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Contents

Articles

Book Review

SZÉCHENYI EGYETEM
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Articles

Institutiones Administrationis – Journal of Administrative Sciences
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Exchange and provision of information in the field of tax administration and prevention of tax evasion

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Abstract

The exchange and provision of information on taxpayers generally pursue different objectives. According to the provisions of tax law, the main purpose of obtaining information on taxpayers was to implement effective tax administration. Subsequently, other tasks have been added to this objective, including prevention of tax evasion, tax avoidance and related tax crime detection and investigation. The provision and exchange of information between the tax administration authorities and other legal entities, especially the national supervisory authority or national central bank, is subject to a strict regulatory regime, based on an explicit legal mandate to utilise the information. The reason is that the subject of the provision and exchange is often information that has a special secrecy protected by the law, such as banking secrecy, professional secrecy or protected information regarding securities. The authors identify and analyse the legal regime for providing information for the purposes mentioned, especially in the conditions of the Slovak Republic. The legal regime in the Slovak Republic is also more or less affected by legal acts adopted at global (OECD) level and EU level, so the authors take into account, to some extent, these legal acts when dealing with the automatic exchange of tax information between the tax administration of EU and non-EU member states. In this context, the authors differentiate according to whether the provision of information takes place under vertical or horizontal institutional relations. Following that, the aim of the paper is to identify how the related authorities/persons interact in horizontal institutional relations and vertical institutional relations.

Keywords

banking secrecy, supervisory authority, tax administration, automatic exchange of tax information

1 Introduction

The subject of the provision and exchange of information is often information about the taxpayer, which has special secrecy protected by law (in particular, banking secrecy, trade secrecy).[1] At the moment that this information is obtained by the financial administration authorities (or tax administrator) in the process of tax administration, it simultaneously acquires the status of tax secret, which is protected by the tax law.[2] Apart from this, the disclosure of tax secrecy is subject to criminal law protection.[3] For the above reasons, the exchange and disclosure of information between the tax administration in the Slovak Republic and other legal entities in the Slovak Republic or abroad is subject to a strict regulatory regime, based on an explicit legal mandate to handle the information. Such a legal mandate can be identified in two areas:

- in the legal regulation of administrative cooperation between domestic and foreign tax authorities,[4] between which information is exchanged (i.e., in horizontal institutional relations), and
- in the legal regulation of the financial market, in particular in the provision of cooperation by financial market operators vis-à-vis tax authorities (i.e. in vertical institutional relations) with regard to information concerning taxpayers or in the legal framework of cooperation between the financial market supervisory authority and other public authorities (i.e. in horizontal institutional relations).[5]

The aim of the paper is to identify the forms of interaction between the parties mentioned in horizontal institutional relations and vertical institutional relations. The forms of interaction between financial administration authorities and financial market entities can be illustrated by examples of legislative texts. In what follows, we will limit ourselves exclusively to the existing selected national regulation of institutional cooperation, the purposes of which may be diverse. In our opinion, this may include in particular

- tax administration (for example, establishing the correct tax base),
- automatic exchange of information on financial accounts,

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1 This protection in a broader sense is related to the concept of protection of economic goods as part of private property. See for example Vladár (2015).

2 In the Slovak Republic, it is § 11 of Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code) and on Amendments to Certain Acts.

3 In the Slovak Republic, this is § 264 (entitled "Threat to trade, banking, postal, telecommunications and tax secrecy") of Act no. 300/2005 Coll. Criminal Code.

4 In the European Union, the legal basis for this cooperation is Art. 6 letter g) the Treaty on the Functioning of the European Union, known as "administrative cooperation"; in this context, a number of legally binding EU acts governing international tax cooperation have been adopted. Outside the EU, international double taxation treaties can be mentioned. The beginnings of international cooperation in tax administration are connected with direct taxation, only later this cooperation was extended to indirect taxes. See Babčák et al. (2018, 264).

5 The relations listed are regulated by national legal regulations (laws) in the field of the financial market. In principle, the exchange of information with the central bank can only be regulated on the basis of reciprocity, by a written agreement on mutual cooperation with other authorities. See Slezáková et al. (2018, 84).

- eliminating tax evasion and tax avoidance,[6]
- preventing and investigating tax crime (tax frauds),
- obtaining tax information for financial market supervision purposes (as a special purpose in the financial market area).

2 Exchange and disclosure of information protected under financial market regulation

The legal framework for cooperation under financial market regulation should be seen as a legal framework under which such information is provided, the scope of which is defined in specific financial market laws. It should be noted that such a legal framework also contains exemptions, defined by the relevant law, from the obligation of confidentiality of certain facts about a taxpayer (e.g. banking secrecy), which applies to anyone who has access to such information by virtue of their employment or other status. The disclosure of data is mainly carried out in the framework of cooperation or collaboration, which is enshrined in the laws regulating the financial market. On the other hand, tax laws that regulate the procedural aspect of tax administration also contain provisions that regulate the procedural obligation of various legal persons (who are not considered taxpayers and who have rights and obligations under tax administration) to provide data. These other persons include selected financial institutions (payment service providers, insurance companies, reinsurance companies, branches of foreign insurance companies, branches of foreign reinsurance companies) (Babčák, 2022, 502).

The tax authority with substantive competence in the administration of taxes on commercial financial market entities is the *Office for Selected Economic Entities.* The creation of a separate tax institution for financial market entities demonstrates the importance of this part of the economy for the generation of the revenue component of the public budget. The provision of information occurs here:

a) by financial market entities (credit institutions/banks, financial institutions other than banks) or selected groups of persons with a special relationship to these entities (e.g. members of the board of directors or supervisory board of a financial institution, its employees, proxies, liquidators, trustees, provisional administrators in bankruptcy, restructuring, arrangement or insolvency proceedings, or supervisory trustees exercising supervisory administration), providing information to the tax authorities (tax administrators such as municipalities or tax authorities, or financial administration authorities),
b) between the financial market supervisory authority and other public authorities or other legal persons (including tax authorities).

Ad a) In the provision of information by financial market entities, it is particularly important to break banking secrecy by introducing *exemptions for banks (or branches of a foreign bank),*

[6] Tax evasion can have various causes (political, social, legal and economic). For the causes of tax evasion in detail, see Šimonová (2017, 17). Morawski states that international tax avoidance gives the taxpayer new opportunities. The taxpayer can take advantage of several national tax systems, or more specifically their inconsistencies, to avoid taxation by making additional use of double taxation conventions between them. In such a case, the actions taken in each country, if considered separately, may not only not be abusive, but may be perfectly natural for the authority. See Morawski (2020). For the conditions of automatic exchange of information for this purpose in concrete, see Morawski (2017).

which is tied to a written request from authorized entities according to the Banking Act. It lists 29 cases when banking secrecy can be breached upon written request, while only the following two exceptions apply to the disclosure of information on a taxable entity. The Bank and a branch of a foreign bank shall report without the client's consent on matters concerning the client's secrecy, only upon a written request from

(i) the tax office, customs office, Financial Directorate of the Slovak Republic or the tax administrator, which is a municipality, to the extent necessary for the performance of tax administration and customs supervision, if they apply to a client of a bank or a branch of a foreign bank or to the client's property or a branch of a foreign bank, including recovery of tax arrears in tax enforcement proceedings or recovery of customs debt, fines and other payments assessed and imposed under customs and
(ii) the Criminal Office of the Financial Administration and the Financial Directorate of the Slovak Republic, to the extent necessary for the purpose of 1. performing tasks in detecting criminal offenses, identifying their perpetrators and searching for them, or 2. performing tax administration and customs supervision, if they apply to a client of a bank or a branch of a foreign bank, or to assets of a client of a bank or a branch of a foreign bank.[7]

As of 1 May 2022, a thirtieth case of breaching banking secrecy will be added, upon a written request from the Criminal Office of the Financial Administration for the purpose of providing data to the European Anti-Fraud Office.

The written request must, in general, contain at least the information by which the bank can identify the matter in question (in particular, the exact identification of the person about whom the information is requested and the definition of the scope of the information requested). The information to the required extent can be claimed by the applicant (relevant tax authorities) if the declared purpose is proven.

In this context, we must point out that such minimum identification data do not need to be stated in the written request of the tax authorities referred to in points (i) and (ii) or even during the tax control at the relevant bank or branch of a foreign bank. For both situations mentioned under points (i) and (ii), the possibility to submit a written request without the necessary minimum data was introduced from 1 January 2019[8] (on this date, this option was also introduced for tax control in the relevant bank or foreign bank branch).

A special case of breaking banking secrecy in relation to tax authorities is the fulfilment of the notification obligation pursuant to a different provision of the Banking Act,[9] which was introduced into the Banking Act by its amendment (Act no. 359/2015 Coll., with effect from 1 January 2016). According to this exception, the fulfilment of the notification obligation to the competent authority of the Slovak Republic is not considered a breach of banking secrecy:

(i) for the purpose of automatic exchange of financial account information for tax administration purposes pursuant to Act no. 359/2015 Coll. on the automatic exchange

[7] See § 91 par. 4 letter c) and s) of Act no. 483/2001 Coll. on Banks and on Amendments to Certain Acts.

[8] With the effect of Act no. 373/2018 Coll., Amending Act no. 371/2014 Coll. on Resolving Crisis Situations in the Financial Market and on Amendments to Certain Acts, as amended, and Amending Certain Acts.

[9] See § 91 par. 11 of Act no. 483/2001 Coll. on Banks and on Amendments to Certain Acts.

of information on financial accounts for tax administration purposes and amending certain laws, and

(ii) for the purpose of the automatic exchange of information on cross-border measures subject to notification for tax administration purposes under Act no. 442/2012 Coll. on International Assistance and Cooperation in Tax Administration (Koroncziová et al., 2019).

Another case of the provision of data by financial market entities (specifically banks) is the *statutory information obligation for the purposes of the proper performance of tax administration*, which has been in the Banking Act since its inception (from 1 January 2002). Its purpose is that banks and branches of foreign banks are obliged to notify the competent tax office according to the entrepreneur's registered office or permanent residence of the number of each current and deposit account opened and cancelled by the entrepreneur who is or was their client, within 10 days after the calendar month in which the account was opened or canceled.[10] As in the previous case, this is not an exception to a breach of banking secrecy, which would be subject to a written request from the tax authority.

A similar notification obligation (in terms of its content) is the *special notification obligation of the value added taxpayer according to the* Value Added Tax Act (in its wording effective from 15 November 2021), under which the payer of value added tax is obliged to notify the Financial Directorate of the Slovak Republic of each bank account kept with the payment service provider or with the foreign payment service provider that he will use for the business subject to value added tax, immediately after he became a taxpayer or from the date on which he set up such a bank account. In addition, the payer of value added tax is obliged to notify any change, addition or cancellation concerning this bank account, as soon as this fact occurred.[11]

For selected persons (with a special relationship with a financial market operator), the exemption from the duty of secrecy vis-à-vis the tax authorities of facts which they have learned by virtue of their position in the performance of their duties and which are relevant to or affect the development of the financial market interests of its individual participants, is found in several sectoral laws of the financial market. For example:

(i) the Insurance Act, which states it does not constitute a breach of confidentiality if the information is provided by a state administration in the field of taxes and fees in matters of tax administration, if the person involved in the administration of taxes is an insurance company (or reinsurance company, insurance company from another EU Member State, reinsurance undertaking from another EU Member State, a branch of a foreign insurance undertaking, a branch of a foreign reinsurance undertaking), a policyholder or insured person,[12]

(ii) the Act on Collective Investment which states it does not constitute a breach of confidentiality if the information is provided to the tax authority for the purposes of tax proceedings.[13]

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[10] See § 90 par. 1 of Act no. 483/2001 Coll. on Banks and on Amendments to Certain Acts.

[11] See § 6 par. 1 and 3 of Act no. 222/2004 Coll. on Value Added Tax. On duplication with § 90 par. 1 of the Act on Banks will not work, because the term "payer of value added tax" is not the same term as the term "entrepreneur" (pursuant to § 2 par 2 of Act no. 513/1991 Coll., the Commercial Code), to which § 90 par 1 of the Banking Act refers.

[12] See § 72 par. 3 letter d) of Act no. 39/2015 Coll. on Insurance and on Amendments to Certain Acts.

[13] See § 162 par. 3 letter f) of Act no. 203/2011 Coll. on Collective Investment.

In the capital market, we can find similar legislation on the provision of information at the written request of authorized entities, as is the case with breaking banking secrecy. These are the so-called "protected facts" under the Securities and Investment Services Act. This law introduces 15 authorized entities to which, at their written request, the central securities depository or investment firm is obliged to provide information on protected facts. Tax authorities are also included among these eligible entities if the client of the central securities depository or investment firm is a participant in the tax proceedings.[14]

A completely new legal regulation in the area of data provision by financial institutions is the Act no. 123/2022 Coll. on the Central Register of Accounts and Amendments to Certain Acts, which entered into force on 1 May 2022 and was approved on 17 March 2022.[15] The main objective of the Act is the transposition of Art. 32a of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, and the transposition of Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offenses, and repealing Council Decision 2000/642/JHA. Its target must be considered as a new *specific case of breaching banking secrecy under the Banking Act and a new specific case of providing information that is protected under the Securities and Investment Services Act as "protected facts".* This Act establishes a central register of accounts, which is an information system of public administration and which is maintained in order to allow access for defined authorized authorities to data on accounts maintained and safe deposit boxes leased in the territory of the Slovak Republic. The administrator and operator of the central register of accounts is the Ministry of Finance of the Slovak Republic, which has put it into operation on 1 January 2023. Data on the payment account, deposit account, building savings account, account of the owner of the book-entry security, rental of the safe deposit box, and their changes are entered in the central register of accounts, but the register does not contain data on mortgage loan accounts. For example, the identification of the financial institution that maintains the account or leases the safe deposit box, the account opening date or the rental lease start date, the client identification details, the account cancellation date, or the safe deposit box rental termination date are recorded. The National Bank of Slovakia, the central securities depository and financial institutions are obliged to send data on the creation, change or termination of data to the central register of accounts electronically.[16] The central register of accounts will not contain data on account balances (financial balances), but only basic account information.

Data from the central register of accounts will be provided electronically in a direct, continuous and remote manner, only after stating the purpose of the search and entering specific (albeit incomplete) data relating to the account, safe deposit box or client of the financial institution. The Act identifies 11 cases for which authorized entities may request data from the central

[14] See § 109 and 110 of Act no. 566/2001 Coll. on Securities and Investment Services and on Amendments to Certain Acts (Securities Act).

[15] The approved bill is available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/123/20220501

[16] A financial institution means a bank, a branch of a foreign bank, a payment institution, a branch of a foreign payment institution, an electronic money institution, a branch of a foreign electronic money institution, an investment firm and a branch of a foreign investment firm.

register of accounts, including (i) the Financial Directorate of the Slovak Republic, the customs office and the tax office for the *purpose of tax administration and customs supervision,* (ii) the Financial Directorate of the Slovak Republic for the *purpose of detecting tax crimes,* (iii) the Criminal Office of the Financial Administration *for the purpose of detecting and investigating criminal offenses and providing data on them to the European Anti-Fraud Office*. The data provided to or from the central register of accounts remain subject to banking secrecy or protected facts pursuant to the Securities and Investment Services Act.

As the National Bank of Slovakia is to supervise the fulfilment of the obligations of financial institutions and the central securities depository in providing data to the central register of accounts, the draft law, as a regulation that interferes with the national central bank's existing competences, has been consulted according to European Central Bank 98/415/EC of 29 June 1998 on the consultation of the European Central Bank (ECB) by national authorities regarding draft legislative provisions. In this context, the ECB stated that the exercise of the new supervisory role for the National Bank of Slovakia was not in conflict with its institutional set-up.[17] For the purpose of supervision, the National Bank of Slovakia should have access to data in the central register of accounts.

The provision of data by a bank, a branch of a foreign bank, a central securities depository or an investment firm to the central register of accounts pursuant to this Act shall not constitute a breach of banking secrecy or a breach of "protected facts". Nevertheless, we have to state that the constant addition of new cases of breaches of banking secrecy in the Banking Act (as well as protected facts under the Securities and Investment Services Act) raises the question to what extent the protection provided by banking secrecy can still be considered effective.

Ad b) *For a supervisory authority* (in the Slovak Republic, the National Bank of Slovakia), the provision of information is provided for as its legal entitlement in order to ensure synergy with other public authorities. As it is a public authority, the legal entitlement is based on Article 2(2) of the Constitution of the Slovak Republic. The provision of information is not implemented as an exception to the obligation of confidentiality (by employees of the central bank) but ex lege exclusion from the scope of selected confidentiality provisions.[18]

The supervisory authority is entitled to disclose information to tax authorities, for example, under the Insurance Act. The reasons for such disclosure may vary (e. g. to establish the correct tax base). As such, the National Bank of Slovakia may provide information obtained in the course of supervision to tax and fee authorities in tax administration matters if the tax and fee authority requests it in writing.[19] As the central bank also supervises the commercial insurance industry and obtains information that may also have an impact on the control of tax compliance by the taxpayer (for example, in the area of technical provisioning), it was necessary for the central bank to be able to provide such information to the tax administrator, which could use it in its activities.

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[17] Opinion of the European Central Bank of 1 March 2022 on the establishment and operation of the central register of accounts (CON/2022/7), p. 6 (2.7).

[18] This is an obligation in § 7 and 41 of Act no. 566/1992 Coll. on the National Bank of Slovakia, and in § 2, 3, 17 and 24 of Act no. 747/2004 Coll. on Financial Market Supervision and on Amendments to Certain Acts (in Relation to Facts Detected in Supervision or Proceedings before the National Bank of Slovakia).

[19] See § 79 par. 26 letter i) of Act no. 39/2015 Coll. on Insurance and on Amendments to Certain Acts. It is worth noting that this authorization was added to the Insurance Act with effect from 29 June 2021 and its justification can be found in a separate part of the explanatory memorandum to Act no. 209/2021 Coll.

The general legal framework for cooperation, exchange of information and interaction in the framework of financial market supervision between the National Bank of Slovakia (as a supervisory authority) and other public authorities and other persons having information on supervised entities (including tax administration authorities) is the Financial Market Supervision Act.[20] This Act also specifies that the details of the provision of interaction can only be regulated by a written agreement on mutual cooperation and provision of information between the National Bank of Slovakia and the competent authority.

The importance of the exchange of information between the tax authorities and the supervisory authority can also be very beneficial for sanction proceedings conducted by the tax authorities or the supervisory authority, due to the observance of the principle of "ne bis in idem" in administrative punishment. At the same time, a certain sanction in the area of administrative punishment can subsequently have a major impact on the related criminal proceedings for a tax offense. The need for cooperation between national authorities is also emphasized here by the judiciary (Milučký & Milučký, 2021, 624). On the other hand, the principle of "ne bis in idem" can be curtailed according to the case law of the Court of Justice of the European Union and the European Court of Human Rights. However, such a restriction must not go beyond what is strictly necessary to achieve the objective[21] (principle of proportionality).

The general legal framework for cooperation and interaction in the activities of the central bank is the Act on the National Bank of Slovakia, according to which the National Bank of Slovakia is entitled to cooperate and exchange information with public authorities in the Slovak Republic and other countries and with international organizations (including tax authorities) to the extent necessary to ensure the performance of its tasks under this Act and special regulations.[22]

When exchanging information with the central bank in accordance with the above-mentioned provisions of the Financial Market Supervision Act and the Act on the National Bank of Slovakia, it is always a matter of breaking so-called professional secrecy, which applies to employees of the National Bank of Slovakia.

3 Administrative cooperation and exchange of information in the field of taxation

Tax evasion and tax avoidance represents a problem, as a result of which individual states lose a substantial part of their state budget revenues, as taxes represent the main revenue to the state budget. In the event of a loss of this income, the state is unable to finance its societal tasks and goals, and therefore strives to protect, maintain and secure its largest revenues as much as possible. For this reason, states are fighting the problem of tax evasion and avoidance in various forms and ways. The most effective tool in the fight against tax evasion and tax avoidance seems to be the automatic exchange of information in the field of taxation as one of the forms of administrative cooperation.[23]

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[20] See § 1 par. 3 letter h) and § 3 par. 1, 3 and 7 of Act no. 747/2004 Coll. on Financial Market Supervision and on Amendments to Certain Acts. See interpretation for this Slezáková et al. (2018, 51, 81).

[21] For example, judgment of 20 March 2018, *Luca Menci*, C-524/15, EU:C:2018:197, or *A and B v Norway* App no 24130/11 and 29758/11 (ECtHR, 15 November 2016), also see Rakovský (2021, 145).

[22] See § 34a par. 3 of Act no. 566/1992 Coll. on the National Bank of Slovakia.

[23] Other forms of administrative cooperation are stipulated in Chapter III of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC which was implemented also to Act no. 442/2012 Coll. of the Slovak Republic.

Administrative cooperation in the field of taxation has a long history and exists at the global, EU and national level. At the global level, where the Organisation for Economic Cooperation and Development (hereinafter OECD) is the decision-making body; administrative cooperation is enshrined in the Convention on Mutual Administrative Assistance in Tax Matters (hereinafter the Convention), Base Erosion and Profit Shifting Action Plan (hereinafter BEPS), as well as in the Model Tax Convention on Income and on Capital[24] (hereinafter OECD Model Tax Convention). At the EU level, the EU addresses administrative cooperation in the Directive on administrative cooperation in the field of taxation[25] (the so called DAC1 and its amendments) and, to some extent, international cooperation in the field of tax claims is also stipulated in the Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.[26] These Directives are implemented into the national legal order of the Slovak Republic. OECD legal acts affect legislative processes within the EU, which in turn affect national law-making.

3.1 Exchange of information in the field of taxation in the conditions of the Slovak Republic

National legal systems are largely influenced by the situation and global (OECD) legislation, but of course mainly by European law, as directives must be transposed by Member States into their national legal systems. Legal acts in the field of exchange of information adopted by the EU are influenced by legal acts adopted by the OECD (e.g., OECD BEPS / EU Anti Tax Avoidance Directive[27] (the so called ATAD), OECD BEPS Action 12 (Mandatory Disclosure Rule, the so called MDR) / EU DAC6, OECD BEPS Action 5 / EU DAC3). However, a more proac-

[24] Article 26 of the OECD Model Tax Convention reads as follows: *The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.*

[25] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (the so called DAC1) and its amendments:
DAC2 - Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation;
DAC3 - Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation;
DAC4 - Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation;
DAC5 - Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities;
DAC6 - Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements;
DAC7 - Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

[26] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

[27] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (so called ATAD).

tive and prompt approach to addressing exchange of information issues by the EU has recently emerged (especially in the case of DAC7 and DAC8[28]).

There are several types of exchange of information, namely spontaneous, on-request and automatic. The greatest potential in the fight against tax evasion and tax avoidance has the automatic exchange of information.[29] In the field of taxation, this is enshrined in the conditions of the Slovak Republic in Act no. 442/2012 Coll. and in Act no. 359/2015 Coll., to which a Decree of the Ministry of Finance of the Slovak Republic no. 446/2015 Coll. laying down the details of the verification of financial accounts by notifying financial institutions was also adopted. Act no. 442/2012 Coll. regulates all types of automatic exchange of information, except for the automatic exchange of information on financial accounts, which is regulated by Act no. 359/2015 Coll. International cooperation and assistance in the recovery of certain financial claims is enshrined in Act no. 466/2009 Coll.

3.1.1 Automatic exchange of information on specific categories of income and capital

The automatic exchange of information on specific categories of income and capital was introduced into the national law of the Slovak Republic as a result of the implementation of DAC1. This Directive was not the first directive which ensured administrative cooperation in the field of taxation: it followed Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, which for the first time legally established administrative cooperation between Member States, including the exchange of information. In 2003, the EU adopted Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, which for the first time introduced a mechanism for the automatic exchange of information between Member States' competent authorities on non-resident savings income. DAC1, which repealed Directive 77/799/EEC and subsequently Directive 2003/48/EC, became a milestone in the field of administrative cooperation in the field of taxation.

It expanded and strengthened administrative cooperation in the form of spontaneous exchange of information, exchange of information on request, automatic exchange of information and other types of administrative cooperation – such as simultaneous controls; presence in administrative offices and participation in administrative enquiries; and administrative notification. DAC1 enshrined the automatic exchange of information, although not for the first time, as it appeared in Directive 77/799/EEC and, in practice, the system of automatic exchange of information was first introduced by Directive 2003/48/EC. However, DAC1 was certainly the first to introduce the automatic exchange of information for tax purposes concerning, *inter alia,* the following income sources: employment, director's fees, pensions, ownership of and income from immovable property, and from life insurance products not covered by other Union legal instruments on the exchange of information.[30]

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[28] Final text of DAC8 is still a work in progress.

[29] According to 2 letter h) of Act no. 442/2012 Coll. automatic exchange of information means the exchange of a predefined type of information between competent authorities, without prior request, within preestablished time limits.

[30] Royalties were included in the categories of income subject to mandatory automatic exchange of information in order to strengthen the fight against tax fraud, tax evasion and tax avoidance by DAC7.

The Slovak Republic, like all Member States, is obliged to exchange information only on those categories of income which they have at their disposal, which are located in the tax files / relevant registers of the tax administrator of the notifying Member State and which can be obtained in accordance with the information gathering and processing procedures in that Member State. At the same time, states can bilaterally agree on the automatic exchange of information on other categories of income as well. The competent authority of the Slovak Republic[31] may also notify the competent authority of the Member State that it does not wish to receive information on selected category of income.

The essence of this is the exchange of information on the available categories of income of non-residents between the competent authority of the Slovak Republic and the competent authorities of the Member States through the CCN network, no later than 6 months after the end of the tax period. This exchange of information exists exclusively between EU Member States and is carried out in compliance with DAC1.

3.1.2 Automatic exchange of information on financial accounts

Exchange of information on financial accounts was introduced by the OECD in 2014 by adopting the *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (hereinafter the Standard), of which the Common Reporting Standard (CRS), the model Competent Authorities Agreement (MCAA), comments to the CRS and MCAA and the user manual for the CRS XML schema are integral parts. The EU was inspired by the Standard and this resulted in the adoption of the DAC2, which the Slovak Republic implemented into national law by Act no. 359/2015 Coll. and details are enshrined in Decree no. 446/2015 Coll.

In the case of this exchange of information, the *Reporting Financial Institution shall communicate the following information in connection with the Reportable Person and Reportable Accounts to the competent authority of the Slovak Republic for a calendar year or another appropriate reporting period*: details of the reporting financial institution, details of each financial account holder or controlling person, financial account number, and financial account balance or financial account value, as well as other data in the case of a manager's account or deposit account, by 30 June of the calendar year following the calendar year for which the reporting obligation is fulfilled. Subsequently, information on reportable accounts held by non-resident taxpayers (reportable persons) shall be exchanged between the competent authority of the Slovak Republic and the competent authorities of the Member States, competent authorities of Contracting States[32] or the competent authority of the United States of America by 30 September of the calendar year following the calendar year which fulfils the reporting obligation. The Slovak Republic exchanges information with EU Member States on the basis of DAC2, with Contracting States on the basis of the Convention and with the USA on the basis of the FATCA[33] agreement.

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[31] The competent authority of the Slovak Republic in the field of exchange of tax information is the Financial Directorate of the Slovak Republic.

[32] A Contracting State means a Contracting Party to an international treaty by which the Slovak Republic is bound. In this case the international treaty is the Convention on Mutual Administrative Assistance in Tax Matters, as amended by the provisions of the Protocol (Notification of the Ministry of Foreign Affairs and European Affairs of the Slovak Republic No. 461/2013 Coll.).

[33] Foreign Account Tax Compliance Act.

3.1.3 Automatic exchange of information on advance cross-border rulings and advance pricing arrangements

The exchange of information on advance cross-border rulings and advance pricing arrangements was enshrined in the BEPS Plan of the OECD, but only on an ad hoc basis. This *mandatory spontaneous exchange* of advance cross-border rulings and advance pricing arrangements takes place between the Convention's signatories, who at the same time have committed themselves to the *minimum standard of Action 5 of the BEPS Plan* adopted by the OECD. DAC1 also laid down a mandatory spontaneous exchange of advance cross-border rulings and advance pricing arrangements. However, the downside of the spontaneous exchange of information is *the discretion*[34] of the State, which allows the issuing Member State to decide which other Member States should be informed. The EU went further and introduced an *automatic exchange* of advance cross-border rulings and advance pricing arrangements through DAC3, which the Slovak Republic transposed into national law through Act no. 442/2012 Coll. The essence of this exchange is the exchange of advance cross-border rulings and advance pricing arrangements between the competent authority of the Slovak Republic and the competent authorities of the Member States, automatically within three months from the end of the calendar half-year during which the advance cross-border rulings and advance pricing arrangements were issued, amended or renewed. The automatic exchange of advance cross-border rulings and advance pricing arrangements between EU Member States takes place on the basis of DAC3 and the spontaneous exchange of advance cross-border rulings and advance pricing arrangements between Contracting States takes place on the basis of the Convention.

3.1.4 Automatic exchange of country-by-country reports

The OECD enshrined the exchange of country-by-country reports (CbCR) in Action 13 of the BEPS Plan. The legal basis for the automatic exchange of CbCR lies in Art. 6 of the Convention. The preamble of DAC4 clearly states that it has followed the work of the OECD under the BEPS Plan, and was transposed into the national law of the Slovak Republic by Act no 442/2012 Coll. Its essence is the automatic exchange of reports of multinational groups of companies, which will achieve consolidated revenues for the group of at least 750 mil. eur. The report contains information on their amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, registered capital, accumulated earnings, number of employees and tangible assets other than cash and cash equivalents, with regard to each tax jurisdiction in which the multinational enterprises group (MNE) operates, including a list of each constituent entity of the MNE group and the nature of the main business activity of the constituent entity.

The Ultimate Parent Entity, Constituent Entity or Surrogate Parent Entity shall submit the CbCR to the competent authority of the Slovak Republic. It must be submitted in accordance with the format stipulated by the law and within 12 months of the last day of the reporting fiscal year of the MNE group (timing for filling). An earlier filing deadline (e.g., aligned with the tax reporting filing deadline in the jurisdiction) is not prohibited, but it is not recommended (OECD, 2017, point 24). The competent authority of the Slovak Republic shall send CbCR by automatic exchange of information to the competent authority of the Member State or competent authority of the contracting state in which the Constituent Entity is resident for tax purposes or in which the Constituent En-

[34] Preamble of DAC3 para 4.

tity is subject to income tax in respect of activities carried on through a permanent establishment; this shall be done within 15 months of the last day of the fiscal year in question of the MNE group to which the CbCR relates. The exchange of CbCR with EU Member States takes place on the basis of DAC4 and with the Contracting States on the basis of the Convention (Art. 6).

3.1.5 Access of tax administrations to information about beneficial owners within the anti money-laundering legislation

DAC5, as well as DAC2, followed the Standard adopted by the OECD. Information on financial accounts also includes information on beneficial owners for these financial accounts, if the financial account is owned by a legal entity or another legal arrangement of assets. The DAC stipulates that, if the account holder is an intermediary, the financial institutions shall review that entity and identify and report its beneficial owners (due diligence). The information is obtained in the framework of the anti money-laundering Directive (EU) 2015/849,[35] which is used to identify beneficial owners. For the financial administration to be able to monitor the application of due diligence procedures by financial institutions effectively, it must have access to information obtained in the fight against money laundering. Without such an approach, it would not be able to monitor, confirm and verify that financial institutions properly apply the DAC2 Directive by correctly identifying and reporting the real owners of intermediaries.[36]

DAC5 was implemented into the national law of the Slovak Republic by Act no. 267/2017 Coll., amending Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code). Its Section 26 par. 17 (amended by Act no. 267/2017 Coll.) stipulates that the *liable person is obligated to provide the Financial Administration upon request the data obtained in meeting the obligations under anti money laundering (AML) legislation*.[37] The legislation in question ensures that tax authorities have access to the mechanisms, procedures, documents and information on financial institutions in order to monitor compliance with the financial institution's obligations regarding the identification of the beneficial owner under AML legislation,[38] thus ensuring a more effective fight against tax evasion and fraud.

3.1.6 Automatic exchange of information on cross-border reportable arrangements

The disclosure of information on potentially aggressive tax planning measures has been enshrined by the OECD in Action 12 of the BEPS Plan, which the EU followed up with the adoption of DAC6.[39] The Slovak Republic implemented DAC6 by Act no. 442/2012 Coll.

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[35] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

[36] Explanatory note general to the Act no. 267/2017 Coll. which amended the Tax Procedure Code.

[37] Act No. 297/2008 Coll. on Protection Against Money Laundering and Terrorist Financing and on the Amendment to Certain Acts.

[38] For more details about AML issue see Daudrikh (2020).

[39] Preamble of DAC6, para 4: the Commission has been called on to embark on initiatives on the mandatory disclosure of information on potentially aggressive tax-planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project.

Through this exchange of information, timely, comprehensive and relevant information on a potentially aggressive tax scheme, meaning a structure which could lead to tax avoidance or evasion, shall be provided to tax administration; moreover, this exchange of information should help to identify intermediaries who provide general or tailor-made "tax schemes" to their clients and to identify the users of these schemes / clients themselves.

Intermediaries or relevant taxpayers (if an intermediary does not exist or enjoys legal professional privilege under the national law of the Member state) are required to file information on reportable cross-border arrangements with the competent authority of the Slovak Republic, which, by means of an automatic exchange, communicates the information on the reportable cross-border arrangement to the competent authorities of all other Member States within 30 days from the last day of the calendar quarter in which the information was submitted by the liable person to the competent authority of the Slovak Republic. Recently there have been a few cases pending before the Court of Justice of the EU which deal with the issue of lawyers' legal professional privilege in connection with DAC6 obligations.[40]

3.1.7 Automatic exchange of information on the income of active sellers achieved through digital platforms

DAC7 was adopted on 22 March 2021 and is intended to ensure the automatic exchange of information on the so-called active sellers achieved from the sale of their goods and services through digital platforms.[41] The OECD has also developed Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy. Although the OECD Model Rules of are *not identical to the scope of DAC7 (DAC7 is wider) in terms of the sellers on which information must be reported and the digital platforms through which information must be reported, the Model Rules are expected to provide for the reporting of equivalent information in relation to relevant activities that are in the scope of both DAC7 and the Model Rules, and which may be expanded further to cover additional relevant activities.*[42]

In a period of rapidly evolving digitalisation of the economy, this automatic exchange of information should assist tax administrations in correctly quantifying the taxable income of people selling through digital platforms without a physical presence. The intention is not only to cover the cross-border use of the platforms, but also to obtain information on domestic sellers via domestic digital platforms. To ensure this automatic exchange of information, the obligation of Reporting Platform Operators to collect and provide the competent authority of the Slovak Republic with information on Reportable Sellers who carry out relevant activities (so actively sell goods and provide services through platforms) was introduced.[43] This means any activity carried out for consideration in the following categories: *the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces; a personal service; the sale of goods, and the rental of any mode of transport.*

[40] Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, and see also Béra (2021).

[41] The issue of collective lending, which is provided through digital platforms, also known as peer-to-peer lending, is addressed in Heseková (2018).

[42] Preamble of DAC7 para 16.

[43] Explanatory note to the proposal of Act by which the DAC7 will be implemented into the Slovak national law.

DAC7 was transposed to the national order of the Slovak Republic by Act no. 250/2022 Coll., Amending Act no. 442/2012 Coll. on International Assistance and Cooperation in Tax Administration.

3.1.8 Automatic exchange of information on taxpayers using crypto assets and electronic money

In the context of another amendment of DAC (DAC8), the final text of which is still a work in progress, the EU seeks to extend the scope of the automatic exchange of information between Member States' tax administrations on information on taxpayers using crypto assets and electronic money, investing through them, as well as on revenues from or related to crypto assets and electronic money investments. The OECD has also started developing the Crypto-Asset Reporting Framework CARF), a new global tax transparency framework designed to ensure the collection and exchange of information on transactions using Crypto-Assets. The OECD has also started proposing a set of amendments to the CRS, in order to bring new financial assets, products and intermediaries into its scope, because they are potential alternatives to traditional financial products. In order to obtain as much information from relevant parties as possible and to regulate this area as well as possible, the OECD has started public consultations relating to this topic with a deadline for comments of April 2022 (OECD, 2022).

3.2 Methods of tax information exchange

The information communicated through the automatic exchange of information takes place electronically between the Member States of the EU via the CCN platform, which, according to Article 3 para 13 of the DAC, constitutes a common platform based on the common communication network (CCN) established by the EU for all electronic transmissions between the competent customs and tax authorities. The competent authorities of the EU Member States automatically exchange only the information obtained under DAC1, DAC2 and DAC4 through the CCN platform. The automatic exchange of information under DAC3 and DAC6 is ensured through a secure central register set up by the Commission, where Member States record relevant information to which the competent authorities of other Member States have access. In the event that the competent authority of the Slovak Republic also exchanges information with non-EU member countries, hence with other State Parties to the Convention, the exchange of information takes place through the Common Transmission System (CTS). This communication channel was developed by the OECD with annual financial support from the participating jurisdictions. The aim of the CTS is to exchange information securely, and it allows competent authorities to transmit information covering additional information exchanges, namely CRS, CbCR, MDR, exchange of information on request and spontaneous exchanges of information.

3.3 Benefits of automatic information exchange

The main benefit and also the main goal of introducing the automatic exchange of information is the effective *fight against tax avoidance, tax evasion and tax fraud*, which are associated with aggressive tax planning by multinational companies, but also "large" taxpayers – individuals. With the current freedom of movement, there is an increased risk of transfer of income and assets to countries where taxpayers are not residents and there is a risk that the transferred income will not be reported to the competent authorities of the country of residence, neither by the tax-

payers themselves nor by third parties – such as banks and employers. A benefit of automatic exchanges of information can be the *assessment of the correctness of the submitted tax return* and *an assessment of the correctness of the tax levied*, which, however, does not automatically mean the generation of additional tax revenues for the state budget. Informing taxpayers of the existence of an automatic exchange of information can also have a *deterrent effect* on those who would like to avoid their tax obligations by transferring income/assets to other Member States/ Contracting States. This effect could contribute *to voluntary tax compliance by taxpayers*. Administrative cooperation in the form of the exchange of information should also aim to *reduce harmful tax competition by ensuring transparency in the tax rules of the Member States*. The general objectives of administrative cooperation are to contribute to the proper functioning of the internal market, to protect Member States' tax revenues and to increase fairness in the tax system. However, the Commission has stated on several occasions that its main objective is to increase the transparency of tax rules, as opposed to reducing harmful tax competition, which is also reflected in the preambles to the DAC amendments.[44]

3.4 International assistance in the recovery of tax claims

International cooperation/assistance means the exchange of information necessary for recovery and delivery of documents related to tax recovery, securing a claim or other acts related to recovery on the basis of reciprocity between the competent authority of the Slovak Republic and the competent authority of another EU Member State and the competent authority of a State Party to a Convention.

The recovery of claims between the Member States of the European Union is ensured on the basis of Council Directive 2010/24 / EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures (Directive on recovery of claims), which was transposed into our Act no. 466/2009 Coll. on International Assistance in the Recovery of Certain Financial Claims and on the Amendment of Certain Laws.

With non-member states of the European Union, recovery of tax claims is ensured on the basis of the Convention, which is also enshrined in Act no. 466/2009 Coll. The Slovak Republic is a signatory to the Convention, which results from the Notification of the Ministry of Foreign and European Affairs of the Slovak Republic no. 461/2013 Coll.. As of 22 December 2021, this Convention has been signed by 144 jurisdictions, some of which have entered reservations[45] under Art. 30 par. 1 letter (b) of the Convention, as a result of which they do not provide administrative assistance in the recovery of a tax claim or administrative sanction, in respect of those taxes specified in the reservations. If one State reserves the right not to provide any form of administrative assistance in the recovery of certain taxes (which is stated in the reservations), the other State shall not provide that State with administrative assistance in respect of those taxes, because under the Convention there is a need for mutual administrative assistance, which, according to the OECD Explanatory Memorandum, means on the base of reciprocity.

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[44] Report from the Commossion to the European Parliament and the Council on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation, COM/2018/844 final, 13; and also see Commission staff working document evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, SWD/2019/327 final, 14.

[45] List of Declarations, Reservations and other Communications, available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=127

Assistance in the collection of taxes may also be provided on the basis of Article 27 OECD model Tax Convention, which should also ensure the recovery of tax claims in bilateral relations. Its Art. 27 par. 1 reads as follows: "*The Contracting States shall lend assistance to each other in the collection of revenue claims. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.*"

4 Conclusions

First of all, we can conclude that the general goal of exchanging information is to increase the transparency of the tax rules and to reduce harmful tax competition.

The aim of the paper was to map the forms of interaction in horizontal institutional relations and vertical institutional relations in the regulation of tax law and the financial market. Based on the analysis of the current legal situation in Slovak tax law and financial market legislation, it can be stated that their interaction is reflected in the anchoring of cooperation between financial administration authorities (or tax administrators) and financial market entities. In particular, the cooperation between financial administration authorities (or tax administrators) and (i) the financial market supervisory authority (within the basic procedural regulation for the exercise of financial market supervision, i.e., the Financial Market Supervision Act) and (ii) the central bank (according to the legal framework of the Central Bank Act, i.e., the Act on the National Bank of Slovakia) are regulated. In both special cases, an identical entity acts, as the supervision of the financial market in the Slovak Republic is ensured by the central bank. The general framework for cooperation with the central bank does not take into account the specifics of cooperation with tax authorities.

Cooperation and interoperation, as manifestations of the interaction between tax law and financial market legislation, pursue several objectives: not only tax administration, prevention and detection of tax crimes and the elimination of tax evasion, but even the acquisition of tax information for the purposes of financial market supervision. Achieving these tasks must be distinguished according to which tax authority the data are to be provided (whether it is the Financial Directorate of the Slovak Republic, Criminal Office of the Financial Administration, tax office, customs office, municipality as tax administrator), or whether they are provided to the supervisory authority.

As mentioned in the paper, existing financial market regulations have recently been supplemented with provisions aimed primarily at ensuring a legal framework for cooperation and interoperation with financial market entities without violating existing legal obligations, such as a banking secrecy or professional secrecy.

The paper on the other hand has also analysed the forms of administrative cooperation and it was concluded that the most effective tool to combat tax evasion and tax avoidance is to secure the automatic exchange of information between tax administrations of EU and also non-EU member states. The exchange of information and international cooperation on a global level is secured by OECD legal acts, such as the OECD Model Tax Convention, BEPS Plan and also the Convention, and on the EU level there are Directives (e.g., DAC1 – DAC8 and the Directive on recovery of claims). All these acts and documents affect the legal order of the Slovak Republic. It is given by the fact that the Slovak Republic, as a member state of the EU, has to transpose directives into its national law and also by the fact that the Slovak Republic is a member of OECD and signatory to the Convention.

The extent of automatic exchange of information is still growing and expanding. The exchange of information has been constantly adapted to the needs of the time and responded to

the constantly evolving practices of aggressive tax planning. The Slovak Republic is receiving much information via automatic exchanges of information and it is a must for the Slovak Republic to use them effectively.

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The constitutional principle of decentralizing public power in the Polish legal system

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Abstract

Decentralization of public power is one of the fundamental principles in rule of law democracies. It is a constitutional principle manifested through the functioning of local self-government. The article concisely characterizes the decentralization of public power in Poland, with particular emphasis on the basic principles governing the functioning of local self-government. The author also points to problems related to the implementation of this principle.

Keywords

decentralization, local self-government, autonomy, territorial division, public tasks, subsidiarity principle

Introduction

Decentralization is one of the basic principles underlying the Polish state (Skoczylas & Piątek, 2016). Pursuant to article 15 of the Constitution of the Republic of Poland,[1] the territorial system of the Republic of Poland shall ensure the decentralization of public power. It is treated as a social idea, rooted in the content of constitutional regulations and is as important in the legal system as constitutional regulations. It occupies a place among the constitutional values on which the state system is based (Kieres, 2020), and is one of the most important system principles (along with the principle of subsidiarity) on which the nature and shape of public administration are constituted (cf. Zgud, 1999; Szpor, 2021, 20; Cieślik, 2004, 33; Popławska, 1998, 190; Przybylska-Marciniuk, 2004).

Decentralization of public power in the Polish legal system

Decentralization of public power is defined in various ways: as a political postulate, a legal principle, an organizational model or a mechanism for the functioning of public power (cf. e.g.: Kumaniecki, 1924; Bigo, 1928; Reiss, 1932; Panejko, 1934; Starościak, 1960; Wiktorowska, 2002;

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended.

Fundowicz, 2005; Niczyporuk, 2006). In each of these approaches, it is possible to distinguish and highlight specific features of decentralization. Above all, however, and pursuant to the Constitution of the Republic of Poland, the principle of the decentralization of public power underlies the territorial system of the Republic of Poland. Any action of the authorities affecting the territorial system of the Polish state should be designed while taking the principle of decentralization into account. The concept of public power used in the Constitution is very broad.[2] However, attempts to clarify it in the context of the term "territorial system" forces one to interpret this principle in relation to the organizational structure of the state and the division of tasks and competences that follows. It therefore determines the existence of local self-government and entails a transfer of some of the powers of higher-level public authorities to lower-level entities. Such an organizational arrangement of public administration entities determines the political system of the Polish state, which, in the light of the Constitution of the Republic of Poland, is a rule of law democracy. It can therefore be concluded that local self-government is an element of the territorial system of the Republic of Poland and also a part of the system of public power (Izdebski, 2009, 15).

The existence of local self-government in Poland is one of the conditions for an efficiently functioning democratic state. It is also emphasized in the international law, primarily in the European Charter of Local Self-Government,[3] which was ratified by Poland and has been in force since 1 March 1994. By ratifying it, "Poland considered the ECLSG to be valid in its entirety and separately for each of the provisions contained therein, with the promise that it will be consistently preserved" (Skoczylas & Piątek, 2016). The Charter emphasizes the role and importance of decentralization and points out that local communities constitute one of the foundations of democracy, and that the right of citizens to participate in making decisions regarding public affairs is one of the democratic principles common to all the Member States of the Council of Europe.[4]

Decentralization is defined as a permanent and legally protected transfer of important tasks, competences and funds from national authorities to bodies operating at various levels of the territorial division of a country (Nowacka, 2003, 63). It is a manifestation of the broadest cooperation between the administrative system and the social and the economic ones. In the context of local self-government, it involves engaging separate parts of the social system,[5] namely communities shaped according to their area of residence, in processes of self-administration. In this way, they become part of the administrative system with regard to administrative tasks specified in statutory provisions.

Decentralization should be recognized as a constitutional value and characterized by the world of social principles that shaped its content and gave it a certain public dimension, where it is described as "the idea of decentralization".[6] In the jurisprudence of the Polish Constitutional Tribunal, decentralization is considered as a relevant social phenomenon.

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[2] According to the Constitution of the Republic of Poland public power should be understood as legislative, executive and judicial power (cf. Art. 10 Paragraph 1).

[3] European Charter of Local Self-Government adopted in Strasbourg on 15 October 1985, Journal Of Laws of 1994, No. 124, item 607, as amended.

[4] Preamble to the European Charter of Local Self-Government.

[5] Cf. Art. 1 Paragraph 1 of the Act of 8 March 1990 on gmina self-government, Journal of Laws of 2022, item 559, as amended, Art. 1 section 1 of the Act of 5 June 1998 on powiat self-government, Journal Of Laws of 2022, item 528, as amended, Art. 1 Paragraph 1 of the Act of 5 June 1998 on voivodeship self-government, Journal Of Laws of 2022, item 547, as amended.

[6] Judgment of the Constitutional Tribunal of 3.11.2006, K 31/06 OTK-A 2006/10, item 147.

The Constitutional Tribunal considers the importance of decentralization in developing the political system of the Republic of Poland to be special, using as the basis the will of the legislator to accept decentralization as a separate constitutional principle (principle of decentralization). The principle of decentralization thus originates from the constitutional legal order – it has normative character.[7] This is because the content constituting the identity of the principle of decentralization has been shaped by constitutional norms, which – according to the tribunal – gives it the characteristics of a specific legal norm, as it is shaped by the constitution.[8]

It is, therefore, necessary to pay attention to the values that shape the identity of the principle of decentralization which, although they have not been singled out *expressis verbis* in the Constitution, can be associated with the principle of decentralization by recognizing their character as constitutional customs.[9]

Going back to the very concept of decentralization, it is worth emphasizing that it has been analysed by a considerable number of Polish administrative law scholars (e.g.: Bigo, 1928; Reiss, 1932; Panejko, 1934; Starościak, 1960). As a result, two types of decentralization have been distinguished: territorial and material. Territorial decentralization consists in equipping the bodies in charge of individual administrative division units with such a degree of self-reliance that it is justified to recognize them as decentralized bodies, which is exemplified by local self-government (Wiktorowska, 2009, 96). Material decentralization consists in entrusting independent bodies or organizations, in principle local self-government, with certain types of tasks (Wiktorowska, 2009, 96).

Regardless of the type of decentralization, its main goal is, on the one hand, to relieve central authorities of carrying out detailed tasks so that they can focus on more general matters, and on the other, to enable local structures to effectively handle local matters (Niewiadomski, 2002, 3–4). In this context, one should pay attention to the principle of subsidiarity, deriving from the Preamble to the Constitution of the Republic of Poland, which in the science of law is combined with the principle of decentralization and often treated as its synonym (e.g.: Winczorek, 2008, 47). This principle means distributing tasks between citizens and their communities and the state. The latter performs more difficult and complex tasks of central nature, which smaller structures are unable to perform. Subsidiarity means that local needs are met at a given level of local self-government. If certain tasks cannot be accomplished that way, it will be supported by central structures. According to this principle, the state should not perform tasks that can be performed more effectively by smaller communities.[10]

Local self-government units and their tasks

Before further investigating decentralization, one should delve into the division of tasks between the state and local self-government. The aim of decentralization is undoubtedly to distribute tasks, competences or funds among territorial bodies, which is proved by the functioning of local self-government. Pursuant to Article 16 Paragraph 2 of the Constitution of the Republic of Poland, local self-government participates in the exercise of public power and performs a considerable part of its public duties in its own name and under its own responsibility. A con-

[7] Judgment of the Constitutional Tribunal of 26.02.2003, K 30/02.

[8] Judgment of the Constitutional Tribunal of 28.11.2013, K 17/12.

[9] Judgment of the Constitutional Tribunal of 19.11.2008, Kp 2/08, OTK-A 2008/9, item 157

[10] Judgment of the Constitutional Tribunal of 12 March 2007, K 54/05, OTK Series A 2007, No. 3, item 25, cf. e.g. Kania (2017, 13–21).

sequence of public power decentralization is empowering local self-government to participate in the exercise of this power. Moreover, the Polish legislator has expressed the will to assign a significant part of public tasks to local self-government. This must mean that these cannot only be marginal tasks (Grzybowska & Grzybowski, 2020, 249). According to the Constitutional Tribunal, the better the decentralization of the state is implemented, the greater the transfer of competences to local self-government is (while guaranteeing the greatest possible level of freedom).[11] Participation in the exercise of public power consists in performing public tasks, not reserved by the Constitution and statutory acts for other authorities,[12] aimed at satisfying the needs of local self-government communities,[13] as well as in performing public tasks stipulated in statutory acts if it is in the state's justified interest.[14]

Several directives follow from these provisions. All tasks to be performed by the state for the benefit of citizens, sovereignty, security, etc. should be distributed as precisely as possible among local self-government units and other public authorities bearing in mind the principle of subsidiarity. As a consequence of this distribution, a catalogue of own tasks to be performed by individual local self-government units can be defined.[15] At the same time, the Constitution of the Republic of Poland does not impose an obligation to specify further own tasks by way of statutory provisions, which in practice makes it extremely difficult to satisfactorily determine such tasks.[16] It can be inferred from Article 166 of the Constitution of the Republic of Poland that public tasks designed to meet the needs of local self-government communities are performed by local self-government units as their own. As emphasized in the science of administrative law, a task will be considered "own," provided that it is not performed according to principles and standards that are uniform throughout the country. If it is, it is a government administration task (Zimmerman, 2008, 175–176). It should be stressed, however, that "despite the existing difficulties in defining the tasks and competences of all public authorities, they should complement one another" (Skoczylas & Piątek, 2016). It should also be noted that the Act on gmina self-government introduces a special category of this unit's own tasks, namely the tasks that are mandatory by virtue of relevant substantive law acts (Article 7 Paragraph 2).

Some of the tasks performed by local self-government are 'delegated' by nature. They should be thus delegated by way of an act and must be justified by the state's needs. Despite the fact that these tasks will be carried out in a uniform manner like other state tasks, their delegation to local self-government units is justified for a number of reasons such as efficiency, effectiveness and accessibility of administrative structures. Unlike own tasks, the financing of which is independent and creative by nature,[17] delegated tasks must be financed from the state budget.

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[11] Judgment of the Constitutional Tribunal of 3 November 2006, K 31/06, OTK Series A 2006, No. 9, item 135.

[12] Cf. Art. 163 of the Constitution of the Republic of Poland.

[13] Cf. Art. 166 Par. 1 of the Constitution of the Republic of Poland; these tasks take the form of 'own tasks'.

[14] Cf. Art. 166 Par. 2 of the Constitution of the Republic of Poland.

[15] The catalog of such tasks is specified in Art. 7 of the Act on gmina self-government, Art. 4 of the Act on powiat self-government and Art. 14 of the Act on voivodeship self-government.

[16] Cf. Pośpiech-Kłak (2018). Delegating tasks to local self-government units undergoes constant evolution. Administrative law scholars also advocate various types of changes in this area. An example can be P. Wieczorek's proposal regarding the re-categorization of 'creating new green areas' (at least to some extent) as tasks delegated to cities. As a result, it would be financed from the state budget and at the same time it would force local self-government units to create such areas, cf. Wieczorek (2022).

[17] Judgment of the Constitutional Tribunal of 13 March 2014. P 38/2011, OTK Series A 2014, No. 3, item 31.

Determining a catalogue of local self-government own tasks and competences to implement them brings at various consequences. A task delegated to a specific local self-government unit is both a right and an obligation incumbent on a specific community. Local self-government units perform their own tasks in their own name and under their own responsibility. Therefore, it should be assumed *a contrario* that local self-government does not perform delegated tasks on behalf of individual government administrative units. As emphasized in the science of administrative law, "those are to be its tasks" (Skoczylas & Piątek, 2016). Consequently, local self-government must be responsible for their implementation. This responsibility takes various forms, "from financial to political" (Skoczylas & Piątek, 2016). Moreover, granting local self-government the competence to perform tasks entails granting it a legal personality (in private and public law). Each local self-government unit creates a corporation; that is, an association of people whose purpose is to carry out common tasks (Skoczylas & Piątek, 2016). On the one hand, having a legal personality allows such a corporation to be a party to civil law relations. On the other, it highlights its self-reliance and separateness from state authorities and allows it to use administrative power in when performing public tasks (Sidorowska-Ciesielska, 2018).

Delegating tasks cannot come down only to burdening local self-government with more and more duties (Niewiadomski, 2002, 7). Local self-government units must be viably prepared for performing such tasks, both organizationally and financially. Therefore, an extremely important element of decentralization is proper material security of local self-government units. Local self-government corporations must be equipped with assets, and it must also be possible for them to receive funds. Without these attributes, local self-government cannot be said to be self-reliant.

Self-reliance of local self-government units

Local self-government units are guaranteed self-reliance by the Constitution of the Republic of Poland. The separateness from the state, both in functional and institutional terms, is a constitutional feature of local self-government.[18] Self-reliance within decentralization can be expressed in the words of J. Panejko, according to whom "this self-reliance consists of the fact that bodies (...) are not obliged to obey orders coming from central authorities and do not have to report to them. However, under the general legal order, they are obliged to comply with the laws and in this respect they are subject to supervision by government authorities" (Panejko, 1926, 95). Self-reliance means that these structures of public power must be situated separately from other bodies and institutions, in other words, local self-government is separated from government administration as well as other bodies entrusted by the legislator with performing public tasks. The self-reliance of local self-government units also affects their legal position in private law. As noted by A. Doliwa, "the essence of the self-reliance of local self-government units is expressed by the constitutional principle that they carry out public tasks entrusted to them by the law in their own name and under their own responsibility, while in the area of civil law, the gmina's autonomy as a legal person involves ownership and other property rights" (Doliwa, 2012). The discussed self-reliance manifests itself not only as a freedom to perform public tasks. Its important elements include legislative as well as financial and property self-reliance (cf. Sidorowska-Ciesielska, 2018). Self-reliance is an immanent feature of

[18] It results, among others, from Art. 16 Paragraph 2 sentence 2 and Art.163 of the Constitution of the Republic of Poland.

decentralized local self-government[19] structures – it is their basic attribute. For this reason, it is subject to judicial protection.[20]

The self-reliance of local self-government units ensures freedom in performing public tasks. Local self-government corporations independently carry out their tasks, expressing the residents' will. However, it should be emphasized that the activities of local self-government must be carried out on the basis and within the boundaries of the law. It is stressed in the science of administrative law that self-reliance is synonymous neither with anarchy nor with autonomy. "Self-reliance is something positive as a self-government-forming factor, but anarchy and free unrestricted choices are considered something negative" (Skoczylas & Piątek, 2016). Individual local self-government units are also not autonomous, due to the fact that the provisions they produce "need a statutory basis to be legal". As the Constitutional Tribunal emphasizes, classifying a specific task as an "own" one does not mean that a local self-government unit has unlimited autonomy in determining the principles, forms and financing of this task's implementation, as the above-mentioned Article 16 Paragraph 2 of the Constitution of the Republic of Poland sets the statutory framework within which it may operate.[21] As A. Sidorowska-Ciesielska points out, "due to the fact that local self-government exists by the state's will, the public power exercised by it cannot be opposed to the power of government administration, both central and local" (Sidorowska-Ciesielska, 2018). Self-reliance therefore does not mean autonomy, but independence, which is an attribute of a decentralized system (Wiktorowska, 2009, 147).

The self-reliance of the bodies of local self-government units is therefore not total. As indicated above, the authorities of gminas, powiats and voivodeships are obliged to act on the basis and within the limits of the law. It is the state's duty to make sure this condition is met through supervision exercised by its authorized bodies. However, in accordance with the Constitution and statutory regulations on local self-government, any interference by state authorities in the performance of local self-government tasks should be limited to supervisory procedures based solely on the criterion of legality (cf. Żelasko-Makowska, 2018a). Such a solution fully correlates with the principle of decentralisation, but respects the principle of relative self-reliance. The supervision may be exercised only in the form provided for in statutory acts, and the provisions on supervision must not be interpreted broadly. As emphasized by the Constitutional Tribunal, any interference in the self-reliance of local self-government units should be based on the principle of proportionality.[22]

Territory of a local self-government unit

Decentralization implies the need to legally resolve the issues related to the territory and/or territorial jurisdiction of a given entity, which is necessary to perform administrative tasks better. Pursuant to Article 15 Paragraph 2 of the Constitution of the Republic of Poland, the basic territorial division of the state is to be determined in such a way so as to ensure that territorial units are able to perform public tasks. Several conclusions can be drawn from the wording of this

[19] Self-reliance is considered a *sine qua non* condition for decentralization – e.g. Wiktorowska (2002, 55).

[20] Cf. Art. 165 Par. 2 of the Constitution of the Republic of Poland, as well as the provisions of local self-government acts, respectively: Art. 2 Par. 3 of the Act on gmina self-government, Art. 2 Par. 3 of the Act on powiat self-government, Art. 6 Par. 3 of the Act on voivodeship self-government.

[21] Judgment of the Constitutional Tribunal of 28 November 2013, K 17/12, OTK Series A 2013, No. 8, item 125.

[22] Judgment of the Constitutional Tribunal of 2007.

provision. First, the system of local self-government is only partially stipulated in the Constitution. A considerable number of issues relating to the system and its functions is provided for in statutory regulations. The Sejm of the Republic of Poland is therefore the authority competent to create a specific "system" and, above all, to determine the entities forming the system (local self-government units) and their organizational ties (Grzybowska & Grzybowski, 2020, 245–246). Second, the constitutional legislator gives the statutory legislator free rein to resolve the issues relating to the structure of local self-government units, only deciding that gmina should remain its basic unit.[23] Finally, the structure of local self-government should depend on the type of tasks entrusted to its individual levels. When defining the tasks and competences of the bodies of local self-government units, the legislator should not only carefully balance national and local interests, but also separate the competences of individual levels of local self-government and government administration.

The territorial division is not a permanent structure. It should be adapted to demographic changes, state policy objectives, and economic and cultural conditions (Tuleja, 2019). However, the Constitution orders that any act defining or changing the basic territorial division of the state[24] shall take social, economic and cultural ties into account.[25] Therefore, any interference in the shape of local self-government and the existing social relations cannot be arbitrary or haphazard (Skoczylas & Piątek, 2016). "The legislator must not create local self-government units arbitrarily, without taking social, economic or cultural ties connecting the inhabitants of a given territory into account (Article 15 Paragraph 2 of the Constitution). Therefore, they also have the right to remain undisturbed in the existing territorial and political structures if they accept them, as they respect the fully-developed (usually in the long term) ties between inhabitants (...) The fact that self-government is a legal institution cannot completely obscure and ignore the existence of natural, historical, economic and cultural ties that determine the fact that inhabitants of a given territory feel and are considered a political and territorial community to a higher degree than others. Thus, the very existence of these ties is of decisive importance when assessing the cohesion of such a community, its self-awareness, and the ability to formulate its own collective tasks and public goals. These ties undoubtedly affect the local political activity of inhabitants. Respecting and nurturing the existing ties is the responsibility of all public authorities and bodies in the state, because they serve the development of democracy and promote active social attitudes".[26]

Self-government community

Decentralization of public power means respecting local self-government communities. As Professor Grzybowski notes, the provision of Article 16 Paragraph 1 of the Constitution of the Republic of Poland emphasizes the personal substrate of local self-government communities,

[23] Cf. Art. 164 Par. 1 of the Constitution of the Republic of Poland.

[24] "The territorial division is the permanent dismemberment of a state's area made for a certain group or specific administrative units of the state or non-state units, [...] performing state tasks" (Leoński, 2001, 107). Another definition is given by M. Chmaj, according to whom "the territorial division is a relatively permanent territorial dismemberment of a state carried out for public administration reasons and assigning an entire territorial unit to its competent administrative body" (Chmaj, 2004, 144).

[25] Cf. Art. 15 Par. 2 of the Constitution of the Republic of Poland.

[26] Judgment of the Constitutional Tribunal of 26 February 2003, K 30/02, OTK Series A 2003, No. 2, item 16.

which means that the basic territorial division, in the "geographical" sense, is a determinant of the range of individual local self-government communities (Grzybowska & Grzybowski, 2020, 249). As follows from the above, one of the main objectives of decentralization, in addition to the distribution of tasks and competences between state and local authorities, is to build a civil society. The role of the community is to stimulate the willingness and ability to manage one's own affairs. Therefore, in accordance with the principle of decentralization of public power, local self-government communities are created (*ex lege*) in territorially separate units, together with local self-government bodies and institutions. According to W. Kisiel, the interest of local self-government communities in a broader aspect serves as a method of determining the values to be taken care of by local self-government administration (Chmielnicki, 2013, 35). The Constitution of the Republic of Poland requires that there be two types of bodies in each local self-government community: decision-making bodies, which generally determine the form of exercising their statutory powers, and executive bodies. However, this does not mean the separation of powers is to be decentralized. Considering the decisions of the Constitutional Tribunal, it[27] should be assumed that the separation of powers only affects the supreme organs of Poland and does not refer to the characteristics of the bodies of self-government communities. Not being under the influence of the separation of powers principle, both types of local self-government bodies display – as the Constitutional Tribunal has put it – only an indirect relationship with the executive power. As a consequence, the functioning of these two types of self-government bodies means that neither statutory acts nor communities themselves can establish any further bodies as community bodies, authorized to decide on their behalf on the implementation of their tasks and the shape of this implementation (cf. Sarnecki, 2002). To summarize, decentralization implemented by means of local self-government not only has a functional but also a structural aspect. The state, as an entity of public power, is obliged to respect the competences of other entities of such power, namely local self-government units (Nowacka, 2003, 63).

Conclusions

Local self-government was restored in Poland in 1990. At that time, the basic local self-government unit, the gmina, was established. Further administrative reforms took place on 1 January 1999. Since that day local self-government has been functioning at three levels: gmina, powiat and voivodeship. The restoration of the dualistic model of local public administration, consisting of a government part (based on the principle of centralism) and a self-government part (drawing from the principles of decentralization and subsidiarity) (Korczak, 2012, 191), was fuelled by the desire to build a new state, restore sovereignty and change the system to a democratic one. This is undoubtedly one of the most important achievements of the Third Polish Republic.

Changes and amendments to local self-government acts are carried out on an ongoing basis. They are caused by various factors including economic, social and political ones. Unfortunately, if such changes are influenced by the last of these factors, their implementation often results in a distortion of the idea of decentralization. For instance, such is the case when determining the borders of local self-government units. Contrary to appearances, the procedure of changing the borders of individual local self-government units is carried out very often. In accordance

[27] Judgment of the Constitutional Tribunal of 23 October 1995, K 4/95, OTK 1995, No. 2, item11.

with the provisions of the Act on gmina[28] self-government, the Council of Ministers, by way of regulation, creates, merges, divides and abolishes gminas and determines their borders, grants them the city status and determines the new city's borders, and also determines and changes the names of gminas and the seat of their authorities.[29] This means that such an extremely important element as the gmina's[30] territory is determined at the sub-statutory level.[31] Perhaps this would not be a problem if it were not for the fact that border changes, especially those of gminas, are often disputed by the local self-government units concerned. Such disputes should not be settled by government executive bodies, as they are politicized by nature. The problem deepened when the Constitutional Tribunal issued its decision of 8 February 2017,[32] which said that "a regulation on determining or changing the borders of a local self-government unit is not normative and does not fall into the category specified in Article 188 Paragraph 3 of the Constitution". The fact that this kind of regulation indirectly affects the legal situation does not mean that rules of general and abstract procedure can be inferred from it. As such, the Tribunal found itself lacking incompetence to assess such a regulation in terms of the hierarchy of legal acts. As a result, the local self-government unit facing a loss of territory is only a passive participant in the proceedings, and its role boils down to expressing an opinion (cf. Żelasko-Makowska, 2018b). This in turn calls into question the correctness of the implementation of the decentralization of public power in the model form stipulated in the Constitution of the Republic of Poland.

Numerous doubts raised by administrative law specialists concern the distribution of tasks between individual levels of local self-government and, in particular, the method of financing their operations. It is indicated that the violation of self-reliance occurs in the case of educational tasks. It is emphasized that local self-government units receive an educational part of the general subsidy from the state budget to perform such tasks, but it does not cover the full costs generated by operating schools. In addition, local self-government units have no influence on teachers' wages, their working hours, or the school's work system (cf. Ostrowska, 2020). Similar doubts arise when local self-government units (mainly powiats and voivodeships) have to perform tasks relating to health protection while its financing system remains centralized (health protection is financed from the National Health Fund and the state budget). Undoubtedly, these are only examples of reservations about the method of financing tasks assigned to local self-government (Ostrowska, 2020).

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[28] Similar provisions can be found in the Act on powiat self-government (Art. 3 Par. 1 of the Act on powiat self-government). The borders of voivodeships were created by virtue of the Act of 24 July 1998 on the implementation of a three-degree territorial division of the state (Journal of Laws No. 96, item 603, as amended). This Act provides for the corrections of voivodeships' borders but only resulting from creating, merging, dividing and abolishing powiats (Art. 5 a). The provisions on changing the borders of gminas have been amended many times, which may suggest that the legislator is aware of problems in this area and tries to solve them. Unfortunately, the core of these provisions, pertaining to the competence of the Council of Ministers to issue regulations on changes to gminas' or powiats' borders, remained intact.

[29] Cf. Art. 4 Paragraph 1 of the Act on gmina self-government.

[30] It should be borne in mind that a gmina is composed not only of a community but also a precisely defined territory (Art. 1 Paragraph 2 of the Act on gmina self-government).

[31] According to J. Szlechetko, the decentralization of public power should occur by way of statutory acts – it is only a statutory norm that can protect the entities of decentralized administration, including local self-government units, against excessive interference of government administration bodies.-Cf. Szlachetko (2018).

[32] File ref. no. U 2/16, OTK ZU Series A 2017, item 4.

Polish democracy is still young and subject to continuous evolution. It is therefore vital to keep fostering and improving it. This cannot be achieved without building a civil society and implementing, as fully as possible, the principles of decentralization and subsidiarity. These principles are one of the foundations of a democratic rule of law.

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Czech qualified investor definition: considering minimal requirements[1]

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Abstract

In recent years, qualified investor funds have become increasingly popular in the Czech Republic. Those who manage these funds know that only investors who meet the legal criteria to be a qualified investor can become one. In other words, failure to meet the criteria excludes a potential investor from participation. This paper focuses on the criteria to become a qualified investor and their proper fulfilment. Moreover, this paper provides brief thoughts on whether the minimum initial investment sum, as one of the criteria, should be reviewed in the context of recent regulatory developments.

Keywords

qualified investor funds, qualified investors, Alternative Investment Fund Managers Directive

Introductory remarks

In recent years, qualified investor funds[2] have become increasingly popular in the Czech Republic. Their growing popularity is not too surprising in the light of market trends, which include the impact of economic growth and the virtually unlimited investment opportunities in a wide variety of alternative assets, such as real estate, private equity, works of art, and vintage wines,[3] as well as the increasing demand for such investment opportunities.

In addition, not only locals but also foreigners are attracted to qualified investor funds due to Czech tax mechanism. For example, the earnings of qualified investor funds in the Czech

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[2] In the Czech Republic, investment funds are divided into retail investment funds and qualified investor funds pursuant to Act No 240/2013 Coll., on management companies and investment funds ("AMCIF") as the main law of the Czech Republic regulating the area of fund investment. For simplicity's sake, qualified investor fund can be understood as alternative investment funds (AIFs) within the context of European legislation if their manager is authorised as such under the Alternative Investment Fund Managers Directive ("AIFMD"). In contrast, retail investment funds are funds under the Undertakings for Collective Investment in Transferable Securities Directive(s) ("UCITSD").

[3] Cf. Explanatory Memorandum to Act No 240/2013 Coll., on management companies and investment funds.

Republic may be taxed at five percent if certain conditions are met. This therefore reduces the operating costs of such funds, providing positive effects for investors. A further motivation for investors may lie in the good reputation and stability of the Czech capital market and/or its supervision by the Czech National Bank, which is a respected institution within Europe.[4]

Those who manage Czech qualified investor funds know that only investors who meet the legal criteria to be a qualified investor can become an investor in them. This seemingly banal conclusion has significant consequences. If these conditions are not met, the investor will not become a qualified investor, and their participation in the fund would not be considered. Their application will be legally ineffective.

The purpose of this paper is firstly to address how the requirements for becoming a qualified investor must be fulfilled, and identify their limits; in other words, to identify which limiting cases may result in not fulfilling the requirements of qualified investor status.

Secondly, this paper addresses brief thoughts on whether the minimum initial investment sum, as one of the criteria, should be reviewed in the context of recent regulatory developments, while being fully aware of possible inaccuracies or incompleteness in the reasoning. The aim is not to support these considerations with complex empirical studies but to highlight current regulatory trends.

1 Qualified investor in the Czech legal system

Section 272 of the AMCIF defines who is a qualified investor and distinguishes between two basic categories of qualified investors.

First, those entities that are directly provided for by law, regardless of the sum of their investment or any other additional criteria. These are in particular professional clients and professional clients upon request within the meaning of Article 4(1)(10) of the Markets in Financial Instruments Directive ("MiFID II"), i.e., credit institutions, investment firms, insurance undertakings, other collective investment undertakings and their management companies. In other words, entities in which it is reasonable to assume a high degree of professionalism exists, with no further conditions therefore needing to be met.[5] This part of the definition reflects the requirements of harmonized regulation, especially AIFMD.

Second, as an example of national discretion, persons who have made the relevant declaration of risk awareness and have either, at the same time, fulfilled the minimum investment requirement (EUR 125,000) or fulfilled the lower minimum investment requirement (CZK 1 million, approx. EUR 40,000), this in combination with a valid suitability assessment.[6]

The following passages address the second of these categories. Specifically, a case where an investor has made the relevant declaration of risk awareness and has, at the same time, fulfilled the above minimum investment.

The selection of this category, or rather part of it, is possibly rationalized by the fact that this part of the definition is located at the imaginary boundary between who is a qualified investor

[4] For these reasons, the offer can also be seen as attractive within a cross-border context, especially with regard to the marketing of investing in qualified investor funds in other member states.

[5] Cf. Section 272 (1) (a) to (g) of the AMCIF.

[6] Cf. Section 272 (1) (h) and (i) of the AMCIF; it is this second category that makes it clear that the qualified investor in the sense of the AMCIF must be understood more broadly than in the sense of the AIFMD, with reference to MiFID II.

and, conversely, who is not and is generally considered a retail investor.[7] At the same time, with respect to the lowest requirements, this definition is often preferred in the statutes of individual funds, although I acknowledge that the fund manager may set stricter criteria.

2 Declaration of risk awareness – thinking fast or slowly?

First, the potential investor must sign a declaration that they are aware of the risks involved when investing in a qualified investor fund.[8]

The purpose of this declaration is clear; to prevent the fund manager's exploitation of investors' behavioral biases, and in turn to activate their long-term cognitive functions through targeted requirements regarding the content, form and presentation of information.[9]

Logically, this declaration must be made at the latest before the actual investment is made. However, the time element of when the declaration is to be made is not expressed in the referenced provision. It may therefore be concluded that, in order to fulfil its purpose, the declaration should not be made too far in advance of the investment (e.g., several months), but it should be made in good time before the investment[10] is made, otherwise it may be difficult for the investor to acquire a realistic understanding of the rights and obligations (including the associated risks) arising from the investment in question.

Within this context, the Czech legislator has decided at least to specify the format of the declaration. It must therefore be made in writing and separately, i.e., not as part of the terms and conditions governing the (investment) contract between the parties.

In written form and separately is in fact a classic demonstration of the warning function. Its purpose is to warn the investor against ill-considered and rash decisions and to arouse vigilance in the investor. It is based on, among other things, the premise that one thinks more carefully about a matter before signing something than one does when only speaking (Veselý, 2022). This is how the distinction is made between slow thinking and fast thinking – as Kahneman (2011) understands it. In other words, because of the separate document which must be signed, the investor gradually moves from fast – which is linked to behavioral biases and is usually quick, automatic and intuitive – to slow thinking (better for decision-making), which is deliberate and deliberative.

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[7] For simplicity's sake, those who do not meet the defined legal criteria for being a qualified investor are retail investors.

[8] Sometimes this requirement is known as the sales or distribution regulation, whereby the manager must ensure that key information relating to the investment, including the associated risks, is disclosed (these obligations are referred to as "Type 1 rules"). Cf. Zetzsche & Preiner (2019).

[9] This is in line with studies showing that the most common causes of customer vulnerability, which may affect qualified investors, are sophisticated marketing practices, which should generally be countered, inter alia, by adopting legal measures. Cf. e.g., European Commission, Directorate-General for Justice and Consumers (2022).

[10] This criterion is generally recognised, especially in the field of investment services and credit products, but also in the communication of key information and other information regarding complex products and services in general. However, the term "good time before" must always be assessed according to the circumstances of the specific business case, in particular the complexity of the product. In general, it is a period within which the consumer can properly and without hurry familiarise him or herself with the information or terms and conditions provided or compare them with those of other products. The investor must neither be prevented from making use of this time, nor be put under any pressure. To do otherwise could constitute a violation of professional care.

The text of the provision also specifies the content of the declaration. The declaration is made against the risks associated with investing in a (specific) qualified investor fund. In other words, the name of the qualified investor fund must be clearly stated for all to see.

However, it may also be appropriate to consider a summary declaration for a nominal list of several funds related to a given investment.[11] On the other hand, taking into account the material features of the declaration, in particular its separation, clarity and visibility, it cannot be considered appropriate for the declaration to include several dozen funds in respect of which the qualified investor is not even interested in acquiring them at a given moment (or within a short period of time).[12]

The question that remains is whether the content of the declaration must also include a list of named risks regarding the qualified investor fund in respect of which the declaration is made. The language of the referenced provision does not indicate this (its title is merely "declaration on being aware of the risks involved in the investment in this qualified investor fund"). This is even though there is empirical evidence that an abstract and non-specific disclaimer (respectively declaration) generally reduces its efficacy.[13] In contrast, a warning that has been couched in much stronger language[14] is able to eliminate most unwanted effects and prevent investor behavioral biases from being exploited, or to activate investors' long-term cognitive functions. The current wording may therefore indicate that the decision-making process may be distorted by external influences, with the efficacy of such a measure being proportionally diminished as a result.[15]

3 Suitability assessment as a key protective measure

A further requirement under the definition of a qualified investor is that the fund manager (or a person authorized by them)[16] must confirm in writing that, on the basis of the information obtained from the person who wants to invest mutatis mutandis, as is the case under the MiFID II suitability assessment,[17] it is reasonable to believe that the investment corresponds to the investor's financial background, investment objectives and expert knowledge and experience.[18]

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[11] This will be typical in cases where investors meet the minimum investment sum by investing in several investment funds managed by the same manager under Section 272(1)(h) of the AMCIF.

[12] Studies show that bombarding investors with information can have the opposite effect. In fact, when more information is available, individuals generally do not focus on the most important information but may be distracted by less relevant information. Cf. Paredes (2003).

[13] It is argued that the warning that past performance is not indicative of future results is ineffective when consumer investors have limited attention and lower processing abilities Brenncke (2018).

[14] For example, "Do not expect the fund's quoted past performance to continue in the future. Studies show that mutual funds that have outperformed their peers in the past generally do not outperform them in the future. Strong past performance is often a matter of chance" Brenncke (2018).

[15] Cf. Delias et al., (2022).

[16] However, such a person cannot be a person who is not authorised to provide investment services or to manage or administer the fund; for example, managers under Article 3 (2) of the AIFMD who are unable to assess the test with sufficient competence.

[17] The information to perform the suitability test is most often obtained through an investment questionnaire with a set of standardized questions, although other means (e.g., a demonstrable record of assets under management) are not excluded.

[18] Sometimes this approach is also referred to as "Type 2 rules", which are a later evolution of the informative "Type 1 rules". Cf. Zetzsche & Preiner (2019).

Although the suitability assessment is about recognizing the participation of an investor in a qualified investor fund, it may also include a statement not to buy.[19] In other words, if the investment being considered is deemed unsuitable or the investor does not provide sufficient information, the fund manager will not recommend the investment (and they will confirm in writing that the investment is not suitable when taking these factors into consideration).

The arrangement of this requirement suggests that if the conclusion is negative, the investment cannot even take place. Indeed, it is a prerequisite that the fund manager (or another sufficiently qualified person) makes a positive written declaration.

However, even if the investment matches the financial background, investment objectives, and investment expertise and experience of the potential investor, the qualitative and quantitative aspects of the information sought need to be considered,[20] otherwise, the suitability assessment may be weak.

To serve as a theoretical definition (but with practical implications), the fundamental areas determining the requirements for the substantive scope of the information to be collected can be understood as its qualitative aspect, while the quantity thereof, the quantitative aspect, which ultimately influences the detail of the information to be collected and its individualization.

The qualitative aspect of the information to be collected, or the minimum standard thereof, is firmly established in Article 25 of the MiFID II and Article 55 of the MiFID II Delegated Regulation.[21]

These divide the information to be collected into three categories, namely information on the investor's investment knowledge and experience, their financial situation (including their capacity to bear losses), and their investment objectives (including risk tolerance and sustainability preferences).

Article 55 of the MiFID II Delegated Regulation provides for a relatively detailed extension of the information to be collected on the investor's knowledge and experience in the field. This includes the provision of information on the investor's knowledge of types of services, trades and investment instruments (here a qualified investor fund), experience regarding the nature, volume and frequency of trades in investment instruments carried out by them, including the time period, as well as information on their education and profession.

Although there are additional, more or less binding, written indications required concerning the qualitative aspects of the information to be provided,[22] its use is influenced by the quantitative aspect. It is therefore left to the discretion of the fund manager to decide, with reference to their duty of professional care, what quantity of information will be required.

The initial determinant is that the quantity and quality of the information provided must correspond to "the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including the complexity and the risks thereof."[23]

A different granularity of information will therefore be required in the case of an investor with whom a fund manager has no existing relationship, and a different scope of information required in

[19] Cf. Recital 87 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU ("MiFID II Delegated Regulation").

[20] Cf. Merenda & Šoural (2017).

[21] Cf. Brenncke (2017).

[22] Article 54 (4) and (5) of the MiFID II Delegated Regulation; also European Securities and Market Authorities (2022).

[23] Article 55 (1) of the MiFID II Delegated Regulation; also Guidelines on Certain Aspects of the MiFID II Suitability Requirements.

the case of a further investment in the fund managed by the fund manager after a certain period of time. However, the complexity, riskiness or liquidity of the fund must also be taken into account. For example, if a fund invests in high-risk, volatile and illiquid assets, more detailed information will need to be collected than if the fund purchases, for example, government bonds, which are generally not that risky. Only in this way can the manager make the (sufficiently qualified) assessment of the customer's (actual) ability to understand the risks associated with these instruments and to bear any financial losses. As a result, for complex or risky funds, the manager is expected to carry out a thorough suitability assessment, and the converse also holds (Herbst, 2015).

The aforementioned is reflected in the wording of the Regulation, which uses the phrase "where relevant". The following are examples of how the phrase is applied:

i) the information regarding the financial situation of the investor shall include, where relevant, information on the source and extent of their regular income, their assets, including liquid assets, investments and real estate, and their regular financial commitments;[24]
ii) the information regarding the investor's objectives shall include, where relevant, information on the length of time for which the client wishes to hold the investment, their preferences regarding risk taking, their risk profile, and the purposes of the investment.[25]

It is evident that the quantitative aspect is not only achieved by the broader granularity of the information to be collected. Equally crucial in this case is its credibility, ensured, for example, by a sophisticated internal structure that detects whether the answers are mutually exclusive, whether the investor is guessing the answers,[26] or whether there is an absence of self-assessment.[27] It is also inappropriate to use vague and indefinite terms that make it unclear what is truly meant,[28] and much more.

The arrangement of the qualitative and quantitative conditions suggests that it is crucial for the fund manager to formulate correctly, for example, the questions in the investment questionnaire to fulfil their duty of professional care. Once the questions have been answered, it is the responsibility of the fund manager to ensure that the investor's answers also have sufficient informational value to show that the investor is sufficiently well qualified to make competent decisions and invest in the qualified investor fund. Failure to do so implies the fund manager has neglected to act in line with their duty of professional care, which can have a negative impact on both them and the investor.

4 Time trigger to meet the legal minimum initial investment sum

The final requirement is the minimum paid-up investment sum or minimum threshold. This requirement can, by its very nature, only be met at the time of the investment, in other words, at the time when the amount corresponding to the minimum investment sum (or the in-kind value corresponding to the minimum value) is credited to the account of the relevant trustee or fund.

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[24] Article 54 (4) of the MiFID II Delegated Regulation; also Guidelines on Certain Aspects of the MiFID II Suitability Requirements.

[25] Article 54 (5) of the MiFID II Delegated Regulation; also Guidelines on Certain Aspects of the MiFID II Suitability Requirements.

[26] This can be ensured, for example, by asking a sufficient number of validating or eliminating questions, but also through the number of individual choices, including an "I don't know" option.

[27] An example would be asking "Are you familiar with qualified investor funds?" with the option of answering "Yes" or "No", which in no way verifies actual knowledge.

[28] An example is the use of the term "alternative investment" without any further specification thereof.

Until recently, it was widely debated whether a qualified investor could lose their status as a qualified investor if, for example, the minimum value of the sum invested fell as a result of market movements (volatility of investment instruments).[29]

Although Czech law originally linked an investor's qualification to the initial acquisition of a qualified investor fund, a change was made at the beginning of 2015. The language of the provision was adapted to indicate that the conditions for being a qualified investor must be met for the entire duration of the investor's investment in the fund.[30]

Interpretive issues were removed by a 2022 amendment, whereby the subject part of the definition of a qualified investor reverted to its original form. According to the explanatory memorandum, the amendment emphasizes the active role of the investor at the moment of becoming a qualified investor, as only at that moment do the mandatory conditions for acquiring this status apply.[31] In order to eliminate any further doubt, an addition was also inserted, stating that the aforementioned shall also apply historically. This updated interpretation certainly best suits the meaning and purpose of this rule, which undoubtedly deters retail investors from participating in qualified investor funds.

This interpretation is also extremely practical. After all, it is difficult to require the fund manager or the investor to estimate market volatility and to set the initial investment sum sufficiently high (e.g., > CZK 1 million) so that it will never fall below the minimum threshold in the future. At the same time, it is also unthinkable that the fund manager should have to make the equivalent of margin calls and ask the investor to add additional resources.

Nevertheless, it is appropriate to address the question of whether the interpretation – that this condition is met (only) when wanting to participate in a qualified investor fund – should be a blanket one without taking into account the circumstances of the individual case. Indeed, there may be cases where an investor subsequently (in the short term) makes an (albeit partial) exit from the fund with a view to entering another qualified investor fund, with this process repeating itself time and again. This may be the case, for example, when lower costs and the need for gradual portfolio diversification play a role.[32]

Here, when taking into account the material characteristics, which may include, for example, the closeness or similarity of the investor's conduct, it may be appropriate to consider assessing the absence of the cumulative condition even over time, since such conduct serves to circumvent the minimum threshold. It goes without saying that only those who have the incentive to remain a qualified investor should be so, even though their initial investment may fall below the minimum threshold due to market movements (more or less independent of their will). This, however, is not expressed in the referenced provision. It is therefore more or less left to the fund manager of a given qualified investor fund to state the above in the contract in order to avoid a potential conflict with their duty of professional care.

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[29] A similar question can be applied, for example, to the cases of individual investors who meet the minimum holding value by investing in another investment fund managed by the same manager or whose assets, of the required amount, are already managed by the manager under individual portfolio management with reference to Section 272(1)(h) of the AMCIF.

[30] Czech literature tends towards the possible loss of status of a qualified investor, likely due to the text of the law (Šovar et al., 2015).

[31] Explanatory Memorandum to Act No. 96/2022 Coll., on the draft Act amending certain financial market laws in particular in connection with the implementation of European Union regulations relating to the Capital Markets Union, No. 96/2022 Dz.

[32] Even a (non-serious) advisor can be motivated by entry fee rewards.

Another area that can be addressed in relation to the timing of a qualified investor's status is legal succession – typically inheritance. This may be the case where the original qualified investor passes away and their heir becomes the person who is to be classified as a retail investor (e.g., because they may not have been assessed as suitable).

There are basically two possible solutions to this dilemma, namely, to exclude the heir from further participation in the qualified investor fund, or to allow their continued participation. The answer depends on the phrase "a share in a qualified investor fund may be contractually acquired only by (…)". The wording implies a distinction between the method of acquisition. If it concerns the statutorily envisaged method of acquisition, without any further contractual intervention, it seems obvious to conclude that the heir may continue to participate in the qualified investor fund without having to be a qualified investor themself.[33]

5 Minimum initial investment sum

The discussion concerning the time trigger is related to the condition of the minimum required initial investment sum for a specific qualified investor fund. In order to acquire the status of a qualified investor and to be permitted to participate, the investor must invest (pay) at least CZK 1 million.[34]

It is this requirement that – unlike the previously stated conditions – may be subject to criticism in light of recent discussions within Europe regarding it being an unjustifiably restrictive barrier to accessing interesting investment opportunities.

An example is the recent initiative in the area of so-called alternative investment funds, specifically their sub-type - European Long Term Investment Funds, which are similar in nature to qualified investor funds.[35] These funds could only be provided to investors subject to, among other things, a minimum initial sum, specifically 10,000 EUR.

Recently the European Commission has come with the argument that the minimum sum condition has shown to be very discouraging for investors and administratively burdensome for fund managers.[36]

On the other hand, the European Commission itself states that the suitability test and the written warning that the product is long-term and illiquid should be sufficient to protect inves-

[33] A consideration may be that inheritance does not constitute disposition of such a thing. Cf. Schuhmann & Schubert (2015).

[34] Ignoring investors who have already invested the required amount in another investment fund managed by the same manager or whose assets, of the required amount, are already managed by the manager under individual portfolio management; see Section 272 (1) (h) of the AMCIF.

[35] These funds are usually illiquid and invest in riskier projects, similar to most qualified investor funds. After all, these funds are a special type of funds or a kind of fund within the meaning of the AIFMD.

[36] Recital 47 of the Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules ("ELTIF II") states "When applied together, the EUR 10 000 initial minimum investment and the 10 % limit on aggregate investment create a significant obstacle to investments in ELTIFs for retail investors, which conflicts with the goal of ELTIFs to establish a retail alternative investment fund product."

tors.[37] In this way, even in the case of these less liquid and generally riskier funds, the minimum initial investment sum has been completely removed.[38]

Indeed, the approach that differentiates between the investor's wealth and their fulfilment of prerequisites to make competent decisions on investments is also supported by the literature (Šovar et al., 2015). In other words, the investors who are capable of making competent decisions on investments are assumed to be aware of the risks involved.

The specific need for an imagined doubling of protective elements is furthermore not even evident from the accompanying materials. Within the context of Czech law, no further justifications for the introduction of a minimum required (entry) investment sum can be found in the accompanying explanatory memorandums to the AMCIF, even in cases where a suitability test and written notice are given.[39]

Even Luxembourg law, which provides the inspiration for the Czech definition of a qualified investor, is not helpful in this respect. Luxembourg law defines a qualified investor as either someone who has sufficient resources to conclude that the possible loss of an investment would not affect their existence, or, on the contrary, someone who possesses the capacity to make sufficiently competent investment decisions, as verified by the suitability test. Both of these must be supported by a declaration of risk awareness.[40] It does not combine these elements.[41]

However, the opposite is the case in Germany, where the term semi-professional investor is These are understood to be (individual) persons who have made the relevant declaration of risk awareness and have fulfilled the lower minimum investment requirement of EUR 200,000, in combination with fund manager declarations that the investor possesses sufficient experience and knowledge and is capable of making their own investment decisions, and also understands the risks involved and that such a commitment is appropriate for the investor concerned.[42] This is perhaps a stricter approach than the Czech one.

Nevertheless, it should be mentioned that this approach is specific, even compared to other areas of financial market law. A typical example is the area of investment services, in particular the distribution of often generally higher-risk corporate bonds. In this case, the set of protective measures is often dependent on the distribution channel chosen (Hobza, 2021), where even in

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[37] Recital 42 of the ELTIF II even states "in cases where the result of the suitability assessment is that an ELTIF is not suitable for a retail investor and such investor nevertheless wishes to proceed with the transaction, the express consent of that retail investor should be obtained before the distributor or manager of the ELTIF proceeds with the transaction." This further reduces the protection of potential investors.

[38] Comf. Article 30 of the ELTIF II, where is stated: "The units or shares of an ELTIF may only be marketed to a retail investor where an assessment of suitability has been carried out (…) and a statement on suitability has been provided (…)".

[39] This limit was introduced in the AMCIF in 2016, but the explanatory memorandum on the reasons for the introduction of this minimum sum, together with the suitability test and the risk statement, says nothing.

[40] Cf. Article 2 (1) Law of 13 February 2007 relating to specialised investment funds, which states that these investor include, inter alia, any investor who has confirmed in writing that they adhere to the status of a well-informed investor, and (i) they invest a minimum of EUR 125,000 in a specialised investment fund, or (ii) they have been the subject of an assessment and it has been confirmed that their experience and knowledge are adequate.

[41] Poland, for example, takes a similar approach. It must be properly assessed whether the investor has the knowledge and experience to make appropriate investment decisions. Cf. Act of 27 May 2004 on Investment Funds and Alternative Investment Fund Management from Poland.

[42] Cf. German Kapitalanlagegesetzbuch (KAGB).

their (strictest) form they do not include a minimum investment sum condition. This is set autonomously by the issuer or the nominal value of the bond or other instrument.

If the general purpose of the concept of the definition of a qualified investor is then to prevent (usually less knowledgeable or inexperienced) retail investors from participating in fund structures in general, which, unlike retail investment funds intended for them, are by their very nature riskier, should this objective not be met if it meets the suitability test? The suitability test, among others, also examines the investor's financial background, including liquidity needs.

A (proper) suitability assessment, combined with a declaration of risk awareness, may be effective by itself. At least this is the general principle of the rule introduced at other levels of financial market law. An additional condition of a minimum required (initial) investment sum creates a barrier to accessing interesting investment opportunities.

It should be further mentioned that this does not exclude the consideration of at least a minimum limit for the invested sum, but not creating discouragement for investors.[43] Maintaining a certain limit would make sense, for example, in order to exclude potential participants who would like to invest small sums on a periodic basis, for which these funds are generally not suitable,[44] mainly, just because these funds are generally illiquid. However, the limit should certainly not be tens of thousands of euros but rather several thousand.

6 Closing remarks

The purpose of this paper is firstly to address how the requirements of the definition of a qualified investor are to be properly fulfilled, and discuss their limits.

Even though there is empirical evidence suggesting that an abstract and non-specific disclaimer (more specifically a declaration) generally reduces its efficacy, the declaration of risk awareness does not have to include a list of the main risks in relation to the particular qualified investor fund in respect of which the declaration is being made. Consideration should be given to whether the content of the declaration should be modified to include at least the main risks to eliminate adverse effects and prevent the exploitation of biases in investor behavior or long-term cognitive functions from being activated.

Secondly, the quality of the suitability assessment arrangement often depends on the fund manager (or another person compiling and evaluating the assessment). In order for this assessment to work properly, it is necessary to address both the qualitative aspects of the information to be gathered and its quantitative aspects (which depend on the degree of relevance to the nature of the customer, the nature and extent of the service to be provided, and the type of product or business envisaged, including its complexity and the risks involved). Failure to do so may result in the fund manager not acting in line with their duty of professional care, which can have a negative impact on both them and the investor.

Thirdly, the active role of the investor is sufficient at the moment when they make the initial investment in the qualified investor fund. The language used suggests that even possible "circumvention" of the rule, or a different method of acquisition, without closer contractual intervention (e.g., from an inherited share), does not result in failure to fulfil the condition.

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[43] Indeed, this is proposed by the Ministry of Finance of the Czech Republic in the context of the ELTIF proposal (Ministry of Finance of the Czech Republic, 2022).

[44] Qualified investor funds often have a limited signing period and are then almost illiquid until maturity, which is not quite the same as the open-ended UCITS funds.

Finally, this paper addressed brief thoughts on whether the minimum initial investment limit, as one of the criteria, should be reviewed while being fully aware of possible inaccuracies or incompleteness in the reasoning. This discussion seems relevant in the context of recent regulatory trends while respecting general principles of financial market law. It was shown that the threshold condition is sometimes mentioned as an unjustifiably restrictive barrier to accessing interesting investment opportunities. To fulfil the principle of the effective functioning of the market, including adequate protection of investors, even the suitability assessment and declaration of risk awareness mentioned may be sufficient. However, both must be of sufficient quality. In other words, it might be enough if the approach where the investor is wealthy enough or fulfils the prerequisites for competent investment decision-making is accepted. However, it must be added that these brief thoughts in the context of recent regulatory developments certainly deserve further empirical analysis to be fully correct.

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On the dual nature of suffrage

Electoral systems and voting rights[1]

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Abstract

One measure of a democratic rule of law is how the state defines the framework for the exercise of representative democracy, and who it grants the right to participate in representative democracy (i.e. who it considers to belong to the people). However, this dual nature of the right to vote raises a number of questions. For example, before the 2018 Hungarian parliamentary elections and during the campaign period, critical voices were heard criticising the system used in Hungarian parliamentary elections (including the institution of winner compensation). By contrast, the fundamental nature of the right to vote, i.e. the subjective aspect, is less often the focus of attention. In this respect, the question rightly arises as to whether the importance of the right to vote as a fundamental right has not been lost. Has the role of different electoral techniques and electoral systems not become a more important issue than the definition and possible extension of the scope of the electorate? Starting from the dual nature of electoral law, the study examines the requirements that can be imposed on electoral systems and the characteristics and challenges of electoral law as a fundamental right.

Keywords

electoral systems, right to vote, constitutional aspects, will of the voters, governability, general suffrage

1 Introduction

According to Article B) of the Fundamental Law of Hungary „*[the] source of public power shall be the people […] The power shall be exercised by the people through elected representatives or, in exceptional cases, directly.*" Even starting from this formulation of the Fundamental Law, it can be seen that the democratic exercise of power is based on the principle of people's sovereignty, according to which the source of power is the people. The democratic exercise

[1] This research was carried out using the European Constitutional Communication Network (ECCN) database, within the framework of the research project of the Comparative Constitutional Law Research Group at the National University of Public Service, with the support of the AURUM Lawyers' Club for Talented Students Foundation.

of power (in addition to the exceptionally used means of direct exercise of power) takes place within the framework of representative democracy when state power is exercised by those representatives who were authorized by the citizens for a specified period of time during the election (Bodnár, 2016, 2). Based on this, it can be concluded that one of the measures of the democratic rule of law is how the state defines the framework for the exercise of representative democracy, i.e. the electoral system, as well as to whom it ensures participation in representative democracy, i.e. in elections (i.e. whom it considers to belong to the people, to whom it thereby provides the right to have a say in the exercise of power). However, this dual nature of suffrage raises many questions. For instance, prior to the 2018 Hungarian parliamentary elections and during the campaign period, critical voices objecting to the system used in the Hungarian parliamentary elections appeared, mainly because it leans too much towards the majority system: e.g. due to the so-called winner compensation (Kurunczi, 2022, 438–439; Badó et al., 2019, 450–454; Cserny & Téglási, 2015, 335–337). In contrast, the fundamental nature of the right to vote, i.e. the subject side, is less often the focus of interest (e.g. with regard to the possibility of the introduction of the literacy test or the fact that the right to vote is tied to domestic residence). In this regard, it is therefore correct to ask whether the importance of the right to vote as a fundamental right has not been lost today. Has the role of different election techniques and election systems not become a more significant issue compared to the definition and possible expansion of the eligible voters? In this context, in addition to the fact that, in my opinion, the task of an electoral system is not merely to reflect the will of the people in the most perfect way – but it must also ensure a stable governing majority and strive to minimize abuses –, it is important to note that the fundamental nature of the right to vote should not be lost sight of. There is no doubt that how votes are converted into mandates is an important issue for the enforcement of political equality, just as it is indisputable that individual constituencies must be formed taking into account the enforcement of the equality of the right to vote in the legal sense, and it cannot be doubted that the definition of an electoral system is also an important element of the functioning of a democratic state. However, all of these primarily belong to the issue of the instrumental approach to suffrage. Nevertheless, the fundamental right approach to the right to vote is at least as important. The definition of persons participating in the exercise of people's sovereignty can not only be seen as less important, but also as more important from the point of view of the constitutional investigation of the right to vote. After all, no matter what electoral system operates in a country, the decision will not be made by the electoral system, but by the voters. No matter how well an electoral system meets all the requirements imposed on it (e.g. sufficiently proportionate and also ensures a stable governing majority), if, at the same time, the range of eligible voters is unreasonably narrow, or certain persons are excluded from the range of eligible voters without adequate guarantees. In doing so, we will necessarily erode the electoral system itself.

In accordance with the above, this study provides a brief overview of the dual nature of the right to vote, as well as the requirements imposed on them. However, it is important to emphasize that the present study examines the issue primarily through the positions appearing in the Hungarian literature, and integrates them with the main trends in international jurisprudence on the electoral systems and the right to vote.

2 The dual nature of the concept of suffrage

Before examining electoral systems and the right to vote, it is important to clarify the constitutional concept of the right to vote. First of all, it is necessary to state that the right to vote has

a dual nature. On the one hand, it can be understood as the rules (Lovas, 2006, 172) that determine the way of establishing representative bodies (e.g. parliaments, local governments, etc.). This approach can be considered the substantive side of electoral law (substantive law), i.e. also a kind of instrumental approach. On the basis of the instrumental approach, we see the right to vote as a means of establishing people's representative bodies and ensuring democratic legitimacy. In order to create a body based on the principle of people's representation, it is essential that a part of the population has the right to vote (Ficzere, 2010, 289–290). In jurisprudence, this state organization approach was stronger for a long time, since the right to vote was not considered a fundamental right for many decades. This changed in the second half of the 20th century, when the view that the right to vote was more than just a privilege granted by the state and therefore not legally enforceable became common, but a subjective human right that the state is obliged to ensure for its own citizens (Halász, 2018, 715). However, on the other hand, the right to vote is a fundamental political right, which means the right to participate in power or in the conduct of public affairs, and as such we can understand the subjective side of the right to vote (i.e. who has active and passive voting rights). The two approaches above have a common basis: the principle of people representation.

3 On constitutional requirements for electoral systems

In a democratic state, it is essential that the principle of people's representation is fully implemented. The principle of people's representation can be implemented both directly (e.g. by referendum) and through elected representatives. Although direct exercise of power can be considered a stronger instrument, in a modern state the representative democracy should take priority over direct democracy. Therefore, the electoral system used by a country to elect members of the various representative bodies (in particular members of parliament) is of particular importance. The electoral system, as a key element of the constitutional-institutional system, significantly influences other elements of the political system, namely party structure and the system of power and government (Fábián, 1999, 53).[2] Therefore, this section of the study focuses on the requirements that must be considered in the definition of electoral systems, which, in their interest, are considered constitutional and at the same time fair (and suitable for the social context in which they are used).

3.1 General characteristics of electoral systems

Before analysing the main requirements of electoral systems, it is important to review their main basic types. Election systems are primarily those systems (and the methods and techniques associated with them) that are used to distribute mandates after the end of voting, that is, they determine which of the individual candidates will get a mandate or how many will get a mandate from the lists of party (Tóth, 2016, 202). On this basis, we can distinguish three basic electoral systems: the majority system, the proportional system and the mixed system. In the case of majority systems, which may be absolute or relative majority systems, representation is based on an acquired majority. In the absolute majority systems, a candidate who obtains more than 50% of the total votes cast obtain a mandate; however, in the case of the latter, it is

[2] For more on the constitutional basis of the system of government and the Hungarian public administration, see: Patyi & Téglási (2014, 203–218).

sufficient for a candidate to obtain a majority of the votes cast. The advantage of an absolute majority system is that it can result in the most stable governance as the elected candidates enjoy broad support. A serious disadvantage, however, is that it does not always produce an end result since in the event of a more even distribution of votes, none of the candidates receives an absolute majority, and the fate of the mandate remains open. In contrast, the advantage of a relative majority system is that it is practically always effective (statistically very unlikely to have exactly two of the large number of votes cast for each candidate). The disadvantage, however, is that against the will of many voters (in our example, against three-fourths of the voters), someone is elected with few votes and that even in this system, all the votes that were not cast for the winner are lost. In contrast, in proportional systems, mandates are allocated in proportion to the votes, and this system seeks to create consistency between the votes cast and the mandates. The advantage of a proportional system is that it reflects the will of the electorate more accurately so that voters who remain in the minority are also represented. Another advantage is that a single vote will certainly be successful, i.e. there will be no need to organise another round, re-mobilising huge human and material resources. However, the disadvantage is that the representative body can become too fragmented, and many parties can get a mandate, which can make decision-making very difficult; further, it takes a disproportionate amount of time and energy to reach a consensus. In mixed electoral systems, a combination of the two principles of representation is implemented, the additional element of which is provided by the institution of compensation. Of course, these electoral systems[3] do not always work according to their pure meaning, but they have many variants and combinations in the world.

Before further examining the requirements of these electoral systems, it is important to analyse the tendency of electoral systems of EU countries. The electoral systems of the EU member states can be grouped according to three major subtypes of electoral systems, according to which a proportional electoral system can be observed, e.g. in Austria (Federal Law in National Council Elections Law 471/1992. 1-2. §), Belgium (Electoral Code of Belgium), Bulgaria (Gancheva et al., 2016), Cyprus (Stumpf & László, 2018, 180), Denmark (Pap, 2007, 198), Estonia (Riigikogu Election Act) and Finland (Finnish Election Law). Among the proportional electoral systems, it is important to highlight the electoral system in Greece. Of the 300 members of the Greek parliament (Vouli), 238 are elected in single and multi-member electoral districts (based on list voting), and 12 mandates are distributed on a party list. In addition, however, 50 parliamentary mandates are automatically awarded to the party that won the most votes in the election. This is known as the principle of 'enhanced proportionality', by which the system responds to the main flaw in proportional electoral systems: an overly fragmented parliament (Stumpf & László, 2018, 184). Proportional electoral systems are also present in The Netherlands (Act of 28 September 1989 containing new provisions governing the franchise and elections), Ireland (Constitution of Ireland Article 16.), Latvia, Malta, Portugal, Spain, Sweden (Stumpf & László, 2018, 86–193) and Luxembourg (Loi Electorale No. 30 21 février 2003). A majority electoral system is used in, e.g. the United Kingdom (Representation of the People Act 1983) and France. In addition to proportional electoral systems, the second most commonly used method in the European Union is the mixed electoral system, which seeks to combine the advantages of a proportional and majority system while eliminating their disadvantages. Such a system can be observed in Lithuania, Germany and Italy.[4]

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3 For more details on the nature of electoral systems, see: Cservák (2017).

4 For more on the latter, see: Baraggia (2017, 272–279).

3.2 Constitutional considerations related to the definition of electoral systems

On the electoral systems often raise the question of what expectations can and should be set for them (in order to be constitutional and fair). Can these aspects be determined at all? Can there be an absolutely bad and absolutely good electoral system? What are the main directions of each electoral system? As can be seen from what has been written above, in the European Union is dominated by proportional electoral systems (Kurunczi & Szabó, 2020, 787–788). However, it can also be seen that, in addition to ensuring and increasing proportionality, some elements in the practice of individual countries seek to ensure stability at the same time (see, e.g., the Greek electoral system). It can also be considered as such that in several countries, smaller electoral districts are set up to strengthen the relationship between voters and members of parliament, even if more than one mandate is allocated in a given electoral district (Fábián, 1999, 60).

However, whatever system a country uses, it can be stated with great certainty that several aspects must be considered in its definition of the electoral system (Ahmed, 2022, 225–227), i.e. several aspects will affect the operation of the system. According to Dieter Nohlen the concept of the electoral system is interpreted extremely broadly in the political debate on electoral systems, encompassing almost everything that affects the electoral process (Nohlen, 1996, 7). Thus, e.g., elements that influence the electoral system are

(1) the type of electoral system (majority-proportional-mixed),
(2) the regulation of the process of becoming a candidate, e.g. that it is tied to a voter recommendation or just the payment of a financial deposit (see, among others: Cserny 2018, 43–64),
(3) the process of forming electoral districts (Nohlen, 1996, 12),
(4) the definition of mandate allocation mechanisms (Stumpf & László, 2018, 176–195) or
(5) the electoral redress system (Temesi, 2018, 195–210) as well as
(6) the requiring voters to participate in elections.

Some electoral models treat the exercise of the right to vote not only as a right but also as an obligation, thus sanctioning the absence of voting if there is a right to vote. Such can be observed, e.g., in Belgium (for more see: Cserny, 2018, 25). Belgium introduced compulsory voting in 1893. Art. 62 of the Belgian Constitution, providing that Belgian nationals must exercise their right to vote (Hallók, 2018, 121).

However, it is worth looking at the constitutional aspects of electoral systems from a more distant perspective, rather than at the specific elements of the system. On this regard as a hypothesis, we can state that an electoral system must ensure both the fullest representation of the will of the electorate and stable governance. In my view, the fulfillment of either condition is not in itself a sufficient condition of fair and well-functioning electoral systems.

In the context of electoral systems, the requirement of proportionality should be emphasised first. The principle of people's representation will be complied with primarily by the electoral system that best reflects the will of the voter. This is because a proportional electoral system can display the election result in the composition of the elected body in the most perfect way (as mandates are allocated in proportion to the number of votes cast). However, this aspect cannot and should not be seen as overriding as no electoral system will be better or worse because it enforces proportionality less. For example, a mixed electoral system will necessarily tip to the majority or proportional side. A good example of this is the comparison of the electoral systems of Germany and Hungary, which are often compared; yet proportionality can be perfectly observed in the case of the former and the predominance of majority elements in the case of

the latter (see e.g., the so-called the institution of 'winner-compensation' in our country). In the context of the requirement of proportionality, the question is also whether it can be regarded as a necessary and essential condition. For example, the Hungarian Constitutional Court [Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary] took the position that, according to the Fundamental Law, the electoral system does not necessarily have to be proportionate as the Fundamental Law does not include a provision on the proportion of proportional, majority or compensation subsystems of the electoral system [Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary, Reasoning [39]). At the same time, it can be stated that an electoral system must strive to reflect the will of the voter as much as possible.

In addition to proportionality, the second important requirement for an electoral system is that its application should ensure a stable governing majority. According to the instrumental approach to suffrage, it can also be considered a tool for concluding and renewing the social contract (the indirect exercise of power by the subjects of people's sovereignty); thus, an electoral system that serves only proportionality and does not take the need for a stable governing majority into account will not be ideal in itself. If an electoral system results in a fragmented parliament (or other elected body), it can easily lead to government crises and thus to socio-economic crises. According to Tibor Ördögh, diverse parliaments demand the formation of coalition governments that can make the political system unstable (Ördögh, 2016, 104). Therefore, most electoral systems also include elements that help achieve stability. The Greek example, where the winning party gets an additional 50 seats to help governability, can also be considered as such, but the institution of 'winner compensation' appearing in the Hungarian electoral system can also serve as an example of this (see the end of the study for more details on this institution).

An additional requirement of electoral systems is that they should minimise the possibility of cheating (i.e. they should not allow manipulation). In this regard, especially the institutional elements of electoral systems must be considered – thus, e.g., the formation of electoral districts, the possibility of re-registration or voting by mobile ballot box or the ways in which votes are cast (see, e.g., the institution of voting in the letter).

As a fourth requirement, an electoral system must always be adapted to the social and cultural roots and organisation of the given country. According to Dieter Nohlen, social development and structure, political culture, power relations or even the behavioural patterns of the political elite all determine the structure of the electoral system (Nohlen, 1996, 8).

Finally, as a fifth aspect, it is important to emphasize that it is also a particularly important requirement in the context of an electoral system, whether the election system of the given country guarantees the free expression of opinion during the election campaign and the election process, and whether it ensures voters' right to information. The purpose of an election campaign is clearly to influence the will of voters and to convince them which party they should vote for (Török, 2015, 151). And this is only possible if we adequately ensure the free flow of opinions and the fullest enforcement of the right to information. In relation to this aspect, it is worth highlighting one decision of the Slovenian and Serbian Constitutional Courts. In a 2011 decision, the Slovenian Constitutional Court [U-I-67/09, Up-316/09 | SL-0168] stated that the integrity of the elections can only be achieved if broad information prevails in the election campaign. In this decision, the Slovenian constitutional body stated that elections or referendums can only be considered fair if they express the true will of the people and if the public was widely and comprehensively informed during the campaign. Therefore, the flow of information influencing public opinion before the elections should be maintained as long as possible. In 2015, the Serbian Constitutional Court stated it in its decision no. Uz-6600/2015/SR-0167., that the

possibility of free speech must be ensured in the election campaign. The Hungarian Constitutional Court also dealt with the issue in several decisions (3107/2018. (IV. 9.) AB decision, and 3240/2019. (X. 17.) AB decision), and established that certain factual statements in the election campaign should be evaluated as political opinions (and thus there is a greater obligation of tolerance towards them), if voters can interpret them properly in the context of the election campaign and can clearly identify their underlying political message (It analyzes the practice of the Hungarian Constitutional Court in detail: Koltay & Szikora, 2022) This approach helps to obtain information on a wider scale. It is worth noting that the Hungarian Constitutional Court said (in 3240/2019. (X. 17.) AB decision), that: „the half-truths, ambiguous, or untrue statements made by the candidates in the campaigns generate a negative process whose harmful effects affect the entire society. Manifestations that ignore good morals and good taste also qualify the person who lives by such means as moral. Freedom of speech, which is protected by fundamental law, does not mean that every opportunity that is not illegal and does not entail adverse legal consequences must be taken advantage of. In addition to ethical aspects, this is also the well-understood self-interest of all involved." However, this „moral clause" has not yet been applied by the Hungarian Constitutional Court.[5]

Of course, the criteria of an electoral system can be determined based on other requirements. Thus, important criteria of an electoral system are that it must

1. provide appropriate legitimacy (that is, for the various social groups to recognise the electoral system, to accept the legitimacy of the power created by it);
2. ensure political integration (do not cause political polarisation in society by the debate over the electoral system);
3. properly represent the will of the voters (do not result in a result contrary to the will of the voters); and
4. result in representative government (Nohlen, 1996, 30).

It is therefore important to emphasise that the criteria of electoral systems can be determine on the basis of any aspect [which, in addition to the above, can also be influenced by the size, traditions or even political considerations of a country (Szoboszlai, 1999, 261–299)]; in any case, only the creation of a complex, multi-faceted system (which displays all the above requirements) will serve the fullest realisation of the principle of people's representation (on this topic, see: Kolodny, 2014). For this reason, we can also state that the definition of an electoral system is one of the most national issues in the formation of constitutional order.

4 General characteristics of the right to vote - challenges in regulating the subjective side of the right to vote

After reviewing the requirements for electoral systems, let us examine the subject side of the right to vote. In connection with this, it is first necessary to say a few thoughts about the fundamental nature of the right to vote.

As I mentioned above, the right to vote – in addition to the instrumental approach – can also be approached from the fundamental law's point of view, in which case we mean the subject side of the right to vote, i.e. the definition of the range of eligible voters. The right to vote is therefore equally linked to fundamental rights and state organization rules. The right to vote is, on the one hand, a basic right to participate in the conduct of public affairs, and on the other

[5] See also in this context: Téglási (2015, 33); Téglási (2018).

hand, it is a means of establishing a representative legislative body (in this regard, Benjamin Constant states, that „only direct election can lend real power to national representation and ensure that this representation is deeply rooted in public opinion. A representative appointed in any other way will find nowhere a voice that acknowledges him or her. […]" (Constant, 1997, 100) and a guarantee of legitimacy (Dezső, 1995, 172). This is confirmed by the practice of the European Court of Human Rights (hereafter: ECtHR), according to which passive behavior is not enough for the state, it must actively contribute to ensuring the right to vote as a fundamental right [Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1987, no. 9267/81], and by the decision no. 1/2013. (I. 7.) AB of the Hungarian Constitutional Court as well, according to which the right to vote is a fundamental right with a dual function: on the one hand, it ensures the right to participate in public affairs, i.e. the indirect form of public decision-making, on the other hand, it also serves as a means of establishing and legitimizing the representative body [decision no. 1/2013. (I. 7.) AB, Reasoning [54]).

Regarding the historical aspect of the right to vote as a fundamental right, it is important to point out as a starting point that between the time of the demand that arose during the civil revolutions and its actual recognition, it functioned as the right of those with „political ability", which the state allows for a specific group of citizens (Dezső, 1998, 21). By the second half of the 20th century, however, a new view became common, according to which suffrage is not only a constitutional state task that cannot be constitutionally enforced by the individual, rather, it is a human right that the state is obliged to ensure, and if it does not comply with this obligation, it can be enforced by all rights holders became common (Domahidi, 2009, 2474). This can clearly be traced back to the idea, that a democratic state can only exist if its power comes directly or indirectly from the people.

Before examining any further questions, it is necessary to determine where the right to vote, as a fundamental right, can be placed in the system of fundamental rights. According to Eszter Bodnár, three steps led to the recognition of the right to vote as a fundamental right: 1. gradual extension of suffrage, 2. the conceptual set of legal positivism based on civil rights, 3. inclusion in the fundamental rights catalog of international human rights documents (Bodnár, 2014, 30). First of all, it is important to note that the right to vote can be considered a first-generation political freedom (cf. Bodnár, 2014, 30 – according to her point of view, in the 18th and 19th centuries we could not yet talk about democratic, universal and equal suffrage, since at that time racial, gender and wealth censuses were still decisive), since already in the 18th century, both personal and political freedoms appeared among the classic fundamental rights (Foster, 2003, 9). However, the right to vote cannot be classified as a freedom in the classical sense, but as a participation right. Because as long as freedoms „give an answer to the question to what extent public power can intervene in people's lives, and what people should and should not do, until then, participation rights determine where public authority decisions come from, that is, who or what is the source of the power intervention that dictates to people what they can and cannot do" (Halmai & Tóth, 2003, 81–107). At the same time, the right to vote, as a fundamental right, can also be interpreted as one of the strongest means of limiting the exercise of power, because the people are able to deprive the exercisers of power who can restrict other fundamental rights of their power (Bodnár, 2014, 35). Therefore, the right to vote can also be considered a political freedom, and thus can be interpreted together with freedom of expression, freedom of information, the right to association, the right to assemble, the right to petition, and the right to participate in public affairs (Balogh & Schanda, 2014, 23–25). The right to vote can also be determined based on the division according to the Hungarian Constitutional Court (28/1994. (V. 20.) AB decision), according to this, it should be classified as a classic fundamental right,

since it also has a subject legal character, it can be enforced against the state by legal means and by judicial means. In addition to the above, the right to vote can also be classified as a citizen's right, for it may be excercised by the members of the political community, which – in accordance with what was written in the previous points – usually includes the citizens of the state (Sári & Somody, 2008, 32).

The role and importance of the right to vote therefore go beyond the creation of the people's representative bodies. The right to vote is also one of the (indirect) forms of participation in public affairs. Thus, it will be of particular importance who in a society has active suffrage rights, i.e. how the subjective side of suffrage is defined. In this regard, it can be stated as a basic requirement that persons belonging to the political nation, i.e. the people, have the right to participate in the election of the members of the people's representative body. We can also say that a citizen in the political community of which he or she is a member has the right to choose who will exercise power over him or her. According to Eszter Bodnár – in this respect – the right to vote can be approached as a kind of right to self-determination, and thus it can ultimately be traced back to human dignity – which is why the general fundamental right limitation rules must be applied when examining it. Regarding the right to human dignity, it is important to emphasize that it is not only a fundamental right, but also a principle that permeates and determines the content of all fundamental rights, including the right to vote. The German Constitutional Court went even further in this regard in connection with the relationship between the right to vote and human dignity, and stated that the right to democratic participation is an expression of individual responsibility and human dignity, and thus the right to vote is one of the guarantees of human dignity (Bodnár, 2014, 130–131). It directly follows from this that everyone whose decision will affect their life can take part in the elections, therefore, it is only exceptionally possible to exclude certain persons from the circle of eligible voters (Bodnár, 2014, 33). However, it is also necessary to add to what has been written above that by exercising our right to vote, we are actually not only deciding our own fate, but also the fate of the entire community, that is, the entire nation. And this statement is correct even if it goes without saying that not everyone's vote will be worth the same amount in reality, because the political community is usually so large that a single vote has little effect on the outcome of the elections or the composition of the people's representative body. Nevertheless, it is very important that everyone among the members of the people has the opportunity to cast their vote. Because although the vote of each person may have a small direct influence on the final result of the vote, overall, it will still have an impact on the total number of votes. There are two reasons for this: on the one hand, his or her vote must, in principle, be suitable to result in representation, on the other hand, even if his or her vote is worth „nothing" in the end (because, for example, he or she votes for the losing candidate), it is still important that he or she was able to cast their vote as a member of the people. That is why, in each case, the legislator and the law enforcer must use the individual limitation and exclusion options in a self-limiting manner and apply them only in the most justified cases. The enforcement of this is important if only because the right to vote is closely linked to human dignity through the right to self-determination. It follows directly from this that no distinction can be made between persons of equal dignity in such a way that their vote will have less or more weight than that of the other members of the political community – considering that all community members must be given equal opportunities to participate in community decision-making (Bodnár, 2014, 34). It follows from all of this that the fundamental content of the right to vote (without which we cannot speak of a democratic right to vote) is the right to decide (cf. Bodnár, 2016, [17]). According to this, the voter can freely decide whether he or she wants to participate in the elections and, if so, for whom he or she will cast his or her vote. In

this context, it is particularly important to emphasize that the right to make a decision does not include the effectiveness of the decision (i.e. that the vote will necessarily result in a mandate), only that the vote has the same chance compared to other votes to result in representation.

4.1 The concept of general suffrage

With regard to the fundamental law examination of the right to vote, it is also necessary to briefly review the concept of the generality of the right to vote.

We can define the concept of the generality of suffrage by quoting the definitions of several authors. Győző Concha – in a 1906 writing – puts it like *„[…] the nation itself has the greatest interest in not only making more of its members participate in the creation of its will, but also giving it the right to vote*" (Concha, 1906). And according to Jenő Gönczi „*[t]he right to vote is considered general if, in addition to citizenship, a certain age and possibly a permanent home (domicile) in the same village or electoral district for a specified period of time, [...] you also have other special requirements [...]*" (Gönczi, 1918). With regard to the „modern" definition of the generality of suffrage, it is also worth highlighting several definitions. According to József Petrétei for example „*an important condition for democratic elections is that the subject circle of those entitled to vote is defined as broadly as possible. […] To this end, the basic principle of the generality of the right to vote requires that basically every citizen has the right to vote and can be elected*" (Petrétei, 2009, 224). In their writings, Károly Tóth (Tóth, 2016, 204) and István Kukorelli (Kukorelli, 2003, 712) similarly define the concept of the generality of the right to vote. According to this, „the meaning of the generality of the right to vote is that except for the absolutely necessary and justified, so-called natural exclusionary reasons, all Hungarian citizens of legal age should have the right to vote." Márta Dezső also puts it in a similar way, according to her „the principle of the generality of the right to vote means that all citizens of legal age have the right to vote - except for the so-called natural exclusionary reasons" (Dezső, 2002, 173). When defining the generality of the right to vote, it is necessary to examine each element of the relevant practice of the ECtHR and the Hungarian Constitutional Court. The ECtHR, among others in the case of Sukhovetskyy v. Ukraine, found that the right to vote in a democratic state is not a privilege after the suffrage was gradually extended during the historical development [Sukhovetskyy v. Ukraine, Judgment of 28 March 2006, no. 13716]. According to the ECtHR any deviation from the principle of general suffrage carries the risk of undermining the democratic legitimacy of the elected legislative body [Aziz v. Cyprus, Judgement of 22 June 2004, no. 69949/01., and Matthews v. United Kingdom, Judgment of 18 February 1999, no. 24833/94]. The primary obligation of the state here is therefore not to refrain from violating the fundamental right (in this case, the right to vote), but rather that the state adopt positive measures in order to be able to hold democratic elections. In this context, it is worth mentioning the judgment Baker v. Carr from the practice of the Supreme Court of the United States of America. In this case, some citizens filed a lawsuit because the legislator did not change the assignment of electoral districts in such a way that it took into account the population density of certain parts of the state and the changes that occurred in it (Molnár, 2017, 50). Based on this logic, the ECtHR reached the concept of „general suffrage" from the „institutional" right to hold free elections [Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1987, no. 9267/81. és Yumak and Sadak v. Turkey, Judgment of 8 July 2008, no. 10226/03].

In several decisions of the Hungarian Constitutional Court, it dealt with the principle of the generality of the right to vote. In a 1991 decision (6/1991. (II. 28.) AB decision), the Constitutional Court stated, for example, that neither referring to convenience aspects, nor to technical

difficulties that can be overcome, nor to the goal of making the election results public in the shortest possible time, can serve as a basis for limiting the principle of generality. Nevertheless, Paragraph (5) of Article XXIII of the Fundamental Law has excluded the possibility of voting away from the place of residence in relation to local government elections. The basis for this was a decision of the Constitutional Court (783/E/2002. AB decision) in which the panel stated that the necessity of creating a rule that would enable the possibility of voting away from the place of residence on the day of municipal elections cannot be deduced from the constitutional rules of the right to vote. However, the dissenting opinions attached to this decision by Miklós Lévay and András Bragyova said that the legislator does not have the constitutional possibility to link the actual exercise of the right to vote to a narrower geographical area compared to the territory of the country. Eszter Bodnár also agrees with this idea, according to whom there would be no obstacles to the implementation of the above given today's technical conditions (Bodnár, 2014, 104). In a 2008 decision (54/2008. (IV. 24.) AB decision), the Constitutional Court also stated that the obstacles to the generality of the right to vote cannot be expanded by additional objective limitations beyond the constitutional limitations (this is of particular importance because – as the Constitutional Court in 16/1994. (III. 25.) AB decision also stated – the constitutional limits of the right to vote can only be defined in the right to vote clause of the constitution), however, the legislature may bind the exercise of the right to vote to procedural conditions. In terms of the generality of the right to vote, the final document of the 1990 Copenhagen meeting of the Conference on Security and Cooperation in Europe (CSCE) is also of outstanding importance, in which the participating states declared that they would hold free elections at reasonable intervals and that they would be held on the basis of general and equal suffrage.

In accordance with the above, according to the Fundamental Law, based on the generality of the right to vote, Hungarian citizens of legal age,[6] who do not fall under any disqualifying reason have both active and passive voting rights. So based on the generality of the right to vote (for a definition, see also: G. Karácsony & Smuk, 2014, 165–166), everyone has the right to vote if the conditions related to its exercise are met (Dworkin, 1997, 19) – i.e. no one can be arbitrarily excluded from it (Bodnár, 2014, 102). However, the concept of the generality of the right to vote can also be defined in such a way that it actually means that the right to vote must extend to as many members of the people as possible, and those who are subject to it can actually exercise their right to vote (i.e. neither administrative nor other restrictions are possible). Namely, in the event that the person with the right to vote cannot exercise his or her right to vote (because e.g. the state does not ensure its conditions as part of its obligation to protect institutions), the principle of the generality of suffrage cannot apply either.

4.2 The challenges of general suffrage

Based on the above-clarified aspects of the principle of general suffrage, it is important to emphasize that its principle (and scope of subjects) has been interpreted differently in different eras. In this context, András Jakab stated in his presentation at a conference,[7] that after World

[6] It is important to note that the range of eligible voters is defined differently in the election of members of parliament, the election of local government representatives and mayors, and the election of representatives of the European Parliament in Hungary, i.e. neither for active voting rights nor for passive voting rights can be given a 'general' all-encompassing definition.

[7] https://aceeeo.org/hu/projektjeink/2014-valasztasok-eve

War I, the right to vote could not be revoked from surviving soldiers who returned home from the front (because they risked their lives for their country), thus, they received active voting rights in the majority of states. The merits gained in the war appeared as an easing rule in the suffrage of the time. In Hungary, the Prime Minister's Decree of 1919[8] already ensured the right to vote, regardless of age, to those who had been assigned to front-line service for at least twelve weeks during the First World War (Hollósi, 2015). However, among these soldiers, there were also many persons who were confronted with the ideas of the Communist Manifesto at the front, so it was feared that parties professing Communist views would gain strength in Western countries as well. In order to counterbalance this, the affected states extended the right to vote to persons (mainly women) who survived the war in the hinterland, and who did not have it before, in order to maintain the political balance. If we look at the current challenges to the principle of universal suffrage from time to time [e.g. the requirement of domestic residence, the question of right to vote of people with intellectual disabilities, the suffrage of those sentenced to imprisonment, the dilemma of children's suffrage (Kurunczi, 2020), or the question of nationalities' parliamentary representation (Kurunczi, 2014)] then we can see that, in the majority of cases, behind the expansion of the circle of those who have the right to vote, there is some political profit-making intention or other political goal. A detailed analysis of these challenges is not the purpose of this study, however, it is important to emphasize that defining the right to vote and ensuring it as widely as possible is considered essential in order to strengthen democratic legitimacy.

5 Conclusions

In my study, I primarily looked for the answer to the question of what the two natures of the right to vote mean: i.e. what criteria an election system must meet in order to be considered constitutional and fair, and who can be included in the circle of eligible voters. Answering these questions is also crucial, as we can best determine the completeness of the implementation of popular representation by examining these areas from the approach of the instrumental and fundamental right to suffrage. In connection with electoral systems, it can be stated that an electoral system can be considered constitutional if it embodies the will of the electorate, and at the same time, it ensures a stable governing majority and adapts to the social system, minimizes the possibility of abuses and provides appropriate legitimacy to the exerciser of power. István Kukorelli puts it this way regarding the requirements for electoral systems: a constitutional and fair electoral system aims to provide the legislature with unquestionable legitimacy. With that said, however, an election system that meets the above criteria cannot be considered sufficient for popular representation to prevail, for that, it is also necessary to define the range of eligible voters as broadly as possible. Based on the historical development trends, we can see that until the 19th century and the beginning of the 20th century, the right to vote was seen as a kind of privilege. Today, however, we have now reached the „everyone except who..." principle, on the basis of which the possibility of active participation in elections is becoming increasingly widespread in all societies, even if we can still encounter many challenges in connection with the generality of the right to vote, which foreshadow further opportunities for the expansion of the right to vote.

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[8] Decree No. 5.985 of the Hungarian Government of 1919 on the right to vote in the National Assembly, the Legislative Assembly and the Municipalities.

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The Russian invasion of Ukraine and the Czech Supreme Administrative Court

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Abstract

The presented paper is devoted to the Czech Supreme Administrative Court's approach to the Russian invasion of Ukraine from the perspective of deciding asylum issues. Specifically, the author focuses on the principle of non-refoulement and breaking the standard rules of administrative court proceedings and Ukraine as a safe country of origin. Finally, the author describes a relatively recent Czech Supreme Administrative Court's ruling in which it addressed the issue of including temporary protection within the international protection system.

Keywords

Russia-Ukrainian conflict, Czech Supreme Administrative Court, non-refoulement, safe country of origin, temporary protection

Introduction

It certainly goes without saying that the Russian invasion of Ukraine, which began on the morning of 24 February 2022, represents the largest armed conflict on European soil since the end of the Second World War. Along with unimaginable horrors and human and material losses, this invasion has also resulted in the largest modern refugee wave to date, which the old continent and, above all, the Member States of the European Union have had to deal with. In this article, the author mainly presents the principle of non-refoulement, the concept of safe country of origin and the approach of the Czech Supreme Administrative Court to their application in the context of the Russian-Ukrainian war. Finally, the author presents a relatively recent judgment of the Czech Supreme Administrative Court regarding the inclusion of temporary protection in the international protection system and the resulting procedural advantages for applicants for temporary protection (namely Ukrainian refugees).

The principle of non-refoulement

Under the principle of non-refoulement, no person may be "*forcibly, directly or indirectly transferred (returned) to a country or area where he or she would be at risk of being subjected to human rights violations*" (Wouters, 2009, 25). In this general sense, the principle is then further specified in relevant (mainly international law) but also other legal instruments. In general, the

sources in which the principle is contained can be divided into refugee law sources and human rights law sources, or into international law sources with universal applicability and regional sources, or into hard law and soft law sources.

Historical development of the principle

The idea of a prohibition of refoulement is relatively new. It was only in the first half of the 19th century that the concept of asylum and the principle of non-refoulement for political dangers began to take concrete shape. In 1905, the United Kingdom enacted the so-called Aliens Act,[1] which, among other things, made it obligatory to grant entry to persons fleeing persecution on political or religious grounds. However, it was not until the First World War and the associated mass displacement of people that the principle of non-refoulement began to take hold in the international environment. The principle first appeared in the 1933 Convention Relating to the International Status of Refugees, but its scope was very limited and its practical significance was not very wide, as only eight states ratified it, three of them with reservations (Goodwin-Gill & McAdam, 2007, 202).

Global conflict, this time Second World War, again contributed to another shift. In 1946, the United Nations took the position that refugees who had serious reason to fear going back to their country of origin could not be returned. That same year, the International Refugee Organization was founded to provide assistance to the millions of people who had been forced to resettle as a result of the war (Haraszti, 1960, 378). In view of the fragmented legal framework, with different categories of refugees regulated by different documents after the Second World War (Weis, 1967, 39), the United Nations Economic and Social Council (ECOSOC) established an ad hoc Commission on Homelessness and Related Problems in 1949.[2] It was mandated to produce a revised document that would uniformly regulate the international status of refugees and stateless persons based on Article 14 of the Universal Declaration of Human Rights (Goodwin-Gill & McAdam, 2007, 203–204).[3] The result of the Commission's work was the Convention Relating to the Status of Refugees (more commonly referred to as the Geneva Convention, after the city of its adoption), adopted in 1951,[4] and its art. 33, which expressed the principle of non-refoulement. The Office of the United Nations High Commissioner for Refugees was established in 1950 to oversee the implementation of the Geneva Convention.[5]

The basic expression of the principle of non-refoulement can thus be said to be embodied in the 951 Geneva Convention, according to art. 33(1) of which "*No Contracting State shall expel or return („refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*". The Convention, later supplemented by the so-called New York Protocol of 1967,[6] became the basis of international refugee law. It

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1 Online: https://www.legislation.gov.uk/ukpga/Edw7/5/13/contents/enacted

2 UN. United Nations Economic and Social Council (ECOSOC). *Resolution No. 248 (IX)*. 1949.

3 Art. 14(1) Universal Declaration of Human Rights:

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

4 Convention relating to the Status of Refugees of 28 July 1951 (in the Czech Republic publ. under no. 208/1993 Coll.).

5 Cf. art. 35 of the Geneva Convention.

6 Protocol Relating to the Status of Refugees to the Convention relating to the Status of Refugees of 31 January 1967 (also published in the Czech Republic under No. 208/1993 Coll.).

defined the conditions under which a person becomes a refugee, when they cease to be a refugee and what rights they enjoy. The fundamental obligation it imposed on states, from which states cannot derogate, is precisely the obligation to respect the principle of non-refoulement.[7] Even today, the continuing importance of the Geneva Convention and its place at the heart of international refugee protection has been confirmed by its contracting parties, for example, in their 2002 Declaration.[8]

However, the Geneva Convention is of course not the only document determining the content of the principle of non-refoulement. The prohibition of refoulement has gradually spread to the field of international human rights law as part of the prohibition of torture and inhuman or degrading treatment or punishment. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9] explicitly mentions the principle in its art. 3. Mention should also be made of art. 7 of the 1966 International Covenant on Civil and Political Rights[10] and certainly art. 3 of the 1950 European Convention on Human Rights (ECHR)[11] (which will be discussed in more detail below), which prohibit subjecting anyone to torture or to inhuman or degrading treatment or punishment. The supervisory bodies of these treaties have subsequently interpreted these provisions to include a prohibition on refoulement in the event that a person would be subjected to treatment contrary to these articles.[12]

Europe

When analysing the legal regulation of the principle of non-refoulement on the European continent, it should be borne in mind that two regional formations exist side by side. It is therefore necessary to distinguish between what European States are obliged to do as parties to the Euro-

[7] Cf. art. 42(1) of the Geneva Convention.

[8] UN. The United Nations General Assembly. *Resolution 57/187.* 2002. point 4.

[9] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (publ. under No. 143/1988 Coll.).

Art. 3:

(1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[10] International Covenant on Civil and Political Rights of 16 December 1966 (publ. under No. 120/1976 Coll.).

Art. 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[11] European Convention on Human Rights of 4 November 1950 (publ. under No. 209/1992 Coll.)

Art. 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[12] The Human Rights Committee, established under art. 28 of the Covenant, is the supervisory body of the Covenant. The Committee first interpreted art. 7 of the Covenant to include the prohibition of refoulement in General Comment No. 20 – see Human Rights Committee, *General Comment No. 20 of 10 March 1992*, para. 9. As regards the interpretation of the supervisory body of the European Convention, the European Court of Human Rights, see below for more information.

pean Convention on Human Rights and, therefore, as members of the Council of Europe, as opposed to what they must do as members of the European Union. At present, the European Union consists of 27 Member States, while the Council of Europe consists of 46 Member States. All the Member States of the European Union are also members of the Council of Europe. It should only be mentioned in passing that the European Union has not yet become a party to the European Convention on Human Rights.[13]

Council of Europe and the European Convention on Human Rights

The ECHR does not expressly provide for a prohibition of non-refoulement (Furramani & Bushati, 2022). It has already been noted above that the supervisory bodies have, over time, interpreted the general provisions containing the prohibition of torture, inhuman or degrading treatment or punishment as including a prohibition on refoulement in the event that a person would be subjected to treatment contrary to these articles. In connection with the Council of Europe and the European Convention on Human Rights, we refer to the European Court of Human Rights (ECtHR), in connection with the supervisory authority, which has thus inferred from art. 3 in particular, in combination with art. 1 of the Convention. A landmark decision in this regard is the ECtHR's 1989 decision in *Soering v. the United Kingdom*,[14] in which the ECtHR addressed the principle of non-refoulement and concluded that the return or extradition of a person by a Contracting State for the purpose of carrying out the death penalty is contrary to art. 3 ECHR. The ECtHR then returned to the conclusions of *Soering v. the United Kingdom* more than twenty years later in *T.I. v. the United Kingdom*, in which it upheld the absolute prohibition on returning persons if they are to be subjected to inhuman treatment within the meaning of art. 3 ECHR.[15] The gravity of the ECtHR's findings in this case resonates to this day, as they have been adopted by the European Union and the essential elements of "*serious harm*" as defined by the ECtHR have subsequently been incorporated into Article 15 of the Qualification Directive in the context of subsidiary protection, extending safeguards beyond those qualifying as refugees.

Other cases in which the ECtHR has confirmed that persons cannot be returned to another state if they face inhuman treatment under its jurisdiction include *Hirsi Jamaa and others v. Italy*,[16] *Saadi v. Italy*[17] and *Vilvarajah and others v. UK*.[18]

Furthermore, the ECtHR's decision in *M.S.S. v. Belgium and Greece*, according to which Belgium violated art. 3 and 13 ECHR and both directly and indirectly violated the principle of non-refoulement, was crucial. Belgium returned the applicant for international protection

[13] On this point, cf. in particular the negative opinion of the Court of Justice, which found that the Agreement on the Accession of the European Union to the European Convention on Human Rights was not compatible with art. 6(2) TEU or with the Protocol (No 8) to art. 6(2) TEU on the Accession of the Union to the European Convention on Human Rights (Opinion of the Full Court of 18 December 2014, C-2/13, EU:C:2014:2454).

[14] *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

[15] *T.I. v the United Kingdom* App no 43844/98 (ECtHR, 7 March 2000); *Cruz Varas v Sweden* App no 15576/89 (ECtHR, 20 March 1992); *Ahmed v Austria* App no 25964/94 (ECtHR, 17 December 1996).

[16] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

[17] *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008).

[18] *Vilvarajah and Others v the United Kingdom* App no 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991).

to Greece, thereby subjecting the applicant to inhuman and degrading treatment consisting of detention in inhuman conditions in Greek detention facilities and, subsequently, of the applicant living on the streets. Greece has also been known for its practice of not allowing potential applicants for international protection access to asylum procedures and returning them directly to their country of origin or returning them to Turkey, thereby also indirectly exposing the applicants to the risk of refoulement by Belgium.[19]

Art. 3 ECHR operates absolutely,[20] so exceptions to the principle of non-refoulement cannot be applied as in the application of the Geneva Convention. On the other hand, the substantive scope of protection is narrower than in the Geneva Convention – it provides protection against torture, inhuman or degrading treatment or punishment. On the other hand, the prohibited conduct is not linked to exhaustively listed grounds as in the provision of protection from persecution under the Geneva Convention. The parameters that must be met in a particular case in order to meet the definition of inhuman treatment within the meaning of Article 3 ECHR have been elaborated by the ECtHR in, for example, *Ireland v. the United Kingdom*.[21]

European Union

The Common European Asylum System (CEAS) is based on international refugee law and international human rights law, in particular the Geneva Convention.[22] It therefore does not create a new system of protection, but fills gaps in the international legal system and builds on international legal instruments – in particular the Geneva Convention.[23]

The need to regulate asylum and migration issues at EU level arose with the creation of the single market and the free movement of people within the EU. The abolition of border controls has led to the movement of refugees between Member States and an increase in their numbers. Thus, the motivation for states to align their commitments in this area was not to increase refugee protection, but rather to protect their own economic and security interests. The issue of refugees was first regulated by international treaties, mainly concerning visa policy[24] and asylum.[25] With the Maastricht Treaty, the issue of asylum became part of EU law under the so-called third pillar (intergovernmental cooperation). In 1997, the Treaty of Amsterdam brought this area under the first pillar, making it part of Community law and thus falling under the competence of

[19] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

[20] *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996).

[21] Ireland v the United Kingdom App no 5310/71 (ECtHR, 18 January 1978).

[22] Cf. Article 78 of the Treaty on the Functioning of the European Union and Article 18 of the EU Charter of Fundamental Rights.

[23] See also, for example, points 3, 4 and 17 of the preamble to the Qualification Directive.

[24] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ L 239, 22.9.2000, p. 19–62.

[25] The Schengen acquis – Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention. OJ C 254, 19.8.1997, p. 1–12. The Dublin Convention introduced a system for designating a single responsible State for the examination of an application. However, at a time when national asylum systems were not harmonised, returning persons to a State responsible for a decision whose protection system did not comply with the international law obligations of the Geneva Convention could amount to a violation of the prohibition of refoulement.

the European Community.[26] On the basis of the then existing legislation (art. 63 of the Treaty establishing the European Community), the Council of the European Union was empowered to adopt measures[27] to establish a Common European Asylum System,[28] the so-called minimum standards.

A significant change in the area of asylum was brought about by the Lisbon Treaty,[29] which removed the pillar structure and brought the area of asylum and immigration, together with judicial and criminal cooperation, into Title V of the Treaty on the functioning of the European Union (TFEU) under the title "Area of Freedom, Security and Justice". Art. 78 TFEU became the new basis for the EU's asylum policy. The Lisbon Treaty's contribution to the field of asylum, and in particular to respect for the principle of non-refoulement is also the transposition of the EU Charter of Fundamental Rights into primary law.[30]

From a general perspective, the process of building the Common European Asylum System took place in two phases. The starting point was, of course, the national asylum systems. The first phase involved the adoption of minimum standards, i.e. achieving at least basic harmonisation. The legal basis for this phase was the Treaty establishing the European Community, specifically art. 63 thereof. The second phase consisted of raising these achieved standards. The legal basis for this phase is the TFEU, specifically art. 78 thereof. The direction of the CEAS and the rough outline of harmonisation measures were first regularly contained in documents of a political nature, which generally provided a longer-term perspective and were thus the conceptual building blocks of the CEAS. These key documents include the 1999 Tampere European Council Conclusions, the 2004 Hague Programme, the 2007 Green Paper on the future Common European Asylum System, the 2009 Stockholm Programme and the 2014 Post-Stockholm Programme.

At the moment, the principle of non-refoulement is therefore regulated in primary law by art. 78 TFEU[31] and art. 19(2) of the EU Charter of Fundamental Rights.[32] Secondary legal norms

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[26] This area has been expressly included in the new Title IV. of Treaty establishing the European Community under the heading "Visas, asylum, immigration and other policies related to free movement of persons".

[27] These measures were adopted unanimously by the Council under art. 67 of the Treaty establishing the European Community during the five years following the entry into force of the Amsterdam Treaty. However, unanimity made agreement on the measures difficult and led to the adoption of only basic, low standards. The Nice Treaty of 26 February 2001 allowed for a qualified majority procedure for the adoption of further measures in this area. Cf. the newly modified art. 67(5) of the Treaty establishing the European Community.

[28] The term "Common European Asylum System" did not appear in the Treaty establishing the European Community, but was introduced only by the 1999 Tampere European Council Conclusions, as an objective of the measures adopted on the basis of art. 63 of the Treaty establishing the European Community.

[29] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

[30] Cf. in particular art. 18 of the EU Charter of Fundamental Rights.

[31] Art. 78(1): The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

[32] Art. 19(2): No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

dealing with asylum and refugee issues form the so-called Common European Asylum System. This consists of the Qualification Directive,[33] the Dublin Regulation,[34] the Procedural Directive,[35] the Reception Directive[36] and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 (establishing 'Eurodac' for the comparison of fingerprints).

The Union legislation builds on the already existing international law obligations of Member States regarding the principle of non-refoulement, which is based on the already mentioned art. 78 TFEU or Article 21 of the Qualification Directive.[37] It has also been confirmed by the Court of Justice of the European Union[38] that the Qualification Directive was adopted as a guide for Member States in the interpretation and application of the Geneva Convention. This is the basis for the formal element of mutual trust between Member States, on which the whole Common European Asylum System is built.

Czech Republic

According to art. 1(2) of the Constitution of the Czech Republic, the Czech Republic respects its obligations under international law. The principle of non-refoulement can therefore be generally defined as an international legal obligation with primacy of application. According to the Czech Constitutional Court, non-refoulement is one of the rights where derogation is not permitted and is guaranteed not only by treaty instruments (the aforementioned art. 3 of the Convention against Torture, art. 7 of the International Covenant on Civil and Political Rights, art. 3 of the ECHR), but at the same time it is also a norm of general international law of a mandatory nature.[39] The Czech Supreme Administrative Court also refers to the official interpretation of the Office of the United Nations High Commissioner for Refugees, according to which non-refoulement is part of customary international law and therefore binding on all States.[40] The Supreme Administrative Court understands non-refoulement in two senses. In a narrower sense,

[33] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. OJ L 337, 20.12.2011, p. 9–26.

[34] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. OJ L 180, 29.6.2013, p. 31–59.

[35] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. OJ L 180, 29.6.2013, p. 60–95.

[36] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. OJ L 180, 29.6.2013, p. 96–116.

[37] Art. 21(1): Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.

[38] Judgment of 2 March 2010, *Abdulla and Others v Germany*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105.

[39] Resolution of the Constitutional Court of 21 December 2004, II. ÚS 543/03.

[40] Judgment of the Supreme Administrative Court of 14 June 2007, 9 Azs 23/2007-64, judgment of the Supreme Administrative Court of 26 July 2007, 2 Azs 30/2007-69, judgment of the Supreme Administrative Court of 19 September 2007, 1 Azs 40/2007-129.

it understands non-refoulement as enshrined in art. 33 of the Geneva Convention and. in a broader sense, it understands non-refoulement according to art. 3 of the ECHR, the case law of the ECtHR (mainly on art. 3, 1 and 8 of the ECHR), Article 3 of the Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights, and possibly in the light of other international instruments[41] to which the Czech Republic is bound. Recent decisions of the Supreme Administrative Court show that at the moment the principle of non-refoulement is mainly based on the ECHR and the related case law of the ECtHR – see the recent decisions of the Supreme Administrative Court cited in the following passages of this article.

At national level, the principle is enshrined in five procedures; firstly, there are the procedures for granting international protection in the form of asylum or subsidiary protection under Act No. 325/1999 Coll., on Asylum; secondly, the procedure for granting temporary protection under Act No. 221/2003 Coll. on Temporary Protection of Aliens;. thirdly, non-refoulement is a ground preventing departure in the context of a decision on administrative expulsion of an alien, which is regulated by Act No. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic; fourthly, the obligation arises for the state authorities to take into account the principle of non-refoulement in the framework of extradition proceedings regulated by Act No. 104/2013 Coll., on International Judicial Cooperation in Criminal Matters; and fifthly, it is the criminal courts that take into account non-refoulement when assessing the admissibility of imposing a sentence of expulsion under Act No. 40/2009 Coll., the Criminal Code.

As already mentioned, the Czech Republic, pursuant to art. 1(2) of the Constitution of the Czech Republic, complies with its obligations under international law. The purpose of this provision is that, by observing the rules of international law (whether customary, treaty or otherwise), the Czech Republic should contribute to the harmonious and predictable functioning of the international community as far as possible.[42] Thus, in order to fulfil art. 1(2) of the Constitution of the Czech Republic, it is necessary that any entity, the conduct of which is attributable to the Czech Republic, must behave in a manner conducive to its fulfilment.[43] In view of the above-mentioned proceedings in the framework of which non-refoulement is contained and which may be interrelated or not even precluded from overlapping,[44] it is necessary to point out one of the fundamental practical consequences of the applicative primacy of the international law obligation of non-refoulement. The priority application of international law must always occur in the proceedings and before the authority where that fact first comes to light. If the constitutional principle of priority of application of an international convention applies generally, it applies in principle at all times and at every moment. It cannot be inferred restrictively from any provision that its application should be tied to a specific point in time, and no authority can therefore legitimately disregard an international obligation of which it is or should be aware and postpone its application or refer it to a later point in time or to another authority. If, therefore, a strict application of a national rule of law should inevitably lead to the possibility that a person might be extradited to a country where their life or personal liberty would be threatened

[41] Judgment of the Supreme Administrative Court of 26 March 2008, 2 Azs 71/2006-82, judgment of the Supreme Administrative Court of 11 February 2009, 1 Azs 107/2008-78.

[42] Cf. also the preamble of the Constitution of the Czech Republic, in which the Czech Republic declares itself a member of the family of European and world democracies.

[43] Judgment of the Supreme Administrative Court of 26 March 2008, 2 Azs 71/2006-82, judgment of the Supreme Administrative Court of 30 September 2010, 7 Azs 42/2010-146.

[44] E.g. § 80(3)(b) of the Criminal Code.

or where they would be subjected to torture, inhuman or degrading treatment or punishment, and such an interpretation would at the same time amount to a violation of either art. 33 of the Geneva Convention or art. 2, art. 3 of the ECHR, the authority applying the national norm must depart from it and instead choose an interpretation of the relevant provisions that takes into account the imperative to protect fundamental human rights and freedoms. Preference will thus be given to an internationally consistent interpretation of the national rule, according to which the State in which the refugee seeks protection is obliged to prevent their return to a country where their life would be in danger.[45]

The non-refoulement principle, the Czech Supreme Administrative Court and the Russian invasion of Ukraine

The Czech administrative justice system is based, among other things, on three basic provisions, which are § 75(1), (2) and § 109(5) of the Code of Administrative Justice Procedure (CoAJP).[46] Pursuant to § 75(1) CoAJP, "*when reviewing a decision, the court shall base its decision on the facts and legal situation that existed at the time of the administrative authority's decision"*.[47] Pursuant to § 75(2) CoAJP, "*the court shall review the contested parts of the decision within the limits of the points of appeal."* [...] Finally, pursuant to § 109(5) CoAJP, "*the Supreme Administrative Court does not take into account facts which the complainant has raised after the contested decision was issued."*

However, in the field of international protection, the provision of § 75(1) CoAJP is excluded and art. 46(3) of the Procedural Directive is directly applicable, according to which Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to the Qualification Directive, at least in appeals procedures before a court or tribunal of first instance. The Supreme Administrative Court therefore bases its review in international protection cases on the factual and legal situation on the date of the contested decision of the Regional Court, not on that of the administrative authority as in the standard application of § 75(1) CoAJP.

However, long before the outbreak of the Russian-Ukrainian crisis, the Supreme Administrative Court had already made exceptions to these two rules in its case law. These procedural rules can be broken by another norm that enjoys primacy of application, namely the ECHR and the resulting principle of non-refoulement. With regard to the breaking of § 75(1) CoAJP, the Supreme Administrative Court has already stated in its judgment of 24 August 2010, 5 Azs 15/2010-76, that art. 10 of the Constitution and art. 2 and 3 of the ECHR take precedence over this provision, "*which must be interpreted in the light of the international law principle of "non-refoulement" as establishing the obligation of the Czech Republic not to expose any*

[45] Judgment of the Supreme Administrative Court of 14 June 2007, 9 Azs 23/2007-64, judgment of the Supreme Administrative Court of 19 September 2007, 1 Azs 40/2007-129, judgment of the Supreme Administrative Court of 1 August 2013, 6 As 28/2013-38.

[46] Act No. 150/2002 Coll., Code of Administrative Justice Procedure, as amended. In this article, this Act will be referred to as "CoAJP". The Code of Administrative Justice Procedure is the fundamental act of administrative justice in the Czech Republic.

[47] The Czech administrative procedure is basically a two-instance procedure. The decision-making period of the administrative authority is therefore the decision-making period of the appellate administrative authority.

person subject to its jurisdiction to any harm that would consist of endangering life or being subjected to torture or inhuman or degrading treatment or punishment, for example, by being expelled or otherwise forced to travel to a country where such harm would be threatened."

The Supreme Administrative Court then followed up on these conclusions and extended them in relation to the exception to the rule of § 109(5) CoAJP as well, for example, in judgments of 10 September 2015, 2 Azs 163/2015-28, of 13 November 2019, 6 Azs 170/2019-50, of 12 February 2021, 2 Azs 43/2020-27, or of 29 April 2021, 10 Azs 414/2020-41. This procedure was also confirmed by the Constitutional Court in its ruling of 19 May 2020, III ÚS 3997/19.

After 24 February 2022, the Supreme Administrative Court was confronted with the question of how to deal with the fact that the decisions of the regional courts challenged by the cassation complaint[48] were issued before that date, at a time when the invasion of Ukraine had not started yet, and thus the regional courts could not take it into account. In judgments handed down after 24 February 2022, the Supreme Administrative Court has consistently taken a positive approach to the question of whether to take account of the war in Ukraine, even though it occurred after the contested judgments of regional courts were handed down, on the ground that the forced return of the applicants[49] to their country of origin might be contrary to the principle of non-refoulement. In cases where the Supreme Administrative Court did not find any other error on the part of the regional court or the administrative authority (typically the Ministry of the Interior), taking into account the change of circumstances in Ukraine led to the annulment of the contested judgment of the regional court and the decision of the administrative authority (see judgments of 10 March 2022, 10 Azs 537/2021-31, of 11 March 2022, 6 Azs 306/2021-49, of 24 March 2022, 1 Azs 36/2022-31, of 31 March 2022, 9 Azs 13/2022-32, of 7 March 2022, 4. 2022, no. 4 Azs 324/2021-46 and 8 Azs 55/2022-25, of 8. 4. 2022, 5 Azs 86/2021-33, and of 14. 4. 2022, 5 Azs 212/2020-44). However, it must be emphasized that the Supreme Administrative Court proceeds in this way only in cases where regional court decided the case on the merits. The Supreme Administrative Court follows a different procedure in cases where regional court dismissed the action or discontinued the proceedings on procedural grounds (judgment of 25 March 2022, 5 Azs 14/2022-25). It has also followed a consistent procedure in its case law issued after 24 February 2022 in cases of Ukrainian applicants for international protection in situations where it finds other grounds for annulling the contested judgment of the regional court and, at the same time, the contested decision of the administrative authority. For the time being, in no such decision has the Supreme Administrative Court failed to instruct the administrative authority that, in addition to correcting the errors of the previous procedure for which the Supreme Administrative Court annulled its decision, it is also obliged to take into account the current situation in Ukraine related to Russia's military aggression (see judgments of 25 February 2022, 5 Azs 82/2020-64, of 8 March 2022, 10 Azs 524/2021-32, of 25 March 2022, 8 Azs 336/2021-33; the same remark is also contained in the judgment of 17 March 2022, 1 Azs 16/2021-58, by which the Supreme Administrative Court rejected the Ministry's cassation complaint, i.e. a cassation complaint filed in the opposite order to the majority of cases, because it was filed by an administrative authority).

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[48] In the Czech Republic, a cassation complaint is an appeal against a final decision of a regional court in the administrative justice system, which is heard by the Supreme Administrative Court – cf. § 102 CoAJP.

[49] Applicant is referred to in the Czech Republic as a complainer. It is the person who lodged the cassation complaint – cf. again § 102 CoAJP.

Long before the Russian-Ukrainian war, the Extended Chamber of the Supreme Administrative Court[50] had also already recognized the breaking of the rule enshrined in § 75(2) CoAJP in international protection cases, according to which the court reviews the contested statements of the decision within the limits of the pleas in law (see judgment of 8 March 2011,. 7 Azs 79/2009-84) b because of the primacy of the ECHR and the resulting principle of non-refoulement,. According to the Extended Chamber, the regional courts "*may not disregard, even beyond the pleas in law, if there are grounds for protecting the applicant from imminent serious harm in the country of origin which the defendant has failed to take into account in a situation where no further proceedings in which protection could be granted are envisaged. The findings in that regard are, as a rule, based on the applicant's statements in the application or at the interview and on facts established about the country of origin in the proceedings or known from other proceedings or known generally. Thus, if the court has knowledge that it is necessary to grant the asylum seeker subsidiary protection pursuant to § 14a of the Asylum Act, since failure to do so would be a violation of the principle of non-refoulement and protection can no longer be granted in other proceedings, it shall annul the defendant's (administrative authority's) decision without that fact having to be expressly pleaded in the application."* This exception applies not only to the proceedings before regional courts, as it follows from the case law of the Supreme Administrative Court that it is also obliged to take into account any errors of the administrative authority or regional court which could lead to a violation of the principle of non-refoulement. Therefore, in such cases, the Supreme Administrative Court is not bound only by the objections set out in the cassation complaint (judgment of 3 October 2018, 6 Azs 300/2018-23). Regional courts have consistently, and since before the pilot judgment of the Supreme Administrative Court No. 10 Azs 537/2021-31was issued, taken into account the change of circumstances in Ukraine, even if the applicants themselves do not allege a change of circumstances in their action.[51] The Supreme Administrative Court consistently does so in cases where that fact is not included among the objections to the cassation complaint.[52]

In conclusion, it should be noted that the Supreme Administrative Court did not take into account which side of the conflict the asylum seekers stood, if any. For example, in the pilot judgment No. 10 Azs 537/2021-33, the Supreme Administrative Court annulled the decision not to grant asylum to a Russian-speaking citizen of Ukraine who had politically sided with the pro-Russian side during the Ukrainian revolution in 2013 and 2014. He worked in companies with Russian capital and worked as a "minder" at anti-government demonstrations, stopping anti-government rallies and pushing demonstrators out of the area, for which he was paid.[53]

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[50] The Extended Chamber of the Supreme Administrative Court is a special chamber consisting of 7 or 9 judges (cf. § 16(1) and (3) CoAJP). It decides in cases where one of the standard (three-member) chambers of the Supreme Administrative Court reaches a legal opinion that differs from the legal opinion already expressed in a decision of the Supreme Administrative Court (cf. § 17(1) CoAJP). The Extended Chamber therefore acts as an important unifier of the Supreme Administrative Court's case law and thus of the entire Czech administrative justice system.

[51] This applies to the judgment of the Regional Court in Hradec Králové – Pardubice of 2 March 2022, 36 Az 3/2021-47, and the judgments of the Regional Court in Brno, 41 Az 9/2021-36, 41 Az 12/2021-34, 22 Az 24/2021-38, 22 Az 36/2021-28 and 41 Az 21/2021-42.

[52] Supreme Administrative Court judgments 10 Azs 537/2021-31, 6 Azs 306/2021-49, 4 Azs 324/2021-46, 8 Azs 55/2022-25, 5 Azs 86/2021-33 and 5 Azs 212/2020-44.

[53] Cf. point 2 of judgment 10 Azs 537/2021-33.

Change of the security situation in Ukraine as a judicial notice

The regional courts and the Supreme Administrative Court also had to consider whether the ongoing conflict in Ukraine is a well-known fact that does not need to be proved. Facts of common knowledge (so-called judicial notice), similarly to facts known to an administrative authority from official activity (§ 50(1) of the Administrative Procedure Code),[54] are objectified, largely undisputed facts that are not, in principle, proven in court or administrative proceedings. However, the parties to the proceedings may dispute the content of the judicial notices (as well as facts known to the administrative authority from official activity) by their allegations, and may also propose evidence be submitted to prove their different allegations. Judicial notice may be known to everyone or to a wide range of persons at a certain place and time (the Supreme Administrative Court has interpreted this concept at length, for example, in its judgment of 12 April 2011,1 As 33/2011-58).

There is a consensus among the regional courts[55] and the Supreme Administrative Court[56] that the conflict in Ukraine is indeed such a judicial notice.

Ukraine as a safe country of origin

General on the safe country of origin concept

The safe country of origin concept is a controversial part of European asylum law. The possibility for Member States to designate a country as a so-called safe country of origin by their national standards stems from Article 37 of the Procedural Directive.

Member States have started to apply the concept of safe countries of origin as a means to distinguish between applications for international protection that are well-founded and those that are not and, as a result, to speed up asylum procedures. The logic behind this concept is that, if a person comes from a country that does not generate a high number of refugees, it is likely that the person will not face persecution in that country either (Hunt, 2014, 502). At the beginning of the 1990s, the number of applications for international protection increased rapidly, and the ministers of the Member States adopted the so-called London Resolution,[57] which laid the foundations for the concept of safe countries of origin.

The concept of safe country of origin

A country is a country of origin in relation to an applicant for international protection if the applicant is a national or stateless person and has previously resided in that country on a regular

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[54] Act No. 500/2004 Coll., Administrative Procedure Code, as amended. In the Czech Republic, the Administrative Procedure Code is the fundamental act for all administrative proceedings.

[55] See judgments of the Regional Court in Brno 41 Az 9/2021-36, 41 Az 12/2021-34, 22 Az 24/2021-38, 22 Az 36/2021-28 and 41 Az 21/2021-42.

[56] See the cited judgments of the Supreme Administrative Court 10 Azs 537/2021-31, 6 Azs 306/2021-49, 1 Azs 36/2022-31, 9 Azs 13/2022-32, 4 Azs 324/2021-46, 8 Azs 55/2022-25, 5 Azs 86/2021-33, 5 Azs 212/2020-44 and 5 Azs 14/2022-25.

[57] Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution"), points 6–8.

basis.[58] The criteria that a safe country of origin must meet are contained in Annex I to the Procedural Directive, which follows on from art. 37(1) thereof. According to the Annex, a country is considered to be a safe country of origin if it can be demonstrated, on the basis of the legal situation there, the application of the law within the democratic system and the general political situation, that it is free from persecution as referred to in art. 9 of the Qualification Directive, torture or inhuman or degrading treatment or punishment and the threat of arbitrary violence in the event of international or internal armed conflict. This assessment shall take into account, inter alia, the extent to which protection against persecution or ill-treatment is provided through:

a) the relevant laws of the country and how they apply;
b) observance of the rights and freedoms set out in the ECHR or the International Covenant on Civil and Political Rights or the Convention against Torture, in particular those rights which cannot be derogated from under art. 15(2) of ECHR;
c) observance of the principle of non-refoulement under the Geneva Convention;
d) a system of effective remedies against violations of these rights and freedoms.

If the applicant comes from a country designated as safe, they still have the opportunity to provide the State with compelling reasons why that country is not safe in relation to them and the concept cannot be applied.[59] When taking into account the *de facto* protection of human rights in countries of origin, Member States rely in particular on information from other Member States, the European Asylum Support Office, the Office of the United Nations High Commissioner for Refugees, the Council of Europe and other relevant international organizations.[60] In the light of the above, it can be concluded that both aspects of mutual trust apply here – both formal trust and trust *in concreto* are assessed. The Procedural Directive does not contain, mainly for political reasons (ECRE, 2015, 2), a list of countries that can be considered safe countries of origin. However, in the framework of the implementation of the Procedural Directive into national law, some Member States have proceeded to draw up their own national lists of countries they consider safe countries of origin. These national lists, however, contain derogations that could result in countries being judged as safe or otherwise in quite different ways by Member States. The main differences in such national systems include, for example, whether States differentiate the definition of persecution in the country of origin according to the gender of the applicant or which Member State authority is competent to issue such lists (AEDH et al., 2016, 6). In addition, there are states in the European Union that do not apply this concept at all (e.g. Spain, Italy, Poland, and Sweden) (Orav, Apap, 2017, 3). In view of this, and also in response to the refugee crisis in Europe, a proposal was therefore made by the European Commission in 2015 to issue a regulation harmonizing this area and creating a common list of safe countries of origin for Member States (European Commission, 2015). However, this proposal was not implemented and was eventually withdrawn in 2019 (European Commission, 2019).

Procedural consequences

If the applicant for international protection comes from a safe country of origin, the state then considers the application to be unfounded within the meaning of art. 32(2) in conjunction with art. 31(8)(b) of the Procedural Directive. The Member States are thus not obliged to decide on

[58] Art. 36(1) Procedural Directive.

[59] Art. 36(1) Procedural Directive.

[60] Art. 37(3) Procedural Directive.

the merits of the application for international protection, since it is presumed that the applicant could have been granted protection by his home state (Boeles et al., 2014, 280). Where Member States apply the concept of safe countries of origin, this practice is also mirrored in procedural terms – states then examine the specific application in an "accelerated procedure", but are still obliged to follow the principles and principles set out in Chapter II of the Procedural Directive.[61] In contrast to the previous arrangement, under art. 14 of the Procedural Directive, applicants are guaranteed the opportunity to participate in a personal interview on their application, where they can also present compelling reasons why their country of origin cannot be considered safe in their case. If the applicant does so, the state must then refute the applicant's claims, otherwise it would violate the principle of non-refoulement by returning the applicant.[62] According to the European Association for the Defence of Human Rights (AEDH), such accelerated procedures do not provide applicants with sufficient procedural guarantees that their application will be considered individually; furthermore, they can violate the principle of equality before the law, as applicants may have unequal (procedural) rights depending on their origin (Orav, 2021, 3, 7). The CJEU[63] has also commented on such criticisms, according to which the acceleration of the international protection procedure does not discriminate against applicants according to their country of origin, but only if they are allowed to exercise all the rights that EU legislation grants to applicants under the ordinary procedure.

Ukraine as a safe country of origin in the Czech Republic

With the entry into force of Decree No. 68/2019 Coll., which amended Decree No. 328/2015 Coll., Ukraine was added to the list of safe countries of origin regulated by Decree No. 328/2015 Coll., which implements the Asylum Act and the Act on Temporary Protection of Aliens, with the exception of the Crimea peninsula and parts of the Donetsk and Luhansk regions under the control of pro-Russian separatists (Article I of the amending Decree, § 2, point 24 of the Decree). Thus, as of 23 March 2019, the Czech Republic considered most of Ukraine to be a safe country of origin. Next, the article will focus on how the administrative courts have treated this fact after 24 February 2022.

The amending Decree entered into force on 23 March 2019. For the Ministry, this meant a change in the procedure for applications for international protection submitted as of that date by those Ukrainians coming from the part of Ukraine defined in the Decree as safe (i.e. except for the above-mentioned Crimea peninsula and the parts of the Donetsk and Luhansk regions under the control of pro-Russian separatists). In accordance with art. 16(2) of the Asylum Act, it is necessary to assess whether the applicant has rebutted the presumption of safety in their case – i.e. whether they have demonstrated that Ukraine cannot be considered a safe country of origin in their case – before examining the merits of their application.[64]

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[61] Art. 31(8)(b) Procedural Directive.

[62] *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008), paragraph 129.

[63] Judgment of 31 January 2013, *H.I.D. and B. A v Refugee Applications Commissioner and Others*, C-175/11, EU:C:2013:45, points 74 and 75.

[64] § 16(2) of the Asylum Act reads: An application for international protection shall also be rejected as manifestly unfounded if the applicant for international protection comes from a state which the Czech Republic considers to be a safe country of origin, unless the applicant for international protection proves that in his/her case this state cannot be considered such a country.

The material conditions for determining that a country of origin is safe are set out in Annex I of the Procedural Directive. According to the Directive, a country is considered a safe country of origin if it can be demonstrated, "*on the basis of the legal situation there, the application of the law within the democratic system and the general political situation, that it is free from persecution as referred to in Article 9 of the Qualification Directive, torture or inhuman or degrading treatment or punishment and the threat of arbitrary violence in the event of international or internal armed conflict."* The substantive conditions are transposed into Czech law by § 2(1)(k) of the Asylum Act, which must be interpreted in a euroconformist manner. According to this provision, the safe country of origin is the state "*of which the alien is a national or, in the case of a stateless person, the state of last permanent residence*,"

1. in which persecution, torture or inhuman or degrading treatment or punishment and the threat of arbitrary violence on account of international or internal armed conflict are generally and systematically avoided,
2. which its citizens or stateless persons do not leave for reasons referred to in § 12 or 14a,
3. which has ratified and complies with international human rights and fundamental freedoms treaties, including standards on effective remedies; and
4. which enables the activities of legal entities that monitor the human rights situation.

The Regional Court in Brno stated shortly after the invasion that one of the material conditions, namely that there is no threat of arbitrary violence on the territory of the state in the event of an international or internal armed conflict, is no longer met by Ukraine with regard to the Russian-Ukrainian war (judgment of 2 March 2022, 41 Az 9/2021-36).

The conclusion that this security criterion is no longer fulfilled in the current situation was confirmed by the Supreme Administrative Court shortly after the outbreak of the conflict, for example, in judgments of 7 April 2022, 4 Azs 324/2021-46 and 8 Azs 55/2022-25. In subsequent case law, the Supreme Administrative Court has held that Ukraine can no longer be considered a safe country of origin in all cases where a Ukrainian's application was considered manifestly unfounded within the meaning of § 16(2) of the Asylum Act.

Finally, the author adds that, formally, the Czech Republic still considers Ukraine, with the exception of the Crimea peninsula and parts of the Donetsk and Luhansk regions under the control of pro-Russian separatists, to be a safe country of origin, as Decree 328/2015 Coll. has still not been amended. At the moment (more than a year after the start of the invasion), a change in the decree is still being prepared to remove Ukraine from the list of safe countries of origin.[65]

Temporary protection is a type of international protection

Finally, the author considers it appropriate to draw attention to another judgment of the Czech Supreme Administrative Court,[66] in which the Supreme Administrative Court dealt with the institution of the temporary protection of Ukrainian refugees in connection with the procedure of the responsible authorities (in this case, the Regional Assistance Centre for Ukraine).[67] In that

[65] Draft Decree amending Decree No. 328/2015 Coll., implementing the Asylum Act and the Act on Temporary Protection of Aliens, as amended by Decree No. 68/2019 Coll. Online: https://odok.cz/portal/veklep/material/KORNCP59PK1T/.

[66] Judgment of the Supreme Administrative Court of 2 February 2023, 10 As 290/2022-30.

[67] Regional Assistance Centres for Ukraine are centres coordinated by the Ministry of the Interior and operating in every regional town of the Czech Republic. Their primary task is to provide assistance to persons fleeing the armed

judgment, the Supreme Administrative Court dealt with two essential issues, namely whether the court proceedings concerning temporary protection can be regarded as a matter of international protection pursuant to § 35(5) CoAJP[68] and whether the alien can therefore be represented by the Organization for Aid to Refugees in such proceedings.[69] In this judgment, the Supreme Administrative Court answered the first question in the affirmative, which conditioned the affirmative answer to the second question, that temporary protection should be understood as a type of international protection within the meaning of § 35(5) CoAJP.

As indicated above, the Supreme Administrative Court first of all reproached the Regional Court for relying solely on national (Czech) law in determining whether temporary protection can be included under international protection. The concept of international protection in § 35(5) CoAJP must be defined primarily in the light of European Union law (and primary law at that). In particular, the Supreme Administrative Court constructed its reasoning as follows.

According to the Supreme Administrative Court, temporary protection can be most generally characterized as "*a flexible instrument of international protection, which provides refuge for a limited period of time to persons fleeing a humanitarian crisis*" (Ineli-Ciger & Skordas, 2019).[70] The contemporary European concept of temporary protection has its origins as consequence of the war in the disintegrating Yugoslavia. Following the experience of providing temporary shelter to refugees from the countries of the former Yugoslavia, it was the EU Member States that agreed in July 2001 to adopt Directive 2001/55/EC on temporary protection[71] and transpose it into their national legislation. This is probably the only international formalized temporary protection regime to date.

However, the concept of "international protection" is already dealt with in primary EU law, which places all the regimes compared by the Regional Court (asylum, subsidiary protection and temporary protection – author's note) in one system and gives them a common basis. How-

conflict in Ukraine with applications for temporary protection and to provide accommodation in cases where they have no accommodation of their own.

[68] § 35(5) CoAJP: If a party seeks judicial protection by bringing an action in the matter of international protection, a decision on administrative expulsion, a decision on the obligation to leave the territory, a decision on the detention of a foreigner, a decision on the extension of the duration of the detention of a foreigner, as well as other decisions resulting in the restriction of the personal freedom of a foreigner, he or she may also be represented by a legal person established on the basis of a special law, whose activities, as specified in the statutes, include the provision of legal assistance to refugees or foreigners. The legal person shall be represented by an authorised employee or member of the legal person who has a university degree in law required by special regulations for the practice of the legal profession. The provisions of this paragraph on the representation of a foreigner by a legal person shall also apply in cases where a directly applicable European Union regulation on the free movement of workers applies.

[69] The Organization for Aid to Refugees is a non-profit, non-governmental and humanitarian organization that has been operating in the Czech Republic since 1991. The main activities of the organisation include providing free legal and social counselling to applicants for international protection and other foreigners in the Czech Republic, organising educational programmes for the general and professional public and other activities aimed at supporting the integration of foreigners. Online: https://www.opu.cz/en/.

[70] The reference now used was also used by the Supreme Administrative Court in its judgment.

[71] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L 212, 7.8.2001, p. 12–23.

ever, this definition, which the Regional Court otherwise rejected as irrelevant, is crucial to the present case.

The basis for the Common European Asylum System is currently (i.e. after the adoption of the Lisbon Treaty) art. 78 of the TFEU, which lists, among other things, the various measures that the EU legislator can take in this area, including the legal basis for a common regime of temporary protection for displaced persons in the event of a mass influx, in art. 78. Before that, however, art. 78(1) TFEU states that the European Union shall establish a common policy on asylum, subsidiary protection and temporary protection with a view to granting any third-country national in need of international protection an adequate status and ensuring respect for the principle of non-refoulement. This policy must be consistent with the Geneva Convention, the New York Protocol and other relevant treaties. Art. 78(1) TFEU makes no substantive distinction between asylum, subsidiary protection and temporary protection. On the contrary, art. 78(1) TFEU can more logically be seen as conceptualizing the relationship between the various regimes and the concept of international protection in precisely the opposite way to that of the referring court, in the sense that certain persons are in need of 'international protection' and are consequently granted a certain status, whether in the form of asylum, subsidiary protection or temporary protection. Similarly, the implementation of the Geneva Convention and the New York Protocol and the guarantee of the principle of non-refoulement are intended for all regimes, asylum, subsidiary and temporary protection (after all, this is explicitly confirmed, for example, in recital 3 of the Qualification Directive).

This is also how some Advocates General have described the relationship between international protection and its various forms in cases concerning the Common European Asylum System. For example, the opinion of Advocate General Bot: "*Protection deriving from refugee status must therefore, in principle, be considered first, since the EU legislator has included other forms of international protection considered 'subsidiary', 'complementary' or 'temporary' only to supplement the standards laid down in the [Geneva] Convention*".[72] Advocate General Mengozzi's opinion is similar: "*In the Qualification Directive system, refugee status and subsidiary protection status are specifically regarded as two distinct but closely linked components of the concept of international protection. Such an integrated approach makes it possible to interpret the provisions of that directive, supplemented by the regime introduced by Directive 2001/55/EC, which provides for temporary protection in the event of a mass influx of displaced persons [...], as a normative tendency towards a comprehensive system capable of covering any situation in which a third-country national or a stateless person who cannot be granted protection by his or her country of origin claims international protection on EU territory*."[73]

It may also be added that the legal basis for the adoption of the Temporary Protection Directive was art. 63(2)(a) and (b) of the Treaty establishing the European Community (as it stood after the adoption of the Treaty of Amsterdam). This required the Council to adopt measures concerning refugees and displaced persons in terms of minimum rules for the temporary protection of displaced persons from third countries who are unable to return to their country of origin and of persons who are in need of international protection for other reasons (point (a)) and to promote a balanced distribution of the efforts involved in the reception of refugees and displaced persons and the consequences thereof among the Member States (point (b)). This provision was the only place where the EC Treaty referred to 'international protection' (the field of

[72] Opinion of the Advocate General of 7 November 2013, *H. N.*, C-604/12, EU:C:2013:714, point 44.

[73] Opinion of the Advocate General of 18 July 2013, *Diakité*, C-285/12, EU:C:2013:500, point 60.

asylum, on the other hand, was dealt with separately in the first paragraph of art. 63 of the EC Treaty, and it was only on the basis of art. 63(2)(a) of the EC Treaty, which referred primarily to 'temporary protection', that the concept of subsidiary protection in the original Qualification Directive came into being.[74]

Supplementary protection and temporary protection were thus founded on the same basis; in fact, supplementary protection was itself first "temporary protection". The separate competence clauses for subsidiary and temporary protection were only introduced by art. 78(2) TFEU, after all the provisions envisaged had been 'wrapped up' in the single common policy described in art. 78(1) TFEU.

Finally, it can also be pointed out that even before the Lisbon Treaty came into force, the Supreme Administrative Court pointed out that the European asylum system cannot be reduced to a set of individual asylum directives. The individual provisions cannot be viewed in isolation, but must be interpreted in their interconnectedness (for example, the judgment of the Supreme Administrative Court of 15 August 2008, 5 Azs 24/2008-48). Although the Temporary Protection Directive is a somewhat "special relative", it is still part of the same system (cf. recital 1 of the Directive).

Asylum, subsidiary protection and temporary protection are therefore much more intertwined than their definitions and formal separation in secondary law (and possibly their national implementation) suggest. For this reason alone, it is appropriate to include temporary protection matters (albeit so far granted only in a single case on the basis of EU Council Implementing Decision 2022/382) under the concept of an international protection issue. This is because, on the one hand, the Supreme Administrative Court gives priority to an interpretation of procedural rules which more effectively protects the rights of individuals (cf. resolution of the Extended Chamber Nad 202/2020) and, on the other hand, it places all the regimes of the Common European Asylum System side by side and does not make unjustified distinctions between them.

The Directive foresees that temporary protection will be applied in particular when a mass influx of persons threatens to overwhelm asylum systems (cf. the definition in art. 2 of the Directive quoted above). While it will then be formally possible to lodge an application for asylum or subsidiary protection (cf. art. 17(1) of the Directive), the Directive foresees that these applications will not be processed within a meaningful time (cf. art. 17(2) of the Directive: the examination of any asylum application pending before the expiry of the period of temporary protection is completed after the expiry of that period). In such a situation, temporary protection will effectively replace the protection that would otherwise be provided by the "standard" asylum system.

For all these reasons, the Supreme Administrative Court concluded that the concept of international protection as used in § 35(5) CoAJP must therefore also include temporary protection. It may be added that the logic of the above interpretation naturally also applies to other rules of CoAJP that deal with matters of international protection, i.e. § 31(2) CoAJP (decision of a single judge in the case of an action against a decision) and § 56(3) CoAJP (priority decision-making in matters of international protection).

[74] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. OJ L 304, 30.9.2004, p. 12–23.

Conclusion

In this article, the author focused on the decision-making practice of the Czech Supreme Administrative Court (and partly of the regional courts deciding in administrative justice) in relation to the basic institutions of asylum law and the change of the security situation in Ukraine caused by the Russian invasion. In particular, the question of breaching § 75(1) and (2) , § 109(5) CoAJP, the possibility of considering Ukraine as a safe country of origin and the status of temporary protection within the framework of international protection were answered, placing these issues in an international or European context. On the basis of the examined decisions of the regional courts and the Supreme Administrative Court, the author concludes that the Czech Supreme Administrative Court is basically consistent in relation to the war in Ukraine and the conclusions of the regional courts are also consistent with its views. At the same time, these conclusions are consistent with the international obligations of the Czech Republic. Moreover, the Supreme Court of Justice took the Russian-Ukrainian conflict into account immediately after its outbreak, issuing its pilot judgment 10 Azs 537/2021-33 on 10 March 2022, less than three weeks after the outbreak of the conflict.

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Thoughts on the meaning content of the principle of local autonomy

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Abstract

Autonomy is a fundamental principle in many areas of public law, and particularly in relation to local self-government. The term itself is widely used, sometimes too widely. But what are the conceptual foundations of this principle? What are the components of this principle? Within the framework of this paper, I will examine some aspects of the principle of autonomy, without claiming to be exhaustive, in an attempt to shed light on the theoretical significance of the principle's role in relation to local self-government. The aim of this study is neither to describe current trends in the field of autonomy, nor to explore the reasons for the obstacles to its application. Instead, the study will seek to explore the concept on a dogmatic basis in order to make more effective reference to its components in the context of some of the current issues that can be associated with autonomy. In addition to examining the components, the study will seek to highlight the importance of the correct use of the concept in the protection of the right to local self-government.

Keywords

autonomy, self-regulation, local self-government, legal protection, devolution

1 Introductory thoughts

Within society there can be different more particular communities. Such elementary communities are, among others, the family, the association, the scientific society, the church or the political party. Even if a national or social community has reached a higher degree of unity, it cannot eliminate the organising power of all these. These communities act within the framework of their autonomy, the extent of which is determined by the sovereign State, to varying degrees according to the nature of each community (Lapsánszky et al., 2017, 173).

The premise of the original conception of any form of self-government was that all participants have the same preferences. This assumption of homogeneity collapsed in the recent centuries, nevertheless, a weaker notion is logically coherent: A collectivity governs itself when decisions implemented on its behalf reflect the preferences of its members (Przeworski, 2010, 17–18). István Ereky also points out that self-government is only possible for public bodies for which the statutory law explicitly recognises the right of self-determination of the depositaries. This right of self-determination extends only to their independent powers, they shall not be giv-

en instructions in that respect (Ereky 1939, 376–377). József Petrétei stresses that the recognition of the state is also necessary because the existence of autonomies implies the possibility of fragmentation, but a democratic state must grant the request for autonomy in accordance with democratic political values, while certain reasonable limits must be constitutionally enshrined (Petrétei, 1995, 7).

This is no different for local self-governments, which, in addition to their many similarities, are differentiated from other types of self-government (public bodies, civil organisations) by a number of important features. Among these, Ulrich Scheuner stresses that local self-government is differentiated from self-government organised on a professional-occupational basis primarily by its democratic-political basis and its general powers (Scheuner, 1981, 17).

The principle of autonomy is therefore fundamental in many areas of public law, and particularly in relation to local self-government. The term itself is widely used, sometimes too widely. But what are the conceptual foundations of this principle? What are the components of this principle?

Without autonomy there is no self-government. The application of this principle is essential for self-government, but it is not only linked to local self-government. Freedom within the state, within certain limits, is made up of a number of components and unfortunately is often used as a synonym for self-government, which makes it very difficult to understand its true meaning.

Constitutions rarely refer explicitly to the principle of autonomy, and even more rarely to local autonomy,[1] but in fact any regulation that in some way gives local self-governments powers that they can exercise under their own responsibility within the framework of an Act can be considered autonomy.[2] It is also reflected in this form in the European Charter of Local Self-Government[3] (hereinafter "Charter").[4]

Within the framework of this paper, I will examine some aspects of the principle of autonomy, without claiming to be exhaustive, in an attempt to shed light on the theoretical significance of the principle's role in relation to local self-government. The aim of this study is neither to describe current trends in the field of autonomy, nor to explore the reasons for the obstacles to its application. Instead, the study will seek to explore the concept on a dogmatic basis in order to make more effective reference to its components in the context of some of the current issues that can be associated with autonomy. In addition to examining the components, the study will seek to highlight the importance of the correct use of the concept in the protection of the right to local self-government.

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1 This research was carried out using the European Constitutional Communication Network (ECCN) database, within the framework of the research project of the Comparative Constitutional Law Research Group at the National University of Public Service, with the support of the AURUM Lawyers' Club for Talented Students Foundation. See Constitution of the Republic of Croatia, Article 137; Constitution of the Italian Republic, Transitional and final provisions IX; Constitution of the Portuguese Republic, Article 6 (1); Constitution of Romania, Article 73 (3), Articles 120-121; Spanish Constitution, Article 140, Article 141 (2).

2 See Federal Constitutional Law of Austria, Article 118; Constitution of the Czech Republic, Article 104; Constitution of the Republic of Estonia, Articles 154 and 157; Constitution of Greece 102 (2); Constitution of the Republic of Poland, Articles 16 (2) and 166 (1); Constitution of the Republic of Lithuania, Article 120 (2); Basic Law for the Federal Republic of Germany, Article 28 (2); Constitution of the Slovak Republic, Articles 64/A and 65 (1); Constitution of the Republic of Slovenia, Article 140 (1).

3 European Charter of Local Self-Government; Strasbourg, 15. X. 1985.

4 See Preamble, Article 9 (1) and (5), Article 11.

2 The conceptual uncertainty of the principle of autonomy

"Etymologically, the term autonomy comes from two Greek words: auto (meaning 'self') and nomos (meaning 'law, rule'). Thus, the original meaning of the word autonomy referred to the right to make own laws." (Miklósné, 2010, 75). Móric Tomcsányi also reminds us that this term means self-legislation in a strict grammatical sense, but in a broader sense it means the right of autonomous provision (mostly autonomous rule-making). However, its common and academic use has broadened, and is generally used to describe the autonomy of regulation (as opposed to the power of governmental authority to intervene) (Tomcsányi, 1926, 242). Because of the expanded meaning, researchers have come to quite different conclusions along different research lines, and so the definitions are very diversified. According to Gábor Kecső, the diversity in the meaning of autonomy is mainly due to the different features of the subject areas under investigation (Kecső, 2016, 79). According to Ilona Pálné Kovács, this is a historically developed democratic value that has been conserved by modern democratic states. There are several approaches to it, but in a very pragmatic way, she argues that local autonomy is in practice nothing more than holding certain capacities to serve citizens locally (Kovács, 2008, 14). Adrián Fábián focuses on the fact that the essence of autonomy is independence, i.e. that local self-government operates autonomously within the frameworks of the Acts (which cannot be formal, it must provide real freedom of action) (Fábián, 2016, 38). Gábor Kecső points to self-determination, saying that autonomy means the relative freedom of local self-government to define its goals and use its instruments. Self-determination is not the same as independence because, for example, the Constitutional Court is independent of the government, but it does not set its own goals and instruments, but the Act does (Kecső, 2016, 100). István Hoffman stresses the separation, i.e. autonomy typically means separation from the central state power. As local self-governments are state bodies, their separation is relative, and its extension and guarantees are determined by the public law of the state (Hoffman, 2015, 40). According to Gordon L. Clark, autonomy is based on the power of immunity and the power of initiative. The former protects against interference by the authority of higher tiers of the state, while the latter refers to the power to regulate and legislate in their own interests. The American reality, he argues, is very far from this, local governments are the bureaucratic extensions of state governments (Clark, 1984, 205). Zoltán Magyary places the question of autonomy in a historical context, according to him, county nobility never considered autonomy as an original right of the county to manage its own affairs independently, but always as a piece of state functioning, a way of exercising executive power (Magyary, 1930, 165), limited by the law, which was only controlled by the legislature and the courts (Magyary, 1942, 63). Jürgen Backhaus sees local autonomy as about democracy, subsidiarity and fiscal responsibility (Backhaus, 2012, 1). In practice, he sees autonomy as a value category, which Marianna Nagy also emphasises, but she stresses that autonomy is not a value in itself, but a value if and because it is possible to carry out a task better, more effectively, more democratically, more efficiently and more cheaply. If this is done, she believes that autonomy should be preserved, and if not, a correction should be made (Nagy, 2017, 26).

István Bibó basically saw the possibility of separation from the concentration of power in increasing the autonomy of individual fields (e.g. science, art, education). The example of this, in his view, is the historically successful independence of the judiciary (Bibó, 1982, 557–558). Andrea Miklósné Zakar tries to bring together several theoretical and conceptual approaches. According to her, autonomy is the empowerment of a community with a system of institutions with some kind of representative or even administrative powers. These powers may be linked

to the whole or part of the territory inhabited by the community, but they must also encompass all individuals belonging to or wanting to belong to the community (Miklósné, 2010, 77).

The definitions may seem very different, but they generally summarise different aspects of autonomy. The reason is that this principle necessarily deals in some way with issues related to the right to decide on one's own affairs and to implement that decision autonomously.

Generally it can be said that autonomy is the essence of self-government, that self-government is based on it, its organisational expression (Kiss, 2016, 427). A separated principle, but because of its very broad meaning, it is also a framework for all the other principles that apply to local self-government. Some authors use it explicitly as a synonym for self-government, which makes it even more difficult to explain this principle. Since it is the essence of self-government, it is natural that it has been the focus of interest for subnational communities for centuries. List stressed the importance of autonomy, the right to enact municipal regulations and to impose taxes, which should be exercised through elected municipal councillors, as early as the beginning of the 19th century. Moreover, contrary to Lorenz von Stein's position, he did not consider autonomy to be important only for pragmatic economic reasons, but as an important first step towards constitutional government, which could be achieved through multi-level government (Chaloupek, 2012, 5–9). Ann Bowman and Richard Kearney point out that although local governments generally want increased autonomy, state governments have shared their policy-making sphere with reluctance, frequently prefer to tell them how to solve the problems (Bowman & Kearney, 2010, 329). According to Christopher L. Eisgruber, local autonomy is at once essential and dangerous to democracy, because local governments are indispensable mechanisms for securing participation, but on the other hand, they cannot by themselves provide people with the capacity to make effective choices (Eisgruber, 2001, 91). What is certain is that local autonomy depends on many elements: historical circumstances, constitutional structure, local resources, forms of local-national relations, the strength of social groups, their involvement in the local community, etc. (Vetter, 2002, 114). The members of an autonomous community may be linked by the same occupation, the same activity, the same culture, the same nationality or the same geographical locality. These autonomous associations operate on the principle of self-government and their autonomy is derived, i.e. they need to be recognised by law (Kovács et al., 2018, 7).

There is also no doubt that autonomy is not the same as sovereignty. Andreas Ladner and his colleagues argue that it occurs only because a national or regional legal framework grants it. Thus, it is necessarily limited, autonomy does not cover the defence of local governments of which the actions do not conform to the legal framework. Since the autonomous body is part of a larger political system, the principle of autonomy must be reconciled with the principle of unity (Ladner et al., 2019, 175–176). I, myself, agree that autonomy needs to be granted at a higher level of legislation if it is to be achieved. There are different approaches as to why this autonomy should be granted by the regulation. Consequently, it can be approached from two directions. According to the derivative theory, autonomy is created by a decision of another (higher) power. In opposition, the origins theory holds that the existence of autonomy is only recognised by the higher power. It is essentially a choice between a natural law approach and a legal positivist approach (Kecső, 2016, 79–80). There is no doubt that the two approaches are very different, but the result is a kind of freedom. This freedom can be directed against something ("freedom from") or in favour of something ("freedom to"). In the former sense, local self-government may claim protection against unauthorised interference, while in the latter sense it may represent local initiative to achieve community goals (Ladner et al., 2019, 12–24).

Although autonomy is seen by many authors practically as a donation of the state, in my view the main goal is not to confirm or refute this, but to understand the original content of the principle. I think that the understanding of the principle is made more and more difficult due to the fact that its meaning has expanded enormously over the centuries. The use of it has become too general, and it can be used for everything that concerns local self-governments. I would not see any particular problem with this extension of meaning in itself, but it is important to note that it means that the concept of autonomy can be seen in two ways. It can be a separated principle that determines the content of self-government, but it can also be an outcome that is a result of other principles.

Looking at autonomy as a result, it is perhaps neither the most expressive nor the most fortunate to build the essence of self-government on the expanded and diversified principle of autonomy. However, it is possible (and indeed necessary) to build on autonomy in the narrow (original) sense.

The common link in the positions described above is freedom within the framework of the law, the right to decide on their own affairs and the autonomous implementation of their decisions. This requires the existence of powers through which this can be exercised. In full agreement with István Ereky, what is essential is that they should have powers which they can exercise with relative independence. (Ereky, 1939, 372) Based on this principle, autonomy sets out requirements that cannot be derived from other principles. In theory, the principle of decentralisation is very similar to it, so it is necessary to separate it from decentralisation. This also requires going back to the original meaning of autonomy.

3 Autonomy and self-regulation, i.e. autonomy in the narrow sense

As I have already noted above, autonomy in its original meaning refers to the right to self-regulation. In the works of German authors, this original element is very prominent, which is important because it helps to distinguish this principle from decentralisation.

Normative principles justify that local self-government has to be free to make regulatory decisions. This implies that local self-government must adopt a democratic structure, that it must find the resources to undertake any service collectively wished to be provided for itself, that it ought to represent the views of its inhabitants to other agencies, and finally that higher levels of government must respect its integrity and morally legitimate activities (Ladner et al., 2019, 10). According to Hans Peters, autonomy is the right of a separate community from the state to create law for itself. For local communities, it means that they can enact generally enforceable norms in their own sphere of activity. The dominant opinion is that autonomy and self-government (or more precisely self-administration,[5] which I translate in this section for the clarity of the text) are two concepts of different natures. He agreed with Paul Laband, who said that the concepts of self-administration and autonomy are similar and often interlinked (Peters, 1926, 37–38). Among contemporary authors, Reinhard Hendler also stresses that, although autonomy and self-administration are commonly regarded as synonymous concepts, but autonomy in relation to public institutions is really about self-regulation based on authorisation of an Act (Hendler, 2007, 12).

Autonomy, as described above, therefore in legal sense necessarily implies legislative power. Self-administration, however, is in itself only administration and does not include the power

[5] The German word ‘Selbstverwaltung’ is usually translated (and used in this sense) simply as ‘self-government’, but it literally means self-administration.

to legislate. The two concepts are linked (in German terminology: Autonomie zur Selbstverwaltung, i.e. autonomy for self-government) and cover the possibility of administrative legislation. The two concepts are therefore opposed, but complement each other well (Peters, 1926, 37–38). According to Paul Laband, in the past, both concepts meant the freedom of a person to organise his legal relations of his own free will. Autonomy, in his view, is an ability to will and act recognised by an Act. It is opposed to sovereignty, since, in the context of self-regulation, the community can only carry out what it has been authorised by the higher community to carry out (in contrast, the sovereign power has no such limits). Autonomy as a legal concept therefore does not imply sovereign power, it must respect the limits set by the sovereign, it cannot be in contradiction with the Acts issued by the sovereign (Laband, 1876, 107–108). The cited German authors (and many others) thus argue that Selbstverwaltung (self-government in general translation) in itself really means only autonomous administration, to which autonomy adds the possibility of autonomous regulation.

The Hungarian term 'önkormányzás' has more the meaning of the German 'Selbstverwaltung' with the addition of autonomy. In other words, in Hungary we only call a body self-governing if it has some autonomy of regulation (Selbstgezetzgebung/Selbstregierung), not only autonomy of the executive in the narrow sense.[6] If a body does not have regulatory autonomy, the designation referring to autonomy should be accompanied by a restrictive expression (e.g. "autonóm államigazgatási szerv", i.e. autonomous administrative agency). Therefore, the two concepts of autonomy are certainly not that far apart, but in Hungary in general, researchers focus more on autonomy. Maybe it could be said that the concept of autonomy without an adjective necessarily includes regulatory autonomy.

The English term local self-government fairly well reflects the Hungarian term 'helyi önkormányzat', although it is interesting that it only exists in the legal English language. It is no wonder that in legal terminology (as the English counterpart of the French autonomie locale) this is the intermediary term, because its content best captures what the concept of local self-government is intended to express. It is therefore easy to see that autonomy and self-government, and autonomy and decentralisation, are not the same concept, but that autonomy is necessarily part of self-government. Finally, it should be noted that it also follows from the Charter that self-government is a combination of administrative and regulatory activity.

Since autonomy also builds on the principle of decentralisation, it is important to distinguish it from the principle of decentralisation, which for the reasons stated above is only a kind of synthesis of what is described there. Móric Tomcsányi stresses that, while autonomy implies autonomy to initiate provisions, in the case of decentralisation it is possible to have a higher instruction (but in that case the body is not obliged to implement the instruction, which is considered illegal, and its decision is also a final one) (Tomcsányi, 1926, 242). Sabine Kuhlmann and her colleagues formulate this as autonomy is the difference between administrative and political decentralisation. In the former case, local elected representatives are not given autonomous decision-making and control competences with regard to the allocation of local tasks. In this case, although local self-government decides autonomously on the specific organisation of the task, it still acts as a representative of the State or the authorities, i.e. it remains under the legal and professional control of the State and under the control of the professional quality of the performance of the task. Political decentralisation, however, means that a locally elected

[6] It is perhaps for this reason that the term self-government, used in an English-language context but not primarily for British local government, is more expressive.

body takes full responsibility for autonomous decisions on planning, financing and directing, and the legitimacy of the activities of local bodies is only subject to ex-post control by the state (Kuhlmann et al., 2011, 22–23).

4 Specific areas of autonomy

There is no doubt that a large part of the research on local self-government is related to the components of autonomy and their limitations. It is no wonder that after the change of regime, even in the Hungarian Constitutional Court the key concept in local self-government cases has undoubtedly become the principle of autonomy. (Sólyom, 2001, 774). The nature, essence and form of autonomy may be different from one era and state to another. However, certain elements of its content remain constant. (Siket, 2020, 23) Of these, financial autonomy is especially important, since without this, the autonomy of local self-government is only illusory (Kecső, 2016, 97). In this chapter, however, I discuss this issue only at the general level, my goal being merely to identify the different areas.

In a practical approach, the autonomy has four aspects: organisational autonomy (self-organisation, creation of autonomous organisations to manage its own affairs), regulatory autonomy (self-regulation, decision-making in its own right; direct or indirect participation of members in decision-making), administrative autonomy (autonomous management of its own affairs) and economic-financial autonomy (access and autonomous use of funds in connection with its own affairs) (Csalló, 2014, 16). Andreas Ladner and his co-authors take a very detailed look at the components of autonomy, dividing the approaches and constitutional aspects of local autonomy into four sub-dimensions:

- Legalist approach: focuses on constitutional status and general competences. The legal framework and its constitutional protection are important.
- Functional approach: focuses on specific decision-making competences and functional responsibilities. To deliver services, local government must also have the capacities to carry them out. Autonomy is therefore linked to the financial resources local governments dispose of independently and their tax-raising possibilities.
- Organisational approach: the focus is on the autonomous creation and maintenance of an administrative apparatus, i.e. self-regulation. This is how a local political system can be created.
- The political approach to intergovernmental relations: the emphasis is on vertical relations, with central or regional control and access. The nature and extent of these influence autonomy (Ladner et al., 2019, 24–25).

Overall, the authors identify seven dimensions of local autonomy: legal autonomy (guaranteed status), policy scope (tasks to be performed), political discretion (ability to make decisions), financial autonomy (e.g. own resources, tax revenues, borrowing capacity), organisational autonomy (ability to organise own administration), non-interference (consist of the way supervision is organised) and access (ability to influence higher level decisions). Among these, political discretion, financial autonomy and legal autonomy are also considered cornerstones (Ladner et al., 2019, 333–334).

The functions and powers of local self-government have been historically developed in traditional democracies, but they are by no means immutable (it is no coincidence that in many states they are not even listed in the constitution) (Balázs, 2014, 314). What is certain is that all the decision-making and executive functions assigned to local governments reinforce the role of autonomy.

5 A specific approach: the devolution

Devolution is a specific British approach that seeks to regionalise within a system based on parliamentary sovereignty without dismantling sovereignty. It is close to decentralisation,[7] therefore it is logical to compare it with decentralisation, but in fact it is much more than that, ultimately leading to the realisation of municipal autonomy through the local reinforcement of political power. István Hoffman points out that the term devolution is used in British legislation to the specific transfer of powers and the new structure of the United Kingdom after 1997 (when the Scottish, Welsh and Northern Ireland parliaments and executive were established). It is in fact a specific federal structure (the above entities are clearly statehood entities) (Hoffman, 2017, 222). It can be stated that the devolution changes had a major impact, as a balance had to be found that structurally and functionally served the Kingdom's interests (without the specific state system, the balance could easily be disrupted) (Iván, 2015, 87). The emphasis on federal character is also important to distinguish it from the devolution that has been part of decentralisation in the narrower sense, which has strengthened local government units. This process started in 2008 (Hoffman, 2017, 222). This is significant because the concept of devolution has been increasingly used in British local government literature over the last decade or so. It seems as if authors are trying to explain the need for local government reform through the useful ideas of devolution theory. However, while István Hoffman writes about devolution as part of decentralisation, Colin Copus, Mark Roberts and Rachel Wall argue that devolution and decentralisation are separate and differing concepts, where devolution implies a substantial transfer of political power and autonomy as a result of a significant shift in the relationship between central and local government. In contrast, decentralisation describes only the transfer of authority to exercise functions, responsibilities, tasks and finances from one tier to another in accordance with national policy objectives and motives of political expediency within central government (Copus et al., 2017, 11). Robert Agnaroff also argues that devolution is a way of developing autonomy, or the transfer of power downward to intermediate or local political authorities. Devolution as self-rule tries to combine the promise of democracy with expected efficiencies of government, that are closer to the people affected by local decisions. Devolution is normally enabled by organic or basic nature central legislation and supporting regulations (Agranoff, 2004, 26, 29). John M. Cohen and Stephen B. Peterson have identified six normative requirements of devolution:

- the status of the specified unit must be granted,
- jurisdiction and functional boundaries must be clearly established,
- defined powers to plan, decide and manage specific tasks should be transferred to the units,
- it is necessary to establish of basic rules for interaction among units in the governmental system,
- need to be authorised to raise own-sources revenues,
- it is necessary to authorise for devolved units to establish and manage their own budgetary, accounting and evaluation systems (Agranoff, 2004, 29).

Devolution can occur by established units of highly centralized federal systems shifting power downward, through the recasting of unitary systems in a more federal direction, and by

[7] József Fogarasi, for example, uses the term devolution without much clarification, practically as a synonym for decentralisation (Fogarasi, 1997, 23–28).

unitary states transferring power to regions and localities. It is in many ways similar to the power sharing aspects of federation (e.g. autonomy may be guaranteed by the constitution), but also different (e.g. devolved regions usually possess no exclusive powers of their own) (Agranoff, 2004, 28).

In my reading, it seems that some British authors want to use the additional possibilities offered by devolution to move British local governments towards genuine self-government, but in fact they are talking about nothing more than increasing local autonomy. Colin Copus, Mark Roberts and Rachel Wall also note that this is an extremely difficult process, and that attempts at devolution in the UK have usually remained at the level of administrative decentralisation. Shift of power from the centre to the local level would be vital to renew local democracy. However, this requires that this change is organised from the bottom up by local communities. Without this, only the central government's objectives can be achieved, and it still has no trust in local government (Copus et al. 2017, 133–135).

6 The practical significance of local autonomy in the field of legal protection

A deeper understanding of the meaning and significance of autonomy is important from a practical point of view because of the legal protection of local self-government. It also helps to understand the limits of autonomy.

In my interpretation, issues regulated in Article 11 of the Charter fall within the scope of legal protection of local self-governments. According to this: *"Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation."* In this sense, the issues that I consider to fall within the scope of this group are the ones related to the autonomous exercise of powers.

In my view, the purpose of the legal protection of local self-governments is, that – in many respects – the local self-governments are in a subordinate position within the organizational hierarchy of the state.

The Charter assumes that the autonomy of local self-governments shall be guaranteed against the central public bodies (Szabó, 2005, 116). It is necessary to create the legal framework ensuring that central public bodies with a stronger power would not enforce their own political or professional preferences against the will of local communities with different political or professional beliefs.

The legal protection is indispensable for the protection of autonomy. The permanence of substantive independence is also essential for having autonomy; legal restrictions on local public affairs are only constitutional as long as they do not result in the complete hollowing out of independence (Patyi, 2013, 389).

The need to protect powers arises from the balance of power: it prevails primarily over the central executive power, but the legislative power has no room for maneuver either (notwithstanding the fact that autonomy only exists within the frameworks of the Acts), since it cannot hollow out powers protected by the Constitution. In fact, this creates the right to local self-government.

It is noteworthy, that in several states this protection is explicitly manifested in high standards. According to the Czech Constitution, for instance, the local self-government may submit

a constitutional complaint against an unlawful encroachment by the State,[8] and the Croatian Constitution also makes provisions for an investigation by the Constitutional Court if local self-government was violated.[9] Although at a lower level in terms of source of law, but the German legislation also contains similar provisions,[10] according to which municipalities and associations of municipalities may lodge a constitutional complaint based on the violation of the provision of the *Grundgesetz*[11] which stipulates that the right of local self-government shall be guaranteed to the municipalities. In Poland, the Constitution declares the need for jurisdictional protection of self-government,[12] and in other countries the Constitution entitles the Constitutional Court or other court to resolve conflicts of competence between the local self-governments and other public bodies.[13]

In Hungary, the framework of legal protection has been shaped by the practice of the Constitutional Court.

CC decision 3311/2019 (XI. 21.) specifically deals, among others, with the groups of powers enshrined in Article 32(1) of the Fundamental Law. In its decision the Constitutional Court stated that local self-governments (in addition to being parts of the unified state system) enjoy relative autonomy *vis-á-vis* central public bodies with regard to local public affairs, which is the essence of local self-governments; the most important elements of which are listed by Article 32 (1) of the Fundamental Law. Local self-governments are in a vertical position compared to the classical actors of division of powers; therefore the relationship between central public bodies and local self-governments is quite delicate.[14] Powers enshrined in the Fundamental Law should be interpreted as rights guaranteed in the Fundamental Law, because, in the event of their violation, the autonomy which the Fundamental Law intends to ensure is impaired.[15] The Constitutional Court has also explained that these powers provide protection especially against central bodies of the executive branch and against judicial decisions contradicting the Fundamental Law; meanwhile, if opposed to the legislative branch (since autonomy originally exists within the frameworks of the Acts) the measure of anti-Fundamental-Law actions can only be if these powers (or rights) are hollowed out.[16]

CC decision 8/2021 (III. 2.) further strengthened this doctrine. Specifically basing its decision on the provision of the Fundamental Law establishing autonomy, it stated as a constitutional requirement that although the Parliament may reduce the budgetary support of local self-governments (and in a state of danger, the Government may do so as well, in view of the special legal order rules), it may not hollowing out the functioning of local self-governments.[17] It further clarified the criterion of hollow out, stressing that an Act can limit autonomy, but

[8] Constitution of the Czech Republic, Article 87(1).

[9] Constitution of the Republic of Croatia, Article 129.

[10] Act on the Federal Constitutional Court, Section 91.

[11] Basic Law for the Federal Republic of Germany, Article 28.

[12] Constitution of the Republic of Poland, Article 165(2).

[13] See e.g. Constitution of the Republic of Bulgaria, Article 149(1).

[14] CC decision 3311/2019. (XI. 21.), Reasoning [31].

[15] Id. Reasoning [35].

[16] Id. Reasoning [36].

[17] CC decision 8/2021 (III. 2.), Operative part 1. (For a summary of the decision in English, see: https://bit.ly/3P1aoru)

cannot hollow out it). [18]

CC decision 3441/2022 (X. 28.) also stressed that the protection of property of local self-government is important mainly in the context that without property or with the partial deprivation of property, autonomy may be violated. In essence, property and its objects in the static sense are only the basic conditions for management, whereas the dynamic is the management, which is protected by Article 32 (1) e) of the Fundamental Law.[19]

7 Concluding thoughts

Autonomy is one of the most important characteristics of self-government, without it there can be no self-government. There is no doubt that much of the research on local self-government is related to the components of autonomy and their limitations. Although autonomy and self-government are considered by many to be synonymous concepts, I am convinced that no equivalence can be drawn between the two.

Autonomy is in fact (in a narrower sense) about self-regulation of public institutions based on empowerment of an Act. Autonomy is therefore the right of a community outside the State to make law for itself. Necessarily limited, autonomy does not protect action that does not conform to the framework of the Act. I agree with the idea that since the autonomous body is part of a larger political system, the principle of autonomy must be reconciled with the principle of unity (Ladner et al., 2019, 175–176). The common link between the very different views is the autonomy within the framework of the Act, the right to decide their own affairs and the autonomous execution of the decision. For this, it is essential that there are powers through which this can be exercised. Moreover, it is certain that all the decision-making and implementation tasks allocated to local self-government strengthen autonomy.

It is also important to emphasise that autonomy is an important principle in its own right, but because of its very broad meaning, it is also a framework for all the other principles that apply to local self-government, all of which work together to advance local democracy.

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[18] CC decision 8/2021 (III. 2.), Reasoning [168].

[19] CC decision 3441/2022 (X. 28.), Reasoning [47].

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Administrative fines imposed by the Bank Guarantee Fund – analysis under financial law

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Abstract

This study discusses the issues of the legal status of administrative fines. The authors deemed it desirable to apply various investigation methods in this area of research, such as a review and analysis of the established line of judicial decisions (legislative acts, court decisions, official documents) and a comparative analysis. For this reason, the second part of the study discusses the issues in question (synthetically) while taking into consideration the French, German and Danish legal orders.

The majority of the research was also devoted to an analysis of the legal status of the Bank Guarantee Fund (hereinafter: BGF or Fund) and to a discussion of types of administrative fines imposed by the Fund. An analysis and review of the law in force was used as a primary tool in this research area. The underlying goal of this research was to establish the legal status of administrative fines imposed by the BGF and their types, assuming that these penalties mainly play a preventive and repressive function. These issues have a practical and theoretical importance, since they may be used at the stage of law-giving and law-application, and also in scholarly investigations.

The study takes into account the legal status as of 23 April 2023.

Keywords

administrative fine, Bank Guarantee Fund, public finances

Introduction

Legal measures introduced in a given legal act should be effective, thus they must serve to implement the goals intended by the legislator (Hyżorek, 2019, 265). This is why the functions of administrative sanctions should derive from the functions of public administration and administrative law, the aim of which is to protect the public interest and the common good (Wincenciak, 2008, 256). Therefore, they are universal values, essential for any branch of law.

Administrative fines are a frequently applied tool for disciplining entities with various legal statuses. The legal structure, functions and kinds of this sanction are not uniformly outlined in the European Union Member States, thereby the period that is the subject of research may be analysed from a comparative law perspective.

Not only the sanctions addressed here, but also punishments *in genere* perform various functions, but the financial burden inscribed in them validates their main focus on the repressive and preventive function. The modelling of an entity's future behaviour is mainly the domain of the preventive function of administrative fines, where it will be strongly correlated with the educational and protective function (protection of the common good, public security, legal order, etc.).[1] In the context of the repressive nature of administrative fines, an assumption was made that it may not be a dominant function and the burdensomeness of these punishments should not be excessive, which means it should not be disproportionate to the violation noted.

Administrative fines may be imposed by various administrative bodies. The Polish legal order, for example, accommodates the BGF, which became a public finances sector unit only on 1 January 2022. The dynamics of changes in this area prove the validity of the problems analysed, and also the significance and importance of the issues discussed for the practice and theory of law. Scholars in administrative law notice an increase in the number of cases where administrative bodies impose administrative fines, which in turn raises concerns about a return to criminal and administrative law adjudication carried out by administrative bodies outside the sphere of administrating justice. It must be emphasised in this context that administrative fines are only a side area of "repression by means of economic sanctions". Meanwhile, increasingly often, they act as a tool for influencing the behaviour of addressees of administrative law standards and are more severe than fines prescribed in criminal law (Bąkowski, 2017, 379).

It needs to be emphasised that the BGF has had the power to impose administrative fines on obliged entities since 2016. These entities are those identified in the Act on the Bank Guarantee Fund, the deposit guarantee scheme and compulsory restructuring (hereinafter: BGF Act),[2] most of all on banks and cooperative savings and credit unions. These sanctions are imposed on members of bodies of these institutions. The provisions of the BFG Act in terms of these financial penalties are not coherent, uniform or comprehensive. When assessing the legal nature of these financial penalties, we must point to the aim of issuing such sanctions. The relevant literature recognises that the fines imposed by the BGF have the nature of administrative sanctions (Gryber, 2022, 140), and their application results directly from the act.

The legal status of administrative fines and their types from the perspective of regulations of the Polish law

In the Polish legal order, an administrative fine (Article 189b of Act of 14 June 1960 Code of Administrative Proceedings (hereinafter: CAP)[3] shall be understood as a monetary sanction specified by statute and imposed by the public administration authority by way of a decision as a result of an infringement of law. This infringement consists of a failure to comply with an obligation or in a breach of a prohibition imposed on a natural person, a legal person or an

[1] Judgment of the Polish Supreme Court – Chamber of Labour, Social Insurance and Public Matters of 27 October 2015, III SK 3/15, p. 191.

[2] Dz. U. (Journal of Laws) of 2022 item 2253.

[3] Dz. U. (Journal of Laws) of 2022 item 2000 as amended.

organisation unit that does not hold the status of a legal person. This punishment was given the attribute "administrative" because the competences to impose it were vested in bodies of public administration (Sławińska-Tomtała, 2015, 10). In the legal definition of the punishment discussed, the legislator focused on the statutory form of its regulation and the pecuniary character. The essence of an administrative fine, therefore, lies in a disadvantageous change in a legal position of the addressee of an obligation under administrative law, which was not performed or was performed inadequately (Kruk, 2013, 164) and involves a financial burden. An administrative fine is a sanction imposed by an administrative body in the systemic and functional sense and where this body acts within its authority (Stankiewicz, 2017, 267–268); judgment of the Polish Constitutional Tribunal (hereinafter: CT) of 20 June 2017, P 124/15, "Orzecznictwo Trybunału Konstytucyjnego" Series A, 2017, item 50). A definition of an administrative fine is not fully correct, given that the Polish legislator uses the term "sanction" in Article 189b CAP, which is not normatively defined. One must bear in mind that the principles of a democratic state ruled by law resulting from Article 2 of the Constitution of the Republic of Poland of 2 April 1997[4] are used as a springboard to derive the principle of good legislation, which gains particular importance, especially in the case of repressive provisions. This is why we must demand that the legal definition of "administrative fines" meets the standard of correctness, precisions and clarity, especially that regulations of special statutes often have a repressive character. The correctness of a provision means its correct construction from the linguistic and logical point of view. It is a basic condition that allows assessing the provision in the context of the remaining criteria, namely clarity and precision. Clarity of a provision must be understood as its comprehensibility for its addressees. These addressees have the right to expect the rational legislator to create legal norms that will not raise doubts as to the content of obligations imposed and rights granted. Clarity of a provision must be linked to its precisions, which should manifest itself in concretising obligations and rights. Thus, the content of a provision should be obvious and should allow for it to be applied in practice and undisturbed.[5]

The legal definition of an administrative fine allows the identification of at least a few criteria for its categorisation. They may be financial penalties examined from the point of view of the branch of law to which they belong. By doing so, we may identify financial penalties in administrative law, financial law (public finances, banking and tax law), economic law, environmental law, medical law, etc.

We may also identify other financial penalties depending on the entity that imposes them and the entity on which they are to be imposed (the punished party). In the first of these criteria we may identify administrative fines, which are imposed by the bodies of the public finances sector's units (e.g. Minister of Finance, Act of 22 May 2003 on obligatory insurance, on the Insurance Guarantee Funds and the Polish Motor Insurers' Bureau[6] and at this particular moment in time we need to classify the BGF in here too) and entities from outside the public finances sector (e.g. President of the National Bank of Poland, Article 151(1)(2) and 151(2)(1) of the Act of 1 March 2018 on counteracting money laundering and financing terrorism, hereinafter Money Laundering Act[7]).

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4 Dz. U. (Journal of Laws) no. 1997 no. 78 item 483 as amended.

5 Judgement of the CT of 3 December 2009, Kp 8/09, "Orzecznictwo Trybunału Konstytucyjnego" Series A, 2009 no 11, item 164.

6 Dz. U. (Journal of Laws) of 2022 item 2277 as amended.

7 Dz. U. (Journal of Laws) of 2022 item 2277 as amended.

As results from the statutory definition, administrative fines may be imposed on natural persons, e.g. a ship's captain (Article 110(1–3) of the Act of 5 August 2015 on work at sea[8], legal persons (e.g. banks – Article 147 of the Money Laundering Act) and units that do not have legal personality (e.g. limited partnerships – Article 152(1) Money Laundering Act).

These fines may become state revenue (Article 33 of the Act of 25 August on biocomponents and liquid biofuels[9], revenues of budgets of local government units (Article 9xb of the Act of 13 September 1996 on keeping communes clean and in order)[10], and revenues of other units of the public finances sector (e.g. The Labour Fund, Article 106(2) of the Act of 20 April 2004 on the promotion of employment and labour market institutions[11]) and revenues of other entities (e.g. fines included in Article 71(1a)(2) of the Act of 6 November 2008 on the rights of the patient and the Patients' Rights Ombudsman[12] are revenues of a relevant regional chamber of doctors).

The above criteria for the division of administrative fines in the Polish legal order serve as an example. We may also identify fines by taking into consideration the decision-making freedom of the entity that imposes the fine or lack thereof (punishments imposed obligatorily and voluntarily), the absolute and relevant specification of these punishments (fixed fines and fines that fall within certain brackets, specified by percentage, etc.), and also the currency in which the fine is expressed (fines expressed in PLN and equivalents of other currencies (Euro)/units of account (SDR)).

The status of administrative fines in selected countries of the European Union

The further discussion on systemic regulations in selected countries of the European Union focuses on the French, German and Danish legal orders. At the same time, the authors intend to signal the diversity of how this subject matter is regulated, not to analyse the legal orders of these countries in detail.

The French system has developed in a different way to the Polish one and its characteristic feature is the absence of codification of regulations that address administrative sanctions, thus various administrative punishments are regulated in numerous detailed statutes (Peters & Spapens, 2015, 127). Initially, the concept, which was intended to lift the burden of the judiciary by vesting adjudication of certain cases in regulatory (administrative) bodies, inspired doubts. A threat of "punishing without adjudicating" was cited (Fondation pour le droit Continental 2007, 1), addressed also under the so-called "extra-judicial justice" (Delvoive, 1984, 16), which may be associated with the "violation of the principle of division of power" (Conseil d'État, 2017, 3). Ultimately, it was concluded that administrative bodies may impose the discussed sanctions on the condition of ensuring the right to justice to the entities punished.[13] Contrary to solutions found in the Polish law, the French legislation lacks a legal definition of an administrative sanction and clear criteria that would allow a differentiation between an administrative

[8] Dz. U. (Journal of Laws) of 2022 item 1694 as amended.

[9] Dz. U. (Journal of Laws) of 2022 item 403 as amended.

[10] Dz. U. (Journal of Laws) of 2022 item 2519 as amended.

[11] Dz. U. (Journal of Laws) of 2023 item 735.

[12] Dz. U. (Journal of Laws) of 2022 item 1876 as amended.

[13] French Constitutional Council: Decision no 88-248), DC (Conformity Decisions) of 17.01.1989, DC, www.conseil-constitutionnel.fr/decision/1989/88248DC.htm, vol. 27

and criminal repression. There is no definition of an administrative fine either. Despite these shortcomings, fines are an effective and universal administrative sanction applied in numerous French legislative acts. These sanctions may be imposed unilaterally by administrative bodies, not only on natural persons, but also on other institutionalised entities, such as companies or legal persons (Delmas-Marty & Teitgen-Colly, 1994, 187) for unlawful acts, because sanctions are a consequence of a specific violation of law. These sanctions have been attributed a repressive character, though their certain impact is noticed (Huteau, 2015, 230). Just like in Poland, in France too, the principle of specificity is also gaining a special significance. It accommodates the requirement of a clear and precise specification by the legislator of types of administrative torts punishable by a fine. By doing so, the legislator wants to rule out arbitrary rulings issued in the course of administrative proceedings (Philip & Favoreu, 1984).

Contrary to the legal measures in place in Poland, the issues associated with imposing fines in the German legal order for committing "administrative misdemeanours" (*Ordnungswidrigkeiten*) fall under administrative criminal law, in which they play an important role, too (Pache, 1994, 24), constituting – from the financial law point of view – proceeds of various budgets (the federal budget, the budget of federal states and local budgets alike). The Act on Regulatory Offences is an important legal act in Germany from the substantive point of view (Act of 24 May 1968, proclaimed on 19.02.1987[14], amended by the act of 09.12.2019[15] effective as of 17 December 2019, hereinafter: OWiG). Actions intended to pursue liability for confirmed violations of the law, punishable by fines, must be in line with the general principles outlined in the statute (Peters & Spapens, 2015, 160). OWiG accommodates general regulations, procedural regulations, special rules concerning regulatory offences and final regulations. OWiG's special rules address selected categories of administrative offences, including, for example, those associated with violations of government orders and prohibitions, with violations of public order, and with the violation of the obligation of supervision of operations and enterprises. What is important, these acts were clearly distinguished from major crimes (*Verbrechen*) and summary offences (*Vergehen*) (Szumiło-Kulczycka et al., 2016, 20). In section 1 of the OWiG, it was concluded that regulatory offences shall be unlawful and reprehensible (punishable) acts, which may be punished by imposing a regulatory fine. OWiG also names other types of punishments, for example, forfeiture of the benefits that the perpetrator has obtained from committing the regulatory offence or confiscation of objects. A financial penalty discussed here may be imposed not only against natural persons, but also legal persons and units that do not have legal personality (Noak, 2012, 330–331). This set-up may be considered similar to the one applied in the Polish legal order. At the same time, a financial penalty is a legal consequence of an order-related misdemeanour and does not only serve repressive purposes, but also preventive and educational ones (Noak, 2012, 329). This punishment is called *Geldbuße* (regulatory fine) and was clearly separated from a fine called *Geldstrafe* (criminal fine). A financial penalty should exceed the economic benefit that the perpetrator achieved as a result of an order-related misdemeanour.

Denmark is an example of a country in whose legal order different rules – when compared with Poland – for imposing pecuniary penalties have been adopted. It has regulated the possibility of imposing a fine (*bøde*), which is a sanction typical of criminal law. This penalty cannot be imposed by administrative bodies and it is imposed by courts. This results from a strong rooting of the principle of tri-separation of powers in this country and the perception of

[14] BGBl (Federal Law Gazette) I p. 602.

[15] BGBl (Federal Law Gazette) I p. 2146.

threats resulting from excessive expansion of the model of criminal sanctions, which could be imposed by administrative authorities.[16] The Danish legal order lacks a basis to differentiate between administrative unlawful acts and non-administrative unlawful acts. Nevertheless, this does not mean that misdemeanours should be equated with major crimes, because the principles expressed in provisions relevant to the general criminal law will also be applicable to unlawful acts that may be considered administrative misdemeanours. We must point to the fact that apart from the fine (*bøde*), the Danish legal order increasingly allows the application of a sanction called *bødeforelæg* (fine proposal) [*administrative bødeforelæg (administrative fine proposal)*][17], or *administrative bøder (administrative fine)*[18], which may be a legal structure similar to financial penalties in the above-mentioned legal orders. These sanctions are not imposed by courts, but by administrative bodies. What is important, these solutions are applied by way of an exception and, if the guilty person does not accept the penalty imposed or when they do not pay it in time, the case is transferred to court. The sanctions discussed play various functions; repressive, preventive, motivational, educational and informational.

To sum up, the analysis here shows it is possible to identify at least three ways of regulating the financial penalties imposed by bodies of public administration in the functional approach in the EU. The first category is made up of countries in which there is no distinction between administrative sanctions and criminal sanctions, though in some cases the possibility to impose financial penalties by specific administrative (regulatory, special) bodies has been regulated. Such solutions are applied in, for example, Denmark. In the second group of countries, a dispersed system of administrative functions emerges. The model of imposing these sanctions is not internally uniform and administrative violations are addressed in numerous acts of law without procedural principles and guarantees associated with their application being codified. It is found in, for example, France, Spain and Greece. The last method of regulating the issues discussed is the model seen typically in, for example, Germany, Portugal and Italy (Commission of the European Communities, 1994, 12–13). These countries have created and codified a system of application of administrative sanctions. We may see that they strive to achieve, in one legislative act, precise and uniform regulation of fundamental substantive law and procedural issues that refer to administrative sanctions. This allowed a differentiation between unlawful acts as understood in criminal law and administrative offences.

The legal character of the Bank Guarantee Fund

The Fund is the only institution in Poland which covers two basic areas in its scope of activity: a guarantee of deposits and compulsory restructuring. Given the personal scope of operation of various entities (banks, cooperative savings and credit unions and brokerage houses), it needs to be concluded that the scope of operation of the BGF goes beyond the banking market, accommodating entities in the cooperative savings, credit unions and capital markets. We may therefore talk about a special role of the BGF in the financial market.

[16] Danish Ministry of Industry, Business and Financial Affairs. Danish Parliamentary Commission for Finances 2019-20, L 58, Annex 3, Public Consultation Notice of 22 November 2019, p 29. Online: https://www.ft.dk/samling/20191/lovforslag/l58/bilag/3/2110557.pdf

[17] Danish Ministry of Justice. Guidance on law quality, p. 212. Online: https://bit.ly/3JomSFN

[18] Danish Ministry of Finance. Finance act for the financial year 2020, p. 101. Online: https://fm.dk/media/17674/fl20a.pdf

When we address the Fund's legal character, we must take into consideration the regulation of the BGF Act and the Act of 27 August 2009 on public finances (hereinafter as PFA).[19] Under the former legislation, the BGF is not a state-owned legal person or another state-owned organisational unit. It is, however, a legal person that performs specific tasks. Pursuant to Article 9 PFA, the BGF is a unit of the public finances sector (hereinafter: PFS unit). The above leads to a conclusion that the BGF's legal status has a complex nature because its assessment is affected not only by the legal qualification, but also a special role it plays on the financial market, because the BGF is a link in the network of the state's financial security. The basic tasks that it carries out involve ensuring the functioning of the obligatory deposit guarantee scheme and running compulsory restructuring. The aim of the activity of the BGF was specified in Article 4 of the BGF Act as taking action for the stability of the national financial system. The order to act expressed in this way is both a fundamental value and an axiological basis for other content expressed in the BGF Act (Sura, 2013, 69).

Legal scholars and commentators have been discussing its legal character since the beginning of the operation of the Fund, in 1995. We must agree with the position expressed by legal scholars and commentators who claim that an entity that has a separate position in the sphere of public law cannot be a state-owned legal person (Kulesza, 2000, 7). It is worth emphasising that the BGF's rights and obligations, imposed by statute, are carried out in the public interest. The Fund always acts in its own name towards all entities with which it is legally bound (Sura, 2013, 119). The literature also recognises that the BGF may be given the attribute of authority (Kulesza, 2000, 7–8). Transferring some responsibilities of the State to the Fund was justified by the desire for them to be performed effectively and correctly (Janku, 2012). Moreover, the authority-related function of BGF towards the aforementioned entities mainly involves ensuring security by guaranteeing the safety of the deposits gathered (Kowalewska, 2021, 45).

Given the beginnings of the functioning of the BGF, legal scholars and commentators have also noticed that it is a foundation-type institution governed by financial law because it has been granted legal personality and because part of the State Treasury has been transferred to the Fund and because of the scope and nature of tasks vested in it (Mojak & Żywiecka, 2018, 313). We may also encounter a view that the Fund is a passive entity of financial law, and at the same time an entity of the state's financial administration, which does not act in the interest of the State Treasury (Nadolska, 2019, 26). It has been emphasised in the literature that the Fund is an administrative entity *sensu stricto* (Sura, 2013, 266; Bińkowska-Artowicz, 2015, 136).

Classifying the BGF as one of the public finances sector units was crucial in the assessment of its legal character. It is worth noting that an analysis of the statutory catalogue of PFS units leads to the conclusion that they are not uniform and are based on non-uniform criteria, which triggers interpretation doubts and may hinder the differentiation of individual units (Rutkowska-Tomaszewska, 2012, 100). Gathering public funds is necessary for the state and other entities to finance tasks aimed at the fulfilment of public needs, such as public security, national defence, environmental protection, administration, education and health care (Majchrzycka-Guzowska, 2011, 14). As a rule, PFS units are entities that perform public tasks and are financed from public funds (Sawicka, 2010, 37). When it comes to the BGF, the financing that it allocates to performing its tasks does not come from the state budget but from payments (contributions) by entities in the financial market, such as banks, branches of foreign banks, cooperative savings and credit unions and investment companies. Without a doubt, the BGF has

[19] Dz. U. (Journal of Laws) of 2022 item 1634 as amended.

a specific financing system based on contributions as *quasi* public levies (Kowalewska, 2021, 73). It is down to the fact that the Fund plays a particular role of a link between private law and public law. Its classification with PFS units, and at the same time acknowledging its competences and responsibility for maintaining stability in the financial market, make it, despite this legal classification, an entity with special, if not hybrid, features and attributes.

Given the above, we must most of all point to the degree to which the BGF can be classified as a PFS unit. The legislator ruled out the application of the Public Finances Act to the scope regulated in Articles 35, 42(2), 92 and 93 PFA. Moreover, when it comes to the BGF, there are rules other than those resulting from the Public Finances Act for locating available funds (pursuant to Article 315 of the BGF Act); the application of the Act on managing state-owned property is also excluded. What also needs to be emphasised is the fact that there are different rules for drawing an annual draft of the BGF's financial plan, which is transferred to the Minister competent for financial institutions and the Minister competent for finances, but it is an annex to the Budget Act. The effect of classifying BGF as a PFS unit also confers certain financial privileges that allow the possibility of obtaining subsidies and loans from the state budget.

Types if financial penalties imposed by the BGF

The BGF's right to apply financial sanctions in the form of financial penalties is associated with an essential area of its operation, issuing so-called resolutions. Pursuant to the provisions of the BGF Act, the Management Board of the Fund is entitled, in specific cases, to impose financial penalties both on national entities and members of bodies of certain financial institutions (members of management boards, supervisory boards of these entities, members of an administrative body of a European company or a director of a branch of a foreign bank) (Ofiarski, 2021, 18). Positive premises for imposing these financial penalties are neither in competition nor mutually exclusive, so we may see an admissible situation where, in the same period, a national operator or another financial institution and a natural person who is a member of their bodies may be punished (Ofiarski, 2021, 18–19). The aim of fines imposed by BGF is to ensure correct performance of obligations imposed by the statute which demonstrates, most of all, their preventive character.

Financial penalties imposed by the BGF are an element of applying administrative law, which is manifested by issuing administrative acts that include an order to pay concrete sums to the benefit of the State Treasury (Nowicki & Peszkowski, 2015, 11). Looking at the regulation of financial punishments in the BGF Act, we may identify three levels of administrative punishments (Gryber, 2022, 146):

a) repressive – for failure to fulfill an obligation,
b) preventive, which takes the form of influencing the obliged entity,
c) securing – its adequate amount eliminates undesirable behaviours.

Pursuant to the content of Article 79 of the BGF Act, the Fund may impose a fine when:

1) a domestic entity fails to provide information about so-called essential changes, namely information necessary to develop, update and assess the feasibility of resolution plans,
2) a domestic entity fails to perform the duty referred to in Article 78(2) that involves cooperation in the development and updating of the resolution plan.

In such situations, the Fund may impose a financial penalty, by way of a decision, of up to 10% of the revenue reported in the latest audited financial statement and, in the absence of such a statement, a fine of up to 10% of the projected revenue determined on the basis of the economic and financial situation of the entity but not more than PLN 100,000,000**.**

It needs to be highlighted that the legislator stipulated the possibility to raise the so-called financial penalty. However, this may only take place where it is possible to determine the amount of benefits gained by the national entity as a result of failure to provide information or failure to perform duties. The Fund may impose a fine against this entity of up to double the value of benefits gained by it. The financial penalty referred to in Article 79 of the BGF Act constitutes state revenue. The collection of amounts due resulting from the decision to impose the aforementioned financial penalty is regulated in regulations on enforcement proceedings.

Article 79 of the BGF Act and the related Article 78 apply only to a domestic entity that is subject to the developed resolution plan. Moreover, it is worth noting that the amount of the penalty referred to above was determined on the basis of Article 138(3)(3) of the Banking Law with the added total threshold of the fine (Medyński, 2017, 204).

The BGF Act (Article 85) gave the Fund an entitlement to issue recommendations (after asking the opinion of the Financial Supervision Authority). Financial penalties were stipulated to enforce the application of these recommendations by the entity to which they were directed. The recommendations may apply to handing over action plans to remove obstacles in the implementation of resolution plans. The entity to which these recommendations are issued has one month to apply them. These recommendations may be examined not in their non-binding character, but as an authority-carrying act, realised by way of administrative discretion (Gryber, 2022, 150).

The fine under Article 95 of the BGF Act depends on the income earned according to the last audited financial statements of up to 10% of this income. In the absence of a statement, a fine is imposed of up to 10% of the projected revenue determined on the basis of the economic and financial situation of the entity, but not more than PLN 100,000,000**.**

It must be pointed out that this fine may be imposed in each case of failure to adhere to the recommendations in time. It is therefore possible for fines to be imposed multiple times in every time the resolution plan must be supplemented, but only once for each case of issuing recommendations to this plan (Medyński, 2017, 223–224). The punishment described above is a tool that forces cooperation, and so plays a special role. Still, the fact that it is imposed on an entity under restructuring, that is an entity at risk of insolvency, may trigger some reservations. The financial penalty referred to in Article 95 of the BGF Act constitutes state revenue. Collection of amounts due resulting from the decision to impose the aforementioned penalty proceeds on the basis of the provisions of the Act on enforcement proceedings in administration.

A special type of financial penalty can be found in Article 175 of the BGF Act, which mainly regulates the procedure of reviewing the BGF's decisions on taking over rights attached to shares in the entity under restructuring by the acquiring entity. The inspection is carried out by the Financial Supervision Authority. It may also file an objection against the acquiring entity under Article 25h of the Act of 29 August 1997 Banking Law.[20] When such a notice of objection is submitted, the Fund may, by way of an administrative decision, order the entity to sell the rights attached to shares. In this decision, the BGF prescribes when entity is obliged to have disposed of the rights. Failure do is punishable by a fine of up to PLN 10,000,000. The role of the BGF in terms of applying this fine only involves filing a request at the Financial Supervision Authority for such a fine be imposed, but without the Fund's initiative no punishment can be ordered. Even though the BGF does not impose it, this penalty also constitutes state revenue and its collection is done pursuant to provisions of the Act on enforcement proceedings in administration.

[20] Dz. U. (Journal of Laws) of 2022 item 2324 as amended.

Fines under Article 336 of the BGF Act are imposed on a member of the management board or the supervisory board of a domestic entity, an administrative organ of a European company or a director of a branch of a foreign bank who fails to perform their obligation to prepare or present financial statements or other reports and information related to preparation and conduct of resolution to the Fund, or does so in an unreliable or untimely manner.

The upper threshold of the fine was set at EUR 5,000,000. Relevant literature points to the severity of this fine, most likely because it is expressed in a currency other than the Polish zloty (Błachnio-Przych, 2017, 599). This means that this responsibility expressed in the provision must be treated as repressive responsibility (Burzyński, 2008, 111).

The legislator did not refer to the basis of the sanctioned obligation in Article 336 of the BGF Act, which must be queried. It makes it difficult to specify the relation of this provision to other sanction-involving regulations (Błachnio-Parzych, 2017, 595). Certainly, one may take into consideration Article 330(1) BGF Act in this case because it is the article that provides a general basis of information-related obligations that the BGF requires. At the same time, in Article 336 BGF Act the legislator refers to the preparation and presentation (two different/separate acts) to BGF:

1) financial statements,
2) other reports,
3) information

– related to the preparation and conduct of resolution.

The fine referred to is imposed in the event of failure to perform an obligation and in the event that the obligation is indeed performed, but it is done in an unreliable and untimely manner. The attribute of "unreliability" was not defined by the legislator. When invoking the relevant literature, we may point out that an "unreliable" manner means one that is uncertain, and suggests that it is not in line with the truth (Kardas, 2016, 640).

In Article 336 BGF Act, the legislator uses the phrase "may impose", thus applies so-called "administrative discretion". The Fund was granted a choice; in other words, The BGF enjoys "discretionary power" in this regard. The discretionary power, as a consequence of phrases such as "the authority may", should not be interpreted by legal scholars too broadly, as a choice between action and passivity. The discretion is an element that closes the decision-making process (Zimmermann, 2013, 208–209).

The legislator set up a penalty in Euro, thus we must also invoke the content of Article 340 of the BGF Act stipulating that amounts in EUR shall be converted into PLN as per the average exchange rate announced by the National Bank of Poland on the last working day before issuing the decision to impose a financial penalty. Determining financial penalties in EUR in an act raises doubts as to compliance with the principle of *nulla poena sine lege certa* (expressed in Article 42(1) of the Constitution of the Republic of Poland).

The principles of imposing financial penalties by the BGF have been laid down in Article 339 of the BGF Act. They mainly involve an obligation to inform and post information on appropriate websites and automating information on imposing a financial penalty.

In the event of issuing a decision to impose a fine referred to in Article 79(1), Article 95(6), Article 175(6), Article 335, Article 336 and Article 338, the Financial Supervision Authority or the Fund, respectively, shall immediately notify the European Banking Authority of imposing the fine, and if a request to have the case re-examined or a complaint at the administrative court has been filed, the FSA or the Fund shall also inform on how to file the request to have the case re-examined or a complaint at the administrative court and on the outcome of proceedings before the authority that re-examines the case or the administrative court. Where the decision

on imposing a financial penalty referred to in Article 79(1), Article 95(6), Article 175(6), Article 335, Article 336 and Article 338 is final, the Financial Supervision Authority or the Fund, respectively, shall immediately post on their website information on imposing the penalty, including the details of the provisions of the law that were violated, along with the name and surname of the persons or name (business name) of the company against which the penalty was imposed. The Polish Financial Supervision Authority or the Fund, respectively, publish information on imposing penalties referred to in Article 339(2) without disclosing identifying information where:

1) the penalty was imposed against a natural person and disclosing their name and surname would be a measure disproportionate to the gravity of the violation;
2) disclosing the name (business name) of the entity or the name and surname of the person would pose a risk to the stability of financial markets or would pose a risk to pending criminal proceedings or proceedings for fiscal offences;
3) disclosing the name (business name) of the entity or the name and surname of the person would cause disproportionate damage to this person or entity.

Conclusion

The discussion on fines, their functions and the purpose of their stipulation and application is still flourishing, even in the international approach. We may notice an occurrence of a certain expansion of the Polish legal system with new administrative fines, which must raise concerns about the excessive involvement of the bodies of public administration in the justice system.

Comparative research leads to a conclusion that there is a uniform concept of law associated with imposing administrative fines in the European Union, and individual EU Member States specify special goals of these sanctions differently. Standards of democratic countries of Europe have allowed fines to be imposed by administrative bodies, but it is always done with respect to standards of a specific normative procedure. At the same time, we may notice that administrative sanctions and criminal sanctions permeate individual legal orders and this permeation affects different levels of their application. In each of the countries analysed, a repressive and preventive impact of financial penalties is noticed, whereby it is reasonable to conclude that they are their main objectives. These sanctions are, at the same time, an expression of disapproval of unlawful behaviour (Herlin-Karnell, 2014, 2) and serve to protect public interests (Herlin-Karnell, 2016, 305). The fact that the legislator, wanting to lift the burden off the judiciary, authorises bodies of public administration to adjudicate less complicated cases and those less harmful to the public interest deserves approval.

The analysis of the Polish, German, French and Danish legal order leads to a conclusion that there are essential advantages of introducing a possibility of adjudication of certain cases by administrative bodies and it is a commonly applied measure. We however need to remember that such vesting of the adjudication in administrative (regulatory) bodies significantly accelerates processing a given case, which results also from the fact that these bodies hold specialist knowledge and other practical skills that carry special significance in assessing the facts of the case. Entrusting the imposition of certain fines to the BGF also deserves credit in this regard.

The provisions of the BGF Act lack comprehensive provisions referring to the rules of imposing financial penalties. Where the Fund applies such financial penalties, Chapter IV of the Code of Administrative Proceedings applies, which refers to ordering and imposing administrative fines (Ofiarski, 2021, 20). The BGF, when ordering such fines, pursuant to Article 95 of the BGF Act, issues decisions that take many elements into account, for example the gravity

and period of violation, the degree of liability of entities, the damage caused and effects of the violation on financial stability and the financial market.

We must also note that imposing financial penalties as part of the activity of the institution responsible for guaranteeing deposits and resolving violations is only a developing task. The specific characteristics of the operation of the BGF, despite being classified as a PFS unit, is based mainly on a special positioning of the Fund (in the public and private sector at the same time) and on polarising its activities. This will certainly affect the modelling of the practice of imposing such type of punishments. At the moment, these are theoretical reflections since the Fund has not yet imposed these fines against any entity of the financial market.

In conclusion, it is worth emphasising that the legislator's creation of a basis for the BGF to impose financial penalties increases efficiency of operation of the Fund as a body that affects repair processes of the entities of the financial market and mainly as a resolution authority.

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The scope of judicial cooperation in civil and commercial matters within the EU in the context of the exclusion of administrative matters and *acta iure imperii*[1]

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Abstract

The present article focuses on the scope of the key sources of judicial cooperation in civil and commercial matters within the EU, namely the Brussels I bis, Rome I and Rome II Regulations, in the context of the activities of public authorities. The aim of the article is to identify whether a legal relationship in which one of the parties is a public authority can qualify as a civil and commercial matter within the meaning of the Regulations in question and thus be subsumed under their *ratione materiae* and, if so, under which circumstances.

Keywords

Public authority, *acta iure imperii*, Brussels I bis Regulation, Rome I Regulation, civil and commercial matters.

Introduction

The trend towards globalisation in general and the degree of economic integration achieved within the European Union means that private law entities across the EU are taking advantage of the benefits of the internal market. In the context of the free movement of persons, goods, services and capital, they are entering into relationships with a 'foreign element'; relationships that have a certain nexus to the foreign country. Although, especially as individuals, we may often not even be aware that we are becoming a party to a relationship with a foreign element, in today's globalised world, it is difficult in everyday life to avoid entering into relationships with a cross-border element

Such a relationship raises a number of issues, in particular which law will be applicable to the relationship, the courts of which country will have jurisdiction to adjudicate any disputes arising out of the relationship, how the foreign judgment or the authentic instrument will be treated among others. These questions are answered by the branch of law known as private international

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law. As the name implies, it regulates private law relationships with a foreign element. We introduce the article by addressing what characterises these private law relations. The sources of private international law are the norms of national legislation and the extensive system of the Union *acquis*, as well as legal regulation through bilateral and multilateral international treaties.

The EU law takes primacy over the national legislation of the Member States.[2] This means that the Union legal framework also takes precedence over national norms of private international law to the extent that it regulates identical issues. This article will focus on the sources of EU law, namely the Brussels I bis,[3] Rome I[4] and Rome II[5] Regulations, which constitute the general regime for determining jurisdiction and applicable law within the EU in civil and commercial matters.

The aim of the present article is to analyse the substantive scope of the Regulations in terms of the private law nature of regulated relationships, and to identify the circumstances under which they could fall under the scope of the selected Regulations ifone of the parties is a public authority. In particular, we will refer to the case-law of the Court of Justice of the European Union (hereinafter "CJEU" or "The Court"), as it performs an indispensable role in filling legal gaps and interpreting the provisions of the EU law. We have chosen to concentrate on this specific area because civil and commercial matters in the context of some EU laws may also, in particular circumstances, include certain issues relating to administrative and fiscal law (Bělohlávek, 2010, 113).

1 The nature of the relationships covered by private international law

The aim of the present article is to identify when even certain activities of public authorities may fall within the scope of selected regulations of the general regime for determining jurisdiction and applicable law within the EU. The purpose of such regulation is, *inter alia*, to establish a reasonable and predictable way of resolving disputes arising out of legal relationships that transcend national borders (Bělohlávek, 2010, 170). Both the selected regulations and the international treaties of the Hague Conference on Private International Law are sources of private international law, and we therefore consider it necessary to deal at the beginning with the nature of the relationships that fall within the scope of the rules of private international law in general. Naturally, an essential element of a relationship falling under private international law is the presence of a so-called foreign element, a certain *nexus* to a foreign country. According to the case-law of the CJEU, this element is present in any case that is capable of raising questions concerning the determination of the international jurisdiction of the courts.[6]

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2 Judgment of 15 July 1964, *Flaminio Costa v E.N.E.L.,* C 6/64, EU:C:1964:66.

3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter as "Brussels I bis"). http://data.europa.eu/eli/reg/2012/1215/oj

4 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (hereinafter as "Rome I"). https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (hereinafter as "Rome II"). https://eur-lex.europa.eu/legal-content/sk/ALL/?uri=CELEX%3A32007R0864#

6 Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349. See also judgment of 1 March 2005, *Owusu*, C281/02, EU:C:2005:120.

The division between private and public law dates back to ancient Rome. Legal theory classifies these private law relationships as mainly general civil law issues, under which we also find a broad category of family law relationships and individual labour law issues, as well as regulating the status of foreigners. If we disregard the generally assumed de facto disadvantaged position of certain subjects in private law relations, such as the consumer *vis-à-vis* a larger company, the employee *vis-à-vis* the employer, etc., we can argue that private law relationships are those in which the subjects have an equal position. At the same time, it should be true that they cannot impose certain obligations on each other within a private law relationship, nor can they unilaterally establish them (Šmihula, 2012, 23). The autonomy of the will of the parties, which is also taken into account in the sources analysed, is naturally underlined.

Relationships that are public law relationships, in which, for example, an administrative authority imposes a certain obligation on another entity, are naturally excluded from the scope of private international law due to their non-private law nature. What is not excluded and what will be dealt with in this article are relations of a private law nature, in which one of the parties is a private law subject, for example a natural or legal person, and the other party is a public authority such as. an administrative authority. Legal theory knows several approaches to the a question. Those authors who state that the boundary between a private and a public law relationships lies in the nature of the specific obligation are the those with we most agree. Insofar as the public law body in question acts within the limits of its ordering powers, this relationship cannot be subsumed under the rules of private international law. It is not the nature of the subject but the nature of the legal relationship under consideration that determines the private law character (Fábry & Krošlák, 2007, 49). We therefore put the theory based on the nature of the parties on the back burner.

We have decided to address this topic in the context of the EU and selected regulations in the field of judicial cooperation in civil matters because EU law has to be interpreted in an autonomous way to ensure uniform application. The selected regulations do not define of the private law relationships covered by their provisions directly.

2 *Ratione materiae* of the selected regulations

The EU regulations discussed in this article are legally binding and directly applicable acts of the EU *acquis*[7] and bear the aforementioned primacy over the rules of private international law of all Member States insofar as they regulate identical issues and with an identical scope. The present article examines the topic in the context of the Brussels Ibis, Rome I and Rome II Regulations, which constitute the general regime for judicial cooperation in civil and commercial matters within the EU Although in theory we classify them as sources of private international law, we do not find a definition of a private law relationship in their wording. Autonomous interpretation at the EU level, to provide unification and uniform application within the EU, requires us to forget the limits of our national legislation when interpreting them and to examine the scope of the Regulations in the light of the EU, Community law.

Which relations fall under the given regulations by their nature is sought through the substantive scope, *ratione materiae,* of the Regulations. This is defined both positively in the regulations, meaning. which relations fall within the scope, and also negatively, those that are excluded from the scope. The positive definition of the scope of this general regime are civil

[7] Art. 288 of the Treaty on the Functioning of the European Union (hereinafter as "TFEU"). https://bit.ly/42NJJld

and commercial matters. This is stated in all three Regulations in Article 1(1). As we have mentioned, they are classified by theory under private law. The substantive scope further requires the aforementioned foreign element, which, for the purposes of the Regulations, is referred to as "cross-border implications" or "conflict of laws".[8] With regard to the applicable law, the substantive scope is further extended by the contractual and non-contractual obligation and the use of Rome I and Rome II is differentiated accordingly.

Selected regulations apply within the limits of their scope. Unless their temporal scope is given, the previous arrangements – the Brussels Convention,[9] Brussels I[10] and the Rome Convention[11] – are still in force. The CJEU's interpretative material, to which we refer in this article, often concerns the provisions of these very sources, because it is necessary to ensure continuity of interpretation across all the provisions have remained adopted, which means that the concept of civil and commercial shall be interpreted identically for all these sources. Equally, interpreting the Roman and Brussels regimes in relation to each other is needed.[12] Since the substantive scope is regulated in the same way as we will examine it, we will not distinguish between which source a particular judgment is related in this article.

We can so far conclude that, in order to identify whether a case falls under civil and commercial matters, we are only interested in the nature of the relationship in question and not in the nature of the subjects. In light of the case law of the CJEU, in order to ensure a uniform interpretation at the EU level and to avoid giving irreconcilable judgments, it is crucial to interpret the notion of civil and commercial matters in an extensive manner (Garayová, 2019). The autonomous concept of civil and commercial matters must be interpreted in the light of the teleology and systematics of EU law but, in accordance with the case law of the CJEU, the general principles stemming from the corpus of the national legal systems as a whole also have an impact on their interpretation,[13] supported by general principles derived from the corpus of Member States' legal systems. By contrast, reference to the national law of a Member State is inadmissible because it would undermine the uniformity of the Union *acquis*. These difficulties would be caused in particular by the fact that the Community is enlarging, and more Member States means more national legislations, in which there may be considerable disparities in some areas of law (Magnus & Mankowski, 2007, 50).

As the Schlosser report also points out, the division between civil and commercial law on the one hand and public law on the other itself is well-known in the legal systems of the original Member States. Although there are some differences between the legal systems, it was

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[8] Recital 3 of Preamble to the Brussels I bis. Art. 1(1) of the Rome I and also Rome II.

[9] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter as "the Brussels Convention"). https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A22007A1221%2803%29

[10] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter as "the Brussels I"). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0044

[11] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (hereinafter as "the Rome Convention"). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A41980A0934

[12] Recital 34 of Preamble to the Brussels I bis.

[13] Judgment of 28 February 2019, *Gradbeništvo Korana*, C-579/17, EU:C:2019:162. See also: Judgment of 18 May 2006, ČEZ, C-343/04, EU:C:2006:330.

essentially divided on the basis of similar criteria. As such, the concept of civil matters in the context of the analysed regime also included selected branches that are not public law, such as individual labour law.[14] Individual employment contracts are regulated separately within the regulations, taking into account the *de facto* weaker position of one of the parties, the employee.

Looking further back in history to the adoption of the Brussels Convention in 1968, neither the authors of the original wording of the Convention, nor the Jenard report included a definition of civil and commercial matters, and it was assumed that the Brussels Convention also applied to the decisions of criminal and administrative courts, provided that they were given on civil or commercial matters. The case law of the Court of Justice and the aforementioned accession of new members with disparities between their legal systems and those of the original members finally persuaded the Working Party to determine the jurisdiction of customs revenue and administrative matters as being excluded from the scope of civil and commercial matters.[15]

2.1 Exclusion of revenue, customs, administrative matters, and *acta iure imperii* from the scope of the Regulations

As already mentioned in the article, the substantive scope is also defined negatively in the analysed regulations. They consistently exclude, among other areas, all revenue, customs and administrative matters, as well as the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).[16] It follows that the activities of public authorities and, for example, administrative authorities as well, are excluded from the scope of the Regulations. Even so, what does the concept of administrative matters cover? Is it any relationship where it acts as a party? Where is the limit of the exercise of *iure imperii* by a public authority? In defining the merits of the problem under discussion, we are inclined to the theory of the nature of the legal relationship. The application of the Regulations in practice has given rise to a number of preliminary questions, and we, therefore, consider it important to identify, which relationships fall within the scope of the selected Regulations and which do not. We will try to find the answer through the case-law of the CJEU, which fills the legal vacuum in particular provisions of the Regulations with a comprehensive interpretative material. Naturally, a legislator at the time of drafting a law, cannot anticipate all the relationships that will arise in practice, and all the more so with a unified regulation for many different states, and we would therefore like to highlight the possibility of preliminary questions from EU Member States to clarify problematic issues relating to the EU law, because only in this way we can ensure uniform application within the Union

In the following part of the article, we will examine the judgments that concern both applicable law and jurisdiction, since the Regulations are considered to have the same scope.[17] The interpretation we will present in the article is therefore relevant for the application of all the selected Regulations. As we have already mentioned, it is essential to ensure continuity in the field of interpretation with the predecessors of the Regulations we are analysing. The

[14] Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 (hereinafter as "the Schlosser report"). https://bit.ly/42Mmyrp

[15] Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter as "the Jenard report"). https://bit.ly/46pv7vx

[16] Art. 1(1) of the Brussels I bis.

[17] Judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881.

Brussels Convention played a key role in the development of judicial cooperation, and we deal with judgments concerning the interpretation of the Convention because, to the extent that the regulations have replaced it and to the extent that the provisions are retained and equivalent, it is essential to respect this continuity of interpretation.[18] The same applies in the case of the Brussels I Regulation.[19]

The Brussels Convention formulated the negative scope in Article 1 to a more limited degree than it is today. Article 1(1) referred only to the exclusion of revenue, customs and administrative matters.[20] Judicial practice showed it was necessary to add the most important outcome of the case-law of the Court of Justice in the area under analysis to this section, and the negative delineation of *acta iure imperii* was enshrined. The performance of *iure imperii* had to be explicitly removed from the scope of the Regulations, as it underlines the respect for the sovereignty and immunity of the State in the exercise of its sovereign powers. The CJEU's judgment in the 1976 LTU v Eurocontrol case played a key role in modifying the wording of Article 1(1). The Court declared that selected proceedings between a public authority and a private law party may fall within the *ratione materiae* of the Convention. The decisive element is whether, in the context of the case in question, the public authority is exercising its powers. The concept of civil and commercial matters within the scope cannot be interpreted by reference to the law of one of the Member States, which underlines the necessity of an autonomous interpretation and which was also confirmed by the Court of Justice in the judgment in question. The dispute in the LTU v Eurocontrol case concerned the recovery of fees payable by LTU to Eurocontrol, a public body, for the use of the equipment and services provided by that body. Moreover, this usage was of an exclusive and compulsory nature. In this case, the public authority unilaterally set the amount of the charges and the relevant rates. Unilaterally imposed obligations, as we have already mentioned in the article, are a typical feature distinguishing a private-law relationship from a public-law relationship, and therefore the Court of Justice decided that, in this case, the public authority had clearly acted within the limits of the exercise of its powers.[21] The LTU v Eurocontrol judgment has therefore undoubtedly influenced the amended wording of Article 1. We reiterate that the mere fact that a public authority was one of the parties was not declared a reason for the exclusion of *acta iure imperii*. The Court focused its attention solely on the nature of the relationship in question and whether the public body was acting within the limits of *iure imperii*.

The practice of the courts of the Member States within the EU has been significantly facilitated by this landmark judgment, but also by the introduction of *acta iure imperii* in the Brussels I wording. However, the explicit exclusion of the exercise of *iure imperii* from the scope of the Regulation began to raise a number of questions in practice. We therefore, consider it necessary to pay attention to the boundaries of when we can and when we can not speak of the performance of *iure imperii*, in other words, when we can use the Regulation and get the body in question, for example, also in proceedings in which the courts of another Member State have jurisdiction. It is essential in practice to strike a balance between the jurisdictional immunity of the Member States in the area under analysis and the legitimate expectations of the private law party as regards determining jurisdiction and the law applicable to the disputes arising. The

[18] Judgment of 16 June 2016, Universal Music International Holding, C-12/15, EU:C:2016:449.

[19] Judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881.

[20] Art. 1(1) of the Brussels Convention.

[21] Judgment of 14 October 1976, *LTU v Eurocontrol*, C-29/76, EU:C:1976:137.

limits of public law authority cases can only be found in the case-law of the Court of Justice, which has dealt with this issue in a number of key judgments.

3 Possibility to subsume the relationship with the public authority under the *ratione materiae* of the Regulations

Although it is clear from what has been discussed so far that the substantive scope of the Brussels I bis Regulations and, by analogy, of Rome I and Rome II, does not include the exercise of public authority in the form of the performance of *iure imperii*. Since the landmark judgment in the LTU v Eurocontrol case, the practice of the judicial authorities in the Member States has shown that, despite a clear definition, there may be situations that cannot be brought within the scope of the Regulation beyond reasonable doubt. It is precisely these disputes and proceedings before the Court of Justice that will be the focus of this part of the article, with the aim of identifying the *iure imperii* cases and administrative cases that are excluded from the scope of the selected Regulations.

Following the above-mentioned judgment in the LTU v Eurocontrol case, the Court of Justice confirmed the jurisprudence in the Rüffer judgment, in which it declared that the determining factor for the scope of civil and commercial matters is either the reason for the legal relations between the parties or the subject matter of the action.[22] With this, it clearly favoured the former over the latter. That judgment concerned an action brought by an agent responsible for the management of public waterways against the person responsible for the management for the purpose of recovering the costs incurred in the removal of a wreck, which the agent had carried out in the exercise of a public authority. That dispute was excluded from the scope of the Brussels Convention by virtue of the *iure imperii* principle.[23]

We would also like to mention in this section the relatively recent judgment in the Eurelec Trading case, which concerned an infringement of the competition rules by Eurelec in Belgium in relation to suppliers from France. The French Minister for Economic Affairs and Finance investigated the practices of the company in question and brought an action before a French court to declare that Eurelec subjected the trading partners to obligations that resulted in a substantial imbalance of rights and obligations between the parties, to require them to terminate the practices and to impose a civil penalty on them. The question was whether the situation that arose fell within the scope of civil and commercial matters within the meaning of the Brussels I bis Regulation. The Court later addressed whether the authority in question had acted *iure imperii*. The determination presupposes an examination of the legal relationship between the parties, the subject matter, and, where appropriate, the basis for bringing the action. It pointed out that the Minister's investigatory powers must be approved by the court and thus become extraordinary and inaccessible to private law persons. It is always for the national court hearing the case to verify the circumstances. In the operative part of the judgment, The Court declared that an action such as that in question in the main proceedings could not be subsumed under civil and commercial matters, insofar as a public authority exercises an extraordinary power of investigation or an extraordinary power of action over and above the law applicable in private law relations between individuals.[24]

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22 Judgment of 16 December 1980, *Netherlands v Rüffer*, C-814/79, EU:C:1980:291.

23 Judgment of 16 December 1980, *Netherlands v Rüffer*, C-814/79, EU:C:1980:291.

24 Judgment of 22 December 2022, *Eurelec Trading*, C-98/22, EU:C:2022:1032.

This is a very interesting judgment from the aspect that even the same conduct and the nature of the relationship can have a dual character, which is also influenced by the availability of possibilities for private law persons. This brings us to a similar judgment where the situation was different on precisely this point. This is the judgment in Movic and Others, to which The Court referred in the Eurelec judgment in part. The action was brought by the Belgian public authorities responsible for consumer protection against the companies, seeking a declaration from the court that there had been unfair commercial practices against consumers and an order requiring them to cease such practices. The Court of Justice reiterated that the court hearing the case must consider whether there are grounds for exclusion from the material scope of the Regulation. The interpretation from the previous case was largely applied to the present dispute, but The Court declared that the mere fact that jurisdiction was conferred by statute was not in itself conclusive on whether the authority was acting in the exercise of public power. Other persons having a legitimate interest in the matter, or even consumer protection associations, may bring the same action before The Court as persons having an active interest in the matter. It is to the position of the consumer protection association that the Court of Justice has compared the position of the Belgian authorities in the present proceedings, without any advantage being given to the conditions for bringing the action. However, if, for example, the authorities in question had used the exercise of public authority to obtain evidence, their position and action would not be comparable to that of another entity that would not have had access to the evidence in question without the exercise of public authority, and that would have changed the situation. In any event, this dispute has been classified by The Court as falling within the scope of civil and commercial matters.[25] As we can see in these two judgments, even the same subject matter of the dispute does not automatically guarantee both would fall within the scope of the Regulations, and an important determinant is also whether the authority is empowered – in terms of the relevant law – to take actions which, for example, a private law person is not, whether it will avail of these possibilities, or, on the contrary, whether its position in the proceedings is the same as it would be if another private law person, or an association of interests, were in its place.

In practice, the question of the interpretation of civil and commercial matters and the exclusion of *acta iure imperii* also raised doubts about the performance of contracts concluded on the basis of public procurement. The interpretation was provided by the Court of Justice in the TOTO judgment, in which a public entity, the General Director of Roads of Poland, was a party to the dispute as the contracting authority. The dispute concerned proceedings on an application for interim measures in respect of penalties relating to the performance of a road construction contract concluded on the basis of a public procurement procedure. In that judgment, again, the Court of Justice held that, in order to exclude the scope of the Regulation, the exercise of power must go beyond what is permitted in relations between individuals within the limits of civil and commercial law. He added that, as in the Supreme Site Services judgment, the public purpose of certain actions is not sufficient *per se* for those actions to qualify as an exercise of *iure imperii*, since they did not correspond to an exercise of powers that went beyond the rules applicable in relations between individuals.[26] Accordingly, he indicated that the dispute in question related to the performance of a contract concluded on the basis of public procurement and, by an expansive interpretation of Art. 1(1) of the Regulation, the case fell within its material scope.[27]

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[25] Judgment of 16 July 2020, *Movic and Others*, C-73/19, EU:C:2020:568.

[26] Judgment of 3 September 2020, *Supreme Site Services and Others*, C-186/19, EU:C:2020:638.

[27] Judgment of 6 October 2021, *TOTO*, C-581/20, EU:C:2021:808.

Another category of interpretative material from the analysed area is labour disputes arising from individual employment contracts. As we have mentioned in the previous chapters, although labour law is a separate branch in various Member States' legal systems, by an autonomous interpretation of civil and commercial matters the legislator has placed the field of individual contracts of employment under both the Brussels I bis Regulation and the Rome I Regulation.[28] The employee, like the consumer, is *de facto* in a weaker position in the dispute in question, which stems from the generally less economically and legally experienced nature of that person. In relation to the topic under discussion, we are interested in whether employment disputes between an employer that is a public authority and employees of those authorities fall within the Regulations dealt with in this article. In our opinion, based on what has been stated so far, it is clear that disputes arising out of an individual employment contracts fall within their scope, since the public authority is acting in the same manner as any other employer, whether in the public or private sector. It is, of course, essential to respect that the dispute cannot be one that relates directly to activities connected with the exercise of public authority. Employment contracts involving the staff of the various authorities, whether professional, technical or other staff, ought to be governed by the same rules as for all other employees. In the well-known Mahamdia judgment, the Court of Justice provided an interpretation of the Rome I Regulation, without calling into question the scope of the Regulation, even though it concerned an employee of the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria, who was a driver for embassy staff in Berlin.[29] The Court of Justice also addressed a dispute between the Bulgarian Consulate General and a worker who provided administrative services there.[30]

Perhaps one of the most famous judgments in the area examined in the present article is the well-known Pula Parking judgment, which concerned the interpretation of several provisions of the Brussels I bis Regulation, among them the substantive scope in relation to the activities of Pula Parking, a company owned by the City of Pula, Croatia. The company undertook the administration, supervision, maintenance and collection of parking fees in all the paid public parking areas in the town, by the decision of the municipality, headed by the mayor of the town. Mr. Tederahn, a German national, failed to pay the parking fees within the prescribed period and Pula Parking applied to the local notary for enforcement based on an "authentic document" which was to be a verified statement of the accounting records. The Court declared that although Pula Parking had been given powers by the public authority, the nature of the action and the terms of the application had to be examined. It stated that it is for the national court to ascertain whether the action is of an administrative nature, whether the dispute does not involve a penalty that would be categorised as arising from an act of public authority, and whether or not it is of a punitive nature typical of a public-law relationship. In the present case, there was no penalty imposed by a public authority, but only compensation for a service, which is essentially a legal relationship of a private-law nature and therefore falls within the scope of the Regulations.[31]

A very analogous case from Zadar, Croatia, in which the commercial company Obala, established by the municipality – the City of Zadar, was empowered to collect parking fees on public roads. As in the previous case, on the basis of an authentic instrument, the company initiated proceedings for the recovery of the fees corresponding to the parking ticket. The court

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[28] Section 5 of the Brussels I bis and art. 8 of the Rome I.

[29] Judgment of 19 July 2012, *Mahamdia*, C-154/11, EU:C:2012:491.

[30] Judgment of 3 June 2021, *Generalno konsulstvo na Republika Bulgaria*, C-280/20, EU:C:2021:443.

[31] Judgment of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193.

hearing the case did not know whether it could apply the interpretation given in the Pula Parking judgment, since in that case the user had to collect the ticket when entering the car park, whereas in the present case the charge had to be paid in advance for a certain period and, once that period was exceeded, a daily ticket, which was already punitive in nature, became payable. The Court of Justice gain emphasised the need for an extensive interpretation in order to avoid the giving of irreconcilable judgments between the judicial authorities of different Member States. It also recalled the interpretative materia of the Movic judgment already mentioned. Statutory default interest in the event of non-payment of the parking charge in question is a consequence of national legislation on liabilities, which enshrines the creditor's right to compensation, and *de lege*, therefore, we cannot speak of a penalty for a traffic offence in the present case either. The claim for payment of the daily parking ticket cannot qualify as an exercise of public authority within the meaning of the autonomous interpretation of the Union *acquis* and therefore, as in the case of Pula Parking, falls within the scope of civil and commercial matters within the meaning of the Regulations.[32]

Following from the Pula Parking judgment, we consider that one of the most important decisions in the analysed area is The Court's order in Nemzeti Útdíjfizetési Szolgáltató case, which concerned the recovery of a fee that was unilaterally imposed by a public law act. That case concerned the holder of a vehicle registered in Germany who drove a vehicle along a short stretch of a toll road in Hungary without purchasing the necessary vignette. The court hearing the case was familiar with the judgment in Pula Parking, but it was not clear to it whether the charge fell within the concept of civil and commercial matters, as was also the case in Pula Parking. It reiterated, as in previous judgments, that a public purpose *per se* was not sufficient to qualify the action as *iure imperii*. The Court clarified that this case did not involve a punitive mechanism or issuing a payment order. Indeed, the applicant did not exercise any discretion and sued for the payment of a fee increased by an amount that is stipulated in the relevant national legislation, and we cannot say that the body in question has exercised *iure imperii*. An action on the merits to recover a fee for the use of a toll road through legal proceedings "brought by a company authorised in accordance with the law, which classifies the relationship arising from that use as being governed by private law" falls within the scope of civil and commercial matters within the meaning of Brussels I bis.[33]

In another of its decisions, in an action by a private party against the state as an issuer of state bonds, the Court of Justice used the argument that these matters fell within the concept of civil and commercial matters "insofar as it does not appear that they are manifestly outside the concept of civil or commercial matters."[34] We find the judgment most interesting because it implies, to some extent, that unless we can clearly classify a dispute as falling within the enumerated cases of being out of scope, there is a presumption that it falls within civil and commercial matters. On the contrary, the dispute, which concerned a unilateral and retroactive amendment of the terms by the State by legislation in order to reduce the nominal value of the bonds to prevent the insolvency of the State, namely Greece, was clearly an expression and exercise of the public power of the State and, consequently, the dispute could not be subsumed within the scope of the Regulation.[35] We reaffirm that the relevant difference is whether the dispute arises

[32] Judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236.

[33] Order of 21 September 2021, *Nemzeti Útdíjfizetési Szolgáltató*, C-30/21, EU:C:2021:753.

[34] Judgment of 11 June 2015, *Fahnenbrock and Others*, C-226/13, EU:C:2015:383.

[35] Judgment of 15 November 2018, *Kuhn*, C-308/17, EU:C:2018:911.

out of an action or measure that is better available for all equal parties to the dispute in question, or whether it is a measure peculiar to a public authority and, by its use, it is exercising public power and performing an act *iure imperii*.

To conclude this part of the article, we would like to mention one of the key judgments in the Rina case, which was not directly about a public law entity, but about a delegation by the State to carry out the acts of classification and certification of ships. The judgment also concerns a non-EU State, which distinguishes it from most of the decisions mentioned. These acts were carried out by Rina under the authority of the Republic of Panama and, as a result, it is argued that they were an exercise of the sovereign powers of the authorising State. Rina, based in Italy, relied on the jurisdictional immunity of the authorising State within the meaning of the customary rules of public international law. The proceedings against Rina were brought by family members of the victims and passengers who survived the sinking of the ship in the Red Sea and who claimed damages on the basis of Rina's civil liability. This action was based on the provisions of the Italian Civil Code on both non-contractual and contractual liability. The court hearing the case had to examine whether the classification and certification of ships can be classified as the mere exercise of *iure imperii*. The Court stated a key point, namely that acting on behalf of the State does not automatically constitute the exercise of public authority. It also pointed out that the activity in question must also be examined in the light of international agreements, in particular the Montego Bay Convention and the SOLAS Convention. The Court concluded that this dispute and its nature could not be regarded as an act *iure imperii* within the meaning of the EU *acquis*.[36] Nevertheless, "the rules of customary international law...are binding upon the Community institutions and form part of the Community legal order".[37] Moreover, as part of the primary law of the EU, the Charter of Fundamental Rights of the EU is also binding and therefore the right to a fair trial within the meaning of Article 47 of the Charter cannot be omitted in this case. Jurisdictional immunity, which as a rule has completed the process of customary norm-making based on the principle of *par in parem non habet imperium*, is not absolute in nature and relates exclusively to the performance of *iure imperii* in the exercise of the sovereign power of the State concerned. It is therefore for the court hearing the case to ascertain whether, not only under the EU law but also under public international law, an act is one of *iure imperii*. Compensation for damages against a private-law body, such as that at issue in the main proceedings, can also be characterised under international law as not being an exercise of public authority.[38] As we have already stated several times, it is always for the national court to verify those requirements and factors after a detailed ascertainment of the facts of each case.

However, Rina case sparked a debate on the effect of international public law in defining civil and commercial matters. The international law of sovereign immunities can be considered to some extent vague, and individual states regulate these issues at the national level. If the Court of Justice were to interpret the concept of civil and commercial matters in the context of international law, this would have a negative impact on the law of sovereign immunities of the EU Member States, and the competence of The Court to make such a harmonisation is questionable. At the same time, the nature of the two spheres is different (Cuniberti, 2021). However, this is an area that stimulates debate beyond the scope of this part of the present article and will therefore not be discussed in depth.

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36 Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

37 Judgment of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91.

38 Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

The Rina judgment concludes this section of the article. Through the case-law of the Court of Justice, we have identified the boundaries between the performance of *iure imperii* and the exercise of the public authority's powers on the one hand, and the actions that fall within the scope of the analysed Regulations, despite the negative delineation of the scope of application to revenue, customs and administrative matters and, in the Brussels I bis Regulation, also acta *iure imperii*. In the following chapter, we briefly review how civil and commercial matters are interpreted in the context of the key sources of private international law adopted under the auspices of the Hague Conference.

4 Civil and commercial matters in the context of the international conventions adopted under the auspices of the Hague Conference

The Hague Conference on Private International Law (hereinafter "the Hague Conference" or "Conference"), as an intergovernmental organisation, works to unify selected issues of private international law. Various states from all over the world are part of the Conference, as well as the EU Member States and, since 3 April 2007, the EU itself has been a regular member (EUR-Lex, 2017). There are even states that are bound by some of the Conventions but are not part of the Conference as such. The issue of disparities between the legal systems of the members is much more intense regarding the global scope of the Conference than among the EU Member States, whose legal systems show more similarities. It is precisely for this reason that it is essential that the Conference continually seeks a compromise between States (Štefanková et al., 2011, 54).

The Hague Conference has also adopted a number of conventions, the scope of which is limited to civil and commercial matters. In particular, we have chosen to examine the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[39] and the Convention of 30 June 2005 on Choice of Court Agreements[40] because their content is most relevant to the Regulations, which we have dealt with in the previous part of this article, and also because the European Union itself is one of the contracting parties. The exception is Denmark, which has made use of its opt-out clause and does not participate in this form of judicial cooperation.

The Judgments Convention is a relatively new instrument; although the Council has adopted the EU's accession to the Convention, the Convention has not yet entered into force, but it should happen on 1.9.2023.[41] It follows the 2005 Choice of Court Convention and therefore it is necessary to ensure consistency in the interpretation of the articles, which are identically framed. A positive definition of *ratione materiae* is found under Article 1, which states that the Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. Excluded from the scope are, *inter alia*, revenue, customs and administrative

[39] The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter as "the Judgments Convention"). https://www.hcch.net/en/instruments/conventions/full-text/?cid=137

[40] The Convention of 30 June 2005 on Choice of Court Agreements (hereinafter as "the Choice of Court Convention"). https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

[41] Rozhodnutie Rady (EÚ) 2022/1206 z 12. júla 2022 o pristúpení Európskej únie k Dohovoru o uznávaní a vy-kone cudzích rozsudkov v občianskych alebo obchodných veciach. https://bit.ly/3qPqKcP

matters.[42] Again, it is necessary to forget the interpretation according to national law, and the interpretation of this provision must be given in the light of the teleology and objectives of the Convention.[43] Interestingly, the direct wording of the Convention enshrines that "A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings."[44] The Convention thus makes it clear that the theory of subjects has absolutely no place in this context, and the mere fact that a public authority stands on one side does not affect its application. Moreover, within the scope of the Convention itself, it is necessary to identify whether the decision in question falls within the concept of a judgment as defined in Article 3(1)(b) of the Convention.[45] The test of whether we have a judgment that falls within the definition may make it easier in practice to find the limits of the Convention's material scope in disputes in which a public authority is a party. Moreover, in the context also of the aforementioned Rina judgment of the CJEU, the Convention makes it clear that the privileges and immunities of States or international organisations are not affected by the provisions of the Convention.[46]

The interpretation of the scope of jurisdiction is clearly elaborated in the Explanatory Report, which states that the determination of the scope of jurisdiction depends on the nature of the claim or action that is the subject of the judgment, and the fact that the State or public authority is acting as one of the parties to the dispute is not a decisive element. Nor does it matter whether the civil or commercial action has been brought before a civil or administrative court. The key to assessing the scope of application in the area under analysis is to identify whether the public authority in question is exercising the power conferred on it in the matter in question and whether that power is not open to ordinary persons. If the action arises out of such a procedure, including regulatory powers, the scope of the Convention is not satisfied. This report also gives a typical example of the exercise of public power, the recovery of a claim by means of administrative proceedings, without any requirement for judicial proceedings. Orders by governments or governmental agencies, claims against public officials in person acting on behalf of the State, and liability for the acts of public authorities are also excluded from the scope. Conversely, even if a party is not acting within the limits of public authority, the scope is established, for example "when a governmental agency is acting on behalf of private parties, such as consumers or investors", on condition that it is not acting within the exercise of its public powers.[47]

As was the case at the Union level, it is essential to ensure uniformity of interpretation of the equivalent provisions of the different Conventions at the Hague Conference. Therefore, the same definition of civil and commercial matters applies to the scope of the Choice of Court Convention as to the Judgments Convention, and the wording itself contains a provision that the mere fact that a public authority stands on one side does not mean that material scope cannot be given.[48] The negative definition of revenue, customs, or administrative matters themselves,

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[42] Art. 1(1) of the Judgments Convention.

[43] Explanatory Report by Francisco Garcimartín & Geneviève Saumier. https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf

[44] Art. 2(4) of the Judgments Convention.

[45] Art. 3(1)(b) of the Judgments Convention.

[46] Art. 2(5) of the Judgments Convention.

[47] Explanatory Report by Francisco Garcimartín & Geneviève Saumier. https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf

[48] Art. 2(5) of the Choice of Court Convention.

emphasises the focus on the nature of the legal relationship and not on the branch of law, which can be determined in different ways in legal systems around the world. Based on this, we can say that both *iure imperii* and administrative matters can be included under the analysed Conventions under approximately similar conditions as in the case of the EU Regulations under examination.

Conclusion

The present article focuses on the examination of the scope of selected sources of private international law from the perspective of the participation of an administrative or other public authority in the proceedings as a party to the dispute. As we have demonstrated, even disputes that may, at first sight, appear to be public law disputes may fall within the scope of the analysed instruments, if certain conditions are met. We have focused in particular on the Brussels I bis and the Rome I, II Regulations, which form the general core of judicial cooperation in civil and commercial matters within the EU. These regulations define their *ratione materiae* in both positive and negative ways. It must be a civil or commercial matter and revenue, customs and administrative matters are excluded from the scope of application, along with, in Brussels I bis, *acta iure imperii.* As we have shown in the relevant case-law of the Court of Justice, the scope and concept of civil and commercial matters must be interpreted in an autonomous manner, teleologically, systematically, and, moreover, in the light of the general principles arising from all the national rules of the Member States, thus underlining the need for a uniform interpretation and a unified application throughout the EU.[49] The legislator was interested in preserving a broad concept of civil and commercial matters[50] and therefore an expansive interpretation is required in order to avoid irreconcilable judgments being issued within the EU.

Based on the case-law of the Court of Justice, we have identified the need to classify the legal relationship and to define its nature, but also to examine the cause of action and the conditions for the application of the action as key elements for assessing whether the substantive scope is given. It must be an exercise of *iure gestionis* and not an exercise of public authority, *acta iure imperii*. It is also necessary to analyse whether the authority in question is exercising certain powers which are exceptional in comparison with those ordinarily available in relations between individuals governed by private law. Nor is the public purpose of the exercise alone sufficient for the dispute in question to qualify as a performance of *iure imperii* and to exclude it from the scope of application.[51] Nor does it automatically mean that an act on behalf of the state by an authorised entity, nor does the purpose of the exercise in the interest of the state, constitute an act *iure imperii*.[52] Thus, if a party is acting, for example, as an employer of cleaning staff, or, say, as a purchaser of office equipment and the like, its position is completely different from that of a unilateral order within the limits of the *iure imperii*. The court hearing the case is obliged to take all these criteria into account and, on that basis, to decide whether to apply the Regulations in question to the present dispute, of course, if all conditions of scope are met. Judicial cooperation in civil and commercial matters within the EU consists not only of the general regime, which we have discussed in this article, but also of other sources. Insofar as these

[49] Judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236.

[50] Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

[51] Judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236.

[52] Judgment of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349.

sources are limited to civil and commercial matters, the interpretation we have outlined in the article is applicable, within the limits of the equivalent provisions on scope, to other relevant sources of the EU *acquis*.

We have devoted the last part of the article to the effects of the international conventions adopted under the auspices of the Hague Conference on the EU legal order in order to compare the interpretation of the concept of civil and commercial matters in the context of the selected Conventions. As we have shown, also with the Conventions, the key focus is on the nature of the claims or action that is the subject of the judgment and the nature of the parties in dispute is irrelevant. As part of *de lege ferenda* considerations, we could take inspiration at the Union level from the aforementioned Hague Conventions and add to the text of the Regulations a provision on the irrelevance of the nature of the parties to a dispute for the determination of the *ratione materiae* of the Regulations. In our view, it would also speed up the decision-making process in the national courts if the relevant provisions were expanded to include the most relevant conclusions from the interpretative material of the CJEU's case-law in the area concerned.

Naturally, the legislator cannot think of all situations that may arise in practice and therefore, in the conclusion of the article, we would like to highlight the irreplaceable role of the case-law of the Court of Justice, the interpretative material of which substantially complements the sources of the EU *acquis* and fills gaps in some vague provisions and thus clearly facilitates the application of the analysed Regulations in practice.

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Book Review

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Zoltán Nagy (Ed.), *Regulation of Public Finances in Light of Financial Constitutionality. Analysis on Certain Central and Eastern European Countries* (CEA Publishing, 2022)

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In 2022, Central European Academic Publishing published "Regulation of Public Finances in Light of Financial Constitutionality", edited by Prof. Zoltán Nagy. This book is the first instalment in the book series "Legal Studies on Central Europe", which focuses on various aspects of Central European public finance law. The primary goal of the series is to present and discuss legal issues relevant to the Central European region while considering the traditions, culture and mindset of the countries in the area. Other volumes in the series will cover more than private and public law and legal and integration history topics; the aim is to produce international law-related publications and analyses as well. The books are intended for university lecturers and legal practitioners with an interest in contemporary legal issues concerning the countries of Central Europe. Furthermore, the book cited in the title serves as a textbook for the Public Finance Law module of the CEU's Ph.D. programmes, providing a comprehensive overview of the national regulations and a comparative legal presentation of various Central European countries.

This book can be helpful for professionals working in financial law to understand Central European financial regulations better and may provide valuable insights for researchers. The countries of Central Europe have undergone similar economic transformations over the past few decades, which have created similar problems for their societies. Hence, reviewing whether their legal solutions have been successful or fell short in addressing these issues will be helpful. Furthermore, the jurisprudence of these countries may provide important lessons for the future if legislators can learn from each other's specific regulatory measures.

The book's first part deals with theoretical issues related to public finances, introducing the fundamental characteristics of the legal institutions involved in their regulation and their integration into the economic and legal systems. Understanding basic economic phenomena makes interpreting legal institutions and concepts possible. The book enables readers to understand the state's role in the economy and the concept and significance of money in a system for regulating public finances.

The book's second part discusses the national regulatory models of individual Central European countries. The national models illustrate each country's development and system of public financial regulation, highlighting particular fiscal rules in the light of constitutionality. The book covers the legislation of several countries, focusing on Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia. The authors reflect the composition

of the countries covered; all are competent, professionals with many years of theoretical and practical experience in the field and edit each national chapter. Among them are Tereza Rogic Lugaric, associate professor (Department of Financial Law and Financial Sciences, University of Zagreb); Irena Klemencic, assistant professor (Department of Financial Law and Financial Sciences, Faculty of Law, University of Zagreb); Gábor Hulkó, associate professor (Department of Administrative and Fiscal Law, Deák Ferenc Faculty of Law and Political Sciences, Széchenyi István University, Győr) and Michal Radvan, associate professor (Department of Financial Law and Economics, Masaryk University, Brno); Mariusz Poplawski, professor (Department of Public Finance and Financial Law, Faculty of Law, University of Bialystok); Ion Brad, assistant professor (Department of Legal Sciences, Faculty of Sciences and Arts, Sapientia Hungarian University of Transylvania, Cluj-Napoca); Goran Milosevic, professor (Department of Economic Law, Faculty of Law, University of Novi Sad); Miroslav Strkolec, professor (Department of Financial and Tax Law, Faculty of Law and Political Sciences, Pavol Jozef Safarik University, Kosice) and Rado Bohinc, professor (Comparative Law Research Center, Faculty of Social Sciences, University of Ljubljana). The diverse team of authors thus also guarantees the comprehensive coverage of each book chapter.

Furthermore, the reader can gain from the comparative analysis of national regulations in the book's third part, which analyses different national solutions and highlights similar and outlying regulatory models. All in all, the authors have created a useful book in the field of public finance law, which will expand the knowledge and understanding of finance for Ph.D. students and legal practitioners working in other areas of law.

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CONTENTS

ARTICLES

BOOK REVIEW