. 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UNCAT; refers only to *torture* as a reason against *refoulement*), as well as Art. 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the Human Rights Committee (e. g. *A. B. v. Canada*, no. 2387/2014, 16 March 2017). The scope of the "*expanded non-refoulement"* principle[8] based on these instruments of international human rights law does differ in scope and applicability from the principle of *non-refoulement* based on international refugee law, in particular Art. 33 of the Convention Relating to the Status of Refugees.[9]

A state has an obligation not to expel when there are substantial grounds to believe that an individual, if deported, would face a real risk of treatment contrary to Art. 3 of the ECHR. To qualify specific treatment as ill-treatment contrary to Art. 3 of the ECHR, it must attain a minimum level of severity as described by ECtHR case-law (*F.G. v. Sweden*, no. 43611/11, 23 March 2016, §§ 111–127). Such assessment is relative and takes into consideration all the individual circumstances of the case (see *Tarakhel v. Switzerland*, no. 29217/12, or cf. *R.H. v. Sweden,* no. 4601/14, and *K.A.B. v. Sweden*, no. 886/11). The real risk of breach could emanate both from the individual situation of the respective person, from the fact that they belong to a particular vulnerable group, or from the general situation of violence in the receiving country. However, only cases of "extreme general violence" would give rise to an Art. 3 of the ECHR issue (see *Sufi and Elmi v. UK*, no. 8319/07 and 11449/07, 28 June 2011). A wide body of case-law has developed what qualifies as ill-treatment (*X v. Switzerland*, no. 16744/14, *J.K. and others v. Sweden*, no. 59166/12, *S.K. v. Russia*, no. 52722/15, *A.L. (X.W.) v. Russia*, no. 44095/14, *Paposhvili v. Belgium*, no. 41738/10, and *A.S. v. Switzerland,* no. 39350/13). Despite referring to Art. 3 of

the ECHR as a whole, the ECtHR has not given an answer to whether all three "stages" of ill-treatment, i.e. torture, inhuman treatment and degrading treatment, have the equal effect of creating an obstacle to expulsion; it is presumed that mere degrading treatment would not prevent expulsion.[10] The question of substantial grounds requires rigorous, *ex nunc* assessment, and the state authorities have the obligation to assess information known to them of their own volition (*ex officio).*

1.2. ABSOLUTE OBLIGATION V. DISCRETION OF STATE AUTHORITIES

The principle that no one should be extradited, removed or made to leave for a country in which they would face risk of treatment contrary to Art. 3 of the ECHR does not allow for any exceptions or derogation in the time of national emergency. It "enshrines one of the fundamental values of the democratic societies" (*Soering v. UK,* § 88). The Court insists that "it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration, or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3" (*Trabelsi v. Belgium*, no. 140/10, 4 September 2014, § 118). That means the so-called absolute character of Art. 3 of the ECHR fully applies to the principle of *non-refoulement* as a derived Art. 3 right. The ECtHR emphasised this fact in the *Soering* judgment, and since then, despite being "acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence", it repeats the same position (see *X v. Netherlands*, no. 14319/17, 10 July 2018, § 71). In the Court's view, the ECHR does not allow states to somehow "measure" competing rights and interests when Art. 3 of the ECHR is on the scale – there is no margin of appreciation. The ECtHR has confirmed such conclusion in a number of its judgments: we can trace it back to the landmark decision *Chahal v. UK* (no. 22414/93, 15 November 1996), *Saadi v. Italy* (37201/06, 28 February 2008), and up to relatively recent decisions *X v. Sweden* (no. 36417/16), *X v. Netherlands* (no. 14319/17) and *M. A. v. France* (no. 9373/15). Naturally, such an uncompromising approach of the Court is not applauded by the State parties to the ECHR in times when the national security narrative dominates political discussion.

Thus, the practical effect of the absolute character of the *non-refoulement* principle should be that an individual is completely immune from expulsion that would put him or her at risk of a breach of Art. 3 of the ECHR. States, on the other hand, have a positive obligation to ensure they respect that freedom by exercising their powers concerning the entry, stay and termination of stay of aliens with due regard to the material limit of *non-refoulement*. Therefore, states have to ensure procedures entailing the adequate scrutiny of permissibility of expulsion under Art. 3 of the ECHR in light of the respective alien's individual circumstances. Failing to ensure a proper procedural arrangement ensuring rigorous scrutiny would amount to a breach of Art. 3 of the ECHR (*X v. Sweden*, no. 36417/16, 9 January 2018, or *Amerkhanov v. Turkey*, no. 16026/12, 5 June 2018). Moreover, Art. 1 of Protocol 7 to the ECHR enshrines procedural guarantees for the expulsion of regular migrants, and Art. 3 in connection with Art. 13 secures the right to effective remedy in all expulsion cases. Thereby, states' sovereign powers are substantially limited by their obligation to respect human rights.

What consequences does the absolute character of Art. 3 of the ECHR on *non-refoulement* have for the regulation concerning expulsions and the use of discretion within it? Human rights obligations prescribe the issue (risk of breach of Art. 3 of the ECHR upon return), a course of action (to establish if there is such a risk) and outcome (not to expel if there are substantial grounds to believe serious risk exists) of any expulsion proceedings in an unequivocal manner. That rules out the possibility of entrusting the relevant state authority with discretion.[11] Even if it can make its own consideration and judgment about many questions related to the expulsion proceedings or its outcome (e.g. whether to initiate the

proceedings, whether the expulsion would be proportionate to interference with the right to private and family life, how long the entry ban should be, if there are compelling reasons to lift the entry ban because of its unduly harsh impact), the question of the risk of *refoulement* lies beyond any margin of discretion. The law has to be written in a way that makes the principle of *non-refoulement* a clear obligation to be fulfilled, without exception.

Having said that, the practical effects of "absolute prohibition of refoulement" could fall short of the promise of always securing protection. Firstly, "absoluteness" relates to a concept that is, essentially, a court interpretation of what the terms "torture, inhuman and degrading treatment" refer to. These terms are open definitions; from a public administration perspective – "indefinite terms" with all their features, implications, but also specific limits, as mentioned below; without the binding interpretation of the ECtHR, they remain unclear and open to be construed in different ways, ascribed to treatment of different severity. In fact, the ECtHR's margin for discretion of what falls within and outside the scope of Art. 3 of the ECHR makes *non-refoulement* a relative concept over time. This follows from the evolutive interpretation of the ECHR ("a living instrument"), a concept that was adopted by the EctHR and used especially in connection with the qualification of treatment as contrary to Art. 3 of the ECHR (*Selmouni v. France*, no. 25803/94, 28 July 1999, § 101). The ECtHR admitted there is an evolving standard of what is seen as torture, inhuman or degrading treatment in society, which has to be reflected in the legal interpretation of the terms. Therefore, what is now regarded as a breach of Art. 3 of the ECHR might have been acceptable treatment a few decades ago. A prime example of these changes is the willingness to take into account the situation of general violence, such as civil wars, as relevant for the risk of *refoulement* assessment. The court moved from a position that mere general violence would not suffice unless the applicants are able to show some distinguishing features making them more vulnerable to violence (*Vilvarajah v. UK*, § 111), to a more "humanitarian" approach that accepts that in most extreme cases, no "higher vulnerability" needs to be shown (*N.A. v. UK*, no. 25904/07, 17 July 2008, §§ 114–117, as confirmed in *Sufi and Elmi v. UK*, §§ 217–219). Additionally, the ECtHR is not the only international body interpreting these terms, so states could be under another international obligation to follow a possibly different interpretation. In the European context, the case-law of the Court of Justice of the EU is naturally of prime importance.

The previous argument implies that the concept is relative over time, but we might still argue that at a specific point in time it provides absolute protection in relation to its current interpretation. However, there is another issue that could weaken it. ECtHR case-law provided for an interpretation of treatment contrary to Art. 3 of the ECHR on a case-by-case basis. It is up to the national authorities who conduct the administrative proceedings, or later judicial proceedings, to establish the facts of the case and qualify them against Art. 3 as interpreted by the ECtHR. They themselves qualify what counts as ill-treatment. Therefore, despite having the common reference standard in ECtHR case-law, practices could diverge. Such a possibility (or potential risk?), in fact, lies in the very nature and substance of indefinite terms. Even practice concerning "smaller" issues, like the extent to which proven personal experience of ill-treatment suggests future ill-treatment or a standard of proof could thus play a key role in the overall risk assessment. In summary, it is possible to reflect on the ECHR standard of what is understood as ill-treatment, and yet come to an opposite outcome during the risk examination.

2. NATIONAL IMPLEMENTATION OF THE PRINCIPLE OF NON-REFOULEMENT: PROGRESSIVE ALIGNMENT OF NATIONAL REGULATION TO HUMAN RIGHTS STANDARDS

Each of the statements above hides a number of problematic legal issues that would deserve thorough

analysis. For the purposes of this paper, however, let us now outline how the requirement of the *non-refoulement* principle is implemented in a specific national legal system (Czech law) that is to be considered further in the procedural effectiveness analysis.

An EU Member State's national migration law is, in fact, the implementation of EU secondary law from the field of the common EU asylum and migration policy (Art. 77–80 Treaty on the Functioning of the EU). EU law adopts the *non-refoulement* principle in its primary law via Art. 19 (2) of the Charter of Fundamental Rights of the EU. Besides this constitutional guarantee, it finds its expression in secondary law, more specifically, in the Returns Directive (see i.a. Recital 24 and Art. 5). Its national implementation in Czech law could be found in Act No. 326/1999 on the residence of foreigners (hereinafter "Act No. 326/1999").

The Czech stipulation of *non-refoulement* underwent significant changes over time, reasoned by the progressive harmonisation of the pre-1989 regulatory framework to international human rights' obligations and EC/EU legislation. Comparing three statutes regulating expulsions effectively in the last three decades, it is obvious that migration issues have become much more complex. Starting with Act No. 68/1965, effective until 1992, we see the regulation falling short of fundamental human rights standards (the whole statute contains only nine provisions in total, whereas the current law spans well over 200 provisions), while Act No. 123/1992, effective until 1999, did include the "obstacles to expulsion" provision. That was a significant yet insufficient development. It precluded expulsion in cases where an individual's life or personal liberty would be at risk for specified reasons (race, religion, ethnicity, belonging to a particular social group or political opinion). Nevertheless, it allowed exceptions when "an alien is a threat to national security or committed an egregious crime", therefore clearly failing the ECtHR standards: the court does not make room for any "specific reasons for risk", whereas other sources of risk would be irrelevant. The provision is also too restrictive when referring only to risks to right to life (Art. 2 ECHR) and personal liberty (Art. 5 ECHR).

The *non-refoulement* provisions in the current statute – Act No. 326/1999 – were amended three times; the new act itself and its first amendment widened the scope of *non-refoulement*. Most importantly, its language from the beginning included a reference to treatment contrary to Art. 3 of the ECHR, and even a reference to a war conflict (as a situation of general violence), exceeding the ECtHR requirements at the time (cf. the ECtHR's ruling in *Sufi and Elmi v. UK*). It kept the exception clause, but modified it in a way that made it relative, so in effect, not undermining the absolute character of the provision.[12] The first amendment (2006) aligned the applied terminology to the (second generation of) EU secondary migration law (using the language of "serious harm" with an exhaustive list of what qualifies as this) and also ECtHR case-law ("substantial grounds to believe there is serious risk" instead of the previous language "would be endangered") (§ 179 of Act No. 326/1999, as amended by Act No. 136/2006). The second amendment, on the other hand, elaborated solely on the grounds for use of the exception clause. Finally, from August 2019, the provision refers directly to "real danger" which leads to "return contrary to Art. 3 of the ECHR" (§ 179 of Act No. 326/1999, as amended by Act No. 176/2019).[13]

Overall, we see that the principle of *non-refoulement* has a regulatory basis in Czech law that eventually came into compliance with ECtHR case law. Now, it positively *is* in compliance with Art. 3 of the ECHR, since the law only refers to that provision as such. A closer look, however, reveals that the grounds for qualifying as "serious harm" that prevented authorities from removing a person were defined as open definition terms. The terms needed to be interpreted, and the specific facts of the case needed to be assessed against this interpretation in order to decide if they are to be qualified as falling within the scope of "serious harm". The situation is very similar even under the current wording, which eventually leads to open definition terms of "torture, inhuman and degrading treatment". Therefore, the state authorities have to deal with the terms in line with ECtHR and CJEU case law, which means the individual officers and judges have to bear in mind that they

are dealing with essentially European (ECHR and EU), and not national concepts. Moreover, even if they properly reflect the European nature of the national law provisions, there is always room for misinterpretation. That could result not only from a "different legal opinion", but also a mistake.

Let us briefly mention one example of such errors from the case-law of the Czech Supreme Administrative Court (SAC). The case (no. 7 Azs 85/2016, 17 August 2016) concerned an applicant who claimed his expulsion to Libya could not be enforced because of his medical condition. After kidney failure, he attended dialysis a few times a week and was on a kidney transplant waiting list. The Supreme Administrative Court overruled the court of the first instance decision that a medical condition could not be taken into account at that stage of the proceedings; for context, the court of first instance merely stated it was too late to raise the issue. The Supreme Administrative Court, however, did not consider that a serious decline in health due to lack of medical care could fall within the scope of "serious harm" caused by "inhuman treatment", thereby creating an obstacle to expulsion. Instead, it ruled that the claim should be considered during the examination of proportionality of interference with the right to private life (Art. 8 of the ECHR). In summary, the court provided protection for the fundamental rights of the applicant (the expulsion would be enforceable only if necessary in a democratic society, according to Art. 8 of the ECHR), but it stripped the applicant of the "absolute protection" of Art. 3 of the ECHR and it did not explain why the suffering the applicant could face would not reach the threshold of Art. 3 of the ECHR (see *Paposhvili v. Belgium*, no. 41738/10, 13 December 2016).

3. *NON-REFOULEMENT* ENFORCEMENT: PROCEDURAL AND INSTITUTIONAL ARRANGEMENT MATTERS

In this part, we argue that despite having flawless legislation on the material aspects, *non-refoulement* fulfilment depends heavily on adequate procedural and institutional arrangements of the expulsion proceedings. We identified two relatively separate, but closely inter-connected issues in the Czech regulation of expulsion that we consider potentially threatening to the proper conduct and outcome of expulsion proceedings. Firstly, the more general question of who conducts the examination and how its results are reflected in the final decision on expulsion. Secondly, a more specific question of waiving the right to effective remedy and its impact on proper examination.

3.1. WHO MAKES THE CALL – AND HOW?

When we look at the legislative history of answers to the questions in the headline, we see the matter was repeatedly at the centre of attention for the government, the Parliament and the Constitutional Court. It was constantly transformed from very weak, almost absent procedural safeguards in search of the most cost-effective arrangement. The key is what we consider to be effective.

In the current state of affairs, decisions on expulsion are issued in administrative procedures conducted by the Alien Police inspectorate (an integral part of the state police forces). The fact that proceedings are conducted by the police might have some rationale – it is the police who work in the field, make the initial examination on the regularity of the immigration status of an alien, have the power to detain an alien pending a decision on expulsion and actual removal, and if an enforceable decision is issued, the police perform the forced removals. But in order to conduct expulsion proceedings as a whole, the Alien Police Inspectorate also has to examine the risk of *refoulement*.

That would require creating a trained workforce with specific expertise as well as ensuring the flow of recent information about foreign countries relevant for risk assessment. However, as the administrative courts repeatedly concluded, the Alien Police Inspectorate "is not in the position to conduct

a thorough assessment of the risk of breach of Art. 3 of the ECHR were the person to be removed" (see SAC no. 4 Azs 66/2018, 23 January 2019). Act No. 326/1999 outsources the assessment of the risk of *refoulement* by transferring the duty of performing an adequate examination to a different body, the Ministry of the Interior, which has a number of experts working on other migration-related issues, especially international protection. Put simply, the police are obliged to ask the Ministry, in every individual case, whether there is any relevant risk. If the answer is affirmative, the expulsion cannot go forward. The Ministry's answer to the request takes the form of a so-called binding opinion: an act that is not an administrative decision *per se* but is decisive for the actual administrative decision (on the rights and duties of an individual), because its result cannot be questioned by the body which issues the final decision.

Scrutiny of the Ministry is of key importance, since no other body performs a sufficiently deep examination of the same issue. The depth of the scrutiny is essentially the same as when assessing an international protection request, even though the law makes a clear distinction between granting international protection and finding that there are obstacles to expulsion when it comes to legal consequences (see Ruling of the CCC no. IV.ÚS 553/06, 30 January 2007, upholding the decision not to grant asylum despite the fact the applicant showed there were barriers to his expulsion due to *non-refoulement*). The obligation to perform a risk assessment could not be waived by arguing that the alien should have applied for international protection (SAC no. 9 Azs 28/2016, 14 April 2016).

A closer look from the procedural perspective, provided by research of the Public Defender of Rights (Czech ombudsperson; report no. 6610/2015/VOP/HL, 30 August 2016) conducted in 2015/2016, revealed several interesting features of the procedural and institutional arrangements that raised some issues concerning proper examination. We included her findings in order to provide a vivid picture of the possible disparities between rules and their implementation, even though we have to stress they do not necessarily depict the current situation.

It is up to the Ministry to conduct a rigorous examination of its own volition; the alien does not bear any burden of proof or burden of claim (SAC no. 5 Azs 3/2017, 29 November 2017). Nevertheless, obtaining information about personal circumstances is vital. The Defender's research showed that during expulsion proceedings, individuals whose own risks were being evaluated were never interviewed directly by officials of the Ministry of the Interior. The Ministry confirmed the only material they usually relied on was an interrogation report from the Alien Police Inspectorate (report of the Public Defender of Rights, p. 33). All relevant information on personal circumstances is obtained by officers of the Alien Police Inspectorate, who, on the other hand, might miss some parts of the story. Then, information is shared with the Ministry (the file stays at the Alien Police Inspectorate). Therefore, if a piece of information does not look important enough to the police officer, it might not reach the ministry official performing the assessment.[14]

Surprisingly, the expulsion order could even be issued in cases where the binding opinion declared that there are obstacles to the expulsion. In such a case, the expulsion decision does not include any deadline for return. So there are decisions on the expulsion of aliens who were found to be in real danger of persecution or torture. Such a decision is not enforceable in practice, but still binding. If the situation changes and a return is no longer impossible, the Ministry can issue a new binding opinion and the Alien Police Inspectorate issues a new decision laying down a deadline for return. Courts recognised that such unenforceable decisions on expulsion could cause significant uncertainty and stress, possibly resulting in disproportionate interference with private and family life (in breach of Art. 8 ECHR) of the foreigner.

The fact that the assessment takes place without the direct involvement of the persons in question must not affect their right to effective remedy against a flawed outcome. However, the transparency of the whole process is diminished to some extent. The binding opinion is not an administrative decision, so there is no appeal. Its content

could be challenged with the final decision on expulsion; after an unsuccessful appeal, the decision could be challenged by action brought before the court, invoking arguments against the binding opinion (its content, relevance, reliability) (SAC no. 6 Azs 114/2015, 27 January 2016). Therefore, the courts require the binding opinions to be reasoned in the way an administrative decision would be, so that one can learn which facts were taken into account and why the Ministry reached its conclusion (ibid.). The opinion should be supported by evidentiary materials accessible to the alien and to the court (ibid.).

Interestingly, the current regulation of access to effective remedy is a great improvement from the situation under earlier legislation. Previously, the law did not contain any explicit provision on what the procedural outcome of the assessment was; there was no requirement to issue a separate decision. Later, the law required the decision on expulsion to state explicitly whether the obstacles to removal exist or not, so that such declaration could be directly challenged on appeal (Act no. 326/1999, as amended by Act no. 428/2005). The most restrictive was the situation under Act No. 123/1992. which provided for *no remedy* if the state completely neglected to make any examination (CCC no. Pl. ÚS 27/97, 26 May 1998). Such a situation amounted to a clear breach of Art. 3 in conjunction with Art. 13 of the ECHR.

Access to effective remedy seems to be crucial because of repeated complaints about the quality of the Ministry's assessment. Courts repeatedly reminded the Ministry about the importance of making the assessment on the basis of materials that are relevant to the issue of the proceedings, come from multiple and reliable sources, and reflect complete individual circumstances as well as recent developments (e.g. rulings of the SAC no. 1 Azs 105/2008, 4 February 2009, and no. 6 Azs 114/2015, 27 January 2016). The SAC expressly criticised situations when an alien was not even questioned properly by the Alien Police Inspectorate, so the assessment missed important facts and led to an incorrect outcome.[15] Courts also stressed the assessment must not be outdated. But the most damning critique of the Ministry's performance was expressed by the Public Defender of Rights, based on her research of a sample of 35 administrative expulsion decisions in 2015/2016.

Concerning material reflecting the individual circumstances of the person concerned, the Defender criticised in her report that the alien is sometimes asked just a simple question "Are you aware of any obstacles preventing you from leaving the Czech Republic?", which has a fundamentally different meaning than asking about obstacles of return to a specific country, usually a country the foreigner had fled. Other times, the Alien Police Inspectorate did not provide a full transcript of information provided by an interrogated foreigner. In a number of the Ministry's opinions concerning foreigners from Somalia, Afghanistan, Iraq and Syria (countries that would require extra rigorous scrutiny at the time), the Defender found that the Ministry had not made its conclusion on a sufficiently factual basis. The Defender even expressed her suspicion that two foreigners had been expelled after "summary proceedings" not distinguishing sufficiently between their individual cases, raising the issue of possible collective expulsion (the Report, p. 63).

Most importantly, the Research showed that the Ministry fulfilled its duty to issue binding opinions "without any delay" very well, as required by law. Perhaps too well; in 33 out of 34 cases, the Ministry issued the binding opinion the very same day (the Report, p. 60). The Defender notes the sample included foreigners from *prima facie* problematic countries, who provided specific information on the danger they would likely have faced upon return (ibid.). She logically suggested that it was impossible to comprehensively study all relevant material (up to dozens of pages of reports), examine the reliability of claims made by the foreigner, and elaborate a reasoned opinion on the very same day, sometimes within less than 30 minutes. The Defender's conclusions were acknowledged by the Constitutional Court in ruling no. I.ÚS 630/16 of 29 November 2016, where the court *obiter dictum* stated the binding opinion in that case *prima facie* failed the required rigorous scrutiny, contrary to Art. 2 and 3 of the ECHR, reminding that "the re-

quirement to issue a binding opinion without delay does not relieve the Ministry of the obligation to respect fundamental rights and freedoms".

3.2. RIGHT TO EFFECTIVE REMEDY: A PROCEDURAL SAFEGUARD TOO EASY TO WAIVE

Despite reasons to treat risk of *refoulement* evaluations carefully, one might claim that provided there is an effective remedy, flawed administrative decisions could be reversed either on appeal or based on a motion to an administrative court. However, there is another controversy that showed, in some cases, the right to effective remedy might be illusory. It concerns cases of foreigners who waived their right to file an administrative appeal against a decision on expulsion (an appeal is a precondition for a court action to quash an administrative decision). The possibility to waive one's right to effective remedy does not have to be problematic *per se*; but given its serious consequences, it is to be used only when one positively knows what he or she is doing and with what consequences, acting out of one's free, serious and error-free will.

Most significantly, the issue was raised in a series of proceedings, in which dozens of foreigners (illegal workers) were expelled in proceedings lasting only one or few days. Relying on SAC judgments in those cases (i.a. no. 2 Azs 340/2017, 14 August 2018), we might conclude that despite *formally* meeting minimum requirements for a waiver of the right to appeal, the court grew suspicious of what was the true course of events. It started to distinguish between cases on the basis of individual circumstances. We do not have to assume the police officers used threats or duress, even though the possibility of such failings could never be ruled out. Let us assume a less serious conclusion: the proceedings as a whole are not always conducted in a way that would allow foreigners to fully enjoy their rights, including the right to effective remedy. Such conclusion becomes worrisome when we connect it with the previous problem, freedom from treatment contrary to Art. 3 of the ECHR, which arises from an unsatisfactory quality of risk assessment concerning *refoulement*.

Imagine a case that seems to be clear-cut. It was established that there is no permit of stay, the facts concerning personal circumstances are gathered and transferred to the Ministry for assessment. The reply comes within a few hours. The decision on expulsion could be completed within the next few hours. The foreigner could be detained (up to 48 hours just on the basis of probable irregular status without any formal proceedings or decision, according to Act no. 273/2008). Access to legal aid is poor, especially for detained foreigners (CCC no. I. ÚS 630/16, 29 November 2016). The pressure upon the foreigner must be severe, and as they are informed about the decision on expulsion, some forms are signed. Only once it is over does the individual look for legal advice and means to challenge the decision. Now, let us imagine the worst-case scenario. The foreigner is in real danger of torture or inhuman treatment but made statements that were too general and were not properly examined. They end up facing expulsion, having no remedy to prevent it, apart from trying to institute another set of proceedings, such as by applying for international protection.

3.3. PARALLEL EXPULSION AND ASYLUM PROCEEDINGS: DOUBLE THE WORK

Implementation reports concerning the current EU legislation suggested that one of the major obstacles EU-wide is insufficient co-ordination or the diminished functional link between the asylum system and the management of forced returns [cf. Explanatory memorandum to Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 12 September 2018]. The Czech legal situation is one such case.

The risk of *refoulement* is evaluated separately in both sets of separate proceedings, conducted by different administrative bodies (Police and Ministry of Interior). Their actual coordination (not really cooperation) depends on the exact moment when a foreigner subject to expulsion proceedings applies for international protection. When the application is made during or after the proceedings, it is usually seen as dilatory tactics, but the enforcement of the expulsion decision depends on the outcome of the latter proceedings, which includes a separate *refoulement* risk assessment.

Additionally, the fact the expulsion decision is unenforceable due to the conclusion of the binding opinion on the existing risk of *refoulement* does not automatically translate into international protection recognition. A separate set of proceedings could be started by the applicant, but only within a strict time limit of seven days. Failing to keep to this deadline or being denied status of international protection, the foreigner is left with the lowest permit to stay ("toleration of stay").

4. A LOOK ABROAD: SAME ISSUES, DIFFERENT SOLUTIONS?

Section 50 of the German Law on the Residence of Aliens imposes on all foreigners who do not have a residence permit, or have lost it, the duty to leave the territory of the Federal Republic of Germany (*die Ausreisepflicht*).[16] This obligation may be an immediate or a duty obligation, or a deadline may be set for its fulfilment. To impose or enforce an administrative expulsion, the obligation for the foreigner to leave the Federal Republic of Germany must be enforceable. This obligation is enforceable for example if the foreigner enters the territory of Germany illegally, if they do not apply for the relevant residence permit, or if the application for a residence permit is rejected. Thus, German legislature primarily assumes that foreigners who are in Germany illegally can leave the territory voluntarily, without the need for an administrative decision ordering them to do so, or perhaps even without its enforcement.[17]

The German regulation is based on the premise of the general obligation of a foreigner to leave Germany and allows foreigners to remain there only if they fulfil the prerequisites for staying in Germany.[18] Administrative expulsion thus takes the form of an individual administrative act in terms of the forms of public administration activity, and in some cases, it can be described as an "execution act" through which a statutory duty is performed. In our opinion, the German legislation points more clearly to the consequences of illegal residence. For example, it is positive as regards the German legislation that issuing an administrative expulsion (and the related negative consequences of the ban on entry into the territory) is not necessary in the case of an alien whose residence permit has expired and who, at the same time, voluntarily leaves Germany. In other words, not all foreigners found to be staying illegally are necessarily expelled (as in the Czech Republic), but there is leeway for the foreigners to fulfil their obligation voluntarily, and thus avoid the negative consequences associated with administrative expulsion (ibid.). Such legal provision enables a more appropriate response to "negligent" and minor infractions (breaches of law) of foreigners. In the Czech Republic, such an alien cannot avoid an administrative expulsion relating to the prohibition of residence, which, as we have indicated above, might not always be appropriate and proportionate to the misconduct.

In terms of the topic of this paper, the key finding is that the German law on the residence of foreigners directly draws attention to the impossibility of expelling a foreigner when it would violate their rights guaranteed by the ECHR, or the Convention Relating to the Status of Refugees.[19] Thus, the German authorities cannot expel a person who, in the country to which he is to be expelled, can suffer serious harm or degrading conduct. Interesting, and at the same time different, is the way to ensure that such expulsion does not occur.

In order to ensure compliance with the principle of *non-refoulement*, the Act on the Residence of Aliens provides for two ways. Firstly, if the alien requests not to be expelled on the grounds that the principle of *non-refoulement* may be violated *because* they qualify as a refugee, the matter should

be examined by the Federal Office for Migration and Refugees in a separate asylum procedure.[20] The assessment of the "refugee story" will thus be taken over by the specialised asylum authority. From the Czech point of view, this regulation is interesting in that the threat of granting administrative expulsion may lead to international protection proceedings, which in the Czech Republic is often seen merely as an obstructive means of preventing administrative expulsion. In Germany, on the contrary, the law expressly foresees such a procedure (§ 60 par. 1 Law on the Residence of Aliens). A significant positive aspect of such an arrangement is that in handling "refugee objections" the matter is taken over by a specialised body, which can consistently assess relevant facts in personal contact with a foreigner in a separate procedure and not restrict its activity to issuing (more or less a regular file) of the binding opinion.

Furthermore, the German Act on the Residence of Aliens excludes the expulsion of foreigners if this would interfere with their rights guaranteed by the ECHR. This covers situations where a foreigner does not necessarily claim to be a refugee, but on the other hand there are other reasons to prevent their expulsion.[21] Compared to the Czech Republic, the assessment of whether the principle of *non-refoulement* guaranteed by the ECHR is not violated is assessed directly by the administrative body that decides on the matter. Such an approach seems both pragmatic and effective. The decision is taken by the authority that has the most information on the matter, has a file available, and is in contact with the foreigner. By contrast, in the Czech legislation the Ministry of the Interior expresses its opinion on the issue by means of a binding opinion, which, although in possession of deeper professional knowledge, it nevertheless decides without proven documentation and regularly in a more formal way. We believe that the German legislation could be an inspiration for the Czech Republic, as the Czech Police could undoubtedly have the necessary information (access to the necessary databases, etc.), and thus assess the question separately and in more detail, taking into account the circumstances of the case. However, it is evident that in view of previous criticism from the courts, fundamental organisational changes would have to take place, including personnel and professional reinforcement of the Police of the Czech Republic itself.

5. CONCLUSION: IN BETWEEN (BUREAUCRATIC) EFFECTIVENESS AND DUE PROTECTION

In this paper, we wanted to highlight how central the principle of *non-refoulement* is to expulsion proceedings. It determines its outcome when substantial reasons are found to believe an individual would face serious risk of torture or inhuman treatment contrary to Art. 3 of the ECHR, or in extreme cases would face possible death (in breach of Art. 2 of the ECHR). It also shapes the procedural design of the proceedings, since states have to ensure a procedure that ensures the principle is observed. It has to be observed in all circumstances, as prescribed by the absolute character of Art. 3 of the ECHR.

However, we find issues that make the absolute character a more relative one. One of them is that terms such as "torture, inhuman or degrading treatment" are open to the interpretation of the ECtHR, and then to interpretation and application by national authorities. The latter could be less sensitive to the meaning or importance of *non-refoulement*, or could simply err in their judgment. We used the example of the Czech Republic to show that despite having a regulation that fully complies with the ECHR and EU law when it comes to the obligation to respect *non-refoulement*, the procedural setting is of prime importance for its real enforcement. The Czech procedural and institutional arrangements themselves, while maybe not optimal, are not inherently flawed either. We tried to depict that what matters is how the law is turned into practice. The experience stemming from national courts' case-law and The Public Defender of Rights' research suggest the true fulfilment of the obligation in many cases relies heavily on the conduct of individual officers who handle the case, and their commitment. It again supports the vision that training and

professional ethics must work hand-in-hand, even where those implementing policy/law have little margin of discretion to guide their conduct.

When speaking of effectiveness, often we only consider one criterion: *time*. Of course, time is of the essence; unreasonably lengthy proceedings conducted without due care leading to delays would not meet the standards of good administration. Still, acting *speedily* must not equate to acting *hastily*. And both opinions on risk of serious harm formed within a few hours as well as a focus on "shortening" the procedural pathway by avoiding appellate review suggest taking a shortcut at the expense of rights of the individuals concerned. This brings us back to the recent emphasis on control and safety in immigration issues. A focus on effective return procedures is commonly understood to be one of the challenging issues the current system is facing. Nevertheless, it would be a mistake to welcome every development that leads to shorter procedures on forced returns. Common sense dictates there must be a link between time spent with examining the risk of *refoulement* and the achievable quality of the assessment. Effectiveness should not be measured without regard to fundamental rights and freedoms.

Notes

1 The research is funded by Masaryk University; project MUNI/A/1337/2018, Správní vyhoštění s důrazem na správní uvážení a neurčité právní pojmy (Administrative expulsion with emphasis on administrative discretion and undefined legal terms).

2 Brubaker, R. (2017). Why Populism? *Theory and Society, 46*(5), 357–385. https://doi.org/10.1007/s11186-017-9301-7

3 Czech politics is an illustrative example. Tomio Okamura, a leader of the far-right Czech party SPD (scoring 10.64% in 2017 Parliamentary elections), built his political programme around "zero tolerance for migration" and "complete closure of EU "borders", supporting "Czexit" as the only way to prevent the "dictate of Brussels" which "imports terrorists to the Czech Republic". Based on Okamura's Facebook posts. Compare language used by centrist populist ANO party ("I insist, we don't want refugees in Czechia", A. Babiš, 2016), conservative right ODS ("We accept those refugees who are able to integrate fully", M. Kupka, 2015) or social democrat CSSD ("Irregular migrants need to be detained, that is the way forward for Italy", M. Chovanec, at the time Minister of Interior, 2017).

4 See significant efforts of the Commission since 2015 to step up effectiveness of return procedures that it deems unsatisfactorily low (in 2018, 150,000 returns were performed out of 478,000 orders to leave, EU-wide; according to Eurostat figures) despite being "an essential component of the European Agenda on Migration" (COM(2015) 240 final). To this end, see Commission Communication on the Common Return Handbook (September 2017, C(2017) 6505), Commission Recommendation on making returns more effective when implementing Directive 2008/115/EC of the European Parliament and of the Council (March 2017, C(2017) 1600 final) and Proposal for a directive of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) as of September 2018 (COM/2018/634 final).

5 According to polls, 63% of the Czech population would accept no refugees fleeing military conflict whatsoever, with 84% seeing them as major threat to European safety. Data of CVVM from May 2019. https://cvvm.soc.cas.cz/en/press-releases/political/international-relations/4971-attitude-of-czech-public-to-accepting-of-refugees-may-2019. Accessed 23 July 2019

6 Goodwin-Gill, G. (1978). *International law and movement of persons between states*. Clarendon Press. pp. 3-4.

7 den Heijer, M. (2008). Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights. *European Journal of Migration and Law*, *10*(3), 277-314. https://doi.org/10.1163/157181608X338171; Battjes, H. (2009). The Soering threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law. *European Journal of Migration and Law*, *11*(3), 205-219. https://doi.org/10.1163/138836409X12469435402693

8 Hathaway, J. C. (2005). *The Rights of Refugees under International Law*. Cambridge University Press. p. 363.

9 Duffy, A. (2008). Expulsion to Face Torture? Non-refoulement in International Law. *International Journal of Refugee Law*, *20*(3), 373–390. https://doi.org/10.1093/ijrl/een022

10 Battjes, H. (2009). The Soering threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law. *European Journal of Migration and Law*, *11*(3), 205–219. https://doi.org/10.1163/138836409X12469435402693, pp. 208-209.

11 Migration issues, on the contrary, often allow for a broader margin of discretion of policy implementors, as was illustrated in the case of Canada by Bouchard, G., & Carroll, B. W. (2002). Policy-making and administrative discretion: The case of immigration in

Canada. *Canadian Public Administration*, *45*(2), 239–257. https://doi.org/10.1111/j.1754-7121.2002.tb01082.x

12 The exception clause stated two reasons for derogation from *non-refoulement*: 1) the individual can travel to another state where he or she faces no risk, or 2) if the individual poses a threat to national security, was convicted of an egregious crime or it is required by international obligations, they are a given 60-day period to establish the right to enter another state. Only after proving they could not leave would the police grant a visa as a permit to stay.

13 An interesting issue is how to reflect on other provisions of the ECHR that might give rise to non-refoulement (esp. Art. 6 of the ECHR), when the national law points solely to Art. 3 of the ECHR. If such a situation occurred, the way forward would be through a general constitutional obligation to respect human rights.

14 Compare one case recalled by the Defender, in which an address provided showed the person is in particular danger, but without in-depth orientation in the Syria conflict, the information looked unimportant (the Report, p. 36).

15 See SAC's Ruling no. 9 Azs 2/2016, 14 April 2016, in which the Ministry concluded there was no obstacle to expulsion due to the fact that the alien could have found an internal flight alternative by resettling in another part of Iraq, without asking which part of Iraq he had come from in the first place.

16 Bergmann, J., & Dienelt, K. (2020). *Ausländerrecht: Aufenthaltsgesetz, Freizügigkeitsgesetz/EU und ARB 1/80 (Auszug), Grundrechtecharta und Artikel 16a GG, Asylgesetz: Kommentar* (13. Auflage). C.H. Beck. p. 1086.

17 Kluth, W., & Heusch, A. (Eds.). (2016). *Ausländerrecht: AufenthG, AsylG, FreizügG/EU, ARB 1/80, AEUV, EMRK: Kommentar.* C.H. Beck. p. 736.

18 Hofmann, R. M. (Ed.). (2016). *Ausländerrecht: AufenthG, AsylG (AsylVfG), GG, FreizügG/EU, StAG, EU-Abkommen, Assoziationsrecht* (2. Auflage). Nomos. p. 534.

19 Bergmann, J., & Dienelt, K. (2020). *Ausländerrecht: Aufenthaltsgesetz, Freizügigkeitsgesetz/EU und ARB 1/80 (Auszug), Grundrechtecharta und Artikel 16a GG, Asylgesetz: Kommentar* (13. Auflage). C.H. Beck. p. 1088.

20 Hailbronner, K. (2017). *Asyl- und Ausländerrecht* (4., überarbeitete Auflage). Verlag W. Kohlhammer. p. 305.

21 Kluth, W., & Heusch, A. (Eds.). (2016). *Ausländerrecht: AufenthG, AsylG, FreizügG/EU, ARB 1/80, AEUV, EMRK: Kommentar.* C.H. Beck. p. 738.

DOI: 10.54201/iajas.v1i1.12

Role of Hungarian Local Governance in Responding to COVID-19 Crisis

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Abstract: This paper analyses and points out the preventive and protective measures undertaken by Hungarian local authorities to halt the spread of the COVID-19 crisis and ensure the safety of citizens. It is conducted in an empirical, qualitative manner. In doing so it covers Hungarian legislation and official documents from central and local authorities. Firstly, the paper gives a comprehensive overview of the Hungarian local government system by highlighting the types and powers of local authorities. Secondly, it discusses the specific preventive and protective measures introduced by the different local authorities within their competencies and then explores some challenges and opportunities faced by Hungarian local authorities. This paper determines the importance of local governance for an efficient response to COVID-19 in Hungary despite limited resources and powers. Accordingly, the state's long-term investment in local government and improvement is primordial.

Keywords: Hungary, local governance, COVID-19 crisis, measures, response

1. INTRODUCTION

There is no doubt that the COVID-19 crisis has created many challenges for countries all around the world in implementing urgent strategies and measures to halt the spread of this virus and ensure the social, sanitary and economic security for their people. While public attention has focused on international and national policy responses, these efforts will ultimately need to be applied by local-level institutions, which played a key role in determining not only the trajectory of the pandemic but also the outcomes of its different interventions. This research provides a preliminary analysis of the administrative and social role of local institutions in Hungary, which are always placed in the front line to serve people.

The increased spread of the virus forced the state to implement strict restrictions that created several problems for citizens, and made the local authorities' task more difficult. This paper highlights the efforts taken by local government with the state government to create and manage various initiatives to control this pandemic and protect the safety of citizens. The main objectives of the study are to analyse and highlight the preventive and protective measures undertaken by the Hungarian local authorities to reduce the spread of the COVID-19 crisis.

2. RESEARCH METHODOLOGY

This study is based on a mix of quantitative and qualitative methods to gather data and address the analysis questions and objectives based on problems and main goals. The data required have been collected from various sources such as the official Hungarian government COVID-19 database, the Hungarian Fundamental Law, local government databases in Budapest, Pécs and Debrecen, various articles and scientific publications. It is a

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data series collected for a period of four months from March 2020 to June 2020. The data analysis is mainly conducted based on simple tools, reports and figures to analyse the trend of COVID-19 growth and the measures taken over this period.

3. HUNGARIAN LOCAL GOVERNMENT SYSTEM

The Fundamental Law of Hungary explains the political system in the country, which describes Hungary as an independent, democratic, and constitutional state. It is a unitary republic with a decentralised state model. However, politics in Hungary functions within a framework of parliamentary representatives. The Prime Minister is the head of government of a pluriform multi-party system. Thus, the leading body of the entire Hungarian public administration is the government. This constitutional document is based on four fundamental principles: human dignity, separation of powers, state structure and rule of law.[1] The Fundamental Law is not limited to political aspects, it also contains the pillars of public administration in the country.

The decentralisation model and the principle of local government are enshrined in the Fundamental Law via the local self-government rules created in 1990 and updated on 2011.[2] According to Art. 31-35, the state respects three territorial hierarchies: central, regional (county) and local. Hungary consists of 20 territorial sections, more precisely, 19 counties and one capital, Budapest (administered as an independent entity) and 3,175 municipalities.

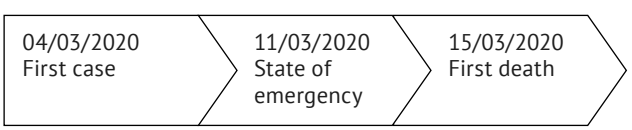
These different public institutions have different powers, different roles and separate responsibilities. The principal tasks of the counties are based on the administrative tasks and the preparation of the strategic development of the territory, while the role of the municipalities is to manage the necessary facilities such as pre-schools, public water utilities, rubbish disposal, elderly care and rescue services. Additionally, this local administration has the right to adopt regulations concerning different local areas of a given municipality according to Section (2) of Art. 32 of the Fundamental Law.

This local governance offers the autonomy to each territory to carry out its activity according to its own responsibility. The local government representatives are elected directly by the citizens to achieve their needs and develop their regions. The number of local council members depends on the number of inhabitants. In municipalities with a population of less than 10,000, the representatives are elected using an individual list, but in municipalities with more than 10,000, the representatives are elected in a mixed electoral system.[3]

To implement an efficient strategy during crisis periods, the decisions made by the local authorities must ensure the proper functioning of the regional administrations and their management with the collaboration of the central government.[4] As a result, the local governments in Hungary played a key role in managing the COVID crisis during the pandemic.

4. COVID-19 PANDEMIC IN HUNGARY

Figure 1. Timeline of the most prominent events related to COVID-19 in Hungary



Source: author's own research and editing, based on data gathered from coronavirus website (Hungarian government website for COVID-19 pandemic)

From the beginning of January 2020, Hungary announced a prevention plan to combat the spread of the virus in the country with an Operational Group, which was formed especially for this purpose. According to the government's official website, authorities announced the first confirmed

cases in Hungary on 4 March 2020. Moreover, the first coronavirus-related death was declared on 15 March 2020. By the end of the month, the virus had spread into all counties of Hungary. Due to the dangers of this pandemic and the inability to manage the crisis in the normal way, the government took several decisive decisions like declaring a state of emergency on 11 March 2020, which was taken quickly and efficiently according to the first case and the first death date.

a) State of emergency

The need to speed up the legislative process in times of crisis pushed the Hungarian government to declare a state of emergency in the country on 11 March by introducing some initial security measures (this period lasts for 15 days, after which the state of emergency can be renewed by parliament according to the Fundamental Law). Firstly, all events including cultural and sporting events were cancelled. Secondly, all indoor gatherings with more than 100 people were banned. Later, other restrictions were implemented by closing universities, primary and high schools, and ordering cafes and restaurants to stop serving beyond 3 pm. From 30 March the parliament approved the extension of the state of emergency for an indeterminate period under the coronavirus law that enabled the central government to rule the country by decrees for as long as COVID-19 lasts.[5]

b) Impact of COVID-19 on local governments in Hungary

Despite the impact of the COVID-19 pandemic in the different levels of governance in the world, the local level was the most impacted due to the direct responsibilities with citizens. The local governments were always at the forefront of combating the pandemic's spread and impact.[6] Many critics focused on their response and recovery efforts, especially in the beginning of the crisis. Hungary was no exception as COVID-19 affected most cities and regions.

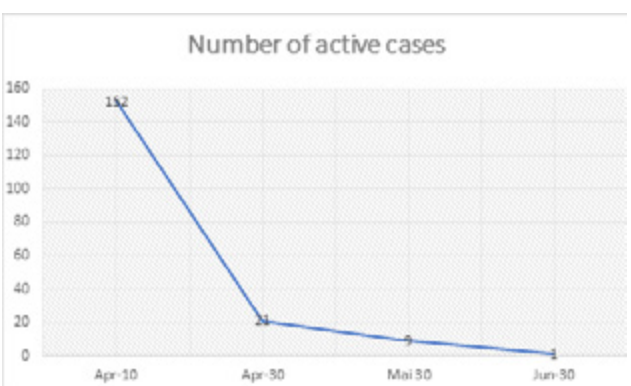
Hungarian local governments are responsible for delivering a good service for citizens by ensuring good coordination between different departments, including health workers, police, public workers, drivers and volunteers delivering food, medicines and sanitisers to fight against the pandemic. To protect them, the authorities gave more care and attention to these citizens due to the sensitivity of their work by ensuring personal protection measures like the compulsory wearing of masks and gloves and the sanitisation of communal and frequently used materials. In addition, immediate quarantine was enforced for workers who showed any signs of a fever, cough or difficulty breathing. Moreover, several campaigns were planned to raise citizens' awareness of the dangers of COVID contagion and the need to respect isolation rules, avoiding close contact with others and any type of eye, nose or mouth touching. Cleaning and disinfecting public places became necessary to guarantee safe areas, a process repeated at certain intervals.

c) Statistics of COVID-19 in Hungary

The graphics above show the evolution of the active case numbers affected by COVID-19 in Budapest, Pécs and Debrecen from the beginning of the pandemic until 30 June. The choice of these cities was based on their political and economic importance in the country.

*Budapest

Graph 1. Number of active cases per day in Budapest from 30 March to 30 June



Source: coronavirus website data (Hungarian government website for COVID-19)

During the first three months of the pandemic, the number of cases in the capital grew rapidly compared to other cities. On 10 April it peaked, recording 152 cases in 24 hours. This rate increased the total number of citizens affected to 580. However, the following months looked more favourable for the inhabitants of Budapest. The statistics showed 21 positive cases on 30 April and only 9 cases declared on 30 May. Compared to the spring period (March, April and May), which was disturbing for citizens and the government, the number of infected people in Budapest fell to a low level in June. Only one case was added on the last day of June to the total number of people affected, accounting for 1978 cases from the 4155 in all counties, making Budapest one of the most affected Hungarian cities.

This result is due to the strong intervention of the different levels of governance (local and central) to control the crisis. During this period, the number of cases did not exceed 100 per day, which constitutes a success for the Hungarian authorities that took several measures to protect the safety of citizens. These new decisions were based on adherence to the state of emergency rules.

* Pécs

Graph 2. Number of active cases per day in Pécs from 30 March to 30 June

Source: coronavirus website data (Hungarian government website for COVID-19)

The situation in Pécs was more favourable than in Budapest at the beginning of the pandemic. By 31 March the total number of infected citizens reached 89. This number multiplied four times in one month to reach 375 cases by the end of April. The number of active cases per day decreased from eleven on 30 March to only three at the end of May. Despite the slow increase in June, Pécs maintained the same downwards trend in infections as all other major cities in the country, and recorded a unique result at the national level by reaching zero cases of infected persons on 30 July. The statistics show that Pécs registered a low rate of infections per day. These results are primarily due to the conscience and responsible behaviour of its citizens, and secondly to the efforts of the local authorities in managing the crisis by adopting some rules and restrictions to protect citizens.

* Debrecen

Graph 3. Number of active cases per day in Debrecen from 30 March to 30 June

Source: coronavirus website data (Hungarian government website for COVID-19)

Debrecen, the capital city of Hajdú-Bihar County, did not register a high number of cases during the first wave of the pandemic. The infection curve was stable because of the practically inexistent day-to-day fluctuations. The total number of infected people was only 23 until 30 April, with an average of one case per day. This situation repeated itself in a similar vein in the following months. In May and June, the number was almost stable. Despite the spread of the virus throughout the whole country, the number of cases was negligible compared to the capital, demonstrating an exemplary prevention strategy against COVID-19 by local authorities in Debrecen, and a great sense of awareness by citizens.

5. PREVENTIVE AND PROTECTIVE MEASURES DURING THE COVID CRISIS

The appearance of COVID-19 in Hungary prompted mayors and local governments to get involved in crisis management and take efficient and quick decisions to prevent the spread of this new pandemic. The contribution of the Hungarian local government has been demonstrated in the sharing of good practices and lessons of how local authorities have managed the response and recovery phases. According to the results of this research, the role of local leaders has been extremely vital in determining how well cities have responded since the start of the outbreak. Budapest's mayor, *Gergely Karácsony* was one of these leaders who personally took to communicating with the public through social media from the start of the pandemic to provide updates about the local situation and explain the preventive and protective measures during the COVID crisis. The mayor of Pécs, *Attila Péterffy,* was also an influencer and decisive during this crisis. He called on the private sector early on to allow employees to work from home to avoid crowding inside offices, and to make employees feel safer and less stressed in their workplaces.

The role of the local governments was not limited only to efforts by leaders, it was also remarkable at the institutional level, with several efficient actions including mobilising their resources to provide the necessary support for health services and facilities, and extending assistance to the most vulnerable to stay safe and healthy. This paper will provide evidence of some measures taken by the local governments of the three selected cities (Budapest, Pécs and Debrecen).

a) Budapest

The Budapest City Council implemented several measures to counteract the spread of the COVID-19 virus in several services. Firstly, to avoid crowding in public transportation, the authorities took the decision to increase the number of active vehicles, permitting passengers to board buses using all doors instead of only the front door, and sanitising all the facilities frequently. In terms of communications, the local authorities shared updates about new rules and regulations not only in the national language but also in English, and provided the necessary support for international residents and tourists living in the city. Additionally, Budapest's mayor took the decision to suspend all cultural activities scheduled in the city's public institutions such as theatres, cinemas and museums. In cooperation with the central government, a final decision was taken by the local government to postpone all planned international events, such as the Hungarian stretch of the Giro d'Italia cycling competition, which was rescheduled for a later date.[7]

For homeless people, new rules were urgently adopted by the Budapest City Council to regulate care facilities and protect the health of homeless people by providing them with separate residences to avoid the crowded homeless institutions.

This housing process allowed homeless people to move into 71 rental apartments in the capital.

Several criteria had to be met by the applicants to become eligible for this program.

Firstly, they had to reside in a night shelter or temporary accommodation for homeless persons in the administrative territory of Budapest. Secondly, they had to be in at least one of these categories:

- work in a healthcare institution, a nursing home or a care home for seniors,
- have a regular income or be self-sufficient,
- aged at least 65 years for men, or 55 years for women, and have a chronic illness that poses a high health risk in the case of a coronavirus infection.[8]

Moreover, given the extra burdens and expenditure on the city during the pandemic (need for protective gear such as masks and disinfectant), it was necessary to review the budgets of the capital and its districts with the central government authorities.

According to the Budapest mayor, it is essential to ensure cooperation not only with the government-run Operational Group in charge of mitigating the new coronavirus epidemic but also with district mayors, to create efficient common coronavirus-related measures and avoid unilateral rules taken by those responsible. Besides, the local authorities needed to improve their efforts to check the health of the elderly and increase the testing of teachers and administrative school staff.[9]

b) Pécs

"In order to slow down the spread of the new coronavirus, I have taken the following measures as mayor of Pécs on Monday, 23 March", Attila Péterffy

*Digital city

In connection with the pandemic situation, the municipality of Pécs has taken numerous measures to slow down the spread of the new coronavirus. These measures require hard work, preparations and carefully considered decisions. In light of these new rules, which were introduced at the social, sanitary and economic level, many questions still arise every day in the minds of citizens regarding the circumstances and decisions.[10]
Applying an innovative and open culture of city leadership, the mayor of Pécs chose to communicate directly with citizens and answer their questions via online channels to reduce personal contact in the current situation. All municipal releases regarding the coronavirus were published in both Hungarian and English to provide all the necessary information and assistance to the foreigners and international students in Pécs. To guarantee the safety of citizens and maintain productivity at the same time, the mayor asked public and private companies to introduce "home office" technology for their employees.[11]

*Coronavirus Charity Fund

Believing that patriotism and volunteering are important pillars of the recovery plan, the City of Pécs announced the launch of social initiatives to protect the most vulnerable groups and seniors from the consequences of this pandemic. The introduction of the social program (PAPI) was essential in ensuring the delivery of food, medicines and postal packages to the homes of the elderly living alone. Despite these economically difficult times, many citizens and companies showed an interest in supporting our efforts by participating in the aid given to PAPI or providing the necessary sanitary facilities: protective gear and disinfectants for local institutions.[12]

With due consideration of the principle of transparency, which is deemed a fundamental principle of good governance, the local authorities created the Coronavirus Charity Fund, designed to organise the distribution of these donations in a positive way. These social tasks are crucial at the local level during the crisis. However, municipal institutions must ensure the continuity of providing the basic services by preparing an action plan for these extraordinary circumstances to manage all public services without any interruption, even during the epidemic.[13]

*New Mayor Coordinating Group

The main goal of the new Mayor Coordinating Group implemented during the crisis is to gather all the information about the current situation and evaluate it. In addition to its role boosting communication with all parties, this coordinating group helped prepare a prevention plan in cooperation with municipal companies and institutions to follow all the instructions introduced by the National Coronavirus Operational Group.[14]

*New measures for administrative services

In light of the current epidemic, the Mayor's Office decided to change the opening hours for customer service. The capacity for receiving customers in the main office of the *Department of Authorities* was limited to only 100 persons per day in the building because of the new restrictions. In addition, direct contact with officials and civil servants was suspended. In-person administration consultations were only possible via the published contact

options (phone, email). Besides this, only urgent submissions and requests were accepted, and had to be handed to receptionists. Queue management also changed, only clients with numbers were able to wait outside in line (in front of the building) to avoid crowding.[15]

Using the same strategy as Budapest's mayor, public institutions provided services online, including all administrative tasks for citizens. They asked them to prioritise digital methods and limit their physical presence to necessary actions only for which there is no other solution, such as the registration of new births and marriages, intent requests and some real estate affairs. Civil marriages were possible, but only with some strict conditions:

- Ceremonies were only possible at the *Kossuth Square building* and in the *House of Happiness*.
- The number of allowed persons was limited: only the registrar, the couple and two witnesses.
- No celebration of any kind was permitted.[16]

*The market hall of Pécs

Due to the practical, symbolic and traditional importance of the market hall in the everyday life of citizens, as a basic source of food, the local authorities decided to keep the market hall open and ready to welcome customers, with due consideration of various restrictive measures and conditions:

- Entry and exit: only one entry into the market hall from the main street, while exiting was allowed on the opposite side of the building only.
- Limit on number of people who can be present inside the market hall to 100 persons at any time. Queues were organised both inside and outside the market hall by ensuring a safety distance of two metres between people in the line.
- Frequent sanitisation of often-used materials (door handles, railings, etc.) and ventilation of the market hall's entire area after closing.
- Customers had to leave the market hall as soon as they were finished with their purchases.

Despite the risk to the health of seniors, as the most vulnerable to the dangers posed by the new coronavirus, the local authorities tried extending the activity of this market to provide a high quality of goods to consumers. In this case, it is important for citizens to be aware, to maintain a collective responsibility and to guard the safety of all citizens.[17]

*Reorganisation in the public medical sector

To protect healthcare workers from this pandemic, the City of Pécs decided to reorganise primary care with coordination from the Ministry of Human Resources. The main objective of this decision was to keep elderly GPs (over 65 years) away from risky areas for their own safety, and replace them with GPs under the age of 65. The senior doctors could continue their activities by participating in medical consultations or communicating with their patients via phone.[18]

*Cultural and sports activities

Implementing the Operational Group's vision to prevent the spread of the pandemic by minimising personal contact between people and respecting sanitary rules, the mayor of Pécs decided to suspend all events, including cultural and sports activities, and close sports halls, swimming pools, theatres, cinemas, the zoo and libraries until further notice.[19]

*Public transport

In terms of local public transportation, the mayor of Pécs took several measures to preserve the health of bus drivers at the local bus company – Tüke Busz Zrt.
This included restrictions regarding use of the front doors and the suspension of buying tickets from drivers, to guarantee the physical separation between the driver and passengers. Furthermore, the mayor ordered the buses to be cleaned and disinfected more frequently each day. To provide an uninterrupted public transportation service with respect to the safety measures, the local bus company – Tüke Busz Zrt. – decided to allocate extra buses during busy times.[20]

*Schools, day-care, nurseries

Due to the pandemic, the Hungarian central government issued an ordinance which empowered the local authorities in Pécs again to decide whether to close day-care and nursery facilities. After long discussions between the Pécs city council members, the immediate closure of these facilities was the easier and desirable solution for the authorities, but it was not efficient for working parents, especially since grandparents were unable to take on the childcare responsibility, which could be dangerous to their health. Thus the mayor of Pécs decided to take a step-by-step approach to close day-care and nursery facilities as well as schools.[21]

c) Debrecen

In response to the coronavirus emergency, the mayor of Debrecen, Mr. László Papp, insisted on the importance of citizen participation and their strong sense of responsibility to give the necessary assistance to the local authorities. He also implemented some local municipal measures to stop the spread of the pandemic. Firstly, cultural events, concerts and festivals were stopped, while theatres, sports halls and thermal baths were closed. Secondly, cash transactions for buying tickets on local buses, trolleybuses and trams were stopped.[22]

In addition, the local authorities limited the number of people allowed to gather together to just 100 indoors, and 500 outdoors. Moreover, the mayor of Debrecen decided to introduce extraordinary suspensions of all nursery care, and implement a new form of education by providing the possibility of online teaching for primary, secondary school and universities to guarantee the safety of students and teachers and ensure the continuity of studies at the same time.[23]

Social institutions in Debrecen worked on creating a new charity initiative in collaboration with citizens, companies and non-profit organisations to provide the necessary sanitary facilities for homeless people by supplying them with disinfectants, masks and plastic gloves. Just like in Budapest and Pécs, the local authorities in Debrecen encouraged the digitalisation of administrative operations, including the operation of urban public services, health care, security and commercial services. Additionally, the Debrecen City Council extended rental terms during the pandemic period for the social protection of citizens. Furthermore, the mayor asked citizens to respect sanitary rules and collaborate with the different administrations in a conscious and orderly manner to protect and preserve their own health and their families.[24]

6. CHALLENGES AND OPPORTUNITIES

This crisis period tested the capacity of the local authorities and their leadership to respond to difficulties by facing challenges and creating opportunities.

a) Challenges

Lack of resources: Applying the same strategy of some other Hungarian mayors, Budapest leader Gergely Karácsony announced some economic reforms to reduce the city council's expenditures, which had increased due to the pandemic. After long discussions with central government, the two parties were not in agreement about the city's budget, the funds destined for the city's leadership decreasing by one-third and the number of city council committees falling from eight to five.

Thus, the Budapest city council decided to take some austerity measures: Firstly, five companies run by the city council were merged into a single public works company, according to the Stadtwerke model in Vienna and big cities in Germany. Secondly, the number of city council committees was reduced, and the number of deputy mayors was lowered to just four. Based on good governance, the mayor of Budapest

adopted this restructuring to save the necessary funds for other urgent expenditures related to crisis management. These new measures will not affect the normal citizens and workers of the capital as it only eliminated some executive positions, oversight committees and disbursement offices.

Reduction of powers during the state of emergency: During the pandemic crisis and specifically on 30 March, the Hungarian parliament passed a bill proposed by the FIDESZ-led government, allowing rule-by-decree for as long as COVID-19 lasts. Despite some critics, this decision was taken to facilitate the government's efforts to respond to the crisis because of the need to speed up the legislative process in times of emergency. This procedure affected the power of Hungarian local governments, which wanted to participate in taking important decisions and be the key player in managing this crisis from the front line of the fight against COVID-19.[25]

b) Opportunities

The pandemic was also a source of inspiration for many institutions, including local authorities in Hungary, which consider COVID-19 an excellent opportunity to improve their online services and implement new platforms to facilitate e-government. This process presents a new vision in the administrative approaches to improve the quality of delivered services and facilitate communication between administrators and citizens. Many local authorities plan to continue this digital method even after the end of the crisis.

In addition, the central administration is working in full coordination with local administration during this pandemic. Combating the virus is the responsibility of all levels of governance.
Thus, many Hungarian mayors focused on collaboration with others to publish common measures in coordination with central authorities. The participation of citizens in Hungary is key to the fight against the coronavirus. This factor was considered crucial by the social institutions of local authorities who collaborated with civil society to share the responsibility for all citizens by creating charity initiatives, protecting seniors, and giving the necessary protection to workers who sacrificed their health and lives to ensure the continuity of normal life for citizens.[26]

7. CONCLUSION

According to the Fundamental Law, the Hungarian political system is based on a decentralisation model and the principle of local government, which offers autonomy to each territory to conduct its activity according to its own responsibility. Since the start of the COVID-19 crisis, the local authorities in Hungary have moved directly to a practical mode. This paper analysed the statistics of three cities in Hungary (Budapest, Pécs and Debrecen) during the crisis period, and evaluated their preventive actions and measures taken during the fight against the pandemic.

Despite the different challenges faced, such as the limited resources and powers, Hungarian local governments did remarkable work to halt the spread of COVID-19, ensure the safety of citizens by responding to new problems, and to implement innovative solutions. As result, the response of Hungarian local government to the pandemic has been a success in Europe, and this is due to the efficient initiatives of local authorities and to the swift and disciplined behaviour of citizens. There have been virtually no mass incidents of infection, constituting an excellent achievement for the Hungarian state.

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DOI: 10.54201/iajas.v1i1.13

EU financial assistance during COVID-19 pandemic: Are loans the solution?

ROMANA BUZKOVÁ* - NIKOL NEVEČEŘALOVÁ**

Abstract: This article deals with the European Union's reaction to the COVID-19 pandemic. The current crisis is having a negative impact on national economies. Based on legitimate concerns about the fiscal stability of the euro area and the EU as a whole, the Union has adopted a number of measures to support the Member States. As part of the solution to the coronavirus crisis, we cannot ignore the role of the European Stability Mechanism, in which financial assistance has been earmarked for euro area members. The article focuses on three instruments providing financial assistance in the form of loans: Pandemic Crisis Support, Support to mitigate Unemployment Risks in an Emergency (SURE) and the Pan-European Guarantee Fund. This EUR 540 billion rescue package was agreed by the Eurogroup on 9 April 2020. The article aims to identify the differences between these instruments and their target groups by analysing and comparing their legal bases, conditions and economic impact. As part of the contribution, we also mention countries that are not members of the euro area but have drawn assistance in the form of loans from the mentioned funds.

Keywords: coronavirus, crisis, European Stability Mechanism, European Union, financial assistance, loans

1. INTRODUCTION

The European Union and the whole world are facing a new crisis caused by the COVID-19 pandemic, which has suddenly and drastically affected not only the EU Member States but also the entire globalised world. The current crisis is having a negative impact on national economies. Member States that already had budgetary targets for 2020 certainly did not expect a stagnant economy, and so individual governments are facing a new situation. Member States will thus have to cope with an economic downturn.

To prevent the spread of the virus, some states adopted such drastic measures that the economic life of the country almost stopped. There has been a decline in the economic activity of households and entrepreneurs. By adopting strict measures, countries literally isolated themselves from neighbouring states. One of the isolation measures was the decision to close the borders between the Member States[1] or the declaration of a state of emergency[2]. In response to these measures taken by governments of the Member States, the European Union also decided to close its external borders.[3]

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One of the options offered to mitigate the effects of the crisis is to increase public spending. However, individual Member States are in financial difficulties and are facing the question of where to obtain the necessary funds.[4] It is already certain that we will be dealing with the effects of the crisis long after the spread of the pandemic has come under control. The EU is also working with this scenario, assessing the March 2020 situation as *unusual* and out of government control.[5]

Based on legitimate concerns about the stability of the euro area and the EU as a whole, the Union has adopted a number of measures, for example, the extension of the EU Solidarity Fund to health crises. In order to provide the Member States with immediate liquidity to address the impact of the coronavirus crisis, the EU also redeployed EUR 37 billion of available cohesion policy funding as part of the Corona Response Investment Initiative (CRII). The Coronavirus Response Investment Initiative Plus (CRII+) extends these measures by introducing exceptional flexibility for the use of European Structural and Investment Funds.[6]

The European Union's coronavirus response contains a diverse set of initiatives and measures, not only in the form of grants. Among others, we can name the relaxation of EU rules on state aid or public procurement. Morais suggests[7] that the solution may lie in a *mixed approach* combining different fiscal instruments (loan programmes, the use of the European Stability Mechanism, the involvement of the European Investment Bank on a large scale, and the establishment of a long-term recovery fund towards restarting the economy).

In this article, we focus on three safety nets protecting the sovereigns, workers and businesses. They all offer financial support in the form of loans. This rescue package was agreed by the Eurogroup on 9 April 2020.[8] Financial assistance is currently available under the following instruments: i) Pandemic Crisis Support, ii) SURE, and iii) Pan-European Guarantee Fund. Table 1 shows the division of instruments according to their providers.

Table 1. Financial support (loans) mitigating the negative impact of the pandemic.

Provided by	Instrument	Supports
European Stability Mechanism	Pandemic Crisis Support	Sovereigns
European Commission	SURE	Workers
European Investment Bank	Pan-European Guarantee Fund	Businesses

Source: authors' own table.

This article aims to identify the differences between these instruments and their target groups by analysing and comparing their legal bases, conditions, and economic impact.

2. EUROPEAN STABILITY MECHANISM

The European Stability Mechanism (ESM) is a permanent financial assistance fund, set up under the Intergovernmental Treaty framework establishing the ESM. Its primary objective is to safeguard the stability of the euro area for which it uses various financial instruments. An intergovernmental agreement established this mechanism and as an intergovernmental organisation it should be activated in the event of situations or "shocks" and events that could potentially jeopardise the stability of the euro area or the EU as a whole. The ESM serves as a tool to prevent the spread of that negative situation to other states. The ESM was activated as a rescue system as part of the so-called *euro crisis*, which eventually manifested itself in more than one euro area country. Following its predecessors, the EFSM and EFSF, the European Stability Mechanism provided financial assistance to Spain, Cyprus and Greece using financial instruments.[9]

We are of the opinion that the current "Covid situation" can be viewed similarly. Therefore it fulfils the characteristics based on which euro area Mem-

ber States could request the activation of ESM assistance. In this context, we list the common features that led the EU to activate the ESM in times of a *euro crisis*, i.e. the current situation fulfils the features of i) unexpected events, ii) that have an impact, iii) on more than one Member State, iv) adversely affecting the national economy of the EU as a whole. If the situation is not resolved, the economic situation of individual countries may worsen, and the recession will deepen.[10]
Assistance from ESM can be provided on the basis of Article 13 of the ESM Treaty framework which regulates how the Member State of the euro area can request financial assistance from the Fund[11], under what circumstances and under what conditions.

3. PANDEMIC CRISIS SUPPORT

Given that the ESM was established with the primary objective of maintaining and safeguarding the stability of the euro area, which is affected by this crisis, it seems logical that financial assistance will be allocated from this fund. Thus, during the negotiations on 8 May 2020 it was agreed that the ESM would be allocated about EUR 240 billion, which will be used to support the economies of euro area members (for all 19 members) with the maximum average maturity of the individual loans of 10 years and an interest rate of 0.1%. This interest rate would be calculated from the borrowed amount, which must not be higher than 2% of its GDP at the end of 2019.[12]

The ESM has established the Pandemic Crisis Support where it uses the option of activating the credit line, the so-called Enhanced conditions credit line[13], when it can operate on the primary market or provide loans. This credit line supports domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID-19 crisis and on the basis of conditions to be specified.[14]

In addition to the creation of this credit line, there were also options involving the issuance of Eurobonds. We recall that this crisis has hit the whole world, and governments are struggling with large budget deficits. The question arose as to whether activating the ESM or issuing the so-called "Corona bonds" (a one-off mutual European bond issuance by euro area countries) would help to solve this crisis. The question is whether this joint responsibility could mean that the costs associated with funding will cause further problems.[15] There was also an opinion supporting the implementation of a European-wide progressive wealth tax (assessed on the net worth of the top 1%); the revenues would be used to repay Eurobonds as common bonds.[16] The introduction of such a tax is obviously a controversial topic, some authors believe this tax could have a positive impact on the migration of taxpayers within the EU, and at the same time support real solidarity in the fight against the consequences of the pandemic. However, creating and negotiating conditions for these instruments, like corona bonds or European-wide tax, seem more complicated than negotiating the ESM assistance.

The ESM credit line accounts for about half of the total allocation of EUR 540 billion[17], the other half consists of individual loans provided by the European Investment Bank and funds used from the SURE employment scheme,[18] which are elaborated further below.

4. SUPPORT TO MITIGATE UNEMPLOYMENT RISKS IN AN EMERGENCY

In April 2020, there were already more than 42 million applications for support for workers on short-time work or similar schemes in the EU.[19] The temporary Support to mitigate Unemployment Risks in an Emergency (SURE) supports national short-time work schemes and similar measures as a response to the current crisis caused by the COVID-19 pandemic. From a legal perspective, SURE is based on Article 122 TFEU. Established on 19 May 2020, it provides financial assistance to the Member States (up to EUR 100 billion in total), which has to address sudden increases in public expenditure to preserve jobs. Affected Member States can borrow money on favourable terms.[20]

The instrument supports all Member States, not just those in the euro area. However, not all Member States would find SURE attractive as they have cheap access to financial markets themselves, for instance Germany. On the contrary, for countries like Italy or Spain, these loans are likely to be cheaper than their own borrowing costs.[21]

The procedure is as follows. First, the Member States request financial support after activating their short-time work schemes or similar measures to support the self-employed. The European Commission consults the Member States before submitting a proposal for a decision to the Council. For each Member State, the Council implementing decision contains all the necessary details, such as the amount of the loan, its maximum average maturity, number of instalments, description of national measures, etc.[22]

The Commission has proposed to grant financial support of EUR 87.8 billion to seventeen countries. The Czech Republic is one of the sixteen Member States to benefit from SURE so far.[23] Table 2 shows the financial support granted to the Czech Republic, Greece, Italy, Poland and Spain.

TABLE 2. FINANCIAL ASSISTANCE GRANTED TO SELECTED COUNTRIES UNDER SURE.

Country	Date of request	Commission proposal	Council decision	Maximum loan (EUR)	Availability	Loan maturity	Instalments (max.)
Czechia	07/08/2020	24/08/2020	25/09/2020	2 billion	18 months	15 years	8
Greece	06/08/2020			2.7 billion			8
Italy	07/08/2020			27.4 billion			10
Poland	06/08/2020			11.2 billion			10
Spain	03/08/2020			21.3 billion			10

Source: authors (based on Council Implementing Decisions (EU) 2020/1345, 2020/1346, 2020/1349, 2020/1353, and 2020/1347).

Loans are underpinned by Member States' guarantees. On 7 October 2020, the Commission announced that it would issue EU SURE bonds of up to EUR 100 billion as social bonds. The Commission plans to use the cash inflows stemming from the EU SURE debt issuance to disburse the loans to the Member States in instalments.[24]

5. PAN-EUROPEAN GUARANTEE FUND

Small and medium-sized enterprises (SMEs) are extremely sensitive to economic downturns, especially in southern European countries. Even in crisis, bank loans and credit lines remain the main sources of SMEs' financing.[25] Endorsed by the European Council as part of the overall COVID-19 response package, the EIB Group has created the Pan-European Guarantee Fund (EGF). The Board of Directors agreed on the EGF structure and business model on 26 May 2020. With EUR 25 billion, this guarantee fund primarily scales up the support for SMEs by mobilising up to EUR 200 billion. All 27 EU Member States contribute proportionally according to their shares in the EIB. Most of the financing is available through intermediaries, e.g. commercial banks or national institutions.[26] How is the EGF support allocated to beneficiaries?

- Small and medium-sized enterprises: at least 65%;
- Companies with 250 or more employees: up to 28% (with restrictions above 3,000 employees, and up to 5% can be used for companies active in the area of health);
- Venture and growth capital and venture debt: up to 7%.

The Pan-European Guarantee Fund is also temporary; its initial investment period lasts until 31 December 2021. Any extension would have to be approved by contributors, i.e. the Member States.[27]

6. CONCLUSIONS

This article focused on the financial assistance provided by the European Union to mitigate the negative effects of the COVID-19 pandemic. Loans are currently available under the Pandemic Crisis Support, the temporary Support to mitigate the Unemployment Risks in an Emergency (SURE) and the Pan-European Guarantee Fund.

Governments should not rely solely on EU assistance but should also focus on developing a strategy based on investment promotion. However, in order to "restart" their economies, they can participate in financial assistance mechanisms. One of the permanent mechanisms of financial support is the European stability mechanism. The ESM is a fund established only for euro area members. The Eurogroup decided to allocate about EUR 240 billion to fight the effects of the coronavirus crisis. Euro area members should be able to borrow an amount which must not be higher than 2% of their GDP with a maximum average maturity of 10 years and with an interest rate 0.1%.

The Czech Republic and Poland are not euro area members, but it seemed appropriate to mention their participation in the individual mechanisms of SURE and Pan-European Guarantee Fund. We want to show that even non-members of the ESM (and therefore non-members of the euro area) are facing the consequences of this crisis too. If we take a closer look at the estimated impact of the current crisis on public finances (see Table 3), the governments will suffer from a significant decrease in GDP. For example, the Czech Republic was expected to have a general government deficit and debt of 6.7% and 38.7% of gross domestic product respectively by the end of the year. According to the European Commission's interim forecast, the Czech Republic's GDP is projected to decrease by 7.8% in 2020. We see that euro area members (Greece, Italy and Spain) have figures around 10%, but they also have much higher debt in terms of a percentage of GDP.

Table 3. Estimated impact of COVID-19 outbreak on public finances in 2020.

Country	General government deficit and debt	GDP decreased by
Czechia	6.7%, and 38.7% of GDP	7.8%
Greece	6.4%, and 196.4% of GDP	9%
Italy	11.1% and 158.9% of GDP	11.2%
Poland	9.5% and 58.5% of GDP	4.6%
Spain	10.1% and 115.6% of GDP	10.9%

Source: authors (based on the Commission's 2020 Spring and Summer forecasts).

Loans can help economic recovery. High sovereign debt, however, is likely to adversely affect economic growth.[28] As already mentioned, some loan recipients are also countries that have previously participated in the ESM (or its predecessors) and are therefore still repaying their debt. We must ask whether the recipients of this aid will be able to meet their obligations and repay these loans.

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DOI: 10.54201/iajas.v1i1.14

Creation of VAT in the modern history of Slovakia[1]

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Abstract: Value added tax (VAT), as a general indirect excise tax on consumption, today represents one of the basic pillars of the tax system in the Slovak Republic. In this article, the authors deal with the development, position and significance of VAT in Slovakia, with an emphasis on its historical development since 1918. The aim of the paper is to assess (pros/cons) of the institution of VAT in the SR, from the point of view of historical development, the current situation, de lege ferenda, and its importance within the tax system, using qualitative methods, as well as analyses and comparisons.

Keywords: Taxation, Value added tax, Tax policy

1. INTRODUCTION

Today, value added tax (VAT) in the Slovak Republic already has the nature of a harmonised tax. From the point of view of tax revenues flowing into the state budget of the SR, VAT represents an important source for financing state budget expenditures. Tax revenues are a significant component of the total revenues of the state budget of the Slovak Republic, accounting for 79.58% in 2017, 77.8% in 2018 and 77.95% in 2019, whereas the revenue from VAT in total tax revenues accounted for 53.02% in 2017, 53.59% in 2018 and 54.54% in 2019.[2] The possibility of state budget expenditures depends directly on the amount of revenue flowing into the state budget, where taxes are traditionally considered to be the main source of revenue. Securing an improvement to the existing legislation – which can also contribute to achieving optimal taxation[3] – we believe should start with a detailed examination of the institution of VAT, from the point of view of its historical development as well as the current operation within the economic system.

2. CREATION OF VAT AFTER 1918 (BRIEF EXCURSUS)

After the establishment of the Czechoslovak Republic (1918), in the field of tax law the Austrian tax system that had been valid for the Czech lands was applied concurrently with the Hungarian tax system, which had been valid in Slovakia. In our opinion, the resulting legal dualism was of no real significance because these two tax systems did not differ markedly from each other at that time. The tax on turnover[4] implemented in 1919 represented a fundamental stage in the development of VAT, and was considered the most important indirect tax in Slovakia. The turnover tax taxed turnover at all stages of productive manufacturing and business activities; it was also levied on the sale of goods between private persons as well as on performances and services of all kinds (such as repairs, transport services, performances of freelance professions), while consumption itself was also subject to this tax, as were goods imported from abroad. The turnover tax in its economic sense fulfilled the functions of accumulation, control function and regulation; it could only be imposed on manufac-

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turing organisations for the direct sales of goods, on sales and supply organisations within manufacturing industries, on organisations purchasing agricultural products, and on trade and other organisations, except for foreign trade enterprises. The Ministry of Finance could stipulate that budgetary and contributory organisations may also be subject to the turnover tax in exceptional cases.

In the period from 1945 to 1952, in the field of indirect taxation, we have identified the following as the most significant changes:

- the introduction of a general purchase tax, which was part of the consumer prices of goods and services, simplified the system of indirect taxation significantly,
- the general purchase tax became the main tool for releasing financial capital generated in state-owned, cooperative and private enterprises,
- any goods on the list of tax rates were subject to the tax,
- the final product was taxed at only one stage (tax collection was concentrated on the trade),
- goods imported from abroad were subject to the same tax regime as goods of domestic production, but the export of goods was not subject to tax,
- some indirect taxes were abolished, such as the water power tax, the mineral and soda water tax, food products tax (so-called access tax),
- other types of indirect tax were adjusted; there was a new amendment to the legislation.

One fundamental change in the field of indirect taxes took place after February 1948, where Act No. 283/1948 Coll. introduced a general tax from 1 January 1949, and subsequent amendments to this law changed the original name of this tax to general purchase tax,[5] which was a new type of indirect tax – it included, and thus replaced, all existing indirect taxes, including turnover tax and price compensatory amounts.[6]

With effect from 1 January 1953 (based on Act No. 73/1952 Coll. on turnover tax as amended by Act No. 107/1990 Coll. and Implementing Decree No. 560/1990 Coll. and the turnover tax rate list)[7] the general purchase tax was again replaced by a turnover tax, which, however, was built on principles differing from[8] the general purchase tax.

One important milestone in the development of the Slovak political-economic system came in 1989, which brought significant (albeit only gradual) changes to all areas of economic life in Slovakia. In the area of indirect taxes, the first step was the adoption of Act No. 107/1990 Coll., which amended Act No. 73/1952 Coll. on turnover tax, starting a new trend of the gradual and ultimately complete abolition of turnover tax. Act No. 530/1991 Coll. on import tax was adopted, which supplemented the turnover tax. The aim of its introduction was to eliminate tax evasion,[9] particularly in relation to natural persons engaged in the foreign trade activity of importing goods. At the same time, during this period legislative activities were underway to create a new tax system.

3. VAT HARMONISATION WITHIN THE EU

The creation of VAT in its current form in the recent history of the Slovak Republic was influenced by harmonisation processes at the EU level, as the area of indirect taxes is currently significantly harmonised in EU Member States, meaning in practice that there is a common VAT system as well as a general system of excise duties, which Member States are obliged to implement in their legal systems.[10] However, the harmonisation is not absolute and Member States still have a degree of discretion in the legal regulation of these taxes, for example in the area of tax rates or exemptions. Initially, there were two different tax systems in Europe in the field of indirect taxation: a) the system applied in France, which was the first and only country to apply VAT; b) in other European countries, where a cumulative cascading system of turnover tax was applied: multiple taxation occurred in this system because not "only" added value was taxed, as in the case of value added tax, which meant this system was unable to guarantee tax neutrality.

When deciding whether to apply a uniform system for Member States in the field of indirect taxation, the conclusions of the special working group established by the European Commission and the conclusions of the Fiscal and Financial Committee of 1960 also clearly contributed; they confirmed that cumulative tax systems for indirect taxation must be abolished and Member States should introduce value added tax. In 1967, the first Council Directive No. 67/227/EEC on the harmonisation of the laws of Member States relating to turnover taxes was adopted, which required individual Member States to replace their existing system of turnover taxes with a common system of value added tax. The common system of value added tax should have been based on the principle that the general excise duty is applied to goods and services in direct proportion to the price of goods and services, regardless of the number of transactions carried out in the production and distribution processes before the stage at which it is subject to the tax. For each transaction, a value added tax was levied calculated from the price of the goods or services at the rates applicable to those goods or services after deducting the value added tax which the individual cost elements were charged directly. The Council also undertook to issue a second directive on the structure of the common system of value added tax and the procedure for its application. The second Council Directive No. 67/228/EEC on the harmonisation of the laws of the Member States relating to the turnover tax as well as the structure and procedures for applying the common system of value added tax precisely defined the subject-matter of the tax (the subject of the tax was the sale of goods and the supply of services within the territory of a Member State carried out by a taxable person for remuneration and the import of goods). This directive also defined other terms such as: place of taxable transaction, territory of the State, sale of goods, provision of services, taxable person. Pursuant to this Directive, the individual Member States retained the right to impose different tax rates and adopt measures in national legislation to prevent tax evasion. This Directive also introduced special tax regimes for small businesses and for entities engaged in agricultural production. Significant changes in the system of indirect taxes also generated problems and fears on the part of individual member states that the revenue side of their state budgets would not be met. For this reason, three more directives were adopted extending the deadlines for introducing value added tax. These were the Third Council Directive No. 69/463/EEC, which extended the implementation period of value added tax for Belgium until the end of 1972, the Fourth Council Directive No. 72/250/EEC, and the Fifth Council Directive 72/250/EEC, which gradually extended the date for Italy to introduce value added tax until the end of 1973. Despite the adoption of these harmonisation directives, the legislation on value added tax varied considerably from one Member State to another. However, the most important directive related to harmonising indirect taxes was the Sixth Council Directive No. 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis for its assessment, the aim of which was to eliminate inconsistencies in the harmonisation process of value added tax between the Member States, and to define the smallest scope for possible derogations from this tax within the framework of national legislative arrangements.

4. VAT AFTER THE ESTABLISHMENT OF THE SLOVAK REPUBLIC (AFTER 1993)

The basic element of the Slovak tax system in the newly established independent Slovak Republic (established on 1 January 1993), as a result of the first phase of the tax reform, was to be the introduction of value added tax as a universal or general indirect tax. The adoption of Act No. 222/1992 Coll. on value added tax, together with the adoption of the Act on Excise Duties signalled a fundamental turnaround in the overall concept of the fiscal policy of the Slovak state. These steps were used to move part of the tax burden into the sphere of indirect taxes, in line with the global trend of easing the tax burden for business entities to stim-

ulate business development.[11] On 1 January 1996, Act No. 289/1995 Coll. on value added tax entered into force. Looking at the legal provisions we see the effort to gradually harmonise Slovak tax legislation with EU legislation. Pursuant to Act No. 289/1995 Coll., the subject of the regulation was value added tax, covering taxable transactions within the country and imported goods.[12] Any imported goods were also subject to value added tax, regardless of whether those imports were made in the course of business activities by business entities or whether they were carried out by entities that were not entrepreneurs.[13] Services, transfers and the use of rights from abroad were not subject to tax. The key term in the law was the term Taxable Transaction, as the definition of this term conditioned the overall mechanism of taxation. Value Added Tax Act No. 289/1995 Coll. distinguished between persons liable for tax (within the country, in principle, they were the subjects for whose benefit the taxable transaction took place and, with goods imports, subjects to whom the goods were to be released with the proposed customs regime, unless otherwise provided) and persons subject to tax (these were the natural and legal persons who carried out the taxable transactions). The taxable entity became a taxpayer, as a specific natural or legal person by registration, either by meeting the conditions stipulated by law, or voluntarily. The possibility to revoke the registration was subject to the condition that taxpayers could only ask for the revocation at the earliest after 1 year from the day they became taxpayers. However, it was also contingent on their turnover not reaching SKK 750,000 in three consecutive months, and SKK 3 million for twelve consecutive months. The subjects of value added tax in accordance with Act No. 289/1995 Coll. were: (a) payable taxable transactions, including consideration in kind; (b) taxable transactions effected free of charge; and (c) taxable transactions effected for the personal consumption of the taxpayer. The tax base was usually a price or other consideration for a taxable transaction that did not include tax. However, Value Added Tax Act No. 289/1995 Coll. provided for a number of specific exceptions to that principle. In general, the tax base was the price including tax if the taxable transaction, which the taxpayer registered according to a special regulation, was paid in cash for the benefit of a person who was not a taxpayer. Firstly, that legislation introduced a basic tax rate of 23%, which applied to all taxable transactions, except for transactions where the law expressly provided for the application of a reduced tax rate. The reduced tax rate was 10% and was applied to the goods and services listed in Annex No. 1, which was part of the Value Added Tax Act, in the transactions of a transfer, succession or lease of real estate or part thereof, in the rental or hire of passenger cars, for which it was not possible to claim a tax deduction, and in the purchase of a car on the basis of a leasing contract. The linear tax rate (19%) was introduced by Act No. 255/2003 Coll., amending Act of the National Council of the Slovak Republic No. 289/1995 Coll. on value added tax as amended, by which a linear tax rate of 19% was introduced with effect from 1 August 2003. An important part of the value added tax application was also the taxpayer's eligibility for tax deduction.

5. VAT AS PART OF THE SLOVAK TAX SYSTEM

We do not consider the principle of taxation in the Member State of consumption to be perfect, given the existing tax evasion,[14] but we consider it to be stable, its application is predictable both for tax subjects and tax administrators. In terms of the subject of the tax, both European and Slovak legislation equally distinguish between four types of taxable transaction that are subject to VAT: (i) the supply of goods for consideration within the territory of the country by a taxable person acting in the capacity of a taxable person; (ii) the provision of a service for consideration within the territory of the country by a taxable person acting in the capacity of a taxable person; (iii) the acquisition of goods for consideration in the country from another Member State of the European Union and (iv) the import of goods from third countries (outside the EU) into the country.[15] 'Supply of goods' shall mean the transfer of the right to dispose of tangible property[16] as the owner. The

distinction between tangible and intangible assets has a direct link to the identification of the taxable business type – the provision of a service is defined in the VAT Act as a taxable business primarily in a negative way, as any transaction which is not a supply of goods is considered a provision of services, but at the same time, the legislation demonstratively states that some businesses have the character of a service provider: (i) the transfer of an intangible property right, including the granting of an industrial property right or other intellectual property right; (ii) granting the right to use tangible property, for example under a lease for a movable or immovable item; (iii) accepting an obligation to refrain from any act or to tolerate acts or status (e.g. on the basis of restrictions arising from easements); or (iv) a service provided on the basis of a mandate or decision issued by a state authority or on the basis of a law, such as the services of notaries or bailiffs. The primarily negative definition of the supply of a service as a taxable transaction has the undeniable advantage of being able to cover, in principle, the entire business sector of services, without the need for their positive enumeration. Based on the applied principle of the country of destination, the export of goods is exempt from VAT under the conditions laid down by the law and, conversely, the acquisition of goods[17] in the country of destination is considered a taxable trade (i.e. subject to tax). In accordance with the declared VAT neutrality, it is natural that goods are subject to this tax regardless of their origin (inland, EU Member State, third country outside the EU). Therefore, goods imported from outside the EU cannot benefit from a tax advantage by making their imports exempt from VAT. When goods are imported into the country, VAT is primarily subject to the provisions of customs legislation, in particular legally binding EU acts, as there is a customs union within the EU (see Cakoci, 2008).

The VAT application system is based on the payment of this tax by all actors in the supply chain (from the manufacturer to the final seller) who supply goods and/or services within the course of their economic activity. If legal conditions are met, these persons (usually, but not exclusively, entrepreneurs) have the status of obligated subjects, which in connection with the payment and collection of value added tax have a number of monetary but also non-monetary obligations in relation to the tax administrator. The legal regulation stipulates precisely when a taxable person is obliged to register as a VAT taxpayer, or when that person becomes a taxpayer ex lege.[18] According to the current legislation, a taxable person is any person who independently carries out any economic activity, regardless of the purpose or results of that activity. However, in exceptional cases, public entities, bodies or institutions may also be considered taxable persons. Not every taxable person is part of the value added tax system. The mere fact that a particular person has the status of a taxable person does not mean that this person is obliged to apply the tax at the rate specified by law in their prices, or in prices of the supplied goods or services, and that this person has rights that the law grants only to a specific group of persons who are referred to as taxpayers.[19] A taxable person becomes a taxpayer based on one of the two presumed possibilities, i.e. registration and subsequent actions of the tax administrator, or on the basis of other facts prescribed by law (ex lege). The registration of domestic taxable persons takes place on a mandatory as well as on a voluntary basis. The mandatory or voluntary registration results in obtaining the legal status of a taxpayer. If the relevant tax administrator finds that a legal entity or a natural person who has submitted an application for tax registration is a taxable person, it shall register the taxable person, issue their tax registration certificate and assign a tax identification number to the taxpayer. On the day specified in the tax registration certificate, the taxable person becomes a taxpayer, both with the obligations and with the rights that the law associates only with the person of the taxpayer. In addition to the mandatory and voluntary registrations of domestic taxable persons, the legal regulation also stipulates other cases of registration leading to the creation of taxpayer status. This is the registration of groups (taxable persons connected organisationally, economically, financially) as well as the registration of foreign persons who carry out their activities in the territory of the Slovak

Republic, or supply goods by mail order.[20] Even in these cases, the registration ends with obtaining taxpayer status. The value added tax base quantifies its subject.[21] For the purposes of calculating tax liabilities, such taxable transactions for VAT purposes are quantified by a monetary amount, which, however, is determined depending on the type of taxable transaction. The tax base is determined in a common and uniform manner for three types of taxable transaction – (i) the supply of goods; (ii) the supply of services; and (iii) the acquisition of goods inland from another Member State. In these cases, the taxable amount is everything that constitutes the consideration that the supplier has received or is to receive from the recipient of the transaction or other person for the supply of goods or services, tax excluded.

Council Directive 2006/112/EC on the common system of value added tax (hereinafter "the Directive") sets minimum tax rates, thus creating scope for them to vary. The taxable transactions are taxed under the conditions valid in the EU country in which the transactions take place, with the basic VAT rate not being lower than 15%. In addition to the basic rate, Member States may apply one or two reduced rates, which may not be less than 5%. The reduced tax rates may be applied only to the supply of goods and services in the categories set out in Annex III to the Directive, examples of which may include food, books, pharmaceuticals, admission to cultural or sporting events, passenger transport, accommodation, etc. In the legislation of the Slovak Republic, the basic tax rate of 20% and one reduced tax rate of 10% are currently applied.

One of the characteristic features of the value added tax is its transparency – despite the fact that the tax is levied at every stage of trade or manufacturing, it does not snowball, as the current legislation excludes the application of tax on tax. Thus, each taxpayer pays the tax to the tax authority only on what, in simple terms, has increased the price of the goods or services they supply compared to the previous stage. The number of stages by which the supply passes from the initial processing up to its final realisation is not important at all.[22] Said mechanism is the result of the parallel effect of partial adjustments related to the occurrence of the tax liability and the eligibility for a tax deduction. The eligibility for a tax deduction on goods or services arises for the taxpayer on the day when the tax liability arose in respect of those goods or services. Therefore, the taxable person will become eligible for a tax deduction on the same day as the tax liability arises for the supplier of goods or services or for the purchaser of goods from another Member State. This fact expresses the basic principle in the application of the value added tax system that eligibility for a tax deduction (the right of the taxpayer in relation to the state budget) cannot arise before the tax liability of the supplier arises in relation to the state budget. One problematic point in the practical application of this principle is the decision-making on the taxpayer's registration made by tax administrators associated with the issuance of a registration certificate and the assignment of a tax identification number, in situations when there are doubts whether the applicant is a taxable person. In accordance with the foregoing, the status of a taxable person is a necessary precondition for both compulsory and voluntary registration, as well as in the case of the ex lege taxpayer status establishment.[23] Although Article 214 of the Directive exhaustively defines the categories of persons that should be identifiable by the individual numbers, this provision does not lay down the conditions which the assignment of a VAT identification number may be subject to. It follows from the wording of Articles 213 and 214 of the Directive that Member States have a degree of discretion in adopting measures to ensure the identification of taxable persons for VAT purposes, even though anyone with the intention, supported by objective circumstances, to pursue an independent economic activity and incurring the first investment costs for these purposes must be considered a taxable person.[24]

6. CONCLUSION

During the targeted historical research of the creation of value added tax and its current significance and position (state of de lege ferenda) in

the tax system of the Slovak Republic, the authors came to the following findings:

From the point of view of historical development (since 1918), the predominant tax among indirect taxes in Slovakia was turnover tax, which was gradually transformed into value added tax (VAT). In Slovakia's recent history, value added tax is considered a reliable and productive tool ensuring income for the state budget (see data in the introduction).

The legal regulation for the institution of VAT in the process of its creation took into account the degree of transformation of the Slovak economy (change of economic system to a market-oriented economy after 1989).[25]

The current form of VAT in Slovak legislation was subject to a process of harmonisation within the EU. One drawback of value added tax in the Slovak Republic would be the costs (direct and indirect) related to tax collection and administration (both in a personnel and material sense). VAT represents a surcharge on the price of the supply (state-initiated price surcharge).

A uniform tax policy and its application within the EU Member States may lead to a disproportionate burden on some[26] taxpayers (taxpayers will no longer be able to take advantage of the tax policy of other states).

Since the principle of the destination country currently applied means that value added tax is levied in the country where the goods or services are consumed, harmonising the legislation related to turnover taxes is possible through the VAT system.

The advantage of tax base harmonisation and the implementation of harmonised VAT rates lies in better transparency and simpler administration in our view, although we still consider setting up optimal taxation to support long-term and balanced economic growth a permanent problem.

Notes

1 This work has been supported by the Slovak Research and Development Agency under Contract No. APVV-16-0160.

2 The processed source data itself from the Ministry of Finance of the Slovak Republic and the Financial Administration of the Slovak Republic is available at: https://www.mfsr.sk/sk/financie/statne-vykaznictvo/klucove-dokumenty-uctovne-zavierky/statny-zaverecny-ucet-sr/ and https://www.financnasprava.sk/sk/infoservis/statistiky/plnenie-statneho-rozpoctu/_1/D%c3%a1tum%20publikovania/MTA=/NjQ=/NzM=/MQ==/MTA=/bnVsbA==/opb.

3 For example, the implemented changes in taxation (e.g. change in tax rates, introduction or repeal of taxes) affect aggregate demand (they change disposable income), while the goal of taxation should not consist of maximising tax revenues flowing into the state budget, but maximising the aggregate supply.

4 It was also referred to as the "chain tax". The subject of the turnover tax was turnover from the sale of goods of own production or own purchase (a condition for the establishment of taxable turnover was the sale of goods, by which the objective tax liability tied to the transfer of ownership of goods for remuneration was established); use or lending were not subject to turnover tax, since, in order for the State to be entitled to turnover tax on the sale of goods, it had to be goods of the taxpayer's own production or of its own purchases. When paying the turnover tax, the principle was that it had to be paid as a matter of priority, because it was not part of the organisations' own funds. When selling products, the turnover tax had to be paid to the state budget, regardless of the organisation's ability to cover all its liabilities from its own resources. The compensation for damage provided to socialist organisations due to loss of goods, damage, theft, defective goods, destruction, etc. was also subject to turnover tax. Gifts were subject to turnover tax too, regardless of whether they were goods of the taxpayer's own production or its own purchase. The day on which the invoice or other sales document was issued was decisive for the tax liability, and the sales prices valid on the day of the sale were decisive for determining the amount of turnover tax. There were three types of tax rate for calculating the turnover tax, namely fixed, percentage and differential. For more see Drachovský, J. (1928). Přehled finančního hospodářství v Československé republice. Praha, 1928. and also Slovinský, A., Girášek, J. (1974). Československé finančné právo. Bratislava: Obzor, 1974, p. 390.

5 Bujňáková, M. et al. (2015). Dane a ich právna úprava v Slovenskej republike v kontexte daňovej politiky EÚ. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2015, p. 408.

6 Price compensatory amounts were introduced in 1947 to compensate for differences caused by lowering prices of certain types of consumer good.

7 According to that legislation, an undertaking was considered a payer of turnover tax. The tax liability arises from the sale of goods of own production, the sale of goods of own purchase, the purchase of goods from abroad and the internal use of goods of own production or own purchase, in specified cases. The tax base consists of the selling price including the tax, surcharges and deductions, in the case of imports; it also includes the import surcharge and customs duty.

8 The tax could be levied on the same goods only once (in principle, the taxation of means of production was not taken into account), the tax was linked to price lists of state wholesale and retail prices (the amount of the tax was determined mainly by the difference between the state wholesale price and the state retail price reduced by the trade margin, the technique of calculating and collecting the tax depended on the special conditions of individual industries, it was paid from the turnover of goods on a monthly basis), the taxpayers were obliged to calculate and pay it on their own, to file a tax return every month and, after the end of the year, to file an annual statement; the tax was not collected from goods exported abroad. See Girášek, J. (1981). Daňovoprávne vzťahy v Československu. Bratislava: Obzor, 1981.

9 Babčák, V. (2015). Právo Európskej únie a boj proti podvodom v oblasti DPH. In Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác. I. diel. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2015, pp. 9-36.

10 For more see Románová, A. (2013), Aktuálne predstavy a snahy EÚ v oblasti daňovej normotvorby In Právo, obchod, ekonomika II. Praha: Leges, 2013, p. 227 et seq.

11 According Králik, J., Jakubovič, D. (2004). Finančné právo. Bratislava: Veda, 2004, p. 725.

12 All business activities were subject to taxation with this tax as long as they took place on Slovak territory.

13 For example, civic associations, budgetary organisations or contributory organisations.

14 For more see e.g. Štrkolec, M. Intrakomunitárne a „extrakomunitárne" obchody a daň z pridanej hodnoty. In Právo, Obchod, Ekonomika III. Košice: Pavel Jozef Šafárik University in Košice, 2013, p. 398 et seq.

15 See Terra, B. J. M., Wattel, P. J. (2012). European Tax Law. Hague: Kluwer Law International, 2012.

16 It follows from the ECoJ case-law that this concept includes any transfer of tangible assets by a party that allows another party to efficiently dispose of these assets as if they were the owner. See the judgments of the ECoJ in Case C-320/88, Shipping and Forwarding Enterprise Safe of 8 February 1990, p. I-285, paragraph 7, and Case C-25/03, HE of 21 April 2005, p. I-3123, paragraph 64.

17 The import of goods into the territory of the European Union is considered the entry of goods from the territory of third countries.

18 Babčák, V. (2012). Slovenské daňové právo. Bratislava: EPOS, 2012, p. 670.

19 For more see Jánošíková, P., Mrkývka, P, Tomažič, I. (2009). Finanční a daňové právo. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2009.

20 Balko L., Babčák, V. a kol. (2006). Finančné právo. Bratislava: EUROKODEX 2006, p. 208.

21 Babčák, V. (2010). Daňové právo Slovenskej republiky. Bratislava: EPOS, 2010, p. 187.

22 Babčák, V. (2010). Daňové právo Slovenskej republiky. Bratislava: EPOS, 2010, p. 160.

23 Prievozníková, K., Olexová, C. Zábezpeka na daň z pridanej hodnoty pri registrácii platiteľa dane. In Manažment v teórii a praxi, roč. 9, č. 1-2 (2013), pp. 29-34.

24 This is because taxable persons, who may apply for a VAT identification number, are considered not only persons who are already performing an economic activity, but also persons who intend to take up such an activity and who have incurred the first investment costs for that purpose. Therefore, these persons may not be able to prove, at this preliminary stage of their economic activity, that they have the material, technical and financial means to take up such activity. For more, see the judgment of the ECoJ of 8 June 2000, C-400/98, Breitsohl, or C-280/10, Polski Trawertyn.

25 See Prievozníková, K. Harmonizácia daňovej sústavy s právom Európskej únie s dôrazom na právnu úpravu dane z pridanej hodnoty. In Acta Iuridica Cassoviensia 25. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2004, pp. 87-91.

26 As VAT has the character of a general indirect excise duty and is included in the price of goods and services, the tax burden ultimately imposes a burden on the consumer, who also pays that tax within the price.

DOI: 10.54201/iajas.v1i1.15

The Remission of Tax Sanctions in Correlation with the Current Pandemic

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Abstract: The COVID-19 pandemic has undoubtedly had a great impact on tax policies in different states across the world and that naturally results in slight changes in their tax administrations. These changes in tax administration can be perceived as a government's response to the pandemic which aims to help taxpayers adjust to this new situation, especially by easing tax duties. Every state has its own measures to cope with the problems that have emerged. This article aims to map and evaluate certain steps that the government in the Czech Republic has taken with the purpose of reducing the negative effects of this pandemic. In the Czech Republic, these measures have taken the form of a mass remission of tax sanctions for non-compliance with selected tax duties among selected taxpayers. This text will analyse the mass remission of taxes as a legal instrument, and will also discuss whether such an unusual measure fulfils its purpose, i.e. to mitigate tax duties during the pandemic, as well as striving to present an overview of the various consequences in relation to tax administration.

Keywords: tax law, tax return, tax procedure, tax sanctions, income tax, value added tax, COVID-19, pandemic, tax administration

1. INTRODUCTION

Before considering the various measures that have been taken in the Czech Republic, it is important to note that for many taxpayers the pandemic could have made the fulfilment of tax duties more difficult than it would have been under usual circumstances. Therefore, one of the areas of tax law, where new regulations have been adopted, is tax administration itself. In specific terms, significant changes in tax administration were related to the evaluation and collection of taxes as well as to sanctions following possible non-compliance with these tax obligations. Accordingly, in the Czech Republic the government aimed to ease the situation for taxpayers during the pandemic with one measure which took the form of a mass remission of selected tax sanctions; this remission resulted overall in extending deadlines for filling out tax returns and paying assessed taxes, and will be explained later on.

Despite these measures being relatively rare to take under normal circumstances, during the pandemic it may be considered an adequate reaction to such a global issue, when in almost every country similar measures have been taken to lessen tax duties for taxpayers during the pandemic.[1] Evidently, it is not only the remission of sanctions that is a key topic of this article, there are also other measures occurring in various forms helping taxpayers to cope with tax duties, e.g. post-

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ponement of payments, application of deductible items, introduction of one-off financial support for those affected by COVID-19, etc. The situation around the virus has affected various areas of tax duties, and therefore, in the authors' opinion, it is not surprising such measures are being taken. It is primarily the easing of legal obligations which is able to mitigate the negative impacts of a pandemic, especially in the field of economics, as this is where the destructive effects appear the most, due to business, conference or product exhibition closures, the reduction of purchases and lower demand. Having considered this, it is the legal easing (for the purpose of this article, the easing of tax duties, e.g. extension of deadlines for tax payment) that can indeed help the economic situation of taxpayers. This opinion is also sustained by recent publications, e.g. the work published as "Ten keys to beating back COVID-19 and the associated economic pandemic".[2]

Whereas some of these measures might require the adoption of a new law, some need only exceptional circumstances to develop in order to activate the hypothesis of a legal provision that already exists in law and gives certain jurisdiction to state organs to respond to a pandemic, and only exceptional circumstances need to be triggered.[3] The former case will include situations when the legal statute does not bank on such a crisis nor does it provide an instrument for solutions to alleviate the impact of a crisis, hence legislative changes are necessary. In the Czech Republic both scenarios have occurred, as legal instruments already established in law were used (e.g. legal instruments of tax law provide relief for taxpayers such as the remission of sanctions for special reasons, the mass remission of sanctions in the form of a Ministry of Finance directive), but also legislative changes were made in various tax statutes, these amendments were consolidated into one particular statute so it ensures greater clarity for subjects of law, and they are therefore are not spread over different legal acts. It was the so called "Lex Covid", which referred in particular to issues in insolvency, execution and criminal proceedings.[4] In tax law it was the new statute Act No. 159/2020 Coll., on compensation bonus (in connection with the crisis measures in respect of the new coronavirus SARS CoV-2), which sets rules for receiving the compensation bonus as financial support, especially for self-employed persons. In addition, another enacted statute, which was Act No. 299/2020 Coll., on amendments to some tax statutes in connection with SARS CoV-2, changed the rules, for instance, regarding real estate tax administration (introducing the remission of tax for specific reasons, which is the pandemic, as an exceptional circumstance), rules regarding estimated tax losses from this year as a deductible item from the corporate tax base, which can now be applied in advance ensuring minimum cash-flow issues. Moreover, with this act the rate of a road tax for selected types of vehicle and the reduced rate for VAT were decreased (for the supply of accommodation, cultural services, i.e. services most affected by the crisis).

In the same manner, it can be differentiated whether the remission of sanctions as a measure by the government applies to all taxpayers or only to selected groups. That means only groups of taxpayers affected by the crisis the most benefit from alleviated tax sanctions (e.g. taxpayers who have entrepreneurial income, taxpayers generally affected by COVID-19).[5] The reason behind this could be that only some groups of taxpayers might face cash-flow issues and hence have problems with the timely compliance of tax duties.

From another point of view, measures take the form of an individual remission of a tax sanction based on an application submitted with individual claims and reasons for avoiding the sanction (e.g. ordered quarantine of employees, income decrease – such reasons need to be proven) or a general remission for every taxpayer within certain groups, without the need for proving the direct influence of COVID-19.

Measures which aim to ease the burden of tax duties for taxpayers can take on many forms, and some of these types of measure have already been mentioned. Noting the vast field of tax administration, the most common measures in various

countries, for example, are the remission of tax sanctions (already imposed in the taxable period during the time of the crisis or previous taxable periods), extending deadlines for filling out a tax return and paying tax, supporting digital communication with the tax administrator, and others.[6]

2. SITUATION IN THE CZECH REPUBLIC

To illustrate the context, the authors have decided to briefly introduce the development of the general situation in the Czech Republic. During the pandemic there was a government decision, which declared a state of emergency, lasting from 12 March 2020,[7] and subsequently on 17 April 2020 the Ministry of Health Affairs issued an emergency measure, which ordered the closure of retailers for example, with some exceptions, the prohibition of accommodation services, taxi services, etc.[8] With these measures by the Ministry of Health, the government aimed to prevent the spread of a pandemic in the Czech Republic by limiting people's contact to the minimum necessary. It was assumed that the pandemic would have an impact on taxpayers, and for many of them it was indeed a challenge to deal with the new situation. A number of restrictions had a negative impact on the economy, both due to the closure of some establishments and changes in customer behaviour.[9] As a consequence, the government resorted to measures aimed at alleviating the COVID pandemic in various areas of law, including taxation. One of the benefits that taxpayers could use after meeting certain conditions was, for example, a compensation bonus in the form of one-off financial support from the government as compensation for difficulties with business activities, etc. That being said, this article focuses on a specific government measure, which alleviated tax obligations related to the assessment of tax, the payment of taxes and the remission of related sanctions. This measure is a waiver aimed primarily at sanctions, which in the Czech Republic include a fine for the late declaration of tax (especially for the late filing of tax returns), which amounts to 0.05% of the set tax for each subsequent day of delay and interest on the late payment of tax, which amounts to the repo rate increased by fourteen percentage points (i.e. around 14% per annum) and interest on the deferred tax payment, which is simply applied when allowing the deferral of the tax payment in full or allowing the instalment payment (around 7% per annum).[10] It was decided that sanctions following the non-compliance with tax duties, such as the assessment and payment of the tax, would be waived under certain conditions. These decisions were implemented in the form of an administrative act, which can be translated as a mass decision of the Minister of Finance.

3. DECISION OF THE MINISTER OF FINANCE

The remission of the above-mentioned fines and interest was implemented by means of a legal instrument introduced in the Tax Code in 2010, the so-called mass decision of the Minister of Finance pursuant to Section 260 of the Tax Code, which reads as follows:

"*The Minister of Finance might exempt, ex officio, in respect of taxes administered by administrative authorities under his control, any tax or related charges.*[1]
(a) because of irregularities resulting from the application of tax laws; or
(b) in the event of emergencies, in particular natural disasters."

There was a total of six decisions during the pandemic.[11] These forgave sanctions already imposed or expected, without the need to submit individual applications.[12] The Minister of Finance

[1] Related charges for tax in the Czech legal system are called "tax accessories", which include interest, penalties, fines and costs of proceedings, if they are imposed or incurred in accordance with the Tax Act.

has the power to use this tool in cases of irregularities in the law and in times of extraordinary events. This form of administrative act [Resolution of the Supreme Administrative Court of 17 December 2013, no. 1 Afs 76 / 2013-57, paragraph 51] alleviates tax duties for all taxpayers defined by rather general features (e.g. certain group of taxpayers). Due to the foresight of the possible exceptional events by law, the legislator did not have to modify the wording of the law, but rather chose to use and interpret an indefinite legal concept already in effect, which is "*in the event of emergencies"*. The administrative body must interpret and take adequate decisions to meet the purpose of such a legal norm. Such decision shall mitigate the negative effects of the extraordinary event on selected groups of taxpayers, but a non-discriminatory approach is necessary. It can certainly be confirmed that the COVID-19 pandemic is an unprecedented situation that can be subsumed under the legal concept of "*in the event of emergency*", as it has affected social and economic relations around the world. The mass tax and related charges exemption previously mentioned is an option similar to the established legal instruments, such as individual applications for the remission of sanctions and requests for deferral of payment. In these cases, the taxpayer must state the reason which allows for the waiver of the sanction, whereas in the case of a general decision of the Minister of Finance, only the conditions specified (if any) must be fulfilled. In our opinion, however, these individual applications also alleviate the so-called "harshness" of the law for excusable reasons, while a mass waiver only responds to an inconsistency in the law or the negative impact of an emergency and is used only exceptionally, as evidenced by the low frequency of use. In general, it can be argued, as concluded by the case-law of the Supreme Administrative Court of the Czech Republic[13], that *the purpose of the mass tax alleviation is not to remedy an illegal decision of the tax administrator on the assessment of the tax, but to respond to inconsistencies in tax laws*[14] or the impact of extraordinary events. Such a decision of the Minister of Finance is published in the Financial Bulletin, as the range of entities it targets is not specifically stated.[15]

In the author's opinion, the Ministry of Finance proceeded correctly in interpreting the COVID-19 pandemic as an emergency situation with a possible negative impact on taxpayers in the first place. Secondly, it is necessary to adopt these solutions as a part of administrative efforts in order to – and this is important – mitigate these negative effects.[16] The remission of sanctions certainly offers great relief for taxpayers, but to assess in detail the impact of the decisions taken by the Ministry of Finance on taxpayers for the purpose of easing tax duties, it is necessary to analyse the content of these individual decisions, which will be done in the following chapters.

3.1. INCOME TAX

Due to the pandemic, the consequence of the first decision of the Ministry of Finance of 16 March 2020 was extending the deadline for filling out tax returns and paying the tax to 1 July for all income taxpayers.[17] The so-called Tax Liberation Package III provided some exemptions for tax, related charges and administrative fees.[18] This means that taxpayers who do not meet the deadline for filing an income tax return by 1 April, which is the usual deadline, and manage to file it and pay the tax by 1 July, will be forgiven the fine for tax returns filed late and the interest on late tax payments for the tax period of the year 2019.[19] Furthermore, with this decision of the Ministry of Finance the interest on arrears was waived pursuant to Section 252 of the Tax Code, and the interest on the deferral of tax payments under Section 157 of the Tax Code. This was justified by the targeted reduction in taxpayers visiting tax offices and by staffing shortages in smaller companies due to the spread of the pandemic. The second decision waived the income tax advance payments, which fell on 15 June. Thus, the obligation to pay income tax advances, which taxpayers must pay in two or four stages depending on the amount of income, was eliminated. This aimed to solve the problem of insufficient liquidity at taxpayers. *The fifth and most significant decision stated that the fine for the late*

filing of tax returns, the interest on arrears and the interest on deferrals would be waived if the tax subject assessed and paid the tax by 18 August 2020.[20]

3.2. REAL ESTATE TAX, VALUE ADDED TAX AND OTHER WAIVERS

With the second decision of the Ministry of Finance, in the case of tax on acquiring immovable property, the deadline for filing a tax return was extended to 31 August if the original deadline fell between 31 March and 30 November.[21] The fifth decision changed the extended deadline from 31 August to 31 December.

In the case of VAT, the fine of CZK 1,000 for a control statement[22] was firstly waived if it arose from 1 March to 31 July. The fine for the late claim of value added tax was then forgiven for those who were forgiven for not submitting a control statement. The value added tax was then waived on selected transactions related to medical equipment, etc., and later, in the last decision, the deadline for filling out a tax return and paying the tax for some tax periods was "extended" until 31 December.[23]

Furthermore, taxpayers who received at least a partial waiver of interest on arrears for reasons related to the spread of the virus on the basis of an individual application pursuant to Section 259b of the Tax Code, and taxpayers who, on the basis of an individual application pursuant to Section 156 of the Tax Code, were allowed to defer payment of the tax or divide the payment into instalments for reasons related to the spread of the virus, are exempt from a fine for the late claim of related tax pursuant to Section 250 of the Tax Code.

Lastly, interest on arrears and interest on deferred payments related to tax advances on road tax in the 2020 tax period was remitted only if these advances are paid no later than 15 October 2020.[24] And in the last decision, they were completely eliminated.[25]

4. ISSUES RELATED TO THE REMISSION OF SELECTED SANCTIONS

The OECD report "Tax Administration Responses to COVID-19: Measures Taken to Support Taxpayers", which compares the individual steps of selected countries and provides information about the individual measures taken by selected countries, states that the Czech Republic has extended the deadline for filing tax returns by three months. The truth is that this is only a consequence of a government decision, which in fact decided only to waive sanctions arising from the three months which are imposed for filing and paying the tax after the usual deadline, within the extended period. This means that a taxpayer may assess and pay tax three months later than the normal deadline set by the Tax Code without sanctions. That is, however, because sanctions calculated from the original deadline until the end of the extended deadline will be remitted, not because the deadline itself is extended.

Undoubtedly, the remission of fines and interest related to late filing and payments is very helpful for taxpayers. During the pandemic they could then focus on other issues arising from this situation, and at the same time they could use the money they would pay in taxes to overcome the unfriendly economic environment during a pandemic. However, it should be pointed out that theoretically, the deadline for filing a return is not extended, only the sanctions for filing and paying later are remitted (i.e. from the time after 1 April 2020).[26] However, the waiver is subject to the taxpayer assessing and paying the tax by the newly set deadline, i.e. 18 August 2020 for income tax. Ultimately though, if they fail to do so, the sanction cannot be waived. This means that if a taxpayer is late and files a tax return and pays the tax only a day later for example, i.e. on 19 August 2020, they will be fined for late filing and be charged interest on the late payment. These sanctions would then be calculated not from 18 August 2020 (new extended deadline)

but from the original deadline for filing the tax return, i.e. 1 April 2020 (in some cases 1 July 2020). Some taxpayers will certainly find themselves in such a situation and will thus face sanctions that will accumulate from as early as April. To avoid this, the above-mentioned decisions would have to specifically extend the deadline for submitting tax returns until 18 August for example.[27]

This is also related to the increased administration of the tax administrator, who proceeds from now on according to the decision of the Ministry of Finance. The point is that the sanctions will in fact be imposed in the end and assigned to the personal tax account of the taxpayer who managed to assess and pay the tax within the new extended period, and such sanctions will then be debited and written off. Theoretically, this would not be the case with a simple extension of the deadline, as sanctions would not be imposed at all.

5. REMISSION OF SELECTED SANCTIONS AND ITS IMPACT ON TAXPAYERS

It is also worth mentioning that the above-mentioned relief to taxpayers by extending the deadline for the payment of taxes meant sanctions were waived only for selected taxes and selected tax periods, not for all tax arrears. Therefore, the remission of sanctions (fines for late-filling and interest on arrears) relates in particular to income tax for the 2019 tax period, income tax advances due, and to cases where deferral of payment or instalments were allowed for reasons related to the spread of the SARS-CoV-2 virus. In this manner, taxpayers could fulfil their obligations in relation to the public budget after the legal deadline without a penalty. On the other hand, it cannot be disregarded that this selective remission of sanctions could ultimately have led to inequalities between taxpayers.

This possible inequality could have arisen in a situation where a taxpayer duly fulfilled their obligation to declare and pay the tax, but before a tax waiver decision was issued in the Financial Bulletin,[28] and then subsequently got into financial difficulties due to the spread of the SARS-CoV-2 virus. Such taxpayer would not have any possibility to request a refund (albeit only temporary, during the protected period) of the tax already paid, which could possibly be used to fund its activities like the taxpayers who did not pay the tax and which were subject to a later remission of sanctions. This is because the deadline for filing and paying tax is still the usual one – 1 April 2020, and after this date the tax already paid stops being an overpayment (which could be requested back) and a taxpayer cannot make a request after the original deadline. By contrast, those who did not fill out a tax return and did not pay by 1 April 2020 have an advantage in terms of cash-flow. If there were no waivers of tax-related charges, but instead there was specifically an extension of the deadline for filing a tax return and paying the tax, this would result in the possibility for returning tax to a taxpayer which was already paid, as it would still be considered an overpayment of tax until the deadline expires. Taxpayers could then use these returned funds to support activities during the crisis.

At the same time, it is necessary to point out other contexts of the chosen solution of support for taxpayers. Without extending the statutory deadline for paying the tax, the individuals formally became tax debtors after filing a proper tax return and without fulfilling the obligation to pay the tax. In a situation where individuals did not file a proper tax return, they did not fulfil the obligation to file a proper tax return on time. Despite the remission of sanctions, the very fact they violated tax law could have a major impact on taxpayers, both in terms of fulfilling private law obligations (e.g. loan conditions with banks) and meeting other conditions (typically subsidy conditions). Although such individuals may have been exposed to completely identical effects related to the spread of SARS-CoV-2 as others, in these cases the aid was possible, but in fact inapplicable.

Furthermore, it can be pointed out that only sanctions for the above-mentioned situations were

waived, but not for tax arrears as such. Therefore, if the taxpayer was in arrears with the payment of another tax (e.g. from previous tax periods) not subjected to the remission, the arrears would bear interest in full compliance with the applicable legislation, regardless of whether it was affected by the spread of the virus or not. This contributed to the fact that the measures taken were not only aimed at certain groups of taxpayers, but also at selected taxes and selected tax periods.

It cannot be argued that the chosen solution was legislatively simple and fast, the legislation did not have to change, and significant support for taxpayers was provided as a result. On the other hand, it is necessary to point out that a change in the law (extending the deadline for filing proper tax returns and paying tax, or enacting a non-interest period for all taxpayers and all tax arrears) would be a more systematic solution.[29] It cannot be overlooked that even tax exemptions must have constitutionally compliant limits of application, so among other things, there must be no unjustified inequality between taxpayers.

6. CONCLUSION

Tax law in the Czech Republic offers many legal instruments that can relieve taxpayers of their tax obligations, one of which, for example, is an individual application for the remission of sanctions or a mass remission of sanctions, which were the topics of this article.

The decision of the Ministry of Finance to waive sanctions for selected taxpayers is a decision that uses legal instruments to mitigate the negative effects of the pandemic, which include, among other things, the waiver of sanctions. This applies to income tax, VAT, road tax, tax on the acquisition of real estate, and more. The characteristics of the approach to remit sanctions in the Czech Republic via a decision of the Ministry of Finance can be summarised as a remission for selected groups of taxpayers without the need to prove the reason or influence by COVID-19. The "waiver of sanctions", tying the condition of compliance to a later deadline, does appear to be an extension of the deadline, but it is not. It can only be characterised as a mass remission of sanctions. Even so, it is a helpful step for taxpayers and the purpose of mass immunity from sanctions was achieved.

It is therefore undoubtedly necessary to conclude that the administrative authority proceeded to use the legal instrument of a mass remission of sanctions to alleviate the situation correctly, and a positive impact was achieved. This fulfils the purpose of this extraordinary legal instrument in the tax code, and in the context of dealing with the negative economic consequences, it must be taken into consideration that not only waiving sanctions but also other tax policy measures such as compensatory bonuses, easing excise duty and social and health insurance obligations also alleviate the difficult situation of taxpayers. However, it should be noted that while the correct process of the tax administrator to impose sanctions was calculated from the original deadlines for assessing and paying taxes, taxpayers who expect the deadline to be extended may be surprised to find out that sanctions are calculated from the end of the original deadline. And this can be counterproductive at a time when it is better to aim for alleviation. Sanctions can cause cash-flow problems or stress on taxpayers.

Ultimately though, in an individual request for the remission of a sanction, the taxpayer has the opportunity to prove that the extraordinary circumstances related to the pandemic caused them to file late, even after the extended deadline, and so even after missing the extended deadline for filing tax returns and paying tax they still have the possibility to submit a request to a tax administrator for the remission of sanctions due to crisis-related reasons, which have to be stated in the application. These individual applications should cover situations which the mass remission did not.

With regard to the onset of the next wave of the epidemic, it will be interesting to observe whether the administrative body's approach to tax subjects will change, or whether waiving sanctions will be a typical example of assistance without specific amendments to the law.

Notes

1 CIAT/IOTA/OECD (2020), Tax Administration Responses to COVID-19: Measures Taken to Support Taxpayers, OECD, Paris, https://read.oecd-ilibrary.org/view/?ref=126_126478-29c4rprb3y&title=Tax_administration_responses_to_COVID-9_Measures_taken_to_support_taxpayers (May 26, 2021).

2 Wei, Shang-Jin (2020) Ten keys to beating back COVID-19 and the associated economic pandemic, In: Baldwin, R., Weder Di Mauro, B. et al. *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes* (London: CEPR Press), 74., http://itsr.ir/en/Content/upload/COVIDEconomicCrisis.pdf (May 26, 2021).

3 CIAT/IOTA/OECD (2020), Tax Administration Responses to COVID-19: Measures Taken to Support Taxpayers, OECD, Paris, https://read.oecd-ilibrary.org/view/?ref=126_126478-29c4rprb3y&title=Tax_administration_responses_to_COVID-9_Measures_taken_to_support_taxpayers (May 26, 2021).

4 Act No. 191/2020 Coll., on certain measures to mitigate the effects of the SARS CoV-2 pandemic. For more information see, e. g.: https://home.kpmg/xx/en/home/insights/2020/04/czech-republic-tax-developments-in-response-to-covid-19.html

5 CIAT/IOTA/OECD (2020), Tax Administration Responses to COVID-19: Measures Taken to Support Taxpayers, OECD, Paris, https://read.oecd-ilibrary.org/view/?ref=126_126478-29c4rprb3y&title=Tax_administration_responses_to_COVID-9_Measures_taken_to_support_taxpayers (May 26, 2021).

6 Ibid.

7 Resolution of the Government of the Czech Republic of 12 March 2020 No. 194.

8 Ministry of Health: Extraordinary measure - ban on retail sales and services with exceptions, No. 41/2020.

9 Explanatory memorandum on Act No. 299/2020 Coll., on amendments to some tax statutes in connection with the SARS CoV-2.

10 In the Czech Republic, there is a self-application system for tax laws, where it is up to taxpayers to evaluate the tax themselves by filing a tax return and submit it to the tax administrator. A fine for the late assessment of a tax is imposed when a taxpayer does not fill out a tax return on time, while interest on the late payment of tax is also imposed, as the deadline for payment ends for most types of tax together with the assessment deadline (filing of the return).

11 Resolution issued in Financial Bulletin No. 4/2020 on 16 March 2020, Resolution issued in Financial Bulletin No. 5/2020 on 24 March 2020, Resolution issued in Financial Bulletin No. 6/2020 on 31 March 2020, Resolution issued in Financial Bulletin No. 7/2020 on 15 April 2020, Resolution issued in Financial Bulletin No. 9/2020 on 10 June 2020, Resolution issued in Financial Bulletin No. 22/2020 on 14 October 2020.

12 Individual application is regulated in Article 269 of Tax Code.

13 Resolution of the Supreme Administrative Court, No. 5 Afs 99 / 2016-28.

14 Ibid.

15 Resolution of the Supreme Administrative Court, No. 1 Afs 76 / 2013-57.

16 Gonsiorová, B. (2017) Proces odstraňování tvrdostí zákona [The Process of Removing the Harshness of the Law], *Právní rozhledy*, 10/2017, 371-374.

17 For the sake of completeness, it is necessary to point out that income taxes in the Czech Republic are divided into personal income taxes and corporate income taxes. Natural persons might have income from dependent activity, rent, capital income, business, or income from occasional activities. Legal entities have taxable income from their activities and from the management of their assets. Natural persons and legal entities file tax returns for income tax by 1 April. Those who have a representative or a mandatory audit file tax returns by 1 July. Tax returns must be filed each year for the tax period preceding the period in which the tax return is filed. Thus, in 2020, it was expected that taxpayers would file a tax return by these deadlines for the year 2019.

18 More information available at: Mašátová, Z. *Finanční správa* 2020, Termíny pro podání a zaplacení některých daní bez sankcí se posouvají. Tisková zpráva [Deadlines for filing and paying some taxes without penalties are being postponed Press release])., https://www.financnisprava.cz/cs/financni-sprava/media-a-verejnost/tiskove-zpravy/tz-2020/terminy-pro-podani-a-zaplaceni-nekterych-dani-bez-sankci-10740 (May 26, 2021).

19 Ibid. This waiver does not apply to entities that fall under the responsibility of the Specialised Financial Office – i.e. banks, and legal entities with turnover of more than CZK 2 billion.

20 Furthermore, pursuant to the Income Tax Act, the fine for failing to report incomes that are exempt from income tax, pursuant to Section 38 of the Income Tax Act, and the fine for the late filing of an additional tax return for the 2018 tax period, are also waived in some cases.

21 In Czech Republic there is a real estate tax return filed every year and the tax on an acquisition of immovable property for cases when there is a sale of real estate. Such tax return must be filed 3 months from the sale. Ultimately, though, this tax was cancelled in September 2020.

22 The control statement is a report related to the value added tax return which provides detailed information about related transactions.

23 Resolution issued in Financial Bulletin No. 22/2020.

24 Resolution issued in Financial Bulletin No. 6/2020.

25 Resolution issued in Financial Bulletin No. 22/2020.

26 Vychopeň, J. (2020) *COVID-19 v účetních a daňových souvislostech [COVID-19 in Accounting and Tax Contexts]* (Praha: Wolters Kluwer ČR).

27 With the addition that they already forgive sanctions imposed from previous tax periods.

28 The first Resolution on the waiver of tax-related charges and administrative fees due to an extraordinary event, No. MF-7108/2020 / 3901-2, was issued in the Financial Bulletin on 16 March 2020.

29 For comparison, in Slovakia there was legislation in relation to COVID-19, which changed a vast group of legal instruments that fall under the jurisdiction of the Ministry of Finance. Act No. 67/2020 Z. z., o niektorých mimoriadnych opatreniach vo finančnej oblasti v súvislosti so šírením nebezpečnej nákazlivej ľudskej choroby COVID-19 (on some extraordinary measures in the finance field in relation to the spread of a dangerous disease), https://www.zakonypreludi.sk/zz/2020-67 (May 26, 2021).

DOI: 10.54201/iajas.v1i1.16

Values of Good, Truth, and Love in Participatory Budgeting in Poland[1]

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Abstract: Literature suggests that government instruments, rooted in the traditional modernist representative democracy, do not effectively protect the common good due to the moral hazard problem, and as a solution, it proposes citizen participation. However, just like over the last century public administration experienced a smooth and almost invisible passage from modernist instruments – informed by Aristotle – to postmodernist ones with a Marxist background, participative governance serves to replace the universal values of Latin (Western) civilisation by the ideas of neo-Marxist new ethics. This is the case of participatory budgeting that cannot effectively enhance financial accountability for the protection of the common good because it infringes on the value of truth. What is worse, by "*the liberation* from freedom" that it proposes is detrimental to the common good. The solution seems to lie in philosophy, that is the love of wisdom, and in true love.

Keywords: participatory budgeting, axiology, Poland, public values, local government

1. INTRODUCTION

Whereas objective truth is the highest value of methodology, the serious threat to discovering the truth about public administration lies in ignoring its philosophical grounds.[2] This is because the philosophy is inseparable from the ethics, rooted in antiquity,[3] and from the axiology.[4] Even if values and ideas are invisible at first glance, they penetrate public administration. "There is no more important topic in public administration and policy than public values"[5] because "what is essential is invisible to the eye".[6] As history demonstrates, "a democracy without values easily turns into open or thinly disguised totalitarianism".[7] Democracy retains its substantive meaning as long as it ensures citizens' participation in making political choices and it guarantees them the possibility to hold those who govern accountable. Thus a true democracy cannot encourage the formation of narrow ruling groups usurping the power for their interests or ideological ends, it needs to respect the correct notion of a human being instead. Bypassing natural law and legitimised decision-making bodies, the democratically elected German parliament gave Adolf Hitler the plenary power enabling him to invade Europe and exterminate millions of human beings.[8]

Public values determine the true aim of all instruments of public administration, whereas legal norms are only a technical tool of its implementation. Ignoring the philosophical grounds of governance instruments covers the postmodernist dangers of the participative reinvention movement that "have overwhelmed the rational-consistent-enlightenment or modern aspect"[9] because the ethical grounds "are not mainstream public administration, nor even political science.

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But neither of those traditions can explain the demise of the demos", where demos means "the fear or expectation of political philosophers from Aristotle to John Adams, and Madison to Marx, that the underprivileged in a democracy would use their political power to balance, if not confiscate and redistribute, the wealth of the few".[10] The smooth passage from the modernist values of government informed by Aristotle to the postmodernist ideas of governance with a Marxist background has profoundly modified public administration, even if apparently nothing has changed.

On the one hand, as Aristotle (384-322 BC) was in search of absolutely fair public administration protecting the *common good* almost 2,500 years ago,[11] scholars and practitioners are also currently in search of *common decency,* requiring a revisit of public values.[12] In Aristotle's concept, humans are happy when they protect common interests because they follow their nature and they respect the natural law that is independent of, and existed before, the positive law adopted by authorised state bodies.[13] Democracy has its justification in the vision of a man capable of taking independent decisions on ethical issues, being responsible for the community's common good, and therefore having the right to participate in the exercise of power.[14] These Greek philosophical grounds are consistent with the Christian ethics coming from God, the Creator of the world, love, and thus absolutely respecting humans' free will. Humans' freedom stems from their supernatural and inalienable dignity, enabling them to search the truth and to turn towards the good. It serves their self-development, as humans are responsible for their fate and the world. To protect the common good, Christian ethics invariably have four postulates: life-long monogamous marriage, pressure for the abolition of slavery, the abolition of revenge which is entrusted to a public judicatory, and the Church's independence of the State.[15] As natural law requires legal protection, the ancient Romans, from 449 BC to AD 529, developed Roman law, being the first extensive, written order of positive law. Roman lawyers believed that only law consistent with a universal sense of justice can be socially accepted and thus effective. These three pillars, i.e. Greek philosophy, Christian ethics and Roman law, opened the floodgates of Latin (Western) civilisation, originating in Europe then transferred to the Americas and Australia.[16] Latin civilisation distinguished itself with an unusual intensity of activities, innovations as well as economic and demographic growth. It resulted in an extension of civil liberties and the development of political systems based on rule of law and protection of the common good.[17] The values of Latin civilisation have become the cradle of modern democracy and modern public administration, leading Europe and the United States to the top of power.

On the other hand, philosophical currents seek to annihilate Latin civilisation, to replace universal values with new ideas, to reinvent the notion of the common good. This movement started with German philosophers and communists, Karl Marx (1818-1883) and Friedrich Engels (1820-1895), and their critical theories about society, economics and politics holding that human societies develop through class conflict. They negated the existence of the omnipresent, the unchangeable, thus an absolute God having a spiritual nature who, after the original sin, seeks reconciliation with human beings, having a spiritual nature as well. Instead, they introduced the notion of matter, having a dialectical nature, thus changeable in the process of evolution, seeking reconciliation with itself, to achieve self-awareness and spirituality. The problem is that they were not able to define the matter, the crucial term for the theoretical cohesion. As for the Marxists, the Absolute does not exist so His universal values cannot exist.[18] Not recognising the need for a connection between law and morality, they deny the concept of natural law, adopting legal positivism as a pillar of the legal doctrine regulating public administration.[19]

In Central and Eastern Europe, the classic Marxists, starting from a Russian politician, Vladimir Lenin (1870-1924), tried to destroy the economic system believing it would trigger the desired changes in culture[20] and the annihilation of the values of Latin civilisation.[21] Using the pretext of protesting against the exploitation of capitalism,

they strove for a total criticism of law, morality and religion.[22] One of the consequences is that "the totalitarian regime instilled an understanding in people that public property is nobody's and 'to take your share' is not immoral".[23] Hence, in Poland, under Soviet influence from World War II to 1989, Marxism was built mainly by methods of economic upheaval and open fights with the Catholic Church. These attempts proved ineffective as Poles were attached to traditional Christian values.[24] The persecution of the Church behind the Iron Curtain only increased Catholic anti-communism, supported by the Vatican and the United States.[25] Also, the culture, children's upbringing, and education encouraging self-development and rational thinking contributed to the failure of the Marxist revolution.[26]

In Western Europe, the communists' attempts to take the political power by military force failed, initially as a result of World War I (1914-1918), and ultimately the Polish-Soviet War in 1920. Then the Western Marxists, in particular A. Gramsi and G. Lukas, understood that the only effective option for the Marxist revolution is to start it directly from the annihilation of Christian values, the reconstruction of culture, the changes in human consciousness.[27] Hence, in 1924 within the University in Frankfurt am Main they established the Social Research Institute. Its leading representatives emigrated to the United States when Hitler came to power. Here they created the critical theory – being the philosophical grounds of postmodernism[28] – of cultural Marxism, called also neo-Marxism or the new-left, and its new, global ethics.[29] Paradoxically, for a century, the Iron Curtain of the Berlin Wall protected Poland from cultural Marxism, being much more effective in destroying the values of Latin civilisation than classical Marxism. Thus, even if the fall of the Berlin Wall in 1989 marked the end of the division between East and West, it was not "the end of the ideology"[30] but rather "*the liberation* from freedom",[31] or even "the end of history", brought about by liberal democracy and the market economy.[32] The effectiveness of neo-Marxism in modifying the way people think is based on a method developed by a Chinese general and philosopher S. Tzu (544-496 B.C.), who found that "fighting on a battlefield is the most primitive way of making war. There is no art higher than to destroy your enemy without a fight – by subverting anything of value in the enemy's country".[33] A political victory requires the consistent destruction of the values of a country until the attacked society no longer considers the enemy as the enemy any more, and fully accepts the new axiological system, civilisation and aspirations. In this way, the neo-Marxist ideology has been implemented all over the world in four stages of subversion, i.e. demoralisation, destabilisation, crisis, and normalisation,[34] as the former agent of the Soviet secret police force described it in his *Love Letter to America*. Since 1989, public administration in Poland has been under the influence of postmodernism, the same as other countries once forming the Latin civilisation. As a consequence, Europe is post-Christian, except for Poland that still appears as a country having the social and cultural foundations sufficient to prevent the final collapse of Western civilisation,[35] similarly to the United States, where there is still place for religion.[36]

Starting from the philosophical passage within public administration from Aristotle to Marx, the article discusses the postmodernist new ethics of participation in the theory of governance and the practice of participatory budgeting (PB) in Poland.

2. THEORETICAL FRAMEWORK: NEW ETHICS OF FINANCIAL ACCOUNTABILITY IN PARTICIPATION

In the Polish context, the first article of the Constitution of 2 April 1997 states that the Republic of Poland is the common good of all citizens. Protecting this constitutional value requires the financial policy, understood as the conscious and intentional activity of persons and institutions involved in setting and implementing specific goals through financial means and specific actions.[37]

Thus, public financial funds and their appropriate spending serve to protect the common good (Polish Constitutional Court, SK 36/07, III.4), requiring coordinated, reasonable politics.[38]

The people's rules, in the classical form, consist of electing citizens' representatives to make public decisions. However, a problem arises as citizens' participation is mainly limited to voting. Using de Tocqueville's (2010) words, "each individual endures being bound, because he sees that it is not a man or a class, but the people itself that holds the end of the chain. In this system, the citizens emerge for a moment from dependency in order to indicate their master, and return to it". The illusory contacts between citizens and politicians, the separation of ownership and control, result in the principal-agent problem.[39] The politicians chosen by the citizens do not always protect the common good because they realise their private interests, e.g. keeping power or obtaining financial benefits, thus the principal's moral hazard problem appears.[40] As a consequence, infringements on the universal values of honesty and decency result in an ineffective result of vertical accountability of politicians for the protection of the common good. To resolve these deficits of axiological democracy, S. Arnstein (1969) proposes the participation of "the governed in their government", arguing that citizens climbing the eight ladder rungs of participation can gain control over public decisions. B. Damgaard and J. M. Lewis (2014) proposed using Arnstein's steps to build five levels of participation in accountability that increase citizens' awareness and control. Leading to joint ownership would overcome the moral hazard problem. The participation is the core of multi-stakeholder governance.[41] However, shaping accountability for the protection of the common good via instruments of governance requires respect for the universal value of truth, since if the latter is infringed, the participants stay on the first rung of participation in accountability ladders, i.e. manipulation.[42]

The analysis of the philosophical and axiological grounds of governance, having a postmodernist nature,[43] entitles us to assume that its instruments infringe on the value of truth. This is because the governance is rooted in critical theory,[44] the theory of permanent negation of existing culture and fundamental values, total destruction being its main goal.[45] It is a "practical philosophy" incorporating accidental sub-theories, without any program, not subject to any verification.[46] Interestingly, the authors of the "Dialectic of Enlightenment",[47] an ideological pillar of critical theory, have rewritten – actually faked – its original content because they deleted all the fragments and terms that could even suggest a relation with Marxist ideology, e.g. they replaced the term "revolution" with "democracy".[48] The critical theory starts from Marxism, considering a human being as an unreasonable, thoughtless creature, as having nothing spiritual. Only the matter can achieve spirituality, provided that the lower level of matter will be destroyed in the process of evolutionary advance.[49] Hence, the individuals themselves should strive for self-destruction, and hence T. Adorno tried to convince that the source of all evil, especially of fascism and racism, is a loving, Christian, patriotic and pro-capitalist family.[50]

The neo-Marxism reasoning of dialectical materialism uses governance to implement the new ethics claiming that nothing has an absolute, unchangeable nature, "the truth and the reality have no stable and objective content – that in fact, they do not exist".[51] Negating the existence of the universal values of objective truth and good, cultural Marxists also negate the existence of humans' free will and their right to choose between good or evil. They claim that individuals' good can be realised without reference to their responsibility which they exercise in the face of good or evil.[52] They replaced the universal values with apparent freedom, implying the obligation to be tolerant of any kind of world view, denying, in reality, the right to be intolerant to attitudes that, even subjectively, are wrong.[53] This is "the dictatorship of relativism that does not recognise anything as definitive and whose ultimate goal consists solely of one's own ego and desires".[54] Plato already noticed that some values should be constant in a democracy.[55] Otherwise, what would be the con-

sequences of voting for the correctness of medical diagnoses, the interpretation of history, or the legalisation of morally negative actions, e.g. theft?[56] The problem becomes more serious when a narrow group of people appropriates the right to decide about it, or even about the person who should become a mayor or a president. After all, would it still be a democracy?

As the aim of destroying the values of Western civilisation is impossible to achieve by the will of the well-educated, rationally thinking majority expressed by representative democracy instruments, the principle of partnership displaces the principle of democratic representation. To implement its ideas, the new ethics – bypassing legitimate authorities – transfers power to the representatives of civil society and the experts of international organisations.[57] "Participatory democracy and good governance are not integrated into a representative democracy. Treated as its complements, they run in parallel, uncontrolled by traditional processes".[58] This is the reason why "deepening legitimation deficits of representative government create opportunities for legitimacy-enhancing forms of citizen participation, but so far, the effect of participation on legitimacy is unclear".[59] Postmodernist new ethics treat the participants of governance as instruments, as tools to implement its ideas aimed at global revolution and destruction;[60] afterwards, they can be physically, psychically and spiritually destroyed. This is probably one of the reasons why, using an emotional tone but with reasonable concern for the future of public administration, Ch. Fox (1996) calls for profound and practical philosophical reflection.

PB, originating from the Brazilian city of Porto Alegre, implemented there by the left-wing Working Party, is the most widespread instrument of governance in the world based on participation in deciding on financial matters. B. Wampler (2008) defines PB as a year-long decision-making process through which residents negotiate among themselves and with civil servants in organised meetings and then vote over the allocation of local spending. The decisions taken in such a way are generally incorporated into the city's budgets. The literature suggests that PB can imply the emergence of a new form of financial accountability, cutting across vertical, horizontal and societal accountability, each associated with three types of budgetary control – administrative, legislative and societal.[61] In reality, no country seems to have all of them in place.[62] Moreover, "while PB does offer new opportunities for participation and decision-making, it continues to bear the risk that authority will be concentrated in the mayor's office, which has the potential to undercut efforts to establish a system of checks and balances".[63]

3. METHODOLOGICAL FRAMEWORK: RESEARCH QUESTION, METHODS, AND HYPOTHESIS

As it follows from the theoretical framework, scholars try to find evidence that governance can be effective in shaping financial accountability. What would be the consequences of finding evidence that PB, the most commonly used governance instrument of financial policy, is a sort of inferior "do-it-yourself" tool, detrimental to the common good, being the central value of democracy in its substantive meaning? Thinking positively, it would a great opportunity for public administration scholars and practitioners to think together about the mechanisms protecting democracy against itself.

The research covers PB of three Polish cities. Poland is a country where PB has quantitatively developed on the widest scale among all European countries[64] and has the least undermined axiological foundations of Latin civilisation of all European countries,[65] thus Poles, attached to these values, are supposed to be sensitive to their infringements. In Poland, three different PB models have evolved, each case represents one of them (cf. table 1) and has the longest experience within each model.

Table 1. Characteristic of PB in three Polish cities

City	Sopot	Dąbrowa Górnicza	Gdańsk
PB model	Plebiscite PB model	Deliberative PB model	Citizens' panel PB model
PB edition analysed in the research	2020	2020	2017, the last one took place then
Population in 2020	36,046	120,259	466,631
Local government position according to population in 2020	147	30	6
Year of first PB	2011	2015	2016
Foreign PB prototype	Does not exist	Brazilian	Australian/Irish
Essential stages of PB model	Residents submit PB proposal in writing. Civil servants make a preliminary verification of the proposal. Residents choose the PB projects without discussion, by voting	Residents and civil servants prepare a needs diagnosis of 35 city districts. Residents submit the proposal in writing, next they choose PB projects at district discussion forums	Mayor proposes the panel's topic. A representative group of residents listens to the speeches of experts invited by the organisers, they discuss and propose the final recommendations
Percentage of city budget allocated to PB	1%	0.7%	The amount was not determined in advance, impossible to calculate *a posteriori*
Minimum age for participation in PB	16 years	no age restriction	18 years
PP participants	4,844 residents, willing to vote	784 residents, willing to take part in discussion meeting	56 residents, selected in a representative manner, took part in the citizens' panels
Number of selected projects/ recommendations	17 projects	107 projects	49 recommendations
Examples of PB projects/ recommendations	Astronomical observatory, playgrounds, medical ambulance, plants and flowers, city defibrillators, devices for recycling plastic bottles, ski routes in municipal forests	Pavements and road renovations, parking, playgrounds, lightening, planting plants and flowers, books for libraries	Anti-discrimination training based on gender and sexual orientation in schools and offices of public administration, municipal website for submitting citizens' petitions

Source: author's own research and editing

In terms of the methods, desk research (i.e. the literature review, the central and local PB legal regulations, the municipal websites, the radio broadcasts on the right and left of the political spectrum) preceded the semi-structured interviews. To get as near to the full picture of PB reality as possible, the research results originate from three principal PB groups of actors, i.e. civil servants, municipal councillors, and residents participating in PB, from each analysed city. Nine interviews in total, lasting between 1 and 2 hours, were conducted. Their transcript numbers 80,000 words.

The research aims to verify the following hypothesis: *PB, being the instrument of postmodernist governance, cannot effectively enhance financial accountability for the protection of the common good because it infringes on the value of truth*. This general hypothesis is verified via three specific hypotheses, each of them corresponding to one PB model.

4. RESULTS: LACK OF FINANCIAL ACCOUNTABILITY FOR PROTECTION OF THE COMMON GOOD IN THREE PARTICIPATORY BUDGETING MODELS IN POLAND

H_1: The plebiscite PB model cannot effectively enhance financial accountability for the protection of the common good because it infringes on the value of truth

The story of PB in Poland starts in Sopot, the smallest of three major cities forming the metropolitan area of Tricity, located in a row on the coast of the Baltic Sea. The city mayor accepted the PB idea, introduced by a scholar in political science, but he implemented it in a form unknown elsewhere before. Due to the lack of any form of discussion (cf. table), it resembles the vote in the Eurovision Song Contest... serving to implement an accidental set of projects. What is worse, the fact of the residents voting on PB projects, costing 1% of the city budget, does not influence the remaining 99% of public expenditure. Simultaneously, PB has become an instrument helping to ignore the needs of residents, as when they come to the city hall and ask the civil servants to implement a public task, e.g. renovate a pavement, they hear there is not enough money in this year's city budget, but they can submit a PB project instead.

An analysis of the PB projects proves that residents often do not have a proper moral attitude to co-decide. Submitting their projects and voting, they try to find the answer to the question "How can I benefit from the PB?". It results in the financing of playgrounds or specialised sports activities. Other PB projects, even if objectively beautiful, such as magnolia tree seedlings or rose bushes, are far from the top priorities of residents' needs. Some PB projects are even destructive for the essence of representative democracy, e.g. the mobile application that allows text messages to be sent to local councillors on how they should lean in every municipal vote.

The voting procedure has a highly informal character. Apart from the online voting, residents can put a downloaded ballot into one of the municipal boxes. Unfortunately, this results in a spectrum of unfair behaviour. The residents supporting a project – e.g. a car park next to the company where they work – rewarded those who "sold" their vote with a can of juice or a mug with a company logo. Moreover, some school principals organised a competition gathering as many ballots as possible from family members or strangers supporting a PB project important for the school, i.e. the playground. In such a "competition", the best classes won cinema tickets, or the best pupils got very good civic grades. Considering this, and the fact the attendance in Sopot is 16.5%, PB does not lead to representative decisions.

Even assuming that the residents had a moral attitude that could counterbalance the agents' moral hazard problem, this would not be sufficient to protect the common good as PB enables civil servants to oppose the residents' will by infringing on the value of truth. Firstly, at the preliminary verification stage of the PB projects, civil servants have the right to take into account not only the criteria of compliance with the law, spatial development and long-term plans, but also the principles of social coexistence. This very fuzzy concept enables projects to be eliminated that the mayor or a civil servant legally can, but personally do not want to, put to the residents' vote, e.g. installation of boards informing about air pollution levels. Secondly, doubts arise at the voting stage, as residents cannot verify if there has been an error

in the counting. Thirdly, at the preparation and implementation stages of the city budget, the residents do not have any legal guarantees their decisions are respected. Despite the existence of PB, the mayor still has the exclusive right and legal responsibility to develop the budget bill and to execute it, and the municipal councillors to vote on it.

H_2: The deliberative PB model cannot effectively enhance financial accountability for the protection of the common good because it infringes on the value of truth

Seeing the illusion of the participation of the plebiscite PB model, in 2015 the city of Dąbrowa Górnicza implemented the deliberative PB model. However, it is also ineffective in determining the truth about the common good because it does not eliminate the problems of the symbolic amount of PB funds and the lack of legal protection given to residents' will. The main difference between the two models lies in the way decisions are made (cf. table). However, replacing voting by discussion still does not guarantee the representativeness of the decisions, as the residents participating in the PB deliberative model do not constitute the representative group for their district. For example, in a district inhabited by 10,000 people, 20 residents willing to come decide about all the PB funds. Within such a group, determining the truth about the common good is impossible in practice for two reasons. Firstly, a significant number of residents – unwilling to take part in the discussion – just want to finance the projects meeting their interests, e.g. a shed for the rubbish bins next to the block of flats where they live. Even if most district forums end with a compromise, this is because the moderators insist on this too much. Secondly, the deliberative PB model does not offer mechanisms that provide protection from the overrepresentation of a group interested in realising a particular project. A social activist and a local councillor of a leftist party admitted in the interview: "I am not afraid to say this publicly. I won every vote because I found an effective method. At the time of the vote I take 5 days leave, and from 9:00 am to 9:00 pm I go around the district from door to door promoting my project, and I win every time. Despite my private local interest, I try to be a person responsible for the whole community as well…".

H_3: The citizens' panels PB model cannot effectively enhance financial accountability for the protection of the common good because it infringes on the value of truth

Using the argument of resolving the problem of the unrepresentativeness of the two previous PB models, the city of Gdańsk introduced the citizens' panel PB model to discuss narrowly selected topics of the city's financial policy. Formally, this PB model comprises two stages, yet the first one, collecting the opinions of interested residents via email does not exist, since for three PBs only one resident sent their opinion. The PB thus consists of citizens' panels comprising a more or less representative group of residents in terms of age, sex, and education. Even if the recommendations are not legally binding, the mayor promised to realise those supported by at least 80% of the participants.

The last PB that took place (2017) concerned supporting civic activity and the equal treatment of women, men and LGBT people. This was the arbitrary choice of the mayor of Gdańsk and his closest collaborators, made without any social consultations. This topic implies the false assumption that the common good in Poland includes the fully legal and equal treatment of LGBT people. It became more evident when the panel's steering committee – comprising civil servants, scholar-social activists and local councillors – arbitrarily prevented the representative of the "Mummy and Daddy" foundation from delivering speeches to the panellists, arguing that the foundation published a report presenting the results of scientific research on the situation of children raised in LGBT relationships. Moreover, as the citizens' panels give PB participants the right to ask for expert opinions on any related topic to gain the necessary knowledge to decide, the residents asked for a presentation on the Church's point of view. As a result, the panel's steering committee arbitrarily chose a priest of the Methodological and Evangelical Church to talk about "the Christian perspective

on the issue of equal treatment of men and women and LGBT persons". The problem is that the Church represented by the speaker, according to official statistics, has 0.1% of believers in Poland, whereas the Roman Catholic Church has 91.9% of believers. The expert presented a one-sided perspective of the Methodological and Evangelical Church, where the women of LGBT orientation are ordained priests and bishops, unlike the Catholic Church, and avoided answering questions crucial for panellists regarding the Christian perspective on issues of LGBT persons.

Moreover, the panellists were not informed at all about the topic of the citizen's panel beforehand. Hence, some of them resigned just before the panel started, after seeing the topic on the contract regulating the remuneration for participating in the PB.

5. DISCUSSION: INSTRUMENTAL USES AND ETHICAL ABUSES

Although Arnstein's assumption that citizens' participation can be helpful in solving the moral hazard problem of a representative democracy, it requires a moral or at least a decent attitude from all of the governance participants. Otherwise, giving residents the right to co-decide on the allocation of public funds only implies a change in the group of people who try to pursue their private interest through public funds. The attempt to resolve the problem of representative democracy via governance, without solving the real source of the problem – with axiological roots – is like attempting to treat the plague with cholera, while simply antibiotics are needed. The attempts to remedy socialism's deficits with more socialism turned out to be ineffective – similarly, remedying democracy's deficits by implementing more democracy won't be effective if universal values are infringed. Democracy is a method that is neither good nor bad. Its effects are good if they lead to the protection of the common good. While participation is glorified as "hope", almost a "pearl" of democracy,[66] it is similar to something round, rather "a bomb with a delayed timer". There are three reasons for this.

Firstly, the postmodernist PB uses residents as instruments to create the illusion of participation, leading, in fact, to "*liberation* from freedom". The residents feel obliged to appreciate the narrow forms of participation that enslaved them. In the case of the plebiscite and deliberative models, this is because PB funds, constituting 1% of the city's budget, provided civil servants with a pretext to stop fulfilling the true needs of residents. Civil servants try to convince that, even if the amount of PB funds is not impressive, they analyse all the residents' proposals, and this sometimes inspires the local authorities to finance certain tasks from the city budget, protecting the common good in this way. However, neither the extent of this impact nor the motivation for such expenditure is clear. In practice, the moral hazard can be even more serious than within the representative democracy because PB projects provide concrete information about citizens' unfulfilled financial needs. Its simple sociological analysis can be a source of precious information about the promises that are effective in gaining electoral support. In the case of the citizens' panel model, the residents – treated as instruments to support the claims of ideological minorities – gain the right to co-decide only within the narrowly defined topic, having false axiological assumptions about the notion of the common good. The residents want to be involved in governance because they believe that devoting their time they could do something good for their community, but they do not realise that they are a cog in a larger machine, and they did not receive the manual.

Secondly, the postmodernist PB uses the residents as instruments to limit the legitimate powers of public local authorities, both mayors and local councillors, and in this way to negate the fundamental value of the representative democracy, as the critical theory of permanent negation claims. The new ethics try to convince residents that they have the right to participate in the city's budget preparation process without bearing any legal responsibility or having political or moral accounta-

bility. This is because, despite the existence of PB, the mayor is still responsible before the financial control authorities and the courts for preparing and implementing a city budget, and the local councillors in turn for voting on it. As a result, the residents participating in PB operate within the budgetary competences of the representative democracy bodies, who are forced by participative pressure to take the responsibility and accountability for the residents' decisions. Who would be legally responsible or morally accountable if the local authorities accepted – under participative pressure – to allocate 20% of the city budget to PB, then the residents decided to spend all this money on flowers, and as a result there was not enough money to finance education or social care? The protection of the common good in the city's financial policy requires not only a decent moral attitude but also professional practical skills, based on knowledge. Acquiring it is time-consuming and requires painstaking intellectual work, while own weaknesses and laziness need to be overcome. The residents do not acquire the professional knowledge by reading leaflets, participating in educational or discussion meetings, and looking at colourful PowerPoint presentations. Despite this, the mayors and local councillors who do not support the ideas of new ethics feel moral pressure to implement PB, and are unable to successfully defend their point of view due to the expectancy of being politically correct. Mayors implement PB because they feel the citizens' pressure, enhanced by unaccountable social activists and inspired by unaccountable international organisations, having in their postmodernist "credo" the slogans of participation, equality, or even democracy, not rooted in the values of good and truth.

Thirdly, postmodernist PB uses residents as instruments to exact financing from the city budget, expenditure contrary to the values shared by society's majority. This is because the citizens' panels imply the arbitrariness of the topic choice and the experts, being the main source of professional knowledge for unprofessionally prepared residents. The governance does give some protection from such thinly disguised totalitarianism. The representative method of the panellists' selection, emphasised as the advantage of the citizens' panel PB model, is only a cover for decisional arbitrariness. This is because the value of participation rooted in critical theory, assuming that everything is changeable, can negate any other value in the name of illusory freedom. Who will protect, once impenetrable, the boundaries of citizens' rights if the point of reference to natural law does not change? Who will protect women or LGBT persons when a group of social activists, forgetting that every human being has the inalienable dignity and the right to live, uses the citizens' panel to ask, for example, about the cheapest ways to kill women or LGBT persons? It sounds like a science fiction story, but citizens' panels at the national level in Ireland, 78% Catholic believers, astonishingly recommended the repeal of a constitutional prohibition on killing unborn children.[67] Accepting the philosophical grounds contrary to the pillars of Latin civilisation, there are no obstacles to asking via citizens' panels: "What are the humanitarian ways of killing people who do not belong to the Nordic, black or white race, who are over 50 years old, or... ill with the coronavirus?" *Déjà vu*? Unfortunately, yes... When those wanting to protect the groups destined to be exterminated, and who are not involved in the citizens' panel topic, are deprived of the right to talk, all that remains is to provide information, using appropriately selected experts, about methods of killing that do not cause pain... and via "democratic" governance, we will return to the darkest pages of world history, as S. Tzu (1963) wanted.

Polish literature suggests strengthening the moral motivation to take care of the common good of the entire human species, using the legal norms, as described by the psychological theory of law.[68] The lectures of its founder, the father of the sociology of law, L. Petrażycki (1867-1931), were of interest not only to students but also to professors. He postulated implementing the "politics of law", leading to doing good things by practical pan-human love.[69] No matter how weird it sounds, he treated the ideal of love set for legal provisions, regulating public administration instruments for example, as the final goal, whereas its achievement requires constant work on the content of the law.

Petrażycki's understanding of love is coherent with God's love in the Christian sense, described by the Latin term "Caritas". It means participation in God's perfect way of being, truly wanting the good of others, not expecting anything in return, absolutely respecting the human freedom to choose or reject what is good. In Christianity, love is not the sentimental feeling but the attitude of heart that requires sacrificing some part of yourself to another person, disposing of self-interested egocentrism. This is a case when a volunteer, not expecting anything in return, offers his time to take care of a hospice patient, and by so doing discourages him from demanding the right to be killed via euthanasia. Obviously, this love cannot result from the codes of ethics – ineffective in practice – proposed for politicians, civil servants, or citizens co-deciding on public things, but this morality is the exact opposite of the postmodernist new ethics placing "pleasure above love, health, and well-being above the sacredness of life (...), immanence above transcendence, a man above God, the *world* above *heaven*".[70]

Love in a Christian sense requires respecting the inherent dignity of every individual life, no matter their gender, background or race. This is why the Catholic Church has always opposed slavery or the killing of malformed children, as accepted by Plato or Aristotle, who have not yet known God's love. Knowing, but forgetting, that the decision-making bodies in Hitler's Germany, Soviet Russia, and other communist regimes killed tens of millions of human lives in the 20th century in the name of building a new world of socialism, using the class struggle as the pretext, as in the words of Lenin, killing political opponents is natural because "you cannot make an omelette without breaking eggs". In the 21st century, neo-Marxists continue the same axiological revolution, this time via "democratic" governance. They are currently using the pretext of the struggle of minorities, who are useful as instruments, at this particular time of evolution. Their ultimate destination – having nothing spiritual – is to be forgotten and annihilated, in the euthanasia process for example, since, according to dialectical materialism, only the matter, whatever it is, selfishly seeking to reconcile with itself, has a chance to achieve spirituality.

6. CONCLUSIONS: TOWARDS RESTORING THE SUBSTANTIVE ESSENCE OF DEMOCRACY – CAN WE STILL TAKE "THE TIME MACHINE"?

Returning to philosophy, a word originating from the Greek "love of wisdom", the article concludes that PB in Poland does not protect the universal values of good and truth, giving residents an apparent sense of agency instead, whereas the real but unaccountable decision-making centres progressively replace these universal values with detrimental ideas of new ethics. Hopefully, the practical philosophical analysis is the future of public administration, free of ideologies introduced deceptively. Scholars abuse the term "democracy" when they use it in the context of instruments serving to destroy its true essence, whereas "public administration must be a key factor in any effort to rediscover substantive democracy".[71]

Last but not least, the most viewed Polish TEDx (ideas worth spreading) speaker, J. Walkiewicz (2009) said that: "Professionalism is not a matter of coincidence. Passion leads to professionalism, professionalism results in quality, and quality is luxury in the contemporary world". Aligning this phrase with the content of the article, we can say that "professionalism in public administration is not a matter of coincidence. Public values lead to professionalism, professionalism results in quality, and quality is luxury in the contemporary world protecting the common good".

Notes

1 The paper is financed by the Polish National Centre for Science, decision no UMO-2014/15/D/HS5/02684.

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DOI: 10.54201/iajas.v1i1.17

Review of Administrative Law - The Theory and Operation of Special Public Administration[1]

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The main aim of the book entitled "Administrative Law – The Theory and Operation of Special Public Administration" is to place practical public administration in the spotlight by raising awareness through a presentation of national basic functions, economy, infrastructure and human public services based on legislature, in a comparative manner with historical analysis, and fulfilling the need of course books as well as professional books.

This book is the result of unprecedented cooperation: it presents the joint work of all the departments of administrative law at Hungarian law faculties and the National University of Public Service. The human and professional/scientific cooperation between the authors, under editor András Lapsánszky, made it possible to process the almost incomprehensible scope of special administrative law as fully as possible. The publication is special and unique in this regard because it is also the result of a working group characterised by a high degree of professionalism and true collegiality.

The relationship between general (general administration) and special public administration (special administration) must be clarified because of the possibilities of nuance and sharp demarcation in the Hungarian doctrinal system. General administration is indispensable in understanding this system, but the distinction between the two branches is mostly virtual. The system is a theoretical basis and general doctrine of special administration. Therefore, the general notional order and structure of public administration is described by general public administration (science of public administration and legal system) – ensuring unity in the more particular world of special administration. The law of special administration focuses on individual sectors of public administration. However, it cannot be separated from the basic notions, apparatus or procedure of public administration, nor can it be understood in and of itself, since it cannot be scientifically analysed without the general doctrines.

As for the theoretical basis, it is important to note that national tasks and functions provide a certain framework for special administration: the activity of authorities belonging to public administration is the route for carrying out state administration. As a result, modern public administration is essentially special administration, as public administration bodies carry out their activities with regard to one sector, in one given area. The rapid improvement of society generates newer and newer needs, and fulfilling them requires newer and newer national engagements (therefore, a restrictive list of tasks is impossible as it is constantly changing). These tasks are mostly realised via public administration, within the framework of the modern 'administrative state.' The general aim of nearly all cases is to increase citizens' quality of life and to realise social wealth.

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The administrative tasks of the state prevail in many areas. The book elaborates on the most significant branches of special administration, and endeavours to highlight information that conveys the important theoretical basis for students and professionals alike, such as: reasons and degree of national intervention; most significant institutions of the sector; relevant legislature; historical characteristics of sectorial administration; international comparative analysis; and regulative models.
The book intends to facilitate the development of the general doctrines of public administration science, its elaboration adapted to the modern administrative regime, with the theoretical – but at the same time practical and educational – processing of professional law.

As a handbook, this work was not intended to be a mere description of the relevant legislation, but to explain to students in a comprehensible way the reasons, history, international context and institutions of administrative intervention in a given sector. The book also conveys important and theoretically significant knowledge for professionals dealing with the administrative areas included in it, in an understandable and concise manner. Therefore, the dual objective – taking on the role of course books and special books – has been fully realised.

The theory of organising special administration chapters into a book can be understood in the wider context of administration. Based on this, the first chapter details the basis of special administration and state functions. It presents the constitutional basis of the administrative tasks of public administration, the current form of European public administration law, as well as its expected means of improvement; the system of national registers; the basis of police and national defence administration; administrative rules referring to foreigners and refugees; regulations of the right of asylum; tax and customs administration; judiciary administration; public finance administration; administrative bases of state property and asset management; the special administration basis of e-public administration, and also public management in administrations and the strategic basis for the implementation of the digital state in Hungary. The second chapter covers economic administration, such as the fundamentals of economic administration; the administration of economic competition; energy and mining administration; nuclear energy and water law and water management; electronic communications administration; construction administration; trade administration; rules of regional development and area management; administration of environmental protection;
the special administration basis of financial services; the administration of consumer protection; nature and wildlife management; transportation administration;
the law of public procurement; the law of state support; and the administration of Agriculture and Rural Development.

The third chapter focuses on human administration, such as health law and administration; the administrative basis of public education and higher education;
child protection and social service administration; cultural administration;
social administration; sport administration; and media regulation.

To summarise, this book is professional, accurate and rooted in law. It is not only interesting, but can be learned, taught and utilised. It can greatly assist those who would like to understand special public administration better. With its comparative analysis that takes multiple perspectives, from not only international and European viewpoints, it can be of great use for students, researchers and professionals.

Discovering and understanding public administration beyond administrative procedure is a serious challenge, but this publication, Administrative Law – The Theory and Operation of Special Public Administration, is an outstanding guide in this endeavour.

Notes

1 https://shop.wolterskluwer.hu/termek-reszletek/kozigazgatas/kozigazgatasi-jog/kozigazgatasi-jog-szakigazgatasaink-elmelete-es-mukodese.p1233/YOV1815.v8810