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Issues of fundamental procedural rights and procedural constitutionality in the Fundamental Law

András Patyi*

* András Patyi, PhD habil, Head of Department, Lőrincz Lajos Department of Administrative Law, Faculty of Public Governance and International Studies, University of Public Service, Budapest; Professor, Department of Public Administrative and Financial Law, Ferenc Deák Faculty of Law, Széchenyi István University, Győr; vice president, Curia, Budapest. E-mail: patyi.andras@uni-nke.hu

Abstract

The Fundamental Law of Hungary entered into force on 1 January 2012, introducing several new constitutional rights, one of it is the right to fair administrative procedure. This paper aims to present a comprehensive analysis of that new constitutional right. The first part of the study is devoted to explain the legal background and the constitutional tradition behind the right to fair procedure (by authorities). We should note that Constitutional Court's decisions had already specifically affected legal regulations of a procedural nature before the declaration of the fundamental right to fair procedure. These decisions – examined in the paper – have been pivotal for Hungary's legal system and procedural law. Secondly, the current practice of the realization of the right to fair administrative procedure is presented. Through the Constitutional Court's practice, we also describe the partial rights/authorizations of this fundamental right. Finally, the right to legal remedy and to fair judicial procedure are analysed in detail.

Keywords

right to fair administrative procedure, legal remedies.

1. Fundamental procedural rights, the Fundamental Law, and the National Avowal (or National Commitment)

It is no exaggeration to state that Hungary's Fundamental Law ushered in significant changes in the fundamental rights defining the requirement of fair legal procedures. In fact, *the right to fair administrative procedures*, as stipulated in Article XXIV, is one of several *entirely new* constitutional rights, which was basically introduced in the Fundamental Law.

One issue closely related to this right is the requirement and declaration of a state that serves its citizens or, in other words, provides "good administration", as expressed in sentence 20 of

the National Avowal.[1] This is part of the notion and requirement of the right to good public administration; however, in agreement with Csaba Erdős, it should be emphasised that "a state providing good administration is actually a state bound by law, where there is no room for arbitrary administration."(Erdős, 2019, 351) The novel constitutional basis for the requirement of fair administrative procedures is the following sentence: "We proclaim that true democracy exists only where the State serves it citizens and administers their affairs justly and without abuse or bias." According to Paragraph (3) of Article R) of the Fundamental Law, the National Avowal is not only a declaration, but it also serves as a framework for the interpretation of other, normative provisions of the Fundamental Law.[2]

Even after its reforms aimed at compliance with the rule of law in 1989/90, the previous Constitution stipulated no similar right, even though the Constitutional Court defined a few requirements (which are now seen to be related to the above-mentioned right) by citing other provisions, and primarily the rule of law clause.[3] The requirement stated in Paragraph (1) of Article XXIV clearly concerns *public administration* as the active segment of *exercising the powers of the state*. According to that Article, "Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities.". Furthermore, authorities must justify their decisions as required by law. As a further fundamental right, authorities must compensate citizens for any damage caused by the unlawful conduct of those authorities.

Another fundamental right that is very closely connected to the above-mentioned new and itemised constitutional norm is the right to *fair procedures*, or in other words, the right to the court. This fundamental right was adopted in Hungary sooner, upon the constitutional amendment of 1989, when it replaced Paragraph (1) of Article 57 (which had stated the entitlement of citizens of the People's Republic of Hungary to the protection of life, physical integrity, and health). The new text had originally been inserted in Section 34 of Act XXXI of 1989 amending Act XX of 1949 on the Constitution of the People's Republic of Hungary (which was first amended and standardised in Act I of 1972 and for the last time in 1989)[4]. According to the

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[1] Concerning the dilemma of the terminology in the National Avowal (operative provisions, thesis, terms), see: Patyi (2019, 9).

[2] According to Paragraph (3) of Article *R)* of the Fundamental Law, "The provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, with the Fundamental Law's National Commitment, and with the the achievements of our historical Constitution".

[3] "The Constitution (Act XX of 1949 amended by Act XXXI of 1989) did not specify fair procedures *expressis verbis*, but the Constitutional Court deduced the notion from the Constitution based on the mutual relevance of procedural guarantees arising from legal certainty [Paragraph (1) of Section 2 of the Constitution] and the right to impartial jurisdiction [Paragraph (1) of Section 57 of the Constitution]. In its decision, the Constitutional Court took into consideration the relevant provisions of the international treaties which served as examples for Section 57 of the Constitution (i.e. Article 14 of the International Covenant of Civil and Political Rights, and Article 6 of the European Convention on Human Rights." CC decision 21/2014 (VII. 15.), Statement of Reasons [57]

[4] In its quoted decision, the Constitutional Court points out that the requirement of fair procedures originated from earlier times: the codes of procedural law introduced after the so-called Compromise (between Hungary and Austria, in 1867), i.e. civil jurisdiction as well as the subsequent civil and criminal procedures) granted the right to a court procedure, the impartiality and independence of judges (through exclusion and conflict-of-interest rules), as well as the right to legal remedy. In this way, elements of the right to fair procedure (as defined in the Constitution and the Fundamental Law) were already present in the legal system of the previous historical constitutional period. Cf.: CC decision 21/2014 (VII. 15.) ibid.

Statement of Reasons of Section 34 of the draft Act to amend the Constitution, "by acknowledging international human rights treaties, such as the Universal Declaration of Human Rights, the International Covenant of Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, Hungary assumed an obligation to acknowledge general human rights and fundamental values. In the spirit of those treaties, the Proposal re-regulates fundamental rights and obligations."[5] In addition, the Statement of Reasons states that "judicial procedures aimed at deciding whether a person is guilty or innocent are especially significant. Consequently, it must be stipulated in the Constitution that every person's case shall be adjudicated by an independent and impartial court. The Constitution also prescribes equitability and publicity, and emphasises the presumption of innocence, i.e. everybody's right to be deemed innocent until they are declared guilty in a final court ruling."[6]

It should be noted that the original text of the Constitution did not specify the right to *fair procedures* or, in the wording of the European Convention on Human Rights, to a *fair trial.* In general, the Constitution made few references to equality before a court. Paragraph (1) of Section 49 of the original Constitution of 1949 should be noted; this provision, transferred to Paragraph (1) of Section 61 after 1972, merely stated that "citizens of the People's Republic of Hungary are equal before the law, and enjoy equal rights". The lack of the right to fair procedures stemmed not only from the Stalinist-Bukharinist Soviet constitution, which had served as the underlying example. (It contained merely token democratic provisions besides a Soviet-type power structure, and had a decisive impact on the structure and contents of Socialist constitutions after World War 2.[7]) Another reason was that "guarantees of Anglo-Saxon origin only became known internationally after the Convention of 1950".[8] Hungary joined this Convention only in the early 1990s, but its text had obviously been known at the time of the major revision of the Constitution in 1972. However, neither this fact nor the existence of the International Covenant on Civil and Political Rights (ICCPR), adopted at Session XXI of the UN General Assembly on 16 December 1966, affected the amendment to Hungary's Constitution in 1972, which continued to eschew the right to a fair procedure (trial). Then again, our country ratified the ICCPR in 1974, and it was only promulgated in Law-decree No. 8 of 1976.[9]

All this is important because the text of Paragraph (1) of Section 57 of the Constitution is an almost verbatim equivalent of the relevant provisions in Article 14 of the ICCPR, which stipulate the following: "All persons shall be equal before the courts and tribunals. In the de-

5 Statement of Reasons, Article 1

6 Statement of Reasons, Article 4

7 Regarding the Soviet Constitution on which Hungary's Constitution of 1949 was based, see: Kovács (1990).

8 Hollán et al. (2009). According to the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993:
"Right to a fair trial: 1. In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

9 The deed of confirmation by the Presidential Council of the People's Republic of Hungary was deposited with the Secretary General of the United Nations on 17 January 1974; pursuant to Paragraph 1 of Article 49, the Covenant took effect on 23 March 1976.

termination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Paraphrasing minimally, Paragraph (1) of Section 57 of the Constitution states that "In the Republic of Hungary everyone is equal before the law and has the right to […]." The equivalent provision in the Fundamental Law (Paragraph (1) of Section XXVIII), *contains one term less*, as equality before the law is stipulated in Paragraph (1) of Section XV. However, the Fundamental Law *adds a term* to the detailed requirements of fair procedure, noting that a court must adjudicate a charge or right in litigation "within a reasonable period of time".

Naturally, these two fundamental rights do not constitute an exhaustive list of the requirements defined in constitutional norms regarding public procedures (related to the powers of the state). It is the requirement (clause) of the rule of law that constitutes both the source of and an overall framework for these requirements.[10] Even though the constitutionality of the procedures (or procedural constitutionality) may have various requirements and principles depending on the type of procedure, there is no democratic constitutional procedural law without honouring the principle of equality, the principle of (or fundamental right to) fair procedure, and an opportunity for the effective enforcement of one's rights. The following principles can be derived beside the need for fairness arising from human dignity (a general freedom of action), based on the rule of law clause: predictability, lawfulness; the due exercise of rights; and the right to a decision taken within a reasonable time. Furthermore, from the principle of democracy, the following can be deduced: the democratic legitimacy of public decision-making entities; majority decision-making; and transparency.[11]

2. The constitutional tradition behind the right to fair procedure (by authorities)

The right to fair procedure by authorities (or, in other words, to *fair administration*) basically defines the requirements for public administration and also provides guarantees, mostly of a procedural nature, i.e. regarding the way and method of exercising the powers of the state. As mentioned above, several decisions by the Constitutional Court had already specifically affected legal regulations of a procedural nature before the declaration of the related fundamental right. These decisions have been pivotal for Hungary's legal system and procedural law, as they basically created a new quality of procedural rights, adding several guarantees to them. For example, it was the Constitutional Court that enforced the judicial review of administrative decisions and the re-codification of the law on infractions (minor offences), as well as true and effective legal remedies against the silence of authorities.[12] The Constitutional Court also ruled on legal remedies that, while formally allowing for judicial control, limited substantive and effective legal procedures.[13] Several decisions by the Constitutional Court examined the notion and applicability of administrative cases; in other words, the substantive scope of administrative procedure. As another constitutional issue, cases based on their contents (characteristics) were administrative cases, but were not subject to the law on administrative procedure. This

[10] As to the comprehensive analysis of the notion of rule of law, see, for example: Varga (2015). Standard definitions for the rule of law are specifically provided on pages 93–108; furthermore: Győrfi et al. (2009).

[11] See a detailed description of procedural constitutionality in: Chronowski & Petrétei (2016), and Chronowski (2019).

[12] CC decisions 32/1990 (XII. 22.), 63/1997 (XII. 12.), 72/1995 (XII. 15.).

[13] CC decision 39/2007 (VI. 20.).

question of constitutionality may also arise as a result of erroneous (limiting) legal interpretation by an authority (and the court reviewing it). The Fundamental Law created an opportunity for the review of the constitutionality of these cases by introducing so-called full constitutional complaints Article 24 (2).

In the Constitutional Court's practice, it is an indispensable requirement for the *lawfulness of public administration* that such administration shall operate within a *legally regulated* procedural framework, and any authorisation to limit rights needs to be specified accurately by law.[14] Fundamental rights primarily provide guarantees to and protect the rights of the legal entities concerned; in contrast, the lawfulness of administrative decisions is *an interest of a state under the rule of law,* which must also be served by the legal regulation of administrative procedure, *regardless of the client's interests.*[15] The application of law by public administration (authorities) serves the enforcement of legal regulations, not only aimed at individuals' interests protected by subjective rights and the effective legal regulations, but also the rights and lawful interests of the public or a community, as well as generally protected legal objectives such as the protection of public order and safety, and also the protection of individuals' lives, safety and rights. As such, an authority's unlawful decision not only infringes the rights of the affected party entitled to seek legal remedy but also the community's rights and interests protected by legal regulations. Ultimately, an unlawful decision violates the Fundamental Law as well, because that law prohibits any authorisation for unlawful decisions. An unlawful decision means that the relevant public administration authority did not proceed while subordinated to the law when making the decision concerned. The two aspects – the interest of an individual versus the interest of the community – may also be opposite to each other, that is, a decision may be favourable to the individual but violates the law.[16] "A decision that is favourable to the client but is unlawful may violate the public interest and others' rights and lawful interests protected by administrative law (for example, a building permit issued without regard to the applicable environmental protection regulations violates the rights and lawful interests of the entities whose health those regulations aim to protect)."[17] A public administration authority is obliged to *pass a decision* in the legally stipulated cases; and, for reasons of predictability, that decision must be passed within a certain (prescribed and respected) *deadline*.[18] Guarantees for a *fair procedure*

[14] Original wording: "entities exercising the powers of the state shall carry out their activities within the organisational framework and according to the operating procedures defined by law, pursuant to regulatory limitations that are predictable and knowable by citizens." [CC decision 56/1991 (XI. 8.), ABH 1991, 454, 456]. The original wording was confirmed and completed by the following CC decisions: "Public administration subordinated to law – a basic requirement arising from the principle of rule of law", CC decision 6/1999 (IV. 21.), ABH 1999, 90., 94.; CC decision 19/2004 (V. 26.), ABH 2004, 321., 353. Decisions passed after the entry into force of the Fundamental Law: "in connection with the operation of public administration entities, it is a requirement arising from the principle of rule of law that public administration should be subordinated to law. Public administration entities intervening in social relations based on their public powers shall make their decisions within a legally defined organisational framework, according to legally regulated procedures, and within the framework of substantive law." Statement of Reasons [72] of the decision 38/2012 (XI. 14.), and Statement of Reasons [20] of CC decision 25/2018 (XII. 28.).

[15] CC decision 2/2000 (II. 25.), ABH 2000, 25., 28–29.

[16] Küpper & Patyi (2009, 1763).

[17] CC decision 2/2000 (II. 25.), ABH 2000, 25., 28.

[18] CC decision 72/1995 (XII. 15.), ABH 1995, 351., 354.

must be enforced in an administrative procedure as well; in particular, an authority cannot be its own client; the two roles must be separated;[19] and the interested party must be heard (if that party wishes to exercise that right). These guarantees are weaker than those in a judicial procedure, but the basic ones must also be enforced in administrative procedures. On the other hand, the protection of legal relations closed with a final ruling and the protection of acquired rights must also be taken into consideration pursuant to the principle of legal certainty, in addition to the goals of providing procedural guarantees and lawful public administration.[20]

As indicated above, the Constitutional Court has derived the basic requirements for the operation of public administration from the principle and clause of the rule of law, a key notion in Hungary's constitutionality. According to the standard practice of the Constitutional Court formulated over a period of three decades, the *subordination of public administration to the law* is deemed as an element of the rule of law in connection with the activities of public administration entities.[21]

These decisions by the Constitutional Court – as well as most of the Court's other decisions referred to in this study – are logically based on the text of the previous Constitution instead of the Fundamental Law. I use them in view of the fact that the Constitutional Court declared the following about repealing, through the fourth amendment to the Fundamental Law, Constitutional Court decisions made before the Fundamental Law had taken effect: "arguments, legal principles and constitutional connections in previous decisions may be used in addressing constitutional questions in new cases, provided that nothing prevents the application of those items based on the equivalence of the contents of the relevant Section in the Fundamental Law with the Constitution, its equivalence with the context of the Fundamental Law as a whole, the rules of interpreting the Fundamental Law, and the specific case at hand, and provided that it is necessary to insert those items into the Statement of Reasons of the decision to be made."[22] I have also considered that, for the above-mentioned reasons, these requirements are closely related to the historic constitution, i.e. they involve a certain *constitutional tradition* which should be emphasised in connection with the new provisions of the Fundamental Law as well.

Regarding a state that provides "good administration and services", it is a basic requirement for the rule of law that *entities exercising the powers of the state* shall carry out their activities within the organisational framework and according to the operating procedures defined by law, pursuant to regulatory limitations that are predictable and knowable by citizens. Hence, the

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[19] CC decision 10/2001 (IV. 12.), ABH 2001, 123., 147.

[20] CC decision 349/B/2001, ABH 2002, 1241., 1273.

[21] The following CC decisions, already quoted and to be quoted below: 56/1991 (XI. 8.), ABH 1991, 454., 456.; 31/2010 (III. 25.), ABH 2010, 178., 191., 29/2011 (IV. 7.), ABH 2011, 181., 200.

[22] {CC decision 13/2013 (VI. 17.), Statement of Reasons [32]} The Constitutional Court ruled that Paragraph (1) of Article B), which stipulates the relevance of the Fundamental Law to the rule of law, has the same content as Paragraph (1) of Section 2 of the previous Constitution, and that the rules of interpreting the Fundamental Law must not lead to a conclusion that goes against a previous position taken by the Constitutional Court. {CC decision 32/2013 (XI. 22.), Statement of Reasons [70]} For that reason, I consider the arguments, legal principles and constitutional connections defined in previous CC decisions referred to in connection with the rule of law still applicable. The practice referred to in CC decision 56/1991 (XI. 8.) was expressly confirmed in (Statement of Reasons [36] of) CC decision 5/2013 (II. 21.) after the Fundamental Law had taken effect. As to the Constitutional Court's practices concerning the usability of decisions based on the previous Constitution, see: Téglási (2014); Téglási (2015a); Téglási (2015b).

Constitutional Court inferred the subordination of public administration activities to the law from the constitutional principle of the rule of law, stipulating that the Constitution's rules permeate the entire legal system; consequently, the subordination of administrative acts to the law also means that they are tied to the entire legal system and the Constitution's rules, and primarily to constitutional rights.[23] According to the interpretation by the Constitutional Court, the subordination of public administration activities to the Public Administration Act, which stems from the principle of the rule of law, means that public administration entities intervening in social relations in possession of the powers of the state shall make their decisions within the legally defined framework, according to legally defined procedures, and within the organisational framework defined by substantive law.[24] All that means that *the institutional system of administrative law procedure* must, when making decisions while applying the relevant laws, enforce both requirements stemming from the rule of law (i.e. the lawfulness of administrative decisions) and legal certainty. The Constitutional Court considers the subordination of public administration to the law as a requirement of the rule of law, which *must be ensured by courts* through the verification of the lawfulness of administrative decisions.[25] The requirement of subordinating public administration to the law was defined by the Constitutional Court primarily as the need for the lawfulness of administrative acts passed when in possession of the powers of the state.[26] Under the Fundamental Law as well, the Constitutional Court deemed the requirement of subordinating public administration to the law (for the overall rule of law) as a general principle.[27] The three most important Constitutional Court decisions on judicial control were related to the review of authorities' decisions, namely CC decisions 32/1990 (XII. 22.), 63/1997 (XII. 12.) and 39/1997 (VII. 1.).

According to Constitutional Court decision 32/1990 (XII. 22.), judicial control *extends to all types of administrative decisions*, including those that do not result in claims for the violation of fundamental rights or were not made in connection with the performance of basic obligations. This CC decision annulled the previous legal provisions (in laws and Council of Ministers' decrees) which limited judicial review to a short list of administrative cases by authorities. Pursuant to this highly significant CC decision, the individual provisions of the Council of Ministers' decree that allowed for review were not unconstitutional in themselves. Was unconstitutional that the review was limited to the administrative decisions specified in the de-

[23] In CC decision 56/1991 (XI. 8.) (ABH 1991, 454., 456.), a text that had become independent of the specific constitutional passage (and the underlying constitutional issue, namely that the municipality of a Budapest district had failed to draft organisational and operating regulations) became a true norm and is now a very frequently quoted and referenced text: over 50 decisions are based on it (*ratio decidendi*), and it is referred to in several minority opinions, with only one *orbiter dictum* situation recorded. As László Sólyom reminds: if a phrase becomes a formula, then fact becomes fiction (Sólyom, 2001, 717).

[24] CC decision 56/1991 (XI. 8.), ABH 1991, 454., 456. CC decision 2/2000 (II. 25.) refers to the original text as if the Court had declared it with that content, i.e. the "phrase" has been modified. ABH 2000, 25., 28. See also: CC decision 38/2012 (XI. 14.), Statement of Reasons [72]; CC decision 14/2018 (IX. 27.), Statement of Reasons [23].

[25] CC decision 24/2015 (VII. 7.), Statement of Reasons [19], [20]; CC decision 30/2017 (XI. 14.) Statement of Reasons [85]; CC decision 14/2018 (IX. 27.), Statement of Reasons [24].

[26] CC decision 8/2011 (II. 18.), ABH 2011, 49., 79.

[27] CC decision 5/2013 (II. 21.), Statement of Reasons [37]; CC decision 24/2015 (VII. 7.), Statement of Reasons [20]; CC decision 30/2017 (XI. 14.), Statement of Reasons [85]; CC decision 3223/2018 (VII. 2.), Statement of Reasons [32].

cree. Based on Constitutional Court decision 32/1990 (XII. 22.), the National Assembly finally passed *Act XXVI of 1991 on the extension of the judicial review of administrative decisions*. However, that act left misdemeanour decisions and procedures "untouched", as it did not allow for the review of final misdemeanour decisions before a court, apart from those that changed a fine to detention. However, according to the Constitutional Court, "authorities dealing with misdemeanours are administrative authorities, and decisions in misdemeanour cases constitute administrative decisions. If a misdemeanour authority rules to punish a conduct against public administration based on the content of the decision or the bearings of the case, then an opportunity to verify the lawfulness of the decision must be provided, pursuant to the rules of administrative justice."[28] At the same time, the Constitutional Court pointed out that the rule of law requires not only the acts of public administration authorities to be subject to law, but also all acts involving decisions *affecting the addressees' fundamental rights.*[29] The contents of this legally regulated framework depend on further constitutional circumstances, and especially on the fundamental rights regulated in the Fundamental Law.

3. The fundamental right to fair public administration procedures in Hungary's Fundamental Law

As noted above, the Fundamental Law guarantees everybody's fundamental right to *fair public administration procedures*, i.e. to have their official affairs "handled impartially, fairly and within a reasonable time by the authorities". Consequently, as confirmed by the Constitutional Court's decisions described below, *the main principles of administrative procedure have been essentially elevated to a constitutional level*. The Fundamental Law was thus involved in the process of fair public administration procedures becoming a basic requirement in the European Union; this process started with the European Code of Good Administrative Behaviour and the Charter of Fundamental Rights, and ended with the Lisbon Treaty. The "principles [arising from the fundamental right] are related to the notion of good public administration, as well as

[28] CC decision 63/1997 (XII. 12.), ABH 1997, 365., 368.

[29] In connection with this, the Constitutional Court pointed out that the dismissal of a public or government official involves a decision by the person exercising the rights of the employer (a public administration entity) which affects the official's constitutional rights. In view of the subordination of public administration to law, the frameworks of the employer's decision under substantive law must be legally defined. The subordination of public administration to law also results in the obligation to regulate the legal position of public administration officials. For lawful administrative decisions, the legislator must, when regulating the legal position of officials, provide guarantees to ensure that public administration officials shall make highly professional and unbiased decisions without any influence and regardless of party policy, solely based on the applicable laws. One element of this guarantee system is the relative stability of public service officials' legal positions. On that basis, the Constitutional Court established that the legal conditions and guarantees, as well as the possibility of employers' decisions without citing the reason for them, violate the requirement of subordination to law as stipulated in Paragraph (1) of Article *B)* of the Fundamental Law. CC decision 8/2011 (II. 18.), ABH 2011, 49, 79–80, confirmed – after the Fundamental Law had taken effect – by CC decision 5/2013 (II. 21.), Statement of Reasons [37]. In addition, the possibility of dismissal without citing a reason violates the neutrality of administrative decisions from the perspective of party politics, their freedom from influence, their impartiality, and thus their lawfulness. CC decision 29/2011 (IV. 7.), ABH 2011, 181., 200.

to the common European principles of the law of administrative procedures".[30] In essence, the acknowledgement (in Article XXIV of the Fundamental Law) of the right to *fair* administrative procedures as a fundamental administrative right constitutes an expression of the above-mentioned rule-of-law requirement. The acknowledgement of the *right to fair administrative procedures (by authorities) as a fundamental administrative right* means that everybody is entitled to be heard before a decision that is detrimental to them is passed, to access the related documents, and to have the reasons for the administrative decision explained to them.[31] The legal protection related to the fundamental right, as stated in Article XXIV, extends to administration by authorities impartially, fairly and within a reasonable time [Paragraph (1) of Article XXIV], as well as to compensation for any damage caused by public administration [cf.: Paragraph (2) of Article XXIV].[32]

The *subject* of the fundamental right to fair administrative procedures is *the client*, the natural or legal person or organisation whose right or lawful interest is *directly affected by the case.*[33] Within the rule of law framework, which constitutes the primary constitutional background for administrative operations, *fairness* is a basic constitutional requirement applicable to all procedures based on the powers of the state. Thus, according to the Constitutional Court, "the requirements of fair procedures must be relevant to authorities' procedures as well (taking into consideration the specific characteristics of public administration procedures), and these requirements must be enforceable as universal and ultimately fundamental rights by the subjects of those fundamental rights. The enforceability of these rights constitutes the limit of an authority's operation and the measure of its lawful procedures."[34] The right to fair administration; that is, the requirement of fair procedures by the authorities, is *not absolute but universal*; in other words, *it extends to everything.* According to the Constitutional Court, it "cannot be violated in any administrative procedure, despite possible variances in the requirements arising from paragraph (1) of article XXIV of the Fundamental Law across various types of administrative procedures, in view of their specific features".[35] Similarly to the unconditional enforcement of the principles, "the individual procedural guarantees based on the right to a fair procedure represent a value, the infringement or disregard of which affects the merits of the case at hand, regardless of its outcome".[36] The consequences derived from the Fundamental Law must consider the special aspects of individual administrative procedures, and the limitation of the partial authorisations (as procedural guarantees considered as parts of the right to fair procedure by authorities) can be examined in each procedure type, but the same fundamental right limitation test must be performed. As opposed to the content of Paragraph (1) of Article XXVIII, which stipulates the right to fair judicial procedures, the Constitutional Court did not indicate any systemic content and absolute right in connection with the fundamental right to fair administration. However, the Court did establish that several partial authorisations (previously rights guaranteed in laws) *were of a similar nature to fundamental rights*; these are focused on clients, and their enforcement is intended to serve the formal and substantive effectiveness (speed, pro-

[30] CC decision 3311/2018 (X. 16.), Statement of Reasons [26].

[31] CC decision 3311/2018 (X. 16.), Statement of Reasons [26], [28].

[32] CC decision 3223/2018 (VII. 2.), Statement of Reasons [29].

[33] CC decision 3223/2018 (VII. 2.), Statement of Reasons [57].

[34] ibid, Statement of Reasons [28].

[35] ibid, Statement of Reasons [34].

[36] CC decision 3311/2018. (X. 16.), Statement of Reasons [34].

fessionality and lawfulness) of review procedures, or their overall subordination to law. These partial authorisations endowed with a fundamental right's character belong to the fundamental right limitation regime referred to in Paragraph (3) of Article I of the Fundamental Law. But which partial authorisations are these specifically? According to the Constitutional Court decision 3223/2018 (VII. 2.), the *temporal dimension*[37] of an administrative procedure is one such partial authorisation related to decision-making within a reasonable time period, even though one of the referenced underlying decisions deemed the examined rule to be unconstitutional due to the so-called *deliberation right in the strong sense*, or in other words, a "discretionary decision without deliberation".[38] "The deadline for legal remedy, together with the notification method and the submission conditions, must not be uncertain to the extent of actually depriving the entitled persons from the possibility of exercising that right, because that would go against the requirements of a fair procedure and reasonable time periods, as stipulated in paragraph (1) of article XXIV of the Fundamental Law."[39] The *communication of decisions* was also classified as a procedural element related to a fundamental right, even though this was established by the Constitutional Court in connection with election procedures, and not concerning administrative procedural laws. The Court identified an omission violating Paragraph (1) of Article XXIV and Paragraph (1) of Article XXVIII of the Fundamental Law resulting from the legislator's failure to ensure in Act XXXVI of 2013 on the election procedure that a second-instance election committee and a review court should communicate its decision with everybody concerned by the resolution passed in an election-related legal remedy procedure.[40] The Constitutional Court also considered the *communication method* as a partial authorisation related to a fundamental right, noting that "persons entitled to take public administration actions must not be generally forced to monitor actions by public administration players and especially authorities, unless this is justified by a good reason (such as a high number of affected persons, or an affected person whose address is unknown). Failure to notify personally all known interested persons of the circumstances allowing for exercising their rights and the deadlines for taking action […] clearly places the entitled persons in a difficult position, without any connection to any constitutional right or value."[41] The principle of *equality of arms* can also be considered as a part of Paragraph (1) of Article XXIV in administrative procedures involving counter-interested clients.[42] However, the enforcement of a fundamental right cannot be decoupled from the general *characteristics* of the procedures of administrative authorities. The Constitutional Court maintained, under the Fundamental Law, the conclusion that "authorities' procedures are targeted, examina-

[37] Statement of Reasons [33], quoting [71]–[77] of the Statement of Reasons of CC decision 3/2014 (I. 21.); CC decision 17/2015 (VI. 5.), Statement of Reasons [108].

[38] CC decision 3/2014 (I. 21.), Statement of Reasons [75]–[76].

[39] CC decision 17/2015 (VI. 5.), Statement of Reasons [108].

[40] CC decision 6/2017 (III. 10.), operative provisions. "According to the Constitutional Court, it follows from Paragraph (1) of Article XXIV and Paragraph (1) of Article XXVIII of the Fundamental Law that a second-instance election committee's decision about an appeal, as well as a court's review decision, must also be communicated with those who incur any right or obligation arising from the decision, even if any decision made in a previous phase of the election-related legal remedy procedure did not have to be communicated to them." Statement of Reasons [37].

[41] CC decision 17/2015 (VI. 5.), Statement of Reasons [109], confirmed by CC decision 35/2015 (XII. 16.), Statement of Reasons [27], CC decision 3223/2018 (VII. 2.), Statement of Reasons [33].

[42] CC decision 10/2017 (V. 5.), Statement of Reasons [61]–[63].

tive procedures by public entities possessing the powers of the state." As a material circumstance from the perspective of the enforcement of a fundamental right, an administrative procedure is differentiated from a civil or criminal procedure by its obligatory *examinative* nature. The authority involved in the procedure in the interest of the public, without any individual (personal) interest, must identify and prove the facts underlying the decision. It is the administrative entity that decides which factual elements are required for decision-making, and which are irrelevant. However, in view of the fundamental right involved and the rule of law requirement, no procedure may be prescribed that violates the right to a *fair* procedure by a public administration authority and fully ignores the interests of the client and other stakeholders.[43] In other words, "an administrative authority's specific procedures aimed at applying the law must not ignore the clients' rights, and must concurrently fulfil the functions of protecting the interest of the public and providing subjective legal protection." During the (administrative) procedure, exercising the stakeholders' rights and fulfilling their obligations require basic *information:* the clients / stakeholders must know the cases that concern them, as well as the facts of those cases and the legal regulations governing them. It is in this sense that the Constitutional Court placed the requirements for the communication of decisions under protection, due to their relevance to a fundamental right. However, the mere communication of a decision cannot satisfy all requirements arising from the fundamental right; that may also require familiarity with the entire case documentation held with the authority. The inspection *of documents* is basically related to the requirement of allowing clients to exercise their rights and meet their obligations. Arising from the principle of equality of arms (which is interpreted as part of the fundamental right), this right ensures in examinative procedures that clients can formulate their declarations, remarks and proposals vis-à-vis the authority's legal position, as well as (even more importantly) their own *defence* in *ex officio* procedures aimed at establishing any liability. Consequently, the right to make statements and the *right to defence* constitute integral parts of the right to fair administrative procedure. (The right to defence is relevant in specialised administrative procedures involving retrospective verification and the potential application of adverse legal consequences, such as a fine.)

If the *right to make statements and the right to defence* are to be enforced, clients must have an opportunity to know the authority's evidential procedure and to review the related documents and other evidence on which the authority's decisions affecting them are based. The right to inspect documents is not only a legal guarantee for the lawful operation of the administrative entity concerned, but it also serves as the basis for the clients' effective participation in the administrative procedure. For that reason, "through the right to make statements and the right to defence, the right to inspect documents necessarily belongs in the sphere of interpretation of the right to fair administrative procedures".[44] In this way, the *right to effective defence* is obviously a partial authorisation within fair administrative procedure;[45] consequently, violating the right to inspect documents constitutes the limitation of a fair administrative procedure insofar as it infringes the client's right to make statements and defend himself/herself.

As an indispensable condition for the verifiability of lawfulness and the avoidance of arbitrariness, the entities applying the law must issue justifications to provide the reasons for their

[43] Cf.: CC decision 165/2011 (XII. 20.), ABH 2011, 478., 520.; confirmed by CC decision 3342/2012 (XI. 19.), Statement of Reasons [13], as well as CC decision 3223/2018 (VII. 2.), Statement of Reasons [30]–[31].

[44] CC decision 3223/2018 (VII. 2.), Statement of Reasons [37].

[45] CC decision 3223/2018 (VII. 2.), Statement of Reasons [36]–[37], [59].

decisions.[46] Besides the right to fair administrative procedures, authorities' obligation to justify their decisions is also elevated to a fundamental right's level in Hungary's Fundamental Law. According to the second sentence in Paragraph (1) of Article XXIV of the Fundamental Law, authorities must justify their decisions as determined by law. Failure to do so constitutes a legal violation and is against the Constitution; in this case, a procedure may be initiated before an ordinary court or, ultimately, before the Constitutional Court. In addition, the justification obligation is important for the predictability of future decisions by entities applying the law;[47] that is, it promotes legal certainty (and thus the rule of law) as well. Since Albert Venn Dicey's staple work, the definition of the rule of law has involved the state's liability before a court for any legal violation causing damage to a private person.[48] The rule of authorities' liability for any damage caused was elevated to a constitutional level in the Fundamental Law, which stipulates that every person has the right to statutory compensation for any unlawful damage caused by authorities while performing their duties.[49] This liability is not objective but based on culpability (imputability); but the compensation obligation cannot be avoided if the authority's decision is proved unlawful, provided that defence on the grounds of reasonable expectation fails.

4. Tradition of the right to a fair judicial procedure and to legal remedy

In specific procedures of the Constitutional Court, the right to fair administration (which continues and significantly extends the above-mentioned, decade-long constitutional tradition through specific provisions in the Fundamental Law) is often coupled with the right to *fair procedure,* especially if the Constitutional Court's procedure was preceded by an administrative and court procedure (usually a lawsuit in a case involving public administration). Both fundamental rights are traditionally connected to the right to legal remedy as well, because the client's rights and the relevant authority's decisions are assessed in a lawsuit following (or for want of) an administrative procedure. These two latter rights were often quoted in conjunction in Constitutional Court decisions based on the old Constitution (which did not stipulate the right to fair administration).

As explained in the introduction, the right to a fair judicial procedure (i.e. to a fair hearing) has always been part of the rule of law, as a constitutional requirement that can be deduced from that principle. While this fundamental right is, logically, not solely relevant to *administrative lawsuits* or other judicial procedures related to public administration, it serves as the "parent right" for the review of administrative decisions by courts, and thus has a direct impact on the regulation of authorities' procedures. *As early as in 1997*, the Constitutional Court declared – as

[46] Győrfi et al. (2009, 164).

[47] Győrfi et al. (2009, 164, footnote 127).

[48] The notion of the rule of law became known in the world, and also in Hungary, after its formulation by Albert Venn Dicey. In his view, the rule of law has the following *three basis components.* Firstly, no government has discretionary power, i.e. the law takes precedence to power, which requires institutional guarantees. Secondly, every man is subject to ordinary law and the jurisdiction of ordinary courts, i.e. everybody is equal before the law. (Public officials are also not exempted from accountability before ordinary courts, and consequently there should be no dedicated administrative court to adjudicate their decisions.) Thirdly, the general rules of constitutional law are derived from the country's ordinary law, i.e. the Constitution is (before the courts) the outcome of a struggle for individuals' rights. Dicey (1995).

[49] Paragraph (2) of Article XXIV of the Fundamental Law

a constitutional requirement for the regulation of the judicial review of administrative decisions – that a court should be able to assess the merits of the litigated rights and obligations pursuant to the conditions of a fair procedure. The rule defining an administrative decision-making authorisation must specify an appropriate *aspect or standard* based on which the court can review the lawfulness of the decision.[50] The Constitutional Court has repeatedly confirmed the essence of that decision since the Fundamental Law took effect. In a decision passed in 2018, the Constitutional Court carried out the summary review of the main guarantee elements of the fundamental right to a fair procedure, and specifically the right to a *public hearing*.[51] It should be noted that the Constitutional Court monitors and takes into consideration the relevant legal practices of the European Court of Human Rights, as Paragraph (1) of Article XXVIII of the Fundamental Law guarantees the right to a fair judicial procedure along similar procedural principles and approaches as Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and promulgated in Act XXXI of 1993.[52] The right to a fair procedure includes, beyond the enforcement of procedural guarantees, *the requirement of effective judicial legal protection.* This means the constitutional requirement of drafting legal regulations based on which a court can adjudicate the merits of the litigated rights. A merely formal opportunity to choose the judicial way is insufficient for the enforcement of the procedural guarantees prescribed in the constitutional rule, which are aimed at allowing a court to make what is intended to be a final decision on the merits of the case at hand. For that reason, the requirement of fair procedures includes the need for effective judicial legal protection, which primarily depends on what a court may review pursuant to the relevant procedural rules.

As noted above, it is a *constitutional requirement* concerning the regulation of the judicial verification of the lawfulness of administrative decisions that courts shall be able to adjudicate the merits of the litigated rights and obligations. Thus, according to the *basic paradigm consistently applied* by the Constitutional Court, the rules defining administrative decision-making rights must specify an appropriate aspect or standard based on which a court can review the lawfulness of a decision. Consequently, the judicial verification of the lawfulness of administrative decisions *cannot be constitutionally limited* to the examination of formal compliance. A court proceeding in an administrative lawsuit is not (and cannot be) bound by the facts established in the administrative decision, but instead may, from the perspective of lawfulness, overrule the administrative entity's deliberation. According to the Constitutional Court's standard practice, unconstitutionality is not limited to legal regula-

[50] CC decision 39/1997 (VII. 1.), ABH 1997, 263. The fundamental right that defined the constitutional requirements for the fairness of procedures was formulated in Paragraph (1) of Section 57 of the old Constitution, which was in effect until 31 December 2011, as follows: "Every person is equal before the court and has the right to have any charge against him or her, or any right or duty in litigation, adjudicated by a legally established, independent and impartial court in a fair and public hearing." Concerning the essential contents of the fundamental right, Paragraph (1) of Article XXVIII of the Fundamental Law that took effect on 1 January 2012 contains identical (almost verbatim) provisions: "Every person shall have the right to have any charge against him or her, or any right and duty in litigation, adjudicated by a legally established, independent and impartial court in a fair public trial within a reasonable period of time." Due to the essentially identical nature of the two provisions, the previous decisions of the Constitutional Court are still applicable.

[51] CC decision 3027/2018 (II. 6.), Statement of Reasons [16]–[27].

[52] ibid, Statement of Reasons [15].

tions that either expressly preclude judicial review beyond the legal question at hand or allow so little room for judicial review vis-à-vis the administrative deliberation that the merits of the case cannot be adjudicated with the required constitutional guarantees; in addition to these cases, those legal regulations which grant unlimited discretionary powers and specify no standard for courts to base lawful decisions on are also unconstitutional.[53] Consequently, through the requirement of effective judicial legal protection against administrative decisions, the right to a fair (judicial) procedure is very closely *connected to the right to legal remedy*; the Constitutional Court's main findings regarding this latter right are summarised as follows. According to Paragraph (7) of Article XXVIII of the Fundamental Law: "Everyone shall have the right to seek legal remedy against judicial, administrative or other official decisions, which infringe upon his or her rights or legitimate interests.". This right means the opportunity to transfer a decision to a *different organisation* or to a *higher forum within the same organisation*,[54] which in turn means that the fundamental right to legal remedy is granted, provided that the law relevant to the procedure allows a stakeholder to have his/her case adjudicated by an organisation other than the one that proceeded in the original case.[55] The opportunity to redress a legal injury is a substantial element of the notion of legal remedy.[56] The legislator may establish various forms of and forums for legal remedies for the various procedures, and may define the number of levels in the system of legal remedies. Consequently, a single-instance legal remedy procedure fully meets the requirements of the Fundamental Law.[57] According to the Constitutional Court, the requirement of providing legal remedy is relevant to decisions on the merits of a case. What constitutes such a decision primarily depends on the subject of the decision and its impact on the person concerned; in other words. on whether or not the decision had a material effect on the affected person's situation and rights.[58] The right to legal remedy specifically means a right to *actual and effective* legal remedy: the fundamental right is not only infringed if legal remedy is entirely excluded,[59] but also if legal remedy is granted by law but cannot be actually and effectively realised for any other reason, for example due to provisions in detailed regulations, thus rendering the right to legal remedy meaningless and formal.[60] Notwithstanding the above,

[53] CC decision 6/1998 (III. 11.), ABH 1998, 91., 98–99., confirmed by CC decision 5/1999 (III. 31.), ABH 1999, 75.; CC decision 14/2002 (III. 20.), ABH 2002, 101., 108.; CC decision 15/2002 (III. 29.), ABH 2002, 116., 118–120., CC decision 35/2002 (VII. 19.), ABH 2002, 199., 211. After the entry into force of the Fundamental Law: CC decision 7/2013 (III. 1.), Statement of Reasons [24], CC decision 17/2015 (VI. 5.), Statement of Reasons [86]–[88], CC decision 14/2018 (IX. 27.), Statement of Reasons [19].

[54] CC decision 5/1992 (I. 30.), ABH 1992, 27., 31.; confirmed by CC decision 35/2013 (XI. 22.), Statement of Reasons [16], CC decision 10/2017 (V. 5.), Statement of Reasons [67].

[55] CC decision 513/B/1994, ABH 1994, 731., 734.

[56] CC decision 23/1998 (VI. 9.), ABH 1998, 182., 186., confirmed by CC decision 3064/2014 (III. 26.), Statement of Reasons [15], CC decision 10/2017 (V. 5.), Statement of Reasons [68].

[57] CC decision 1437/B/1990, ABH 1992, 453., 454.; similarly: CC decision 22/2014 (VII. 15.), Statement of Reasons [95], CC decision 3223/2018 (VII. 2.), Statement of Reasons [68].

[58] CC decision 1636/D/1991, ABH 1992, 515., 516.; CC decision 5/1992 (I. 30.), ABH 1992, 27., 31.; CC decision 4/1993 (II. 12.), ABH 1993, 48., 74.; CC decision 46/2003 (X. 16.), ABH 2003, 488., 502., CC decision 3223/2018 (VII. 2.), Statement of Reasons [66].

[59] CC decision 36/2013 (XII. 5.), Statement of Reasons [61].

[60] CC decision 36/2013 (XII. 5.), Statement of Reasons [28]–[31].

the fundamental right to legal remedy naturally does not mean that an organisation assessing a claim must grant it under any circumstances; what it definitely does mean is that a legal remedy procedure must be carried out pursuant to the relevant procedural rules, by examining the merits of the claim as specified by law.[61]

The entry into force of the Fundamental Law and the related Act on the Constitutional Court on 1 January 2012 signified the start of a new era concerning the above-mentioned constitutionality requirements and provisions related to fundamental rights. Previously, anyone could initiate a retroactive, abstract review by the Constitutional Court; meaning that anyone who was not personally affected, could also initiate the retroactive review of the constitutionality of any legal regulation. In addition, the Constitutional Court was not authorised to annul a specific, contested court decision, even in the so-called constitutional complaint procedure. Instead, the Court could only examine the constitutional compliance of the decision. When the Fundamental Law took effect, the possibility for anyone to initiate an abstract, retroactive constitutionality review ended, and the Constitutional Court gained a new authorisation, namely to review the constitutionality of the legal interpretation of judicial decisions.[62] Until 1 January 2012, the Constitutional Court could review only the *constitutionality of a legal regulation applicable* to a specific case; but since the entry into force of the Fundamental Law, a person or organisation affected by a case may file a complaint with the Constitutional Court against a judicial decision that violates the Fundamental Law if the decision about the merits of the case or another decision concluding a court procedure violates his/her rights enshrined in the Fundamental Law, provided that his/her legal remedy options have been exhausted or he/she has no opportunity for legal remedy. From the perspective of public administration, this means that the Constitutional Court can no longer review just the legislative activities (general acts) of public administration entities, but may also review concrete decisions (individual acts) of authorities applying the law, as well as judicial decisions reviewing the lawfulness of those decisions (acts) by authorities. When repealing a judicial decision, the Constitutional Court may now also annul the underlying administrative decision(s) reviewed by the court. In recent years, the Constitutional Court has ruled in several cases on the judicial review of decisions made by authorities (and specifically public administration authorities). Many of these Constitutional Court decisions are referenced above, and several *important decisions* have been passed.[63]

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[61] CC decision 9/2017 (IV. 18.), Statement of Reasons [21], CC decision 3223/2018 (VII. 2.), Statement of Reasons [69].

[62] Between 1990 and 2011, the Constitutional Court overruled a specific judicial decision only once, at the beginning of the Court's operation, even though it was not authorised to do so based on the legal regulations in effect at that time. This CC resolution (57/1991 (XI. 8.)) was heavily criticised in legal literature; see: Pokol (2000).

[63] Besides establishing a constitutional requirement, CC decision 20/2018 (XI. 14.) also repealed the Curia's decision Kfv.II.37.800/2016/9, with a similar statement of facts to that in CC decision 18/2018 (XI. 12.), which repealed decision 24.Kf.20.623/2016/3 of the Budapest Environs Regional Court. Furthermore, CC decision 23/2018 (XII. 28.) on repealing the Curia's unconstitutional decision Kfv.I.35.676/2017/10; CC decision 3311/2018 (X. 16.) on repealing the Curia's decision Kfv.II.37.070/2016/7; CC decision 3179/2018 (VI. 8.) on repealing decision 35.Kpk.46.443/2016/4 of the Budapest Administrative and Labour Court (concerning the exercising of an attorney's profession); as well as election-related decisions: CC decision 3093/2018 (III. 26.) on the constitutional complaint against the Curia's decision Kvk.IV.37.251/2018/3 (election – suspension of immunity), CC decision 3130/2018 (IV. 19.) on repealing the Curia's decision Kvk.VI.37.414/2018/2 (election – billboards), CC decision 3154/2018 (V. 11.) on repealing the Curia's decision Kvk.V.37.466/2018/2 (election –mailed campaign notifications).

Conclusions (if any)

The Constitutional Court's new competence has already significantly transformed the general judgement of fundamental procedural rights, and reformed its interpretation. Those interpretations are now incorporated in specific legal relations and the system of constitutional requirements directly, through the Constitutional Court's decisions, instead of indirectly, through new procedural rules enacted by the legislator. This can be considered as a revolutionary change, if such a phrase is appropriate for the transformation of the legal system. The significance of traditions has been repeatedly emphasised in this study. I trust that I have managed to present the constitutional requirements that have evolved from precedent-like Constitutional Court decisions (built on and mutually reinforcing each other) into true traditions or achievements. The appearance of a new fundamental right and the National Avowal's ideal of a state providing "good administration" ushered in a major change in this system. But these achievements have turned out (or may turn out) to be deeply rooted in the ideals and requirements of the rule of law in the Austro-Hungarian era, as well as in the period after Hungary's transition from Communism to democracy. So the real lesson to be learned is that the truly or entirely novel features of the traditions of procedural constitutionality are presented by the introduction of constitutional complaints, as well as the direct enforceability and actual enforcement of old requirements (and increasingly stringent new requirements) by the Constitutional Court. This power of the Constitutional Court has confirmed the firm experience that ideals, norms and fundamental rights serve their true purposes in the everyday operation in a constitutional state through institutional forces (in this case, the competences and organisation of the Constitutional Court).

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Digitalization in public administration and its trends

Katarína Kolbenhayerová,* **Tereza Homa****

* Masaryk University Faculty of Law. E-mail: katarina.kolbenhayerova@gmail.com
** Masaryk University Faculty of Law. E-mail: terkakrizova@seznam.cz

Abstract

We live in times where modernization and electronic communication is the unique key to simplifying our daily lives. The electronization of public administration is important for all states and should be one of their priorities. It became particularly apparent during the COVID-19 pandemic. This article will therefore focus on tracing the development of digitalizing public administration in the Czech Republic and describing its possible development in the future, especially the digitalization of tax administration in the Czech Republic. This article also aims to summarize the state of public administration in selected member states of the European Union. Based on that, the authors will evaluate how the Czech Republic is doing in comparison with these countries.

Keywords

digitalization, informatization, state administration, e-government, online, tax administration.

Introduction

The digital age of the 21st century brings new technologies, innovations and trends that are dynamically changing the world and affect all areas of our daily life. Informatization and digitization have changed how we create the economic value, structure and functioning of markets, how we communicate with state organs and how we open a bank account.

In these rapidly changing and constantly evolving technological conditions, the modernization of public administration has become a major priority both in the Czech Republic and in other countries of the European Union and around the world. Information technologies have made it possible to provide modern services, even in public sector governance in general. There has been a huge development in this area in the past decade, from creating the first strategies for eGovernment through legislation, the development of infrastructures and electronic services to a focus on cyber security, etc. A well-functioning e-government system is able to provide a large amount of benefit for the state, including financial savings, and greater involvement of citizens in public and political life and increasing efficiency and transparency.

In this article, the authors will use analysis, description, and comparison to present the main changes in the field of digitalization of the tax administration in the Czech Republic in recent

months. The authors will also focus on the upcoming period, and they will identify what trends could follow. In order to evaluate the state of digitization in the Czech Republic nowadays, the authors will first summarize the current state of the state administration in selected countries of the European Union.

Digitalization in public administration

The fact that digitization is a topic of today is self-evident. As this topic is relatively abstract, specific facts follow from the summary report on the digitization of public administration in the Czech Republic issued by the Supreme Audit Office ("summary report"). Over the past seven years, massive investment has been made in the state's information infrastructure, which is doing very well in terms of technical sophistication. The investments will continue over time. Expenditure of state organizational units and state funds on information and communication technologies ("ICT") amounted to CZK 75 billion between 2012 and 2018. CZK, of which approximately 20 billion was reimbursed from EU funds for digitalizing public administration. However, there is another possibility, namely that citizens are not so interested in digitization. According to the summary report in 2018, 26% of natural persons in Czech Republic used online services to communicate with the authorities. Data box statistics show that only 2% of non-business individuals have voluntarily set up a data box. The advantage of this voluntarily setting is easier and electronic communication with government and in future with other physical and artificial persons. The cost for these volunteers could be the ignorance of the possible effects of documents delivered to the data box if they did not pick it up. We add that in 2018, 97 million transactions took place via data boxes, but only 0.65% of them were made by non-business individuals (Národní kontrolní úřad, 2019).

There are several reasons for inefficient digital tools and their settings, and also the low use of digital public administration services. There is insufficient legislative readiness for further digitization, obsolescent ICT systems in the individual components of public administration, poorly set conditions for cooperation with external suppliers, the financial administration system is not centralized and, last but not least, there is not enough staff capacity to keep the ICT systems in operation and attend to their modernization. (Summary report on the digitization of public administration in the Czech Republic).

One of the many problematic points mentioned above is in the process of being solved. For example, the Ministry of the Interior can be considered the main body coordinating information and communication technologies. The problematic area of shortage of ICT staff in public administration generally corresponds to a very low unemployment rate, which in the Czech Republic is around 3.6% in last quartal of 2021. On the one hand, the number of employees in IT services is increasing, but they primarily gravitate to the private sector.

As for the legislative basis for the possible development of digitalizing public administration in the Czech Republic, it is such a relative novelty, and at the same time the main relevant law is the so-called digital constitution.[1] It regulates the right of natural and legal persons to provide digital services on behalf of public authorities in the exercise of their powers, the right of natural persons and legal entities to perform digital acts (e.g. acting in business and administrative world electronically), the obligation of public authorities to provide digital services and accept digital acts and certain other rights and obligations related to digital services (European Commission, 2018).

[1] Act No. 12/2020 Coll., on the Right to Digital Services.

Legal framework of digitalization in the Czech Republic

There are many key laws that influenced the development of public administration. It was mainly law No. 106/1999 Coll., on free access to information, Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain acts, Act No. 227/2000 Coll., on electronic signatures and amending some other laws and Act No. 365/2000 Coll., on public administration information systems.

At the end of 2019, with effect from 1 January 2021, the Chamber of Deputies of the Czech Republic unanimously approved the "SONIA project" – a private law base for identification and authentication. The aim of SONIA or the banking identity project is to simplify the form of and access to Czech e-government services and online services in both the private and public sectors. The project helps citizens and public administration but also private service providers.[2]

The year 2021 introduced a very important Act on the Right to Digital Services (later Act No. 12/2020 Coll.), which was mentioned above, this act is also referred to as the "digital constitution". It is also important to mention the new Act No. 261/2021 Coll., referred to in Czech as "DEPO". Its obvious ambition is to strengthen the electronic form of public and private communication significantly.[3]

For this article and for the area of digitalization of tax administration, it is very important to mention Act No. 280/2009 Coll., The Tax Code.

The topic of electronic public administration and related issues is legislatively very broad. There are many other regulations that affect the given areas to a greater or lesser extent. For this reason, it is impossible to list all the relevant regulations.

History of the digitalization of government in the Czech Republic, focusing mostly on tax administration

The beginnings of communication between tax subjects and the tax and customs administration took place in the Czech Republic, as well as in other countries of the world, on paper. Although this form of communication is still popular with many tax entities, it also has many disadvantages. The solution offered itself, and with the advent of computers and the development of computer programs and applications, private companies began to offer technical solutions that calculated totals on uploaded forms and filled out some mandatory requirements. Even such a completed form had to be printed out and submitted to the tax office in person or by post.

However, the Czech tax administration did not lag behind private companies either. As will be stated below, unfortunately, although the financial administration of the Czech Republic historically began to utilize IT solutions, it developed only a little thereafter. The main technological tool of tax administration became the Automated Tax Information System (known in the Czech Republic as ADIS). This software was created based on a tender announced in 1991 by the Ministry of Finance of the Czech Republic to obtain an automated tool for tax administration. The development of such a system is a matter of time, yet the first version of the ADIS software solution was launched in 1993. Since then, ADIS has become software that has received

[2] Projekt bankovní identita a jeho vývoj (https://bankovni-identita.cz/o-projektu).

[3] Portál národního bodu pro identifikaci a autentizaci. SPRÁVA ZÁKLADNÍCH REGISTRŮ. (https://www.eidentita.cz/Home).

new functionalities and is still the alpha and omega of tax administration in the Czech Republic. ADIS is connected to the VAT Information Exchange System (VIES) and other systems as a result of long-term closer cooperation with the customs administration, but also cooperation in accordance with European Union regulations. Despite this partial interconnection, cooperation between the financial and customs administrations in the Czech Republic is still limited and it would still be possible to develop it to a large extent (Finanční správa České republiky, 2003).

The development of the use of electronic tools was not limited to tax administration. As electronic tools were intended to facilitate communication with all state authorities, there was soon a need to identify the people who made electronic filings. This is important when verifying that the authorities are dealing with authorized persons. After all, discussions about the possibility of electronic identification of persons have been going on since the 1990s.

Use of electronic authentication and identification of natural persons acting either for themselves or for the legal entity they are authorized to represent

In the Czech Republic, this verification comprised the electronic identification of persons in a guaranteed electronic signature since 2000, when Act No. 227/2000 Coll., on electronic signatures regulated the authentication of electronic documents. Although the law subsequently underwent changes when it was replaced in 2016 by Act No. 297/2016 Coll., on services creating trust in electronic transactions, this is an important piece of legislation. An important institution in electronic authentication is the Guaranteed Electronic Signature. This is the equivalent of a verified signature on a paper document and serves to identify the person and verify the identity that created it.

The Guaranteed Electronic Signature also ensures, in addition to the person's identity, that the document has not been manipulated since the signature. It marks the document with an identifier as a qualified certificate and the document can then be sent electronically. To prevent qualified certificates from being issued illegitimately, only selected companies are authorized to issue them. The certificate is valid for 12 months and must be renewed annually. Since 2014, the legal regulation of electronic signatures in the Czech Republic has also been regulated by the European Regulation (EU) No. 910/2014 of the European Parliament and of the Council (eIDAS Regulation). This has made it possible to simplify the recognition of electronic signatures also across borders.

As mentioned above, administration is more effective when systems are interconnected, both nationally and internationally. One of the first major cases of such international electronic cooperation in the Czech Republic is the New Computerized Transit System ("NCTS"). This is a customs administration project launched in 2002 and the Czech Republic joined it before joining the European Union. It was an electronic communication system between entities and states for a common transit regime. Both Member States of the European Union and third countries were included in the project. The NCTS was the first step towards the wider use of electronic customs declaration exchanges in the European Union (Finanční správa České republiky, 2004).

Undoubtedly, a turning point for the Czech tax administration came in November 2002, when the electronic filing application was launched on the website of the Ministry of Finance of the Czech Republic with the delivery of a data message without a guaranteed electronic signature. This application was part of the ADIS software solution presented above. Subsequently, in 2003, the services provided to the general public in the field of electronic processing of documents for filing tax returns and general filing of documents for tax administration with the possibility of de-

livery via a data message provided with a guaranteed electronic signature, including filings sent by users directly from commercial programs (e.g. accounting software) that meet the specified conditions of the Ministry of Finance (Finanční správa České republiky, 2004).

Tax subjects began to use electronic filing gradually; during 2003 there were 7,018 filings (both with a guaranteed electronic signature and other filings). A significant increase in the use of Electronic Filing began at the end of the first decade of operation of this application, when 2,054,309 filings were filed in 2013. The possibility of submitting with a guaranteed electronic signature is has become greater throughout the operation of the Electronic Filing portal. In the case of submission without a guaranteed electronic signature, it was necessary to confirm this submission in a qualified manner. This condition for submissions made in an unqualified form still applies today.

Electronic filing can be considered a breakthrough in electronization in the Czech Republic, especially from the point of view of tax subjects. Compared to the previous need to administer documents physically, Electronic Filing has opened a more convenient alternative. At the time, it was a significant step forward. Even in its beginnings, electronic filing was intuitive and checked the completeness of the entered data. Like most significant changes in modern society, electronic filing began to be used gradually by tax entities until they found their way to it. Even though there are many filing options today, many tax entities continue to use electronic filing (Finanční správa České republiky, 2004).

With the accession of the Czech Republic to the European Union, the obligation of companies to report in Intrastat also came into force. Intrastat monitors data related to trade in goods within the European Union. At that time, Intrastat was regulated by Decree 201/2005 Coll., of 18 May 2005, on statistics on exported and imported goods and on the method of communicating data on trade between the Czech Republic and other European Member States (Ministry of Finance of the Czech Republic, 2020). The administration and control of Intrastat is entrusted to the customs administration, currently by Government Decree No. 244/2016 Coll., of 18 May 2016, to implement certain provisions of the Customs Act in the field of statistics. Intrastat is perceived as one of the three control pillars of trade in the European Union (in addition to the summary report and the value added tax return). In the Czech Republic, sanctions are imposed for errors in declarations in Intrastat pursuant to Act No. 280/2009 Coll., The Tax Code, as is the case, for example, with wrongly assessed amounts of taxes. Similarly, to Intrastat, tax control statements, which make the tax administration and auditing of data by Czech tax administration much easier, were introduced in 2016.

Another noticeable shift in the digitization of tax administration, especially towards taxpayers, was a tax portal project, which has been available since 3 July 2006. It was introduced to facilitate communication with the tax administrator and its main feature is the tax information box, which can be accessed by any natural person who has been a tax entity alone or as the responsible person in a company or other legal entity paying taxes. A key and, to date, underrated functionality, is the opportunity to look at personal tax accounts of own taxes Here it was possible to view conditions and turnovers on tax accounts. Thanks to it, tax subjects could prevent for example, being fined or forfeiting the overpayments in favor of the state (after 6 years in accordance with Section 64 (6) of Act No. 337/992 Coll., On Tax Administration and Charges), just from being able to review their paid and unpaid taxes. In 2007, the functionalities of the tax information box – the personal tax calendar, document overview, detailed information, and personal tax accounts were expanded. (Ministry of Finance of the Czech Republic, 2020). That year was also a breakthrough regarding the increase in electronic submissions, by 145%.

In 2021, there was a comprehensive "transformation" in the form of a new My Tax portal[4] of electronic submissions (Finanční správa České republiky, 2020).

But before we describe the breakpoint in electronizing the Czech tax administration – portal My taxes, we must not skip another big step in electronic communication of tax subjects with tax administrators and generally citizens with state administration, which was the introduction of data boxes (used for electronic communication, do not confuse with tax information box, which is used just for taxes). These were introduced to the Czech legal order in Act No. 300/2008 Coll., On Electronic Acts and Authorized Document Conversion. Using the data box is free of charge but compulsory for legal entities registered in the Commercial Register and state administration bodies, and individuals register as physical persons voluntarily, although, for example, attorneys and tax advisors are obliged to set up a data box. The tax and customs administration is obliged to send documents to subjects via data box if one has established. It should be noted that, so far, data boxes were mainly created by trading companies, immediately after their entry into the Czech Commercial Register. The data boxes are not yet mandatory for entrepreneurs (Lapáček, 2012).

With effect from 1 January 2023, the Ministry of the Interior of Czech Republic will also set up a data box automatically to each entrepreneur.

Delivery of any new communication to the data box will occur when a taxpayer logs in. This avoids any sign-in obstruction in the event that a report from the state administration authority was delivered to the data box. If the subject does not access their data box within ten days of the date of delivery, the document will be taken by authorities as delivered.

The introduction of a data box in general had a positive effect for tax and customs administration without doubt, especially in reducing taxpayer opportunities to prevent delivery obstructions. Communication via the data box is quick and more efficient than other possible alternatives.

The need for data boxes increased in 2011, when a new legal regulation came into force, namely the Tax Code, Act No. 280/2009 Coll., The Tax Code. The regulation replaced the earlier Act No. 337/1992 Coll., on the administration of taxes and fees, as amended, which was in force since 1993. There are many changes in the new tax code. An important of these is the change in the method of delivery of documents, where one of the basic and primary methods for tax administration is delivery of the documents electronically to the data box (Lapáček, 2012).

On the way to modernize and digitize tax administration, the amendment to the tax regime, the final version signed by the President of the Republic in the summer of 2020 and the amendment to the amendment came on 1 January 2021. The promised electronization of financial administration is a significant step towards the modernization of the entire system used by taxpayers. The vision of the changes was clear, to facilitate citizens communicating with the tax administrator and reduce the administrative complexity of this communication. In practice, it is the introduction of a portal called Online Financial Office (previously talked about naming the entire portal My Taxes), which is an extension of the already available tax information box services. The old tax information box is now accessible next to the new, called DIS +. The portal was officially launched on February 28, 2021.[5]

The new portal presents old functions together with new ones. For the future, further expansion is expected as well as other portal foreign languages mutations. In the future, the portal

[4] Portal MOJE daně (https://adisspr.mfcr.cz/pmd/home).

[5] Portal MOJE daně (https://adisspr.mfcr.cz/pmd/home).

should also offer the possibility of active and passive communication with the tax administrator, such as the possibility of filing a tax return through online forms that will allow some pre-compliance data. This is already possible to some extent through connection to Electronic filing portal (Ondráčková, 2021). However, communication should also work in the opposite direction, i.e. from the tax authority to the taxpayer, in accordance with the delivery of documents.

One of the accessible functionalities is also shown on the names of documents in the public part of the file (Kučera, 2021). There is certainly a space for future solutions to the entire viewing of the write-form. But now this variant is not on the agenda, before the implementation of such extensive solutions would have to be transferred to electronic form, and it carries a considerable administrative burden. Another potential problem may be the cyber safety of such a solution.

In 2021, the Czech Tax Code was amended, which, inter alia, introducing the statutory embodiment of the online financial authority platform. Another significant change and support of electronic communication is also a new possibility of initiating tax control by so-called notification, delivery to the taxpayer's data box (Section 85 et seq. Of the Tax Code). In the same way, tax audit can be expanded or narrowed by tax administrators. This procedure is not only to prevent obstruction in negotiating the physical start of tax audit, but after the experience with the Covid-19 pandemic is a possible alternative to initiating tax audit.

The last less important change associated with the digitization of financial administration is the advantage of taxpayers that provide tax returns in electronic form. In this case, the amendment to them prolongs the deadline for filing a month.

Another current revolutionary novelty is a bank identity project. Which significantly expands the possibilities of legal and natural persons in the Czech Republic. Bank identity is usable both in private and public sectors. It is based on the principle of using access data to electronic banking also for access to other services. The potential of the multifactor identity verification is perhaps the future identification in the online environment. It is therefore not surprising that with effect on 1 January 2021, this private entry point for identification and authentication into force. From the perspective of tax and customs administration, banking identity brings more easier access to e-governments.[6] In practice, it will be able to log in to the electronic submission portal or other financial administration portals through bank identity. This eliminates many administrative burdens and potential risks with various identification data at different locations in the online environment.

Legal framework of tax administration of Slovakia

Tax administration is in the Slovakia regulated mainly by Act. No. 563/2009 Coll., on Tax Administration Act (Tax Code). Act no. 563/2009 Coll. The Tax Code legislates the administration of taxes and the procedure arising from the law tax administration, whether it is the provision of taxes, payments and other activities that in connection with tax administration. The law itself is systematically divided into itself content in seven parts (basic and general provisions, activities of the tax administrator, payment of tax, tax proceedings, liability for breach of duty, special provisions for bankruptcy and restructuring and common, transitional, and final provisions.

The Slovak Tax Code is the main law that regulates the area of tax administration in Slovak Republic. This law is also supplemented by other sectoral tax acts, however, for the purposes of this article, it is not necessary to list them all.

[6] Projekt bankovní identita a jeho vývoj (https://bankovni-identita.cz/o-projektu).

Electronization of public administration in Slovak Republic

In the global ranking of digital competitiveness by the Institute for Management Development (IMD) for the year 2018, Slovakia ranked 50th in the ranking of 63 countries, which is a decrease compared to the previous year, when it took 43rd place. The country's main strengths were evaluated as its investment in electronic communications and wireless broadband; on the other hand, its weaknesses were identified as insufficient financial support for technological development, the low number of foreign experts and inadequate legislation in support of scientific research (IMD, 2018).

Slovakia ended up in 49th place out of 190 countries in the United Nations e-Government Index, which evaluates electronic state and public administration, while it improved by 18 places compared to the last study, in 2017; however, it did not reach the level of 2005, when it took 36th place. According to the e-Government Index, within the countries of the Visegrad Group, Slovakia was in 3rd place and the Czech Republic was bottom. (United Nations, 2018).

A new Strategy, called Digital Transformation of Slovakia 2030 was introduced in 2019. At the same time, the first action plan, for 2019-2022, was also approved. Slovakia identified a long-term vision for the development of eGovernment to manage the economy, society, and the public sector in the transition to the information society. The goal is also to stimulate smart regional development and help researchers and innovators. Specific objectives of the Strategy also include the digital transformation of schools, suitable conditions for data management, especially focusing on public administration as well as support for the development of artificial intelligence and, last but not least, increasing digital skills and implementing a so-called data driven state in order to improve data usage for analytical purposes (European Commission, 2019).

Electronization of public administration in European Union and especially in Estonia

The European Union has published an "eGovernment" action plan, which aims to shape new digital initiatives. In order for the whole project to work and be implemented across the European Union, principles have been set to improve online public services. The first concerns making electronic services compulsory for businesses. One or more online services are already mandatory in half of the EU countries. In other Member States, however, a similar level of digitization has yet to be ensured.

In the Member States of the European Union with the most developed online services, the online channel is the standard channel for up to 43% of services to citizens. There is still room for development on the part of citizens, but there is great potential for a significant increase in the use of digital technologies in the future. It does not matter whether the problem is on the side of inability or lack of technology, an increase can be expected in both groups of citizens (European Commission, 2010).

Another principle established is the so-called "no stop shop", where the resources already delivered to the public administration will be used repeatedly and it will not be necessary to document various requests repeatedly with the same documents and information. The re-use of information is not yet well developed across Member States. The possible reason for this may be the use of outdated software, which causes considerable complications in modernizing e-government services. Therefore, the volume of investment in digitization is also an important indicator (European Commission, 2010).

The basis for online public administration services is the availability of the Internet in each Member State. Given that the increase in households using the Internet within the European

Union has been enormous in recent years, it cannot be assumed that insufficient access to the Internet will be an obstacle to the digitalization of financial management

Digital administration should work not only in isolation in individual states, but also across the European Union, it should be possible to set up companies online, have all the rights in tax proceedings when communicating remotely with the tax office, etc. (for example, it is not possible to open an online account from abroad at most banks) if the public sector will be able to do so. Nowadays, it should be standard to have public institutions' web mailboxes at least in English, if not in the languages of neighboring countries. The argument that webbox translations are very expensive is certainly valid, but the authors believe that the overall savings gained from the simplification of public administration will be higher.

In the case of cross-border administration, it is not only a matter of dealing with matters in other states, but also of receiving foreign documents and verifying those online submissions and eDocuments have been made.

Last but not least, cyber security seems to be one of the problems. As this is more of a technical matter, the authors leave the assessment of this site to experts. It is certain that without the protection of the data provided online, citizens will not be willing to use these services.

It is also important to identify the persons who make the submission. As the authors state in the chapters above. This can guarantee the unambiguous identification of a person and enable the service to be provided to the person entitled to it. Almost all Member States of the European Union have or are implementing a nationally supported electronic identification system. However, there is a lack of a common legal framework and uniform settings in this area, at least within the European Union.

If we focus again on the digitization of the tax administration, the authors have chosen two leading countries from which other countries could learn in this area. These are Estonia and Denmark. Estonia founded Digital Nations in 2014 and has been actively developing the eTaxes project since 2002. For the sake of interest, let us remember where the Czech Republic was in 2002 (see above in the chapter on historical development). Estonia is considered to be the most successful country in the European Union when it comes to digitizing the tax administration. It uses blockchain to digitize public administration and this may be a reason for its effectiveness. In addition to tax administration, Estonia is also successful in the field of online healthcare and education. Data is very well protected strong security. The data are on a cloud with its servers located in Luxembourg (Teillant et al., 2020).

According to the authors, the basic strength of the functionality of the digital tax administration and e-government in Estonia lies in the protection of databases and, as a result, citizens' strong trust. Now Estonia is focusing mainly on the development of artificial intelligence, which will take not only tax but also public online administration even further (Čejková, 2019).

As already mentioned, the basic system in Estonia is the E-tax system, which speeds up the whole declaration process. The tax administrator already uses the data he has from tax subjects in real time, so filing the tax return itself takes only a few minutes. This fast process is also possible thanks to the functioning and identification of tax subjects and availability of pre-filled forms using real data. The document is then digitally signed. This allows for transparent and efficient tax collection. The tax administration itself is then more efficient and less expensive than if all the input data for the tax audit return have to be re-verified. Tax returns are usually made within a few days. The lower need for tax administration officials has made it possible to reduce these posts and thus significantly reduce tax administration costs by up to a third (European Commission, 2020).

Conclusion

On the basis of the above, we can expect that taxpayers in the Czech Republic will communicate with the tax administration based on electronic banking, through which it will not only pay their tax liabilities, but also to deal with all documents and communication with tax administrators. This would mean great simplification and step towards clarity of tax processes and management. As always before the implementation of a new platform with such widespread functionalities compared to the original electronic solution, it is important how the platform will be maintained and developed in the future, especially how much it succeeds to make all functionalities usable by tax payers. Another question is the time horizon in which individual functionality can be accessed. As the DIS is the platform used in Czech Republic, it could be interesting to see the technical solution of e-taxes in another member states and compare them. At least the tax administrations could learn from each other what are the functions taxpayers needs and uses.

The current digitization of the Czech Republic's financial management is debatable, for which it is not only necessary to compare the share of electronic submissions depending on the number of taxpayers, but also on the costs associated. In order for the cost of referring value, it is necessary to judge them in a longer term.

The future can always be estimated. It is certain that the DIS + functionality will be expanded. An ideal state would be if they really reminded electronic banking in a few years. The possible variants of what should be able to know many, but in some areas, these ideas necessarily encounter reality of technical feasibility.

The vision of the future would then be contactless financial administration and with the possibility of remote contact. This is also possible now, but only in some cases (for example, it is possible to send the opinion of the first tax administrator to appeal). There are many questions about further functionalities, especially demonstrating the acquaintance with the content of specific documents, etc.

As it was said before, in future there is a huge potential for the Czech Republic to be inspire in any future digital solutions in other countries. From our knowledge, it follows that if we looked at other developed countries, it would be to mark the Czech Republic as average in the digitization of public administration (especially tax administration). Obviously, the future is to determine the tax directly by the tax authority on the basis of data provided in real time by taxpayers; on the other hand, it is clear what prevents the introduction of this system in larger numbers of countries. The first area is intervention in taxpayers' rights and to some extent, disruption of their activities. Lots of companies correcting their accounting and comes to errors that have occurred if the data was sent to the real-time tax administrator would be responsible person tax subject under great pressure. Another problem may also be the cyber security of such a solution.

Even more likely would taxpayers appreciate to communicate with tax authorities via e-mail. Unfortunately, this kind of communication will never be more than informal communications due to insufficient identification and authentication of the sender.

The challenge in the future will be the motivation of individuals to use electronic filing of tax returns. It is now clear from the financial administration data that this area now deserves the most attention. It will evaluate the effect that will extend the deadline for tax returns in the event of electronic submission.

As regards the legislative foundations for the possible further development of public administration digitization in the Czech Republic, the so-called Digital Institute can be considered

as the flagship. It regulates the law of natural and legal persons to provide digital services to public authorities, in the exercise of their competence, law of natural and legal persons to make digital acts, the obligation to public authorities to provide digital services and take digital acts and some other rights and obligations related to the provision of digital to services.

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Implications of digitalization during the COVID-19 pandemics[1]

Daniela Dzuráková*

* Paneuropean University Faculty of Law PhD student, European Commission Directorate-General legal assistant.
E-mail: dzurakovadaniela@gmail.com

Abstract

The article provides an analysis of the proposal of the Regulation on European Digital Identity with regard to processing of personal data, particularly those that concerns health. It examines the Mobile Tracing Application and Digital Green Certificate, which were established in order to combat COVID-19. Finally, it lists the main challenges and critical positions, as well as proposals on how to tackle some of them.

Keywords

Mobile Tracing Application, Digital Green Certificate, European Digital Identity, GDPR, processing of personal data, health data, COVID-19.

1. Introduction

Digitalization is part of our every-day life and its development has become immense. The idea of creating a "Digital Europe" was originally put in place by the previous Commission's mandate under the name "A connected digital single market" (Bassot & Wolfgang, 2018). The current Commission supported and broadened this idea when publishing point 2 of the Commission Priorities 2019-2024.[2] The latter was accelerated by the existence of the COVID-19 pandemics. In order to keep our lives functioning, the digital world became inevitable. Apart from a non-exhaustive list of justice, school systems, consumer activities communication with private and public bodies and safeguarding the free movement of EU citizens during COVID-19 pandemic, the European Union started to come up with possible ways of addressing these via digital tools.

The pandemic was unprecedented in the history of the European Union and revealed various necessary measures for tackling similar situations in the future. The lack of scientific knowl-

[1] As a disclaimer, the article provides information exclusively stemming from the author's PhD studies and under no means presents any position of the European Commission.

[2] The European Commission's Priorities for 2019-2024. https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en

edge of the virus itself and the non-exclusive competence of the European Union in dealing with COVID led to the creation of digital tools, first using recommendation and a Commission implementing decision, later through a regulation.

It is hoped that the virus is under control, but digitalization is still moving forward. The European Commission provided a proposal for a Regulation on European Digital Identity,[3] which should enable EU citizens to communicate with private and public bodies on various aspects, such as loans, insurance, tax returns, etc. The proposal also mentions data concerning health in the form of QR codes and ePrescriptions. It is not specified whether any other personal data concerning health, and particularly COVID-19, would be included. On the other hand, creating a digital tool that would hold such a large amount of personal data brings many risks.

In its first chapter, the article provides information concerning Mobile Tracing Applications and Digital Green Certificates, as the digital tools used with regard to combatting the spread of the COVID-19 pandemics, yet still enabling free movement of EU citizens. It assesses the legal basis for both digital tools, explains their main functions and mentions some of the bottlenecks with regards to processing personal data.

The third chapter is dedicated to an assessment of the proposal of the Regulation on the European Digital Identity. Apart from evaluating the legal basis and comparing it to the other two digital tools, it offers an analysis concerning the risks and future challenges with regards to personal data, particularly those on health.

2. Mobile Tracing Applications

2.1. Legal basis

Since COVID-19 was the very first pandemic observed within the EU, the legal framework concerning cross-border health threats and yet also the competences of the EU in the health sphere were rather limited. It is to be noted that the EU however had various legal acts at its disposal for regulating possible cross-border health threats in the form of a communication system between the Member States. Such an approach had been established by a Commission Implementing Decision (EU) 2019/1765. Its main aim was to create an e-health digital information system across the EU. Through a network of national authorities, the idea was to exchange best practice on one hand and provide for a smoother transfer of data in the event of providing cross-border health care. Mutual recognition was to be established on the basis of an interoperable system, whereby national authorities would be responsible of their own properly designed digital tools at the national level and implement such technical measures that would enable communication with other national schemes of the Member States relating to eHealth.

However, this Decision (EU) 2019/1765 did not establish a system that would be operable in the event of cross-border health threats in the sense of pandemics, rather than a system that would enable and facilitate the application of patients´ rights to cross-border healthcare.

[3] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, COM/2021/281 final.

As the imminent threat of the COVID-19 pandemics appeared and an urgent response was expected at the EU level, the European Commission first responded with a Recommendation,[4] which referred to the existing legal framework concerning e-Health. With the use of such a legal tool, the European Commission applied the logic that the free movement principle of the EU concept should be the prevailing factor in creating an interoperable system. Since no similar systems had been established previously, the decision to apply the closest provision applicable to the situation in the absence of a real one demonstrated not only a proper legal choice from the point of view of legal theory, but particularly with regards to the necessity for acting rapidly.

Before having the Commission Implementing Decision (EU) 2019/1765[5] amended, the Commission went through various procedural steps. Firstly, it provided Interoperability guidelines (European Commission, 2020), through which it defined and explained the functioning of the mobile tracing applications system, and also established the roles of key players. Further, a more technical specification was issued, which included the IT and key specifications in order to set up a system that would function at the interoperable level.

As a consequence, Commission Implementing Decision (EU) 2020/1023 was adopted as an amendment, although not repealing Commission Implementing Decision (EU) 2019/1765 which has remained equally in force. Apart from new definitions concerning mobile tracing applications, it focused mainly on the protection of personal data. Commission Implementing Decision (EU) 2020/1023 included all the recommendations provided by Guidelines 4/2020 (European Data Protection Board, 2020) of the European Data Protection Board (hereinafter "EDPB").

It established that personal data shall be transferred to a pseudonymised gateway from the national authorities and, due to a key attached to the data, another system of a different Member State should be able to decide the data by unlocking the pseudonymisation of the data.

One full Annex[6] of Commission Implementing Decision (EU) 2020/1023 has been dedicated to the division of roles with regard to processing personal data, and it was established that all the national authorities separately should be in the position of a controller. As a consequence, the creation of an interoperable network would lead to joint controllership.

In line with EDPB Guidelines 4/2020, the text of the Commission Implementing Decision (EU) 2020/1023 comprises the main principles, such as transparency, full control of the personal data by data subjects and no geographical location, as well as the establishment of privacy by design and by default via the pseudonymised transfer. Unlike the text of the legal act itself, the EDPB Guidelines in question provide the legal basis for processing of personal data for the purpose of public interest.[7] In addition, it enables the controllers to base their processing on the consent of data subjects; however "to ensure that strict requirements for such legal basis to be valid are met".[8] The processing of health data, classified as special categories of personal data pursuant to Regulation (EU) 2016/679 (hereinafter "GDPR"),[9] is established on the legal basis of public health interest, occupational medicine or consent.[10]

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4 Commission Recommendation of 8.4.2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data, C(2020) 2296 final.

5 Commission Implementing Decision (EU) 2020/1023.

6 Annex II to the Commission Implementing Decision (EU) 2020/1023.

7 Paragraph 30 of EDPB Guidelines 4/2020.

8 Paragraph 32 of EDPB Guidelines 4/2020.

9 Article 9 of GDPR.

10 Paragraph 33 of EDPB Guidelines 4/2020.

Interestingly, the European Commission did not put itself in the position of a controller, but as a processor, acting strictly under the instructions of the Member States. Such an approach is in line with the logic of the competences of the EU in the health sphere. Its main aim is to establish free movement of persons and the market, rather than dictate what tools the national authorities should or should not use. By creating the "Federation Gateway" system, it provides for harmonized criteria in order to enable the free movement of persons. As a consequence, and in line with the EU competencies in the area of health yet respecting the competencies of the Member States themselves, such a scenario seemed to be the most efficient in order to react quickly to slowly extending border closures. On the other hand, as the Member States had anticipated the existence of mobile tracing applications way before any legal form at the EU level, the response of the European Union might raise some concerns with regards to the efficiency of the system.

From the perspective of the legal basis stemming from the Treaty of Functioning of the European Union (hereinafter "TFEU"), the reference was made indirectly via the applicability of Directive 2011/24/EU. In its preamble, it is stated that the legal basis is Article 114[11] and Article 168[12] of TFEU.

2.2. Mobile Tracing Applications in practice

Looking into the practicalities of the usage of mobile tracing applications and in order to find out their efficiency at the European level, it is important to verify various criteria, particularly their interoperability and the speed of their deployment. Concerning the latter, one may observe that some Member States (e.g. Malta) had already deployed their mobile tracing applications before the idea of the interoperable system at the European level. On the other hand, there were countries which deployed their mobile tracing applications rather late, or not at all (e.g. Sweden, Bulgaria or Luxembourg, which did not even envisage creating mobile tracing applications). Greece and Romania, for instance, started to develop the application, but, by the time the second wave of pandemics, their applications were still not put in place.

With regards to the interoperability criteria, the vast majority of the Member States, even if not at the same time, provided for the interoperable functioning of the applications within the EU. In contrast, Estonia, Hungary, Portugal and Romania did not set up the interoperable functions at the moment of their deployment and they were still not applicable for the second wave of pandemics. As such, they could not have been compatible with other EU applications (European Commission, 2022).

It is also important to mention that Austria was the only Member State of the EU to discontinue its mobile tracing applications. This approach would seem a very reasonable as the EU COVID certificate (see chapter 2 of this Article) replaced the existence of mobile tracing applications at a later stage.

The privacy matter in relation to mobile tracing applications was at stake from the very beginning of the discussions of their deployment. It was established that these applications might be put in place, but not intruding into the privacy of data subjects. Such a position was applied both by the European Parliament, as well as the European Commission (European Parliament, 2020). The compromise approach was also confirmed by the European Data Protection Board,

[11] Approximation of laws.

[12] Competences of the EU in the area of health.

which meant that the deployment of mobile tracing applications was considered to be as an exceptional tool to safeguard the free movement of EU citizens within the territory of the European Union, yet not contributing to the spread of the virus. On the other hand, the need for this tool was balanced by privacy matters, namely data minimisation, no transfer of personal data as such, no geographical tracing and the voluntary download and use of these applications by data subjects.

On the basis of the paragraph above, looking strictly into the existence of the mobile tracing applications, it could be observed that the necessity of a tool on one hand and ensuring privacy measures on the other created a rather balanced platform which could be viewed as proportionate. However, looking into this matter from a broader perspective, an interoperable system at the EU level could not have functioned properly unless the Member States would have safeguarded interoperability and deployed these mobile tracing applications at the same time. This unfortunately was not the case. Member States were either unable to provide such a technical system in a short period of time, or could not even see the added value in their usage. One could also see that the form of a legal instrument might not have been very convincing for the Member States either. Last but not least, it is important to emphasise that, especially in the post-communist countries, the lack of trust in using these mobile tracing applications resulted in their restricted use. The lack of consistency and universality of the system led to inefficiency; it was not applicable throughout the EU territory. Whether its inefficiency could have been predicted stays remains a question. One can only presume that the voluntary approach of the Member States from the very beginning to creating platforms of these types would not establish a solid mechanism.

Consequently, the question whether such a mechanism could have been proportionate seems to be answered negatively. The processing of personal data, knowing that they are not to be evaluated in an interoperable way in any other member State only leads to the conclusion that data subjects would have to be exposed to supplementary processing of personal data and their choice of not uploading these systems came only naturally.

3. EU Digital Green Certificates

The existence of the first vaccines brought optimism not only to the area of health as such, but also promised better and easier regulation of the free movement of EU citizens. The idea was to provide a solidly functioning system of digital certificates that would demonstrate who was vaccinated and who was not. Even though the vaccination against COVID-19 was not a long-term-based vaccine, the SaRs-CoV (Varga, 2020) emerging in 2001 and 2003 is of the same family. Therefore, the Member States agreed to admit vaccination as one of the preconditions for enabling EU citizens to move freely within the EU.

The system was again envisaged as being established on the basis of the pre-existence of interoperable mechanisms, which would enable admitting and confirming the validity of a certificate issued in one Member State by another Member. The data within the certificate was expected to be pseudoanonymized, as in the case of mobile tracing applications. The processing of personal data in the COVID certificates was to be done under the controllership of the Member States with the European Commission acting as the processor when providing the Gateway system.

Since the vaccination system is considered to be a strong intrusion into the privacy of individuals and regardless of the judgment concerning the obligation of vaccination, *Vavřička*, of 8 April 2021, the proposal of the Regulation on Digital Green Certificates (European Data Protection Board, 2021a) also envisaged the possibility of having been tested or provided with a certificate on overcoming the corona. In this way, the Digital Green Certificate would not only

hold information about the vaccination, but also about testing and overcoming of the virus. In addition, the certificate should hold the name, surname, date of birth and, in the case of vaccination, the type and number of the vaccine.

3.1. Legal basis

Unlike with Mobile Tracing Applications, the European Union took a more active approach and opted to create a regulation. It seems that, by availing of such a legal tool, it envisaged eliminating the voluntary aspect and thus avoiding a malfunctioning system. It was imposed in this form on all Member States.

Regulation (EU) 2021/953 (hereinafter the "Regulation on the Digital Green Certificate") was expected to deviate from the already existing system created by the Decision of the European Parliament and Council 1082/2013/EU which served also as the legal basis for the Commission Implementing Decision (EU) 2020/1023 on mobile tracing applications. However, in this case, the very first recital of the Regulation on Digital Green Certificate refers to free movement as also outlined in the very first legal reference of the regulation providing for Article 21(2) of TFEU. This article enables the European Parliament and the Council to act in an ordinary legislative procedure when attaining the right to move and reside freely within the territory of the Member States.

Further recitals of the Regulation on Digital Green Certificate refer to the Council recommendation (EU) 2020/1475,[13] which actually served as the legal basis for the Council Decision 1082/2013/EU on cross border health threats as well. We can observe that, although Council Recommendation (EU) 2020/1475 is mentioned in both legal acts, the Decision of the European Parliament and Council 1082/2013/EU on cross-border health threats refers to health matters as set out in Article 168 of the TFEU concerning health while the Regulation on the Digital Green Certificate's purpose is to facilitate free movement only.

With regards to the Regulation on the Digital Green Certificate, it is important to mention that no impact assessment was performed prior to its adoption. The lack of impact assessment was justified by the urgency of the need to establish a well-functioning system. On the other hand, with regard to the extent of intrusion into the human right to privacy and taking into consideration the fact that the virus had already been there for approximately 6 months, it seems to be difficult to imagine not undertaking any kind of assessment on these terms.

On the other hand, the matter was discussed with the EDPB and the European Data Protection Supervisor (hereinafter as "EDPS") which provided a joint opinion (European Data Protection Board, 2021a). They welcomed the initiative but pointed out various elements to be considered. It mentioned that the basic principles concerning processing personal data, such as data minimization, transparency, adoption of adequate technical and organizational privacy and security measures, would have to be applied. They also emphasised that the personal data may only be processed and stored within a certain period of time, particularly during the existence of the purpose of their processing.

It is interesting that the Regulation on Digital Green Certificate does not prevent Member States from defining other purposes for which the personal data may be processed. It is true that the GDPR rules apply in general and any additional purpose for which a Member State might be

[13] Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (Text with EEA relevance), OJ L 337, 14.10.2020, p. 3–9.

able to process the personal data concerning the Digital Green Certificate should be in line with these rules. However, it is also important to point out that these data are supposed to be processed exclusively during pandemics and it is difficult to imagine what other purposes would be justified enough to deviate from the short-term exceptional derogation of processing personal data.

In addition, as already mentioned, the system of joint controllership could be considered the right one; however, with an unlimited and unknown number of purposes for processing by the member States, the clear identity of the controllership, thus the responsibility for the processing of personal data, may easily be faded out. This could lead to violations of transparency principles, as well as the inability to exercise the data subject's rights.

3.2. European Digital Green certificates in practice

Digital Green Certificates operated on a very similar principle to the Mobile Tracing Applications. It included the creation of a federation gateway in order to make the personal data interoperable between the Member States. As originally stated, the personal data were envisaged to be somehow encrypted in a QR-code, which, using the interoperable communication between the national systems of the Member States, would only provide information on whether the person was "green" to pass or not. However, many codes, when being scanned, displayed the data of name, surname, date of birth, possibly address and information about the vaccination/recovery/test.

At later stages, an obstacle to free movement arose in the form of an additional measure to the vaccination, a test for COVID-19, in some Member States. Not only were citizens required to undergo a supplementary intrusion into their privacy in the form of a medical intervention, but also intrusion by collecting additional personal data. One could question the real efficiency of such a system and also its proportionality vis-a-vis the privacy matters.

4. European Digital Identity

The idea of creating a European Digital Identity stems from the European Commission's priority for digitalization, namely Digital Compass 2030. As the survey shows, 63% of the EU citizen population wishes to have a single digital identity. This would enable its users to facilitate private and public relations, such as loan requests and tax returns, including electronic signature and eStamp. From the perspective of "digital citizenship", one could imagine that the digital identity would enable a citizen to perform any or selected operations from a single user's digital identity, even cross-border within Member States.

However, electronic operations around the EU territory are not a novelty and one can observe them via Regulation (EU) No 910/2014 (hereinafter "eIDAS Regulation"). Under this legal act, the idea was to secure electronic interaction between citizens, businesses and public authorities, thereby increasing the effectiveness of public and private online services.[14] The digital single market was envisaged to facilitate the cross-border use of online services.

The main legal basis mentioned in the eIDAS Regulation is Article 114 TFEU, on the approximation of laws. As a consequence, the principle of subsidiarity was applied as set out in Recital 76 of the eIDAS Regulation. Regarding health data, the applicable legal basis as mentioned is Directive 2011/24/EU.

The system was based on creating a public key infrastructure at pan-European level that

[14] Recital 2 of Regulation 910/2014.

would lead to an interoperable gateway across the national borders of the Member States. In practice, a new system of electronic signatures that would be able to communicate through an interoperable infrastructure would be established. In addition, rules for trust services were defined.

It was deemed that the trust service providers would be liable for any damage (intentional or negligent[15])caused to any natural person from failing to fulfil the obligations stemming from the eIDAS Regulation;[16] that is, the controllers responsible for the processing of personal data would be the trust service providers. Information about any breaches was to be notified to the Commission and the European Union Agency for Network and Information Security (hereinafter "ENISA"). If a security breach or loss of integrity was likely to affect a natural person adversely, the trust service provider would also be obliged to notify the harmed data subject. Although the applicable rules concerning personal data protection were previously guaranteed by Regulation 45/2001, hence the system of protection for data subjects was different from the one established by the GDPR, it reflects a similar practice.

However, the system has not achieved its potential. Only 59% of the EU population enjoys the schemes arising from the eIDAS Regulation. The problem is partly caused by the fact that the vast majority of electronic identities are being used in the private sector, by banks, mobile phone operators etc.

European Digital Identity will be established by a proposal for a Regulation (European Data Protection Board, 2021b) (hereinafter as "Regulation on Digital Identity"), which shall amend the above existing legal framework on eIDAS. According to its explanatory memorandum, it was important to support a trusted and secure digital identity solution, because those solutions which fall outside the scope of eIDAS were very often offered by social media providers, which raise privacy and data protection issues. It emphasised that the eIDAS system should be expanded by three new services, electronic archiving, electronic ledgers and remote electronic signature/seal.

4.1. Legal basis

The legal basis for this Regulation on Digital Identity is Article 114 TFEU. Although there is no mention of the legal basis concerning health, the newly established system is planned to include medical certificates and ePrescriptions, as well as QR-codes.[17] The principles of subsidiarity and proportionality are clearly indicated, justifying the EU's competence to act as the Member States would not be able to create such an interoperable system, thereby not being able to reach the objective.

The proposal has gone through the stakeholders' consultation and is at the stage of the first reading. The proposal was also shared with the Member States. It is mentioned that the secure digitalization on mobile devices is the technological future, justifying why the private and public sector have already moved towards technologically-developed systems. Those of the private sector mentioned in the explanatory memorandum are non-exhaustively Apple, Google and Thales. Last but not least, an impact assessment was made with regard to the proposal. The very first draft received a negative opinion from the Scrutiny Board. After the Commission's follow-up, the Scrutiny Board provided a positive opinion.

In practice, the application of the Regulation on Digital Identity should include three stages. The first one should include an imposition of a mandatory notification of the eIDs. In that way

15 Article 13 of Regulation 910/2014.

16 Recital 37 of Regulation 910/2014.

17 Recital 9 of the proposal.

the mutual recognition of the national systems would be established. The second level would require the exchange of data linked to identity. The last stage, aiming at the full regulation within the EU territory, includes mutual recognition of eID means, as well as full legal recognition of electronic attestations.

4.2. Practical aspects concerning personal data

The explanatory memorandum creates some guarantees concerning full compliance with the data protection legislation, hence the application of the GDPR or Regulation (EU) 1725/2018. It emphasises that the eWallet[18] function would enable the data subjects to control their personal data better. Concerning health data, it clarified that they would only be processed in accordance with national law.

However, it is not clarified how the transfer of personal data concerning health would be made interoperable between the Member States, as their national laws on health could be totally different. Transfers to third countries outside the EU territory, are not consulted more concretely within the proposal. Considering for instance cloud-based solutions, as well as the probability that the eWallet would be used by the American platforms of Apple, Google etc., questions arise as to how secure digitalization, in light of the Schrems II ruling, could be established. In addition, some of the platforms could be also stored on handsets created by third countries that are on the "black list" when it comes to the protection of data subject rights, e.g. Huawei and consequently the transfer of personal data to China (EDPS, 2021).

Transfer of personal data is not considered as the only bottleneck. The collection and processing of personal data with regards to eWallets includes an undefined list of personal data, including biometrics. Although the data minimization principle is mentioned in the recitals as well as the main text of the proposal, it is difficult to imagine, how data minimization would be ensured in reality. One device and an application can hold huge amount of personal data. This could lead to easier profiling and a greater risk of incorrect identities.

To ensure legal certainty, the long-term preservation of electronic documents is envisaged.[19] Since no clear distinction between storage periods with regard to type of personal data is mentioned, it is very difficult to envisage how one of the main principles of lawful processing of personal data, storage limitation, will be applied properly.

As part of the legislative procedure,[20] the EDPS was also consulted. One of the important comments concerned the physical and logical separation of the personal data relating to the eWallet from the rest of the personal data.[21] This part of the comment has been reflected in the text of the Proposal.[22]

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[18] Newly inserted point 42 into the existing Article 3 of 910/2014: "European Digital Identity Wallet' is a product and service that allows the user to store identity data, credentials and attributes linked to her/his identity, to provide them to relying parties on request and to use them for authentication, online and offline, for a service in accordance with Article 6a; and to create qualified electronic signatures and seals".

[19] Recital 33 of the proposal of Regulation on Digital Identity.

[20] Article 42 (1) of Regulation (EU) 2018/1725.

[21] Bullet 5 of the part 2 of the Formal comments of the EDPS on the proposal of the Regulation on European Digital Identity.

[22] Newly inserted Article 6a, paragraph 7.

5. Conclusions

Although the idea of digitalization is more than welcomed by governmental authorities, as well as majority of EU citizens, one needs to take into consideration the possible risks arising from the soon to be established system of the European Digital Identity.

Firstly, it would lead to the exclusion of some people from EU society, particularly those who have lower digital literacy or less access to digital devices. Such a group of people could be rather significant, as it would not only include elderly people and people with disabilities, but also those from socially disadvantaged groups. As it was pointed out in the comments to the legislative proposal by the European Economic and Social committee,[23] digitalization of this type would require a huge campaign and education as well as much work by the Member States in order not to face any cases of discrimination.

In addition, the rather doubtful aspect is the physical separation of the personal data, particularly once the personal data were uploaded to one mobile application. It is difficult to imagine a practical example of how such a physical and logical separation could be possibly reached. As a consequence, the role of the Data Protection Authorities would be very crucial in order to monitor this phenomenon closely.

Third, it seems that the scope of personal data held by the eWallet is very broad. As such, the lack of a data minimisation principle could very easily lead to misidentification and therefore discrimination against data subjects. How data subjects will be able to exercise their fundamental rights while knowing that such a large amount of their personal data might be transferred via mobile applications to countries which do not respect citizens' fundamental rights and have no redress equivalent to the protection of personal data within the territory of the EU can be obtained is a critical issue.

Concerning the legal basis, although the approximation of laws is somewhat relevant, intervention into processing personal data concerning health could require more attention. Although not completely necessary, as it is mentioned in Regulation (EU) 910/2014 to be amended, mentioning the competence of the European Union in the health sphere would be appropriate.

Last but not least, the question of processing personal data concerning health still stays open. For instance, processing the data from the Digital Green Certificates is conditional of the existence of a pandemic, hence derogation from the application of fundamental rights. However, if the eWallet will give the possibility to include the Digital Green certificates, these personal data would fall under a long-term processing rather than a derogation. It will be crucial to disable the digital tools of Mobile Tracing Applications and Digital Green Certificates and consequently delete the personal data from them. To close, the European Digital Identity should not include any personal data concerning health that goes beyond Directive 2011/24/EU concerning only cross-border health care.

[23] Point 1.2 of the Opinion of the European Economic and Social Committee on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, (COM(2021) 281 final 2021/0136 (COD)) (2022/C 105/12).

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Environmental sustainability in the regulation of electronic communications[1]

The last moment?

Máté Mester*

* Regulatory and strategic consultant, lawyer, PhD student at the University of Public Service. E-mail: mester.mate@uni-nke.hu

Abstract

Creating climate-neutral electronic communications is a shared responsibility for the industry and urgent action is needed in the face of warming trends due to global climate change. Despite this, environmental sustainability in the regulation of the electronic communications sector in Hungary has not yet received sufficient attention, nor has there been any related research, articles or studies. Therefore, the aim of this paper is to fill this gap, by reviewing the relevant international, EU and domestic regulatory situation and trends, to provide a comprehensive and high-level picture of sustainability initiatives in the electronic communications sector and evaluate it in order to suggest possible directions for domestic regulatory action. It is hoped that this will serve as a starting point for launching a discourse in the industry and for properly positioning the green transition in electronic communications regulation.

Keywords

electronic communications, networks, services, regulation, environmental sustainability.

1. Introduction – the last moment

Hardly any scientific research questions the fact that humanity has brought about very drastic changes on Earth and that this is not sustainable in its current form. Sustainability has become the most important long-term goal in every aspect of our lives today, and the electronic communications industry is no exception. Sustainability in general means choosing actions today that do not limit the economic, social and environmental opportunities of future generations (Brundtland, 1987).

The uniform scientific view is that the Earth is warming at an unprecedented rate. If current trends continue, the Earth's average temperature could be 2.8-3.2°C higher by the end of the century (Desjardins, 2020, 62–63; Climate Action Tracker, 2021, 4). According to the most re-

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cent data, humanity is within the last moment to reverse the Earth's harmful processes and the warming of the atmosphere (IPCC, 2022). In addition, the negative economic changes resulting from the current global political situation of war could cause the green transformation process, which has not been sufficient so far, to be reversed significantly.

It is no wonder that environmental sustainability is an increasingly pressing issue in electronic communications as well. Despite energy and operational efficiency being in the genes of the industry, the green transition is beginning to be seen as an explicit policy criterion and regulatory objective. Recently, there have been a growing number of regulatory initiatives specifically addressing the environmental sustainability of the electronic communications sector. The electronic communications industry, and digitalisation in the broader sense, is playing a key role in the environmental transformation of other industries and is facing further significant growth. However, this growth may even increase the overall environmental burden, making it particularly critical to strike the right balance in related policies. However, current decisions already determine the environmental burden in 2030 and beyond, due to the overall life cycles of electronic communications infrastructures. Therefore, making electronic communications climate-neutral is a responsibility to be shared among the industry, and global warming trends require urgent action.

Despite this, environmental sustainability has not yet been adequately addressed in the regulation of the Hungarian electronic communications sector and the related administrative framework, nor have there been any related research, articles or studies. Therefore, the aim of this paper is to fill this gap, to review the relevant international, EU and domestic regulatory situation and trends, and to provide a comprehensive and high-level overview of sustainability initiatives in the electronic communications sector. It is hoped that this will serve as a starting point for positioning the issue properly and launching an industry-wide discourse.

While sustainability is a global challenge that affects all industries, this paper focuses exclusively on the ICT sector, and within that, where possible, electronic communications services and networks in particular. It addresses only the economic, social and environmental aspects of sustainability, without addressing the direct physical and biological impacts on the environment and wildlife (e.g. the impact of radio waves on human health and the environment).

In line with the objective pursued, this paper does not evaluate or analyse in detail any individual initiatives or legislation, but only provides an overall picture. As such, it can be considered more as descriptive and partly as comparative research activity. However, the aim is that, by assessing this overall picture, this paper will set possible orientations for the representatives of the domestic industry, in particular the national regulatory authority, and other actors with an interest in or influence on regulation.

After an introductory section, the paper reviews the basic elements of the energy and resource management of electronic communications networks, describes the negative environmental pressures caused by the sector, and then looks at the digital industry's positive impact on the green transformation. It then reviews key industry practices and international and EU initiatives in this area. In the latter, it highlights the relevant elements of the sector-specific regulatory framework and the practices of national regulatory authorities. After outlining the situation in Hungary, the paper concludes by summarising the above and then suggests possible directions for domestic regulatory action.

2. Green genetics

The operation of electronic communications networks and services consumes a lot of energy and resources, so energy (and operational) efficiency is a key factor in service design. Accord-

ing to the laws of physics, a certain amount of energy is required to transmit a unit of data, and transmitting the data itself typically consumes more energy than processing that data (Tanenbaum & Wetherall, 2010, 100). The energy efficiency ("EE") of a communication link is usually expressed in terms of the ratio of the maximum data rate achievable to the energy required (bit per joule) (Hou, 2022, 3). The more favourable this ratio is, the more energy efficient a technology is, and operators will obviously prefer the most energy-efficient solutions.

Another important consideration is that electronic communications infrastructure typically has multiple redundancy. While this was often fortunate in the past in terms of competition and security of service, it is hardly sustainable in increasingly expensive and complex networks. As it is not always economically rational or feasible to build redundant or competing networks, it has become increasingly important, under regulatory pressure or whether market-driven, to share or provide access to individual infrastructure elements (Bartóki-Gönczy, 2013, 114–115; Lapsánszky, 2021, 314–320). The 6G vision, for example, envisages a large-scale autonomous network system, covering space, air, land and water (Matinmikko-Blue, 2021), which obviously cannot be deployed repeatedly and completely in parallel.

Although the first initiatives to reduce the carbon neutrality of telecommunications networks first emerged more than 20 years ago (British Telecom, AT&T and Sprint were among those at the forefront), environmental sustainability as a focus area has only recently begun to appear in this sector (Mester, 2020). This is partly because climate change is becoming a more prominent topic in general, and the results associated with it present a positive image for consumers. On the other hand, the green developments that have been launched in the past, often driven mainly by cost savings from lower energy consumption and by positive marketing, are now starting to deliver actual results in electronic communications networks. This is because trends are much slower to ripen where the natural and logical life cycle of infrastructure is up to 10-20 years. Third, efficiency, encouraging joint investments, promoting cost-effective network construction, increasing access and sharing (which also facilitates the integration of environmental sustainability considerations over competition or innovation) have recently become increasingly important regulatory objectives.

Therefore, as communication technologies, networks and services have evolved, increasingly energy-efficient (and cost-effective) solutions have emerged, and the need to avoid duplication of infrastructure has become increasingly important (just think of the development of mobile phones or mobile networks, or the growing role of infrastructure companies). Both processes have clear benefits for environmental sustainability. Moreover, environmental sustainability aspects are increasingly playing a role in network design decisions (for example, ICT companies are among the largest global buyers of renewable energy), which could further strengthen the green trend. Hence, as operational and energy efficiency are by no means new phenomena for the industry, sustainable development is essentially "in its genes".

2.1. Negative impacts

Nevertheless, assessing the environmental footprint of the electronic communications sector requires a comprehensive approach. First, the carbon footprint of the sector is itself significant, with most of it coming from the power supply and production of network devices and systems. However, in many cases, a significant proportion of the networks is made up of elements designed and built decades ago (think of copper networks, or the 3G network, which is now being switched off in many places, where one of the most important aspects, in addition to reducing fixed costs, is the resulting increase in energy efficiency, which in the case of 5G can be as

much as 100 times higher) (Shurdi et al., 2021, 325). At the same time, pervasive technological developments are increasingly blurring the boundaries of the systems that enable digitalisation. Networks are slowly reaching everywhere and because all communication is IP-based, data (and its storage and processing) is becoming the focus of interconnected systems. The biggest challenge is therefore that, even if the network is more energy-efficient, if the growth in data traffic is exponential then the development of the service will require a much denser infrastructure and the use of more and more devices (Mester, 2020).

In light of all this, it may come as a surprise, but the ICT sector is one of the most energy-efficient industries. While the volume of Internet traffic has grown exponentially over the last two decades, the energy consumption of networks and data centres, and the associated greenhouse gas (GHG) emissions, have increased only modestly (Malmodin & Lundén, 2016, 217). However, there is a real risk that, despite energy efficiency gains, the digital transformation will trigger a "rebound effect": despite energy and material savings, the rapid growth in data traffic and new technologies and uses (e.g. blockchain, IoT, metaverse) will only further increase the overall energy consumption and GHG emissions of electronic communications networks. (Canfora et al., 2020, 259; Skouby & Windekilde, 2010, 13).

While in the early 2000s the ICT industry was responsible for 1% of global GHG emissions, by the end of the decade it accounted for 2-2.5%, of which telecommunications in the narrow sense accounted for 30% (Beton et al., 2008, 13; Sutherland, 2009, 63). Today, this could be as high as 4% (BEREC, 2022). Moreover, if we do not take action, the industry's emissions could rise to 14% of the global value by 2040 (Belkhir & Elmeligi, 2018).

According to the most recent data, 12-24% of emissions are attributable to networks, 15% to data centres and around 60-80% to devices (BEREC, 2022, 5). In addition, the depletion of metals and minerals and the exploitation of fossil resources are currently neglected, even though they are equally critical to the functioning of the digital sector. For example, the carbon emissions from smartphone use alone account for 15% of total emissions (32 kg of raw materials are needed to produce a 2-gram microchip) (BEREC, 2021, 3). Given this, it is not surprising that 40% of the environmental impact of digital technologies is mainly due to the depletion of metal resources, including rare-earth metals, and the use of fossil resources in the manufacture of digital devices and equipment (Bordage et al., 2021, 36). For some raw materials and base materials that are crucial for semiconductor manufacturing, such as indium, gallium and germanium, the digital economy accounts for 80-90% of total consumption. This is a major challenge, because they will also be needed in the energy transition to green energy (e.g. in solar panels and wind turbines), meaning that supply chain security could be seriously compromised (Eerola et al., 2021, 5). In addition, data centres also require significant amounts of natural resources and energy because they are operated using water-cooled systems and run almost continuously (BEREC, 2021, 8). However, it is also important to note that calculations of the current carbon footprint of the ICT sector and estimates for the future are quite different in different studies, which makes a consistent evaluation difficult (mainly due to different methodologies, different data over time and different interpretations of the scope of the sector).

2.2. Positive effects

On the other hand, digitalisation and the electronic communications networks and services that form the backbone of it enable the complete transformation of entire industries, economies and societies ("enabling effect"). A number of solutions will be adopted in the future that will

increase operational efficiency and significantly reduce harmful emissions, thus contributing to the preservation of the environment.

Connecting all people and things through the electronic communications sector could already reduce global GHG emissions by 15-20%, a volume that is itself ten times higher than the sector's own emissions (BEREC, 2021, 3). Other studies suggest that the digital solutions already available could reduce global carbon emissions by 15% (Malmodin & Bergmark, 2015, 44). This is almost one-third of the global target set for 2030 (Ericsson Consumer & IndustryLab, 2020, 9).

There is a growing number of ICT solutions that also bring environmental benefits to other sectors. For example, by adopting 5G technology, the most polluting industries could reduce their carbon footprint by up to 50% by 2030 (MIT, 2021, 14) and, for instance, digitalisation and dematerialisation will enable the replacement and elimination of products and processes that consume huge amounts of energy and resources (transport, printed documents, etc.). Data collection and communication also enable real-time data analysis and feedback to streamline decision-making, reduce risks and improve coordination with stakeholders (suppliers, consumers, etc.). System integration helps to manage resource use by facilitating the use of low-carbon energy sources and reducing energy consumption at system (building, company, network, etc.) level. Process, activity and functional optimisation, as well as simulation, automation, redesign or control of processes, activities and services also improves energy efficiency. (Canfora et al., 2020, xiv). At the same time, telecommunications companies themselves see digitalisation and solutions based on it as key to their own sustainability (Niehoff, 2022, 7). Solutions such as these will therefore be critical for the green transformation of the economy and society.

2.3. Complex impact system

This duality of the electronic communications sector, namely solving its own sustainability challenges and the positive effect of the sector in achieving the sustainability goals in general, requires careful analysis and strategic action (Ojala & Oksanen, 2021). However, perhaps the most important consideration is the aggregate climate impact of the overall emissions from the digital and ICT sectors, which are developing at a dizzying pace. Even if efficiency increases by a factor of ten, the increase resulting from large-scale development may negate or even exceed the positive effects (i.e. the rebound effect mentioned earlier kicks in).

Finally, environmental sustainability is fundamentally a cross-cutting issue that penetrates all aspects of life. Accordingly, it is most typically addressed through global and horizontal initiatives or regulations, to which the ICT sector, and within it, the electronic communications industry, must adapt. Therefore, while there is a case for examining the e-communications sector on its own, given the impacts mentioned above, the extent to which its separate examination, assessment and development would be measurable or feasible can be questioned.

All in all, therefore, the electronic communications sector is a double-edged sword that must be used to save the planet. This must be done not only by renewing the entire sector and, through it, other industries, but also by aligning it with global objectives and expectations.

3. Relevant sustainability initiatives and regulations

3.1. Industry initiatives

As industry players have dealt with environmental sustainability for a long time, they are accordingly a lot more advanced in related actions. On the one hand, it is good practice for the

largest companies to launch corporate responsibility or sustainability programmes and to publish related reports in accordance with their chosen international guidelines. But, on the other hand, it is also becoming increasingly common for companies to issue green bonds, which enable them to raise external funds for improvements or projects aimed at bringing about positive environmental change. (Paemen et al., 2019). While most firms have set very ambitious environmental targets for the period 2030-50, different actors seem to follow different reporting standards (GRI, GeSI, CDP, GHG Protocol, Bilan Carbon, ISO and ITU standards), typically using two different methodologies (SBTi, LCA) to analyse future impacts. In addition, these methodologies do not take into account a number of adverse environmental factors (such as indirect impacts on the whole value chain). This practice makes it significantly more difficult to compare and assess the impacts of individual company efforts or measures (Godlovitch et al., 2021, 35). However, this fragmented approach has been a known problem for at least two decades, and no real progress has been made since then (Sutherland, 2009, 73).

Of course, there is also often a perception that there is little actual substance behind some of the initiatives undertaken by business actors, and that they are driven primarily by marketing objectives and the opportunity for positive communication ("green washing"). Nevertheless, there are many practical methods used by operators trying to reduce their emissions. In the deployment phase, this includes minimising construction activities (e.g. micro-trenching or overhead cables), reusing excavated materials, sharing networks between operators and using more sustainable network equipment. In the operational phase, operators typically achieve significant savings by decommissioning older technologies and optimising the energy efficiency of networks, using alternative or innovative cooling techniques and by switching off network devices at intervals (e.g. at night). The most common measures in the decommissioning phase are equipment reuse, refurbishment and recycling. It is also where the overall reduction of waste, for which there are now standards to rely on, comes in. In addition, service providers often devote energy to raising customer awareness of the environmental impact of the equipment and services they use, and set environmental requirements for suppliers (BEREC, 2022, 26–27; Godlovitch et al., 2021, 48–51).

In addition to individual service initiatives, companies are of course also prioritising sustainability at the level of industry organisations. Both the GSM Association (GSMA) and the European Telecommunications Network Operators' Association (ETNO) are setting their sustainability priorities through different working groups (GSMA, 2022; ETNO, 2021). Both organisations are founding members of the European Green Digital Coalition, which has set a target for its members to achieve full climate neutrality by 2040 (half of the founding signatories were GSMA members) (European Commission, 2021a). Similarly, the members of the European Competitive Telecommunications Alliance (ECTA) have been committed to reducing their environmental footprint for years (BEREC, 2022).

Green objectives are also naturally reflected in the latest technological developments. On the one hand, all network equipment manufacturers have already been committed to environmental sustainability for years (as it is naturally linked to increased energy and operational efficiency), and most related developments will directly improve the energy efficiency of networks and network equipment (optical network development, and in mobile networks MiMo, Beamforming, AI, OpenRAN, smart and autonomous networks) (Ericsson, 2020; Huawei, 2016; Nokia, 2021; Samsung, 2021). However, sustainability, for example, has also been an emerging dominant element in 6G R&D from the very beginning of development. Part of this is to link 6G development targets directly to the United Nations (UN) Sustainable Development Indicators, including how wireless networks can help collect the data needed to achieve the SDGs (Latva-aho & Leppänen, 2019; Hexa-X, 2021).

3.2. Initiatives by international organisations

While environmental sustainability has long been a high priority in global politics, the 2016 Paris Agreement on Climate Change (Paris Agreement) was the first binding agreement to set a common framework to keep global warming below 2°C (or, more precisely, to aim for a maximum of 1.5°C compared to pre-industrial levels) (UNFCC, 2016). Implementation of the Convention is closely linked to the implementation of the UN 2030 Agenda for Sustainable Development, which was adopted a few months earlier (UNDP, 2015).

It is generally accepted in these international environmental initiatives that new technologies will play a crucial role in achieving sustainability goals and addressing future social challenges. ICT developments and connectivity are a prerequisite for the necessary development and a key tool for environmental transition.

Global conventions are not, of course, enforceable by the industry per se, but they directly influence the functioning and actions of international professional and standardisation organisations. The sustainability objectives of the UN and the Paris Agreement have been translated into industry goals through the International Telecommunication Union's (ITU) Connect 2030 programme and related standardisation initiatives, which are driving telecom operators towards more sustainable solutions (ITU, 2020). The ITU's objective is for the ICT sector to reduce GHG emissions by 45% by 2030 compared to 2020. The target was developed by the ITU in collaboration with the industry measurement methodologies (GeSI and SBTi) and the GSMA, as mentioned above, and other standards to support the industry's greening efforts. In addition, several standardisation efforts by other major standardisation bodies (ISO, ETSI, CENELEC) have also addressed sustainability, and the Organisation for Economic Co-operation and Development (OECD) and the International Energy Agency (IEA) have also addressed the issue in a number of documents (BEREC, 2022, 42–44).

3.3. Horizontal initiatives of the European Union

In the European Union, the green transition has long been a priority horizontal regulatory policy objective. Think of environmental standards for cars, rating and labelling schemes for the energy consumption of electronic equipment, eco-design rules and the management of WEEE.[2] However, there have also been several recent horizontal regulations on business reporting that directly affect environmental sustainability objectives and indirectly influence the methodologies used to measure them (Venturelli, 2017, 409; Kozma & Bosnyák-Simon, 2022, 153).

At the same time, there is an increasing emphasis on environmental sustainability at all levels of EU policies. On the one hand, the European Commission's European Green Deal aims to reduce EU countries' GHG emissions to zero by 2050 (European Commission, 2021b). Under the recently published Fit-for-55 climate change package, it intends to reduce emissions by 55% by 2030 (European Commission 2021c). Moreover, the European Commission has launched the Destination Earth initiative, which aims to create a high-precision digital model of the Earth to facilitate the monitoring, modelling and forecasting of natural and human activ-

[2] See Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products ("Ecodesign Directive") and Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE Directive – Waste from Electrical and Electronic Equipment).

ities, and the development and testing of possible scenarios for more sustainable development (European Commission, 2022a). In addition, the Next-Generation EU package in the COVID post-crisis recovery plan has also placed a strong emphasis on climate and digital transformation (European Commission, 2020a), and the European Parliament has adopted two reports on this subject (European Parliament, 2020b; European Parliament, 2020a).

In the above horizontal initiatives, digital technologies are typically identified as an important means of achieving environmental goals, but the need for a green transformation of the digital sector is also raised increasingly often. For example, in the European Green Deal, the European Commission is already calling for a digital sector that focuses on sustainability. In addition, it proposes to improve the energy efficiency and circular economy performance of the sector, from broadband networks to data centres and ICT devices, and calls for greater transparency on the environmental impact of electronic communications services.

3.4. The EU regulatory environment for the sector

Against this backdrop, it is not surprising that the European Commission's recent Digital Agenda also emphasises that the ICT sector needs to undergo its own green transformation, including making data centres climate-neutral and the environmental burden of electronic communications transparent by 2030 (European Commission, 2020b). In addition, the European Commission has launched a number of dedicated industry initiatives, such as the Digital Decade package of proposals (European Commission, 2021d) and the European Data Strategy (European Commission, 2022b), which include environmental sustainability as a priority regulatory objective, but also the Circular Economy Action Plan (European Commission, 2020c), the Broadband and Data Centre Action Plan (European Commission, 2000) and the European Green Digital Coalition mentioned earlier. In addition, a paper on reducing the environmental impact of cloud services and electronic communications services and networks (Bilsen et al., 2020) was prepared, initiated by the European Commission, and a collection of best practices to limit the environmental footprint of the ICT industry (Canfora et al., 2020) have taken place.

In the Joint EU Toolkit for post-crisis recovery from the COVID crisis, the European Commission already encouraged Member States to develop best practices to promote the deployment of electronic communications networks with a reduced environmental footprint and, where EU legislation requires impact assessment, Member States are encouraged to share best practices where environmental impacts can already be identified and assessed (e.g. during the authorisation of networks) (European Commission, 2020d, 3–4). However, in the collection of best practices, Member States have been very general and have mainly made suggestions for measures in the areas of infrastructure construction and sharing, in connection with the energy consumption of networks and optimising the use of available resources and raw materials. Member States' practice also varies widely with regard to environmental impact assessments for spectrum usage rights, and in quite a number of Member States no such practice exists at all. Although the installation of transmission towers is usually subject to some form of environmental regulation, it is not generally subject to an EIA unless required by other regulations (Connectivity Special Group, 2020, 10–11).

Although the above would suggest that sustainability issues are being addressed in a relatively wide area by EU organisations, the issue has been almost absent from the direct regulatory environment of the electronic communications industry. The European Electronic Communications Code, which provides the regulatory backbone for the sector (hereinafter the EECC), for example, addresses environmental sustainability only indirectly, mainly in terms of infra-

structure sharing, coordination of construction works and spectrum management.[3] While the Broadband Cost Reduction Directive (hereinafter: the BCRD), in terms of its practical impact, provides a number of measures to promote more efficient network deployment (thus reducing the environmental burden), apart from a few indirect references (in the preamble), however, environmental sustainability is not addressed in the legislation.[4]

Nevertheless, this trend appears to be reversing, as the impact assessment proposal of the BCRD revision already notes that the growing environmental footprint of the electronic communications sector needs to be kept within appropriate limits to make the EU climate-neutral by 2050, and that appropriate measures in the revised BCRD could provide positive incentives for more sustainable deployment and operation of electronic communications networks (European Commission, 2021e). Environmental sustainability is also reflected in the new draft Recommendation on State aid for the development of broadband networks (European Commission, 2022c). On the one hand, the document identifies the reusability of existing infrastructure as one of the key determinants for reducing the overall cost of deploying new broadband networks and mitigating their negative impact on the environment. On the other hand, the draft would already encourage Member States to consider environmental and sustainability criteria in tendering procedures. Such criteria could include the climate and environmental impact of the network or the compliance of the measure with national and EU climate and environmental standards. It is also proposed that Member States could impose obligations on the selected bidder to implement risk mitigation measures where the network could have a negative impact on the environment.

The Radio Spectrum Policy Group (RSPG) has also recently started to work on this topic and has compiled sustainability considerations and information within spectrum management in a separate report. It has also looked at how spectrum management can help to combat climate change and how this can be translated into concrete actions at EU level (RSPG, 2021b). It also issued a separate opinion on these measures following the report, containing 28 measures (RSPG, 2021a). Initiatives on spectrum management are revolutionary, as wireless communications are particularly characterised by green trade-offs arising from the theoretical relationships between spectrum efficiency, energy efficiency, deployment efficiency, latency, and performance and bandwidth (Matinmikko-Blue, 2021; Csaba, 2020). Radio spectrum, on the other hand, is an essential tool for sustainable development, enabling the data connectivity behind key wireless technologies, universal broadband coverage and the resulting digital transformation.

3.5. The BEREC report

Keeping up with these trends, in 2020 the Body of European Regulators for Electronic Communications (BEREC) also started to expand its knowledge base specifically on environmental sustainability. It set up an ad-hoc expert working group, consulted stakeholders in a series of meetings and workshops, as well as in the two most recent annual industry forums, and commissioned an external study on the subject. As a result, the Body has recently adopted a draft report which has also been submitted for public consultation (BEREC, 2022). The draft report

[3] Recitals (105), (106), and Article 44 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 on the European Electronic Communications Code (EU) 2018/1972.

[4] Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks.

provides an overview of the extent and trends in GHG emissions from electronic communications, the sources of emissions and possible measurement methods. The main focus is on GHG emissions, as this is the area where most data and knowledge is available. It also covers the overall impacts on natural resources (e.g. fossil energy sources, minerals and metals, including rare-earth metals) and reviews the related initiatives and industry practices already presented above.

From this perspective, this draft report summarises the main results of BEREC's groundwork on sustainability in the ICT sector and outlines the body's approach to environmental sustainability. In addition, the report provides a detailed analysis of the issues that are also presented in this paper. As such, it covers the negative and positive environmental impacts of the ICT industry, the related calculations and estimates, and takes stock of related initiatives. It also highlights the main issues related to the sustainability of the digital sector (methodological divergences, rebound effects, use of natural resources) and the resulting challenges for BEREC or for the industry in general (further research, development and standardisation of measurement methodologies, increased industry and regulatory cooperation and information sharing). Furthermore, the BEREC draft report also recognises the indirect positive impact of digitalisation on decarbonisation in other sectors and that digital solutions are a critical factor for climate neutrality.

The paper prepared in support of the BEREC draft report also made several important findings. On the one hand, it highlighted the positive impact of the relevant provisions of the BCRD and EECC as described above, but also pointed out that, above a certain level, network sharing can be detrimental to infrastructure-based competition, investment and innovation. At the same time, the paper suggests that national regulators can use a number of instruments to facilitate the replacement or decommissioning of less energy-efficient technologies (e.g. copper networks, 3G networks) (which in some cases may be hampered by the basic requirement of technology neutrality laid down in the EECC). In addition, an important finding of the paper is that NRAs can only collect data from operators in the context of the application of the EECC, which limits the collection of adequate data on environmental sustainability (and which would therefore be best obtained on a voluntary basis or in cooperation with other authorities). Nevertheless, the study also suggests that there are a number of potential regulatory measures that can be used to take meaningful action: raising awareness among consumers and network operators, developing codes of conduct with stakeholders, promoting eco-design and recycling programmes, encouraging research on sustainability in the ICT sector and promoting sustainability solutions (Godlovitch et al., 2021, 9–12).

BEREC believes that the above findings, and sharing related experience and technical knowledge, as well as the report itself, can serve as a tool for national regulators to further their work on sustainability and thereby reduce the negative environmental impacts of the digital sector. Perhaps even more importantly, BEREC will work with other relevant organisations in the coming period to ensure that the sector's environmental footprint is as transparent as possible and that the indicators are based on accurate data. BEREC has also included a new work-stream in its work programme for 2022 and 2023. The body also intends to contribute to the development of best green practices with stakeholders in the ICT sector and competent authorities. In other words, BEREC will in future place greater emphasis on improving its knowledge and activities in the field of sustainability, in order to contribute its expertise to reducing the environmental footprint of the ICT sector and to bring along the dual transition to a green and digital economy.

3.6. National regulatory authorities (NRAs)

Although the BEREC draft report is a major step forward, some NRAs were already actively addressing environmental sustainability before its publication and, where appropriate, developing dedicated measures in cooperation with other competent authorities (and best practices are presented in the BEREC report). The French (ARCEP), Irish (COMREG) and Finnish (Traficom) authorities have done the most significant work in this area so far. In particular, ARCEP is at the forefront of sustainability initiatives and its activities have served as a model for BEREC. The French authority already started collecting data in 2020 to assess the environmental impact of networks and equipment and has set up a cooperation platform with major industry players. As a result of this work, ARCEP, together with one of the main French environmental organisations, has prepared a report for the French government on the footprint of digital environmental technology (which has been taken into account by the government in its related measures and has also identified specific tasks for ARCEP) and has recently published a specific study on the environmental impact of 5G networks (ARCEP, 2019, 2020, 2022).

COMREG launched a public consultation on the issue at the end of 2019 and presented the results and main findings at an OECD event. Moreover, there were also spectrum sales where COMREG specifically took into account the positive impact of the relevant service on environmental pressures. In addition, environmental sustainability has become a core value of COMREG's 2021-2023 strategy and was included in its regular consumer research at the end of 2021. Finally, an internal project was launched at the Irish authority to understand the impact of Irish networks on climate and identify possible courses of action (COMREG, 2021; BEREC, 2022, 15).

The Finnish regulator, Traficom, in addition to being involved from the outset in the government's strategic work on assessing the environmental impacts of the ICT sector, launched in 2019, has commissioned two studies on the subject and has used a questionnaire to assess the current environmental impacts of operators and networks and the available data. In future, Traficom plans to collect and publish data on a regular basis on the environmental pressures on the sector. Finally, Traficom's strategy identifies the Authority's contribution to a sustainable environment as a key objective (BEREC, 2022, 16).

As regards the other countries, the Spanish national regulatory authority (CNMC) has also set specific sustainability targets in its current strategy and action plan. The Malta Competitiveness Authority (MCA) has consulted a number of stakeholders, including the Environmental Protection Authority of Malta (ERA), with which it intends to work in future to identify potential tasks as a more developed, holistic strategic direction on environmental issues develops. The UK national regulator (Ofcom) has also included sustainability issues in its annual work programme and plans to publish a White Paper on the subject, and the Dutch national regulator and competition authority (ACM) has published draft guidelines on sustainability agreements and their effects on competition (BEREC, 2022, 17; ACM, 2020).

3.7. Hungarian status report

Domestic environmental sustainability policy, regulation and company practices are, of course, well integrated into the international and EU context. At the same time, there is a noticeable growing focus on environmental issues and sustainability in Hungary. In addition to the general environmental rules, the National Sustainable Development Framework Strategy, the basic document for sustainable development in Hungary, which is still valid today, was adopted by

the National Assembly in March 2013 with a mandate until 2024 (NFFT, 2013). This document contains all the UN goals and targets to which Hungary can make an effective contribution to global implementation. It also serves as a long-term concept for the public policy decision preparation and decision-making system and establishes the necessary indicator, monitoring and follow-up system. In addition to these, in 2020 a dedicated climate protection law was introduced in Hungary aiming to decrease the carbon emission of the country by 40% (to the base of 1990).[5] Following that, a National Clean Development Strategy was adopted (NCDS, 2020) However, none any of these laws and documents mention or refer to the ICT industry or electronic communications as relevant in any respect, except the National Clean Development Strategy recognising the positive impact of digitalisation of (other, non ICT) industries (NCDS, 2020; NFFS, 2021).

If we look at the regulatory environment for electronic communications, we see essentially a replication of the EU environment. The backbone of the sector's regulatory framework, Act C of 2003 on Electronic Communications, mentions among its objectives and principles the enforcement of environmental requirements in the context of electronic communications,[6] but environmental considerations appear with practical importance in the areas of interim measures, authorisation, siting and sharing of installations (similar to the corresponding article of the EECC), radio equipment and general rules relating to life and physical health, and are predominantly intended to ensure compliance with nature conservation, environmental, health and urban planning legislation outside the sector.

Beyond this, however, sustainability considerations are not explicitly reflected in the domestic legal environment, including in the activities or strategies of the national regulatory authority. Although the National Media and Infocommunications Authority's (hereinafter NMHH) latest (2021-2025) radio spectrum strategy includes social engagement and a more liveable environment among the areas to be supported, this is not yet reflected in the level of targets and indicators (except for supporting the early deployment of modern, innovative technologies and phasing out obsolete technologies, which will result in significant energy savings, for example through phasing out 3G) (NMHH, 2020, 56). It is a positive sign that, according to the BEREC draft report, the NMHH has already asked questions on sustainability in the 2021 consumer survey and is expected to consult on sustainability challenges with relevant stakeholders (including in a workshop) (BEREC, 2022, 17).

In line with international and parent company trends, the majority of domestic operators have been actively addressing the environmental sustainability of networks and services for a very long time; in other words, industry players in the Hungarian market are significantly ahead in this area. Magyar Telekom has had a sustainability strategy for more than fifteen years and was the first large Hungarian company to go carbon-neutral in 2015. Its primary goal remains a continuous increase in its energy efficiency, a significant reduction in the use of fossil energy sources and at the same time an increase in the use of renewable energies (Magyar Telekom, 2019).

Vodafone, in line with its Group, is committed to reducing its global carbon emissions to net zero by 2040 and is running its network 100% on renewable wind and hydro energy since July 2021. It also aims to reduce its environmental footprint by recycling network waste and halving its other carbon emissions (Vodafone, 2021). Vantage Towers' sustainability commitments are fully in line with this, with the infrastructure company also powering all its base stations exclu-

5 Act of XLIV of 2020 on Climate Protection.

6 See Section 2 (j) of Act of XCII of 2003 on Electronic Communications.

sively from renewable energy sources. In addition, the company's model has a number of environmental benefits, as its operations require fewer base stations in total (Verebély, 2020, 48).

According to the company, the Yettel office building was one of the largest environmentally conscious investments in Central Europe when it was opened, and even today is one of the most modern and environmentally friendly corporate headquarters in Hungary (Yettel, 2022). The service provider's environmental policy is in line with international standards (Yettel, 2021) and the same is found for CETIN, part of the Group (Get-Energy, 2020; CETIN, 2021; SGS, 2022). Yettel also supports its customers' efforts to reduce their environmental impact through a number of actions.

4iG, which has a growing role in the sector, and also TARR have been certified to international standards (FERRCERT, 2019; Group Energy, 2020; 4iG, 2021). DIGI and Antenna Hungária do not have a published environmental sustainability strategy or report, but both have launched related corporate initiatives (DIGI, 2022).

Although this list is far from exhaustive, it reflects one of the fundamental problems already described above: the real performance of domestic operators and network operators is as difficult to compare as that of international companies due to differences in specific targets and the methodologies and timeframes used to measure them (in addition, there are hundreds of smaller cable operators in the domestic market). However, as with international trends, sustainability is gaining increasing attention in the country and is being addressed by a growing number of industry organisations and national events (e.g. HTE Infokom in 2021 and SZIE World Telecom Day in 2022).

4. Summary

Thanks to the genetics of the industry and a number of mutually reinforcing effects, the electronic communications sector can be one of the most effective examples of a green future. The ICT sector, and within it the electronic communications sector, can make a significant contribution to the digitalisation of other sectors and society, and thus to increasing environmental sustainability. The positive impact of digital technologies on other industries is not self-evident and therefore appropriate regulation is needed to ensure that they contribute to the carbon neutrality of other sectors. There is consensus in the literature that digital technologies have an important role to play in achieving global sustainability goals. However, this places an even greater burden on the sector: they must avoid a rebound effect and ensure that overall emissions and environmental pressures remain at sustainable levels.

However, the lack of a single, agreed methodology for monitoring environmental impacts at industry level and the impact of specific services and individual consumption patterns on the environment (although good practices can be found, such as the inclusion of the carbon footprint of current consumption on the bill) makes it significantly more difficult to assess and transform the sector (Sutherland, 2009, 72; Ericsson Consumer & IndustryLab, 2020; French Parliament, 2021). Fortunately, despite this has been being a known problem for at least two decades, regulators seem to have finally started to recognise its importance and, in addition to mapping possible regulatory actions, have begun to develop possible monitoring methods (see ARCEP, Traficom, BEREC and related projects of the European Green Digital Coalition). There is no question that this requires appropriate data, but such data collection under EU rules is not currently possible directly, unless authorised by national regulation in the Member State concerned.

Another complicating factor is that the sector's significant international embeddedness also has an impact in this area. Environmental sustainability is also influenced by different levels of

regulation (international organisations, industry initiatives, standards, EU and national regulations) and there are many examples of parallel initiatives. On the other hand, most sustainability problems are complicated and therefore require equally complex action, with both general and industry-specific elements. Accordingly, industry is affected by both horizontal (e.g. European Green Deal) and specific (e.g. ITU standards) rules, not to mention that the industry is often not easily defined (digital sector, ICT or electronic communications) and although industry players are typically much more advanced in their own environmental sustainability, both they and regulators are in a particularly difficult position to shape their respective actions. They may find it challenging to find the right and coherent directions and to filter the essence out the "noise". However, as in most cases, the most important and most difficult thing to do is to raise awareness, to get the widest industry cooperation possible and to develop measurements, solutions and practices that are acceptable to all, and to avoid duplication (and, of course, green washing). In this process, regulatory initiatives, and in particular national regulators, have a critical role to play.

5. Quo Vadis?

Although the legislative framework is currently limited in many respects, there are a number of available tools that can be used for effective action by Hungarian regulators to achieve these objectives. Of course, traditional regulatory approaches and current economic policy directions (e.g. promoting competition, fostering innovation, encouraging investment and development policy objectives) must be taken into account in the decision-making process, but it is clear that action is needed.

To this end, it would be worthwhile to choose a regulatory policy direction (and if possible a measurement methodology) that is aligned with the environmental sustainability of the sector (in the domestic context, it is worth following EU trends, as appropriate), taking best practices into account. As ARCEP is explicitly at the forefront of sustainability initiatives, its activities could serve as a model for the Hungarian regulator. It should also be remembered that industry players are much further ahead in understanding the environmental sustainability challenges on which they have to build. In addition, particular attention needs to be paid to raising consumer awareness, based on international examples (and the image of a national regulator committed to green transformation can send a positive message to consumers anyway).

It would be at least as important not only to follow and necessarily replicate EU processes with a phased lag, but also to go a little further and take domestic action. This could be, for example, organising a dedicated industry consultation or workshop on environmental sustainability issues; setting up an expert working group to assist the NRA in its work; developing partnerships with relevant peer institutions; integrating sustainability considerations into upcoming NRA strategies, spectrum management, licensing processes and data collection; assessing the environmental status of domestic networks and services; commissioning studies; launching consumer awareness programmes and actions as highlighted above; and exploring related regulatory instruments and legislative options or needs (either at statutory or regulatory level). In any case, a general principle of sustainability must apply here too: if everyone does just a little for the future, we can make a significant impact. We hope to see more and more such minor steps in the regulatory and industry actions of the domestic electronic communications sector. We may be just in time.

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To what extent might (and should) competition law apply to public authorities?

Michal Petr*

* JUDr. Michal Petr, Ph.D., associate professor for European law, head of the Department of International and European law at the Faculty of Law of the Palacky University Olomouc, Czech Republic. In 2010 – 2015, he was the Vice-Chairman of the Czech Competition Authority. The Author specializes in competition law and the regulation of network industries. He is the author of several books/book chapters and numerous reviewed articles in professional journals. E-mail: michal.petr@upol.cz

Abstract

Even though public authorities, in particular the Government and the municipalities, may disturb effective competition by their exercise of public powers, competition law does not apply to them, except for the specific and limited circumstances when it can be used in connection with other Treaty provisions. This article first explores the limits of applicability of EU competition law on public authorities; it concludes that even though EU competition law as such does not provide protection against the conduct of public authorities that distorts competition, its scope should not be expanded. The aim of competition law is to limit market power, not official authority. Instead, after discussing the legislation of selected countries from Central Europe, it is put forward that specific domestic legislation, applied by competition authorities, may provide an effective remedy to this problem. As comparative research of these issues has been rather limited so far, further elaboration of this topic is recommended.

Keywords

competition law; competition advocacy; distortion of competition; public authorities.

1. Introduction

Competition law is an indispensable tool in the market economy, ensuring effective competition in the market and thus increasing consumer welfare. Its norms are addressed to *undertakings*, entities engaged in economic activity.[1] These would typically be persons of private law, it is nonetheless possible for a public authority to be regarded as an undertaking if it pursues an

[1] Judgment of 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH., C-41/90, EU:C:1991:161, paragraph 21.

economic activity.[2] Conversely, if the public authorities exercise their public powers, such as legislation or decision making, competition law does not apply to them.

It is undisputed that not only economic activities but also the exercise of public powers may distort competition. As the Organisation for Economic Cooperation and Development (hereinafter referred to as "OECD") put it:

> "*Competition law generally aims at preventing private restrictive business practices that significantly lessen competition, reduce consumer welfare, and result in inefficient use of resources. However, competition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various government interventions in the marketplace*" (Khemani, 1998, 93).

Should such "anticompetitive" conduct of public authorities be regulated? And if so, by competition law? And if so, should it be enforced by competition authorities, and should competition authorities and public authorities themselves, gain powers over other public authorities?

In order to answer these questions, we will briefly introduce EU competition law and its addressees –undertakings (Chapter 2). After that, we will discuss the conditions under which EU competition law may be applied to public authorities (Chapter 3). Finally, we will consider specific legislation focusing on public authorities in selected Member States from Central Europe (Chapter 4). While answering the questions above, we will not only consider the text of law, but also the relevant jurisprudence and practice of competition authorities, as well as scholarly writings.

The principal aim of this article will be to answer whether there is legislation regulating the anticompetitive effects of public authorities' conduct, and whether more (or less) should be done in this regard.

2. EU Competition Law

In this chapter, we will first briefly outline the basic principles of EU competition law, followed by a discussion of how much these rules may be applied to the conduct of public authorities.

For the purposes of this article, we understand competition law as the regulation of certain coordinated conduct by undertakings, called anticompetitive agreements, and of unilateral conduct by undertakings with significant market power, namely the abuse of dominant position. The legal basis for EU competition law comprises the Treaty on the Functioning of the European Union (hereinafter "TFEU") itself; Article 101 deals with anticompetitive agreements, Article 102 with abuse of dominance. Merger control[3] is not included in our analysis, as this practice is not relevant for the purposes of this article. Neither are the provisions on state aid;[4] these too subject the conduct of public authorities vis-à-vis undertakings to special conditions, guaranteeing undistorted competition, but they are limited to a very narrow area of financial benefits from public funds.

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[2] Judgment of 16 June 1987, Commission of the European Communities v Italian Republic, C-118/85, EU:C:1987:283, paragraph 7.

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[4] Articles 107 – 109 TFEU.

The Treaty identifies the concepts of agreements and dominance only in general terms, refined further by the jurisprudence of the Court of Justice of the European Union (hereinafter "CJEU"). It is not our aim to discuss these concepts in detail; we only provide a basic characteristic to enable further analysis of our main topic – distortion of competition by the conduct of public authorities.

2.1. Anticompetitive agreements

Anticompetitive agreements are generally referred to as collusive conduct. It is so because, in order to gain market power and enabling them to distort competition, several undertakings need to coordinate their conduct.

The agreements are described as any direct or indirect contacts between undertakings, the object or effect of which is either to influence the conduct in the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting in the market.[5] It is possible to distinguish between three forms of anticompetitive agreements: agreements *stricto sensu*, comprising a "concurrence of wills" of independent undertakings in whatever form;[6] concerted practices, which are. a form of coordination between undertakings by which, without it having been taken to the stage where an agreement as properly called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition[7]; and decisions by associations of undertakings.[8]

Not every collusion among undertakings is prohibited, but only those agreements which have as their object or effect the prevention, restriction or distortion of competition within the internal market, for example agreements which directly or indirectly fix purchase or selling prices, share markets or sources of supply or apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.[9]

2.2. Abuse of dominance

The dominant position is described in the CJEU case-law as "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently*

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5 Judgment of 16 December 1975, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, C-40 to 48, 50, 54 to 56, 111, 113 and 114/73, EU:C:1975:174, paragraph 174.

6 Judgment of 26 October 2000, Bayer AG v Commission of the European Communities, T-41/96, EU:T:2000:242, paragraph 69: "*the concept of an agreement within the meaning of Article [101 (1) TFEU], as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention"*.

7 Judgment of 4 June 2009, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, C-8/08, EU:C:2009:343, paragraph 26.

8 According to judgment of 27 January 1987, Verband der Sachversicherer e.V. v Commission of the European Communities, C-45/85, EU:C:1987:34, paragraph 32, decisions by associations of undertakings are even non-bindng recommendations, *"regardless of what [their] precise legal status may be, [which constitute] a faithful reflection of the [association's] resolve to coordinate the conduct of its members"*.

9 Article 101 (1) TFEU.

of its competitors, customers and ultimately of its consumers".[10] Since the dominant undertaking itself holds sufficient market power to distort competition and no collusion with other undertakings is therefore necessary, its behaviour is generally referred to as unilateral conduct.

The competition law does not prohibit the dominant position as such, but its abuse; according to the CJEU, the concept of abuse is

> "*an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*".[11]

The conduct perceived as abusive includes imposing unfair purchase or selling prices, limiting production, markets or technical development to the prejudice of consumers and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[12] It is possible to distinguish between exploitative abusive practices that dominant undertakings employ in order to extract unfair advantages out of their market strength (e.g. excessive pricing), and exclusionary practices, aimed at pushing the dominant undertaking's rivals out of the market.

2.3. Undertakings

For our further considerations, it is important to underline that EU competition law is addressed to undertakings. The term undertaking has not been defined in written competition law for decades;[13] it was nonetheless extensively discussed in the jurisprudence and professional literature.[14] According to the general definition:

"the concept of an undertaking encompasses every entity engaged in an economic activity*, regardless of the legal status of the entity and the way in which it is financed"*.[15]

For the purposes of this article, the concept of an economic activity is of utmost importance. In principle, it consists of "*offering goods or services on the market*";[16] conversely, the activities

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[10] Judgment of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, C-27/76, EU:C:1978:22, paragraph 65.

[11] Judgment of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities, C-85/76, EU:C:1979:36, paragraph 91.

[12] Article 102 TFEU.

[13] The first definition of this term is contained in Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Article 2 (1) (10). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001

[14] In detail, see e.g. Wils (2000).

[15] Judgment of 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH., C-41/90, EU:C:1991:161, paragraph 21 (emphasis added).

[16] Judgment of 18 June 1998, Commission of the European Communities v Italian Republic**, C-35/96,** EU:C:1998:303, paragraph 36.

of Member States, performing "*a task in the public interest which forms part of the essential functions of the state*",[17] in particular "*performance of a State's sovereign or public functions*" (Bailey & John, 2018, 93), is not an economic activity, and a state (public authority), for the purposes of such activities, cannot be considered an undertaking.

The boundaries of an economic activity are not clear. In principle, three conditions need to be met: an undertaking needs to (i) supply goods or services in the market; (ii) bear the associated financial and economic risks; and (iii) be at least in principle able to make a profit out of these supplies (Odudu, 2006, 26). Only the nature of the activity is relevant, not the organisation of the entity pursuing it; as such, undertakings may not only be companies and other "typical" private entities, but also public authorities, provided they are engaged in an economic activity. As the CJEU ruled with respect to a tobacco monopoly, exercised by a state entity with no separate legal personality from the state itself:

"*The State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and service on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong*".[18]

As the economic activity would typically be only a (smaller) part of the activities of public authorities, the entity would be perceived as an undertaking only with regard to its "economic" pursuits.[19]

For the purposes of this article, it is not necessary to concentrate on "borderline" cases between "typical" commercial activities and essentially non-profit activities such as social services or provision of public goods, which are in principle not considered to be economic activities, even if pursued by a private entity.[20] Our focus shall remain on the "privileged" activities of public authorities, namely their ability to exercise public powers:[21] "*activities which fall within the exercise of public powers are not of an economic nature justifying the application of the FEU Treaty rules of competition*".[22]

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[17] Judgment of 18 March 1997, Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG), C-343/95, EU:C:1997:160, paragraph 22.

[18] Judgment of 16 June 1987, Commission of the European Communities v Italian Republic, C-118/85, EU:C:1987:283, paragraph 7.

[19] Judgment of 12 July 2012, Compass-Datenbank GmbH v Republik Österreich, C-138/11, EU:C:2012:449, paragraph 38: *"In so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers"*.

[20] Judgment of 16 March 2004, AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), Bundesverband der Innungskrankenkassen, Bundesverband der landwirtschaftlichen Krankenkassen, Verband der Angestelltenkrankenkassen eV, Verband der Arbeiter-Ersatzkassen, Bundesknappschaft and See-Krankenkasse v Ichthyol-Gesellschaft Cordes, Hermani & Co. (C-264/01), Mundipharma GmbH (C-306/01), Gödecke GmbH (C-354/01) and Intersan, Institut für pharmazeutische und klinische Forschung GmbH (C-355/01)**,** EU:C:2004:150., paragraph 47.

[21] Opinion of Mr. Advocate General Mayras delivered on 28 May 1974, Jean Reyners v Belgian State, C-2/74, EU:C:1974:59, p. 665: *"official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connection with the exercise of this authority can therefore arise only from the State itself either directly or by delegation to certain persons who may even be unconnected with the public administration"*.

[22] Judgment of 12 July 2012, Compass-Datenbank GmbH v Republik Österreich, C-138/11, EU:C:2012:449, paragraph 36.

2.4. Partial conclusions

Competition law protects the effective competition by prohibiting undertakings – entities engaged in economic activities – from abusing their market power, either in collusion (anticompetitive agreements) or individually (abuse of dominance). Even though undertakings will typically be private entities, it is well-established under EU competition law that, when public authorities are involved in economic activities, they are regarded as undertakings, and the competition law applies to them; we will not discuss this any further.

Instead, we will concentrate on cases when public authorities are exercising their "core" public powers, in particular legislation and decision-making. These are clearly non-economic activities, and competition law as such cannot apply to them. Even such activities may however distort competition. In the following Chapter, we will therefore discuss situations in which competition law may be applied in connection with other provisions of the TFEU.

3. "Indirect" Application of EU Competition Law

Even though the EU competition law, i.e. Articles 101 and 102 TFEU, cannot be directly applied to public authorities exercising public powers, it can be to some extent employed "indirectly", in connection with other provisions of the TFEU. Two scenarios need to be considered: the principle of loyalty [Article 3 (4) of the Treaty on the European Union (hereinafter "TEU")] and the rules on public undertakings and granting exclusive and special rights under Article 106 TFEU; the former scenario is typically associated with the breach of Article 101 TFEU, the latter with Article 102 TFEU (Whish & Bailey, 2018, 224).

3.1. The principle of loyalty

Thanks to the combination of Article 4 (3) TEU, Protocol No. 27 on the internal market and competition to TFEU and Articles 101 or 102 TFEU, the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives, among which competition law plays a substantial role.

Before the Treaty of Lisbon entered into force, a corresponding obligation stemmed from Article 10 of the Treaty establishing the European Economic Community (hereinafter referred to as "TEC"); at the same time, Article 3 (1) (g) TEC contained an objective of ensuring that competition in the internal market shall not be distorted. As the CJEU explained already in 1977 in the *INNO* case in relation to abuse of dominance (the same interpretation however applies to anticompetitive agreements):

> "*while it is true that Article [102 TFEU] is directed at undertakings, nonetheless, it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness*".[23]

The obligations of Member States derived from these provisions were originally interpreted very broadly; in essence, every state measure producing restrictive effects on competition were to be prohibited, even in the absence of any behaviour by the undertakings (Faull & Nikpay,

[23] Judgment of 16 November 1977, SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)**, C-13/77,** EU:C:1977:185, paragraph 31.

2014, 811). This was however later re-interpreted as meaning that only such State measures that require or favour anticompetitive conduct by undertakings are prohibited:

> "*In interpreting Article [3 (1) (g) TEC], […] Article [10 TEC] and Article [101 TFEU] it should be noted that Article [101 TFEU], read in isolation, relates only to the conduct of undertakings and does not cover measures adopted by Member States by legislation or regulations. However, the Court has consistently held that Article [101 TFEU], read in conjunction with Article [10 TEC], requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. By virtue of the same case-law, such is the case* where a Member State requires or favours the adoption of agreements*, decisions or concerted practices contrary to Article [101 TFEU]* or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere".[24]

After the Treaty of Lisbon, undistorted competition is no longer listed among the EU's goals. That provision has nonetheless been replaced by a new Protocol No. 27 to TFEU on internal market and competition, affirming that the internal market needs to include a system to ensure that competition is not distorted. The "status" of competition law has thus not been diminished (Petra, 2008, 127), as was also affirmed by the jurisprudence.[25]

Thus, even under the Treaty of Lisbon, State measures disturbing competition are prohibited, as the Court of Justice recently summarised in the *AG2R* case:

> "*It must be borne in mind that Article 101 TFEU, read in conjunction with Article 4(3) EU, requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings*".[26]

Still, only those state measures that impose or induce anti-competitive behaviour by undertakings, reinforce the effects of anti-competitive behaviour or delegate regulatory powers to private operators can be considered as violating these provisions (Bach, 1994, 1357); Article 4 (3) TEU cannot be used simply because a state measure produces effects similar to those of a cartel (Whish& Bailey, 2018, 228).

Even so, these provisions were applied a number of times, in particular with respect to actions by associations of undertakings, for example when France made binding the production quotas set by an association of French wine-growers and dealers,[27] or when Italy required cus-

[24] Judgment of 17 November 1993, Criminal proceedings against Wolf W. Meng, C-2/91, EU:C:1993:885, paragraph 14 (emphasis added).

[25] Judgment of 22 March 2012, Slovak Telekom a.s. v European Commission, T-458/09 and T-171/10, EU:T:2012:145, paragraph 36.

[26] Judgment of 3 March 2011, AG2R Prévoyance v Beaudout Père et Fils SARL, C-437/09, EU:C:2011:112, paragraph 24.

[27] Judgment of 30 January 1985, Bureau national interprofessionnel du cognac v Guy Clair, C-123/83, EU:C:1985:33.

toms agents to set compulsory tariffs[28] or made mandatory the minimum prices set by operators of road haulage services.[29] In a similar vein of argument, also a Dutch administrative decision approving air tariffs fixed by airlines themselves[30] and Italian legislation facilitating price fixing and market sharing by producers and distributors of matches[31] were found illegal.

Article 4 (3) TEU thus provides an important tool for preventing the distortion of competition; however, it cannot be employed against the anticompetitive actions of public authorities alone, but only in connection with anticompetitive practices by undertakings that are required or facilitated by actions of the public authorities, or when the public authorities reinforce the effects of such practices.

3.2. Exclusive and Special Rights

Article 106 (1) TFEU obliges the Member States not to maintain in force regulations ("measures") concerning public undertakings or undertakings with special or exclusive rights that would be contrary to the rules contained in the Treaties, among other "competition" Articles 101 and 102 TFEU. Similarly to Article 4 (3) TEU, it is thus a reference rule; in other words it is not applicable on its own, but only in conjunction with other Treaty provisions (Whish & Bailey, 2018, 230). It is also more precise than Article 4 (3) TEU, while it is bound to concrete provisions of law, not merely to general principles (Whish & Bailey, 2018, 230), but also more limited in scope, as it applies only to measures regarding public undertakings[32] and undertakings with exclusive or special rights.[33] Article 106 (1) has been employed in the process of liberalising markets in the EU, especially the utility ones (Whish & Bailey, 2018, 230).

Similarly to Article 3 (4) TEU, however, this provision does not apply to activities of public authorities on their own but only in connection with the anticompetitive conduct of undertakings they regulate; as Advocate General Jacobs explained in *Albany*, this provision may be infringed "*only where there is a causal link between a Member State's legislative or administrative intervention on the one hand and anticompetitive behaviour of undertakings on the other hand*".[34]

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[28] Judgment of 18 June 1998, Commission of the European Communities v Italian Republic**, C-35/96,** EU:C:1998:303.

[29] Judgment of 4 September 2014, API – Anonima Petroli Italiana SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Others, C-184/13, EU:C:2014:2147.

[30] Judgment of 11 April 1989, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., C-66/86, EU:C:1989:140.

[31] Judgment of 9 September 2003, Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato, C198/01, EU:C:2003:430.

[32] According to CJEU, public undertaking is any undertaking over which the public authorities may directly or indirectly exercise dominant influence. See e.g. Judgment of 6 July 1982, French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities, C-188/80, EU:C:1982:257, paragraph 25.

[33] Opinion of Mr Advocate General Jacobs delivered on 17 May 2001, Firma Ambulanz Glöckner v Landkreis Südwestpfalz, C-475/99, EU:C:2001:284: *"rights granted by the authorities of a Member State to one undertaking or to a limited number of undertakings which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions".*

[34] Opinion of Mr Advocate General Jacobs delivered on 28 January 1999, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, C-67/96, EU:C:1999:28, paragraph 388.

This "causal link" is however not entirely clear. Article 106 (1) TFEU is not breached when the state only creates a dominant position for an undertaking; on the other hand, the dominant position however does not necessarily have to be abused (Whish & Bailey, 2018, 237). As the CJEU explained in one of the early cases concerning the relationship between Articles 102 and 106 (1) TFEU:

> "*a Member State is in breach of the prohibitions contained in those two provisions if the undertaking in question, merely by exercising the exclusive rights granted to it,* cannot avoid abusing its dominant position *[…] or when such rights are liable to create a situation in which that undertaking is* induced to commit such abuses".[35]

The subsequent case-law did not entirely clarify the precise meaning of this "causal link";[36] for the purposes of this article, we nonetheless do not need to explore this question in more detail.

3.3. Partial conclusions

The EU competition law is addressed to undertakings; even though with respect to some activities, public authorities may be considered to be undertakings, it is clearly not so in a situation when they exercise their public powers. Thus, competition law cannot apply to the legislation adopted by public authorities, to their decision-making or broadly speaking, to their regulatory activities.

To some extent, the regulatory activities of public authorities may be targeted by competition law in connection with other Treaty provisions, in particular the principle of loyalty [Article 3 (4) TFEU] and the regulation of public undertakings and undertakings with special or exclusive rights [Article 106 (1) TFEU]. These provisions, however, do not apply to the regulation as such, but only in connection with anticompetitive conduct of the undertakings to which that regulation applies.[37]

EU competition law is thus not sufficient to remedy the distortions of competition that may be produced by public authorities. It is therefore necessary to consider national rules that can to some extent address this problem, left by the limits of EU law.

4. National Legislation

Several EU Member States have indeed adopted specific provisions of competition law, which do not apply to undertakings, but specifically to activities by public authorities. They differ in

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[35] Judgment of 10 December 1991, Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA., C-179/90, EU:C:1991:464, paragraph 17 (emphasis added).

[36] Some later cases require even less than such "induction"; in the judgment of 17 July 2014, European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI), C-553/12 P, EU:C:2014:2083, paragraph 44 that *"if inequality of opportunity between economic operators, and thus distorted competition, is the result of State measures, such a measure constitutes an infringement of Article [106 (1) TFEU], read in conjunction with Article [102 TFEU]"*.

[37] For the same conclusions, see e.g. Kuncová (2014, 224): *"The obstacle is that not all state measures restricting competition (can) lead to anticompetitive conduct of undertakings. Thus, in case where regulatory actions themselves might have anticompetitive effect without any further implications, they cannot be scrutinized under the EU competition rules […]"*.

scope, in their applicability and in their mode of enforcement. In this Chapter, we will consider several approaches, adopted in Central Europe.

4.1. Directly enforceable provisions

Using an example from Czechia and Slovakia, we will first consider specific regulation that is directly applied by competition authorities to public authorities in the same way as antitrust rules are applied to undertakings.

In the former Czechoslovakia,[38] the first legislation on competition entered into force as early as 1991.[39] Next to "classic" anticompetitive conduct by undertakings, namely collusive practices, abuse of dominance and merger control, it also contained a provision on anticompetitive conduct by public authorities.[40] This specific regulation was probably included into the competition law due to the economic situation in then Czechoslovakia, where – before the revolution of 1989 – all the producers and providers of services were state-controlled and no private entrepreneurs existed at all. It needs to be emphasised that the competition authority lacked any decision-making competences in this regard – it was not allowed to decide that certain conduct by public authorities distorted competition or to impose fines, it could only "request" public authorities to remedy the situation,[41] without any legal consequences when they did not.

4.1.1. Czech Republic

In the Czech Republic, this provision was not much used in practice. When the new Czech Competition Act entered into force in 2001,[42] it did not include any regulation of public authorities, only of undertakings. However, in 2012, the same regulation as the original 1991 one was re-introduced into the Czech Competition Act. Curiously, it was added into an amendment of the Czech Competition Act (concerning primarily leniency and settlements)[43] not by the Government, but by one of the Members of Parliament; it was however later endorsed by the Prime Minister.

The wording of the provision in question was very brief; it only stated that "*public authorities are prohibited from distorting competition by aid favouring a particular undertaking or by any other means*".[44] Unlike under the original competition law from 1991, however, the Czech Competition Authority (hereinafter "CCA") was, under these new provisions, allowed to take enforceable decisions – it could decide that there was a breach of competition law[45] and impose

[38] The federation split in 1993; the successor countries originally kept the legal order of the former federation and only gradually adopted new regulations.

[39] Z. č. 63/1991 Sb., o ochraně hospodářské soutěže [Act on the Protection of Competition], as amended.

[40] *Ibid*, Section 18.

[41] *Ibid*, Section 18 (2).

[42] Z. č. 143/2001 Sb., o ochraně hospodářské soutěže [Act on the Protection of Competition], as amended (hereinafter "Czech Competition Act").

[43] Z. č. 360/2012 Sb., kterým se mění zákon. č. 143/2001 Sb., o ochraně hospodářské soutěže [Act Amending Act No. 143/2001 Coll., on the Protection of Competition].

[44] Czech Competition Act, Section 19a (1).

[45] *Ibid*, Section 19a (2).

a fine of up to CZK 10 million (circa EUR 400 000) on the public authority in question.[46]

As this particular provision of the amendment of the Competition Act was not part of the official Governmental proposal, it lacked any substantiation. The Member of Parliament who brought it only mentioned that his motivation was to enable the review of instances of public procurement, where the contracting authorities set the selection criteria in such a way that they clearly favoured a particular tenderer (Plachý, 2012); the same motivation was mentioned by the Prime Minister (Nečas, 2012); as will be discussed below, the legislation in Lithuania and Romania is used for this exact purpose.

This view was nonetheless not shared by the CCA itself. Two years after the amendment was adopted, it published Guidelines concerning its interpretation of the provisions in question (Kolářová et al., 2014). According to these Guidelines, the legislation should only be applicable in situations where the public authority in question exercises its public (governmental) powers, where it is not acting in its private capacity: to put it simply, the legislation shall only be applied when the public authority *directs* some undertakings, not when it is *contracting* with them. In addition to that, the CCA explicitly excluded the public procurement from review under this provision.

This interpretation was heavily criticised by some commentators for being too restrictive (Kindl & Munková, 2016, 389 et seq).

Nevertheless, the CCA itself prepared a further amendment of the Competition Act that entered into force in 2016 and which codified the abovementioned interpretation.[47] Thus, the Czech Competition Act currently provides that a public authority "*shall not distort competition by exercising its public powers without justifiable reasons*", in particular, by favouring a certain undertaking or a group of undertakings, eliminating a certain undertaking or a group of undertakings from competition or eliminating competition from the relevant market.[48] At the same time, it adds that the CCA does not supervise the activities of public authorities which are carried out in the form of a decision that is reviewable in administrative proceedings or provided in the form of state aid, including *de minimis* aid.[49]

Even though the potential scope of application of the provisions on anticompetitive conduct of administrative authorities is quite broad, the CCA dedicated itself almost exclusively to a single type of practice – the limitation of places where certain types of lotteries and gambling games, in particular gaming machines, may be offered to the public.

In the Czech Republic, municipalities are allowed to regulate places where lotteries, including gaming machines and similar gambling devices, can be operated, in the form of a municipal decree, a generally binding legal norm issued by the municipalities. The municipalities welcomed this power and regulated gambling sites, either by completely prohibiting them or, more frequently, by designating specific addresses where gambling was allowed. The CCA was confronted with numerous complaints that some municipalities favoured those undertakings on the premises of which the gambling had been allowed, over those not on the list of authorised premises. In 2014, the CCA published its guidance letter on gambling sites, informing the municipalities that such regulatory activities fall within the scope of the Competition Act and that

[46] *Ibid*, Section 22aa (2).

[47] Z. č. 293/2016 Sb., kterým se mění zákon. č. 143/2001 Sb., o ochraně hospodářské soutěže [Act Amending Act No. 143/2001 Coll., on the Protection of Competition].

[48] Competition Act, Section 19a (1).

[49] Competition Act, Section 19a (2).

the municipalities must set the criteria for determining permitted gambling sites in an objective and non-discriminatory manner; the CCA also informed the municipalities that it would not intervene until the end of that year, so that they could put their regulation in line with the competition law (ÚOHS, 2014).

At the end of 2016, the CCA issued its first decision based on its new competence concerning public authorities, finding that the regulation of gaming sites adopted by the town of Bílina, distorted competition in that market.[50] Several similar decisions were issued thereafter. This interpretation of the Competition Act was also endorsed by courts, for the first time by the Regional Court in Brno, which reviews all of the CCA's decisions, in February 2020 in the *Děčín* case,[51] another action concerning municipal the regulation of gambling sites similar to *Bílina*.[52]

The only decision concerning public authorities not connected with municipal lotteries so far was issued in 2020. It involved municipal rules on parking in the city of Prague, that allegedly favoured only specific types of hybrid and electric cars,[53] thus granting an advantage to their producers and sellers.

4.1.2. Slovakia

Unlike the Czech Republic, where the original Competition Act from 1991 remained in force until 2001, Slovakia adopted its own new competition act in 1994; as regards public authorities, however, it kept the same regime as the original 1991 Competition Act discussed above.[54] Similarly in 2001, when Slovakia adopted a new Competition Act, those provisions remained intact.[55] The Slovak Competition Act was however amended in 2004, when direct enforceability was introduced, akin to the system described above in the Czech Republic; a fine up to EUR 66 000 was introduced for public authorities.[56] Yet another new competition act was adopted in 2021, with identical provisions on the public authorities, including the direct enforceability of these measures.[57]

Unlike the Czech Republic, the cases the Slovak Competition Authority dealt with under these provisions have been much more diverse (Lapšanský, 2020), including the refusal to allow certain homes to disconnect from a central heating system,[58] refusal to allow the opening of a new pharmacy,[59] financial grants to a Slovak press agency (TASR), which could have been

[50] Úřad pro ochranu hospodářské soutěže [Office for the Protection of Competition], decision of 20 December 2016, S538/2015/VS (*Bílina*).

[51] Krajský soud v Brně [Regional Court in Brno], judgment of 6 February 2020, 62 Af 64/2018 (*Děčín*).

[52] The judgment is analysed in detail in Petr (2020).

[53] Úřad pro ochranu hospodářské soutěže [Office for the Protection of Competition], decision of 9 July 2020, S55/2019/VS (*Praha*).

[54] Z. č. 188/1994 Z.z., o ochrane hospodárskej súťaže [Act on the Protection of Competition], Section 18.

[55] Z. č. 136/2001 Z.z., o ochrane hospodárskej súťaže [Act on the Protection of Competition], Section 39.

[56] *Ibid*, Section 38 (2).

[57] Z. č. 187/2017 Z. z. o ochrane hospodárskej súťaže [Act on the Protection of Competition], Section 6.

[58] Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 27 November 2008, 2008/39/2/1/104 (*Stará Lubovňa*).

[59] Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 12 March 2008, 2007/39/1/1/083 (*Bratislava*).

invested in areas where TASR was competing with other press agencies,[60] and financial grants from the Ministry of Agriculture being conditional upon employing a specific rendering plant.[61]

Arguably, this Slovak approach is much more in line with the purpose of such provisions on public authorities than the Czech one, which only concentrates on a single kind of practice.

4.2. Provisions enforced by courts

In other countries, competition authorities may decide that public authorities distort competition and request them to alter their practice; if they do not comply, however, the case must be referred to a court.

In Romania, the Competition Act prohibits any actions by the central or local public administrative bodies which have as an object or may have as an effect the restriction, prevention or distortion of competition;[62] if the public authority does not comply with the decision within 6 months, the Competition Council may refer the case to a court.[63] Not many decisions are taken in this area. According to the OECD, they represent approximately 5 % of all Romanian cases; it is interesting that these provisions are successfully employed in order to remove restrictive conditions on public procurement (OECD, 2014, 45).

Similarly, in Lithuania, public administration entities are prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertaking or their groups and which give or may give rise to differences in the conditions of competition for undertakings competing in a relevant market;[64] if the public authority decides not to comply with the requirement of the competition authority, it may appeal such decision to a court.[65]

Whereas in Romania the number of such cases is small, they constitute a significant proportion of enforcement activities in Lithuania (Kuncová, 2014, 230–231), covering all types of situations, including the allocation of fisheries quotas in the Baltic Sea and public procurement by municipalities (OECD, 2019, 22 et seq). For example in 2020, the Lithuanian Competition Authority identified three cases of an infringement of competition law, two of them being the activities of public authorities (Lithuanian Competition Council, 2020, 79).

4.3. Competition advocacy

In addition to their enforcement activities, competition authorities need to be engaged in competition advocacy, arguing before state and other regulatory bodies in favour of competition, explaining that regulation cannot distort competition, suggesting legislative changes, etc. As the OECD puts it:

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[60] Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 29 March 2006, 2005/39/2/1/111 (*Ministerstvo kultury*).

[61] Protimonopolný úrad Slovenskej republiky [Antimonopoly Office of the Slovak Republic], decision of 17 December 2004, 2004/39/2/1/218 (*Ministerstvo pôdohospodárstva*).

[62] Act No. 61/96 Coll., Competition Law, Section 9 (1).

[63] *Ibid*, Section 9 (3).

[64] Act No. VIII-1099 Coll., Law on Competition, Section 4 (2).

[65] *Ibid*, Section 18 (3).

"*the mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance.* It must assume the role of competition advocate*, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace"* (Khemani, 1998, 93).

All competition authorities pursue such "advocacy", some on the basis of specific legal provisions, for example in Slovenia, where the competition law prohibits the government, state authorities, local community authorities and holders of public authority from restricting the free performance of undertakings on the market;[66] in the of anticompetitive measures, the competition authority shall send its opinion to the authority responsible for it.[67] This opinion is however not binding; it may only be published in order to increase the "pressure" on the public authority.

In other countries, this advocacy role is assumed without any specific legal provisions, as is the case for example in the Czech Republic. In both situations, however, the opinions of the competition authority cannot be enforced, so their success depends entirely on their persuasiveness.

5. Conclusions

Even though competition law ranks high in the hierarchy of EU law and public authorities may distort effective competition by their "sovereign" measures, EU competition law does not address this issue. Competition law may be applied to public authorities as long as they are involved in an economic activity, i.e. as long as they are themselves undertakings, but not when they exercise public powers. The only exception are the situations when public authorities use their powers to enable or facilitate the anticompetitive conduct of undertakings, when competition law should apply in connection with Articles 4 (3) TEU or 106 (1) TFEU. In addition to that, EU law contains other "pro-competitive" rules addressed to public authorities, in particular the regulation of state aid and public procurement.

We agree that the competition law as such, namely Articles 101 and 102 TFEU, cannot be directly applied to public authorities; it is evident that public authorities do not wield *market* power, they use *public* power to regulate the markets instead. There is no space for competition law to be applied in this regard.

At the same time, it is evident that at least some Member States, in particular those with a history of strong involvement of the public sector in the economy, perceive the activities of public authorities as a potential threat to competition and adopt specific regulation addressing this issue. These provisions are not part of competition law (competition law applies to undertakings with significant market power), but they are included in competition regulation, with the competition authority in charge of applying them. This may arguably be a suitable model, guaranteeing undistorted competition.

Concerning the actual content of such provisions, we have been confronted with an astonishing diversity of approaches, ranging from directly enforceable rules, as we have seen in

[66] Act No. 36/2008 Coll., on the Prevention of the Restriction of Competition, Section 64 (1).

[67] *Ibid*, Section 71 (1).

Czechia and Slovakia, to a mere formalised advocacy role in Slovenia. These clearly reflect the different experience and needs of different countries. We however argue that, where public authorities are involved in practices that disturb competition, competition advocacy alone might not suffice and a system of enforceable rules might be preferable; this would generally be the case in Central Europe.

In our opinion, the time has not yet come for a unified approach across the Member States, nor for extensive harmonisation of regulation by the EU. More attention should however be directed to these issues. A thorough comparative study, mapping the legislation in (Central) Europe and assessing its effectiveness, would be a valuable starting point for identifying best practices and for possible future thoughts concerning harmonisation.

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Digitalization and consumer protection enforcement

Virág Balogh*

* Department of Administrative Law, Faculty of Law, Eötvös Loránd University. E-mail: balogh.virag@ajk.elte.hu,

Abstract

The era of "new consumer protection" is marked by maximum harmonization rather than minimum harmonization, a (more) policy-based approach, legislation driven by the fast-emerging ecosystem of digital platforms, the strengthening of collective remedy and agency enforcement, and more cooperation between Member State regulatory bodies and the EU Commission.

All of the above phenomena emphasize changing directions and methods of consumer protection enforcement: digital platforms present a unique set of issues that trigger different policy solutions, mostly based on the findings of behavioral economics. The practices of digital platforms usually affect consumers in more than one Member State, thus EU-wide cooperation is more likely to happen vis-à-vis digital platforms than other kinds of trader. Individual remedies against digital platforms – due to their immense size – result in little change. The European Consumer Protection Cooperation Network is highly likely to open cases with regard to digital platforms.

In Hungarian law, EU-wide coordination complements an already existing rich practice by the Hungarian Competition Authority in the field of unfair commercial practices. In the future, when the number of cases against digital platforms will quite possibly grow, the issue of cooperation will become even more important.

Keywords

digital platform, consumer protection, Hungarian Competition Authority, Consumer Protection Cooperation Network.

1. Subject matter of the paper

Consumer protection has in recent decades emerged as not merely a tool to remedy individual consumer detriment but to correct market failures that are based in flaws on the demand side, rather in the supply-side of markets. Moreover, the development of behavioral economics in recent decades sheds light on how consumers might behave differently possibly suggested by neoclassical economics.

The sheer number of EU consumer protection regulations accompanied by means of collective redress and the rise of regulatory agencies signal a new era in consumer protection, where enforcement legislation based on individual remedy is replaced by consumer interests guarded by regulatory bodies, or in some cases by the EU Commission itself.

This phenomenon was highlighted in the extensive reforms of consumer law and policy in both the New Deal for Consumers and the new Consumer Agenda. The era of "new consumer protection" is marked by

1.) The maximum harmonization method (or even regulations) replacing minimum harmonization directives in order to achieve an even level of consumer protection within the EU,
2.) a (more) policy-based approach, taking into consideration the findings of behavioral economics,
3.) legislation driven by the fast-emerging ecosystem of digital platforms,
4.) strengthening the legal institutions of collective remedy and agency enforcement, and
5.) the elevated level of cooperation between Member State regulatory bodies and the EU Commission.

The paper will focus on how this shift in enforcement is visible through a special subset of consumer protection enforcement rules, namely the Consumer Protection Cooperation Network of the European Union, with regard to digital platforms.[1] Not only will the paper give a quick comprehensive overview of the emerging regulation of consumer protection in an enforcement context vis-à-vis digital platforms, but it shows how the rules for EU-wide cooperation have affected Hungarian administrative law and law enforcement at the Member State level.

2. Development and nature of European consumer protection regulation and enforcement

This part of the paper gives an overview of the astonishing development of consumer protection regulation that took place in the past decades within the EU.

The Rome Treaty did not point to consumer protection as a common policy goal – setting up the common market and establishing a customs union by their very nature were prioritized over creating a catalogue of consumer rights and inserting them into the primary community legal framework. This also resulted in secondary consumer legislation also blooming at a later stage of the evolution of the European regulatory framework, parallel to the enhancement of the consumer society.[2]

The first wave of secondary consumer protection legislation picked up speed in the 1980's and 90's, based on the case law of the European Court of Justice. Without giving a detailed description of the relevant legislation of these decades, it should be pointed out that one of the most instrumental part of horizontal consumer protection regulation was also forged in this period, on unfair contract terms in consumer contracts (Unfair Contract Terms Directive, 93/13/EEC).[3]

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[1] As a result of a biannual review of the Consumer Protection Cooperation Network and its result, the Commission has concluded that one of the market trends that will influence consumers' interests in the near future is the new digital marketing and persuasion techniques applied by digital platforms (European Commission, 2022b).

[2] This phenomenon also paved the way for the European Court of Justice to elaborate on instrumental concepts of consumer protection, such as the notion of the average consumer that was developed by the court and became a fundamental definition of secondary legislation with the passing of the Unfair Commercial Practices.

[3] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L 95, 21.4.1993, p. 29–34.*

Consumer protection became an independent policy within the Treaty of Maastricht. Article 129/A reinforces consumer protection as a community goal, as well as providing the community with a wide a range of legal instruments for effective enforcement. Article 153 of the Treaty of Lisbon reiterated the importance of consumer protection, while the currently effective Article 169 of the Treaty of the European Union gives a catalogue of consumer rights and sets the highest level of consumer protection as a policy goal.[4]

Although Article 169 points to the technique of minimum harmonization in the field of consumer protection, the last decades saw the proliferation of maximum harmonization directives in this field.

Two of the most important pieces of recent consumer protection legislation, the Unfair Commercial Practices Directive[5] and the Consumer Rights Directive,[6] are themselves the result of full harmonization. Full harmonization, as a legislative method in itself, is a tool of convergence: in the event of full harmonization, Member States no longer have the power to deviate from EU legislation in national law, therefore eliminating any competitive advantage and possible forum shopping based on a more permissive national regulatory framework. Hence, one can argue that full harmonization in itself is the first step to achieving a high level of consumer protection within the European Union. The giant instruments of horizontal consumer protection are complemented by the Consumer Sales Regulation of 2019.[7]

In 2018, the EU Commission proposed extensive reforms of consumer protection policy and legislation (especially with regard to horizontal legislation) in its New Deal for Consumers with the following objectives:[8]

- modernize existing rules and fill the gaps in the current the consumer acquis;
- provide better redress opportunities for consumers, support effective enforcement and greater cooperation between public authorities in a fair and safe Single market;
- increase cooperation with partner countries outside the EU;
- analyze future challenges for consumer policy in a fast-evolving economic and technological environment.[9]

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[4] Article 169 of the Treaty on the Functioning of the European Union: order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests.

[5] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

[6] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

[7] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance.) OJ L 136, 22.5.2019, p. 1–27.

[8] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers (COM/2018/0183 final).

[9] COM/2018/0183 final section 1.2.

As the result of the New Deal for Consumers initiative, the Omnibus Directive[10] has amended Directives 98/6/EC, the Unfair Commercial Practices Directive and the Consumer Rights Directive in a way that in obliged Member States to provide for effective, proportionate and dissuasive penalties to address infringements of national provisions when applying the provisions of said directives. The Omnibus Directive elevated and harmonized the maximum level of fines throughout the EU as 4% of the previous year's annual turnover.[11] The 2017 fitness check of consumer legislation showed that such maximum fines differ vastly. For instance, for unfair commercial practices, they can be as low as at €8 666 in Lithuania and €13 157 in Croatia or up to 10 % of the company's annual turnover in France, Poland, and the Netherlands (Šajn, 2020).

In November 2020, the Commission published a Consumer Agenda, setting out priorities and action points for the coming five years. In addition to the Commission's role in coordinating and supporting Member States' consumer protection enforcement, the Consumer Agenda highlights its role in deploying innovative e-tools to tackle illegal online commercial practices and identify unsafe products and to provide funding and support for local initiatives (European Commission, 2020b).

The structure of the consumer protection regulation framework is arranged in such a way that some legal instruments are horizontal by nature, with sector-specific regulation as another layer in sectors where consumers are more prone to consumer harm/detriment. For the purposes of this paper, two of those sectoral instruments are named: the telco network framework regulation (European Electronic Communications Code, EECC, 1972/2018/EU),[12] which puts greater emphasis on end user rights and a special subset of consumer protection regulation,[13] and the Digital Services Directive (DSD, 2019/770/EU)[14] and the complementary horizontal legal instruments.

As to enforcement, the focal point of this paper will be the centerpiece of EU-wide agency enforcement, the Consumer Protection Cooperation Regulation.[15] Aside from agency enforcement, the EU has also adopted legislative tools in order to enhance consumers' abilities to claim collective redress, such as the Representative Actions Directive.[16]

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[10] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance) OJ L 328, 18.12.2019, p. 7–28.

[11] Omnibus Directive preamble (13).

[12] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) *OJ L 321, 17.12.2018, p. 36–214.*

[13] The EECC also renews the regulatory framework on spectrum, access and universal services issues, which are out of scope of this paper.

[14] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ L 136, 22.5.2019, p. 1–27.*

[15] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 OJ L 345, 27.12.2017, p. 1–26.

[16] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) OJ L 409, 4.12.2020, p. 1–27.

Overview of EU consumer protection regulation

3. Outlook: policy foundations of consumer protection with regard to digital platforms

The regulation of network industries builds on the notion of market failures – historically, (i.e. market power, the presence of switching costs) such regulation affected the supply side of markets. The market concentration of industries proved to be the first hurdle that regulation had to overcome in several sectors.

However, after appropriate measures taken in a network industry (i.e. open access), the tools of ex ante regulation should provide sufficient solutions for supply-side market failures. However, without optimal consumer decision-, the market outcomes could still be sub-optimal due to the presence of demand-side market failures (i.e. information asymmetry and consumer decision-making mistakes).

For the very reason above, market regulation needs to encompass demand-side issues as well. Present European consumer policy aims at regulating these exact issues in such a way that broad concepts shall apply to all markets horizontally, while consumers in some markets should require more protection due to the possible presence of more market failures, graver consequences for the consumer, or inherent qualities of the consumer decision making process itself. In this sense, consumer protection never affects the individual relationship between trader (operator) and consumer only, but the market as a whole (Bator, 1958).

As stated before, consumer policy analyzed in this paper is formulated in a context of well-functioning markets. If markets function well, consumers are given the appropriate information they need to make optimal choices, and, in theory, there is no need for state intervention – it is almost a cliché to state that competition serves as the best consumer protection.[17]

According to the neoclassical approach, consumers act in their own self-interest; they are well aware of their preferences, and they know which product or service will best serve

[17] See also: Muris (2002).

their needs. The ideal model of the market is perfect competition, where competition is fierce and information is free and available to both on the supply and the demand side. Due to the results of the research in the area of information economics, the approach was extended with the notion that information is scarce and acquiring it bears costs.

Even in the presence of a well-functioning market, however, there are demand-side market failures to address – without a detailed description of the phenomena of market failures, they generally refer to situations where the market is not functioning in a Pareto-effective way, or not according to the model of perfect competition (OECD, 2010). These market failures serve as a basis for consumer protection intervention (OECD, 2007).

The paper will now focus on three types of market failures that could serve as a reason for consumer protection-based market intervention: 1) information asymmetry, 2) consumer decision making faults, 3) switching (lock-in).

3.1. Information asymmetry

Information asymmetry is a market failure when the traders (operators)[18] on the market possess more information on the goods and services than the consumers who wish to enter into contracts with them.[19] Moreover, gathering information proves to be a significant financial or time cost for consumers, hence it would be rational for a consumer not to gather information after a point – should this occur, the consumer will deliver a decision that is not only sub-optimal for herself, but will be sub-optimal for the market as well.

The main body of European consumer protection legislation aims to straighten this particular market failure: should the level of information asymmetry be lower, its consequences will become smaller as well. Therefore, informing the consumer becomes the first and foremost policy goal – obligatory information provisions are all based on this policy approach.

3.2. Systematic errors in consumer decision-making

However, lack of information is not the only thing preventing consumer from delivering rational and optimal choices: bounded rationality and systematic errors in the decision making itself prove to be just as consequential as not enough information. In recent years, behavioral economics have painted a picture of a consumer who bases her decisions on heuristics, is overconfident and has problems of discounting.

Behavioral economics also points out that one of the cognitive boundaries of consumers is the digestion of information itself – the menu effect shows how consumers are only able to process a limited amount of information, therefore a lot of information received about a potential transaction might not enhance the decision of the consumer. Information overload is a specific consumer issue to assess according to the European Consumer Agenda[20] as well.

Over the past decades, an impressive body of empirical evidence gathered points in the direction that consumers might not be the rational actors described above after all. There

[18] Note that the paper will use the term "operator" when referring to traders in telco markets.

[19] For a classical showcase on the effects of information asymmetry, see Akerlof (1970).

[20] Communication from the Commission: A European Consumer Agenda - Boosting confidence and growth (COM/2012/0225 final), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0225:FIN

are systematic failures in consumer behavior that deviate from the circumspect and well-informed consumer who served as a basis for the legislation and case law described earlier in this paper.[21]

DellaVigna's paper (DellaVigna, 2009) on the empirical evidence produced by behavioral economics gives a summary of the systematic biases in consumer decision making that may be defined as deviations from the neoclassical model of consumer decision-making.

1.) Non-standard preferences (self-control problems, reference-dependence, social preferences)
2.) Non-standard beliefs (overconfidence, projection bias)
3.) Non-standard decision making (framing, limited attention, menu effect, persuasion and social pressure)

Kahnemann's research shows that the consumer decision-making mechanism is influenced by two different systems: "system 1" controls quick emotional decisions, while "system 2" steps in when making analytical, logical decisions (Kahneman, 2012, 19–97). Further, he points to the fact that the combination of intuitive choices and reasoning provides a paradigm that goes beyond the choice model that is assumed for a consumer who would be described as a rational actor (Kahneman, 2003).

Possibly the most powerful thought that may be derived from the behavioral economics literature is that, even in the presence of adequate information, consumers sometimes make flawed choices – meaning that the consumer could end up making a sub-optimal choice even when she is well-informed.

The above-detailed phenomena of consumer decision-making are important from the policy point of view because, even without any intervention from a trader (such as deception or omission), they may lead to consumer detriment. There also could be cases whereby firms may exploit these already-existing flaws and thus create greater consumer detriment.[22]

4. Policy formation and enforcement in the digital sector

With regard to other types of remedies during the consumer decision making process, it may be established that specific consumer biases arise with the phenomenon of ranking in the digital sector (European Commission, 2018). Ranking choices while engaging in a digital service might be a powerful tool for a consumer, but, because of its power, it might give way to a plethora of consumer issues, especially if the consumer is not aware of the method that was used to provide the ranking.[23] Complementing the sector-specific rules of the DSD, the horizontally applicable Unfair Commercial Practices Directive (modified by the Omnibus Directive) in-

[21] European examples include: https://ec.europa.eu/info/policies/consumers/consumer-protection/evidence-based-consumer-policy/behavioural-research_en. See also: Alemanno (2019).

[22] An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it, Final Report for DG SANCO by Europe Economics, July 2007 http://ec.europa.eu/consumers/strategy/docs/study_consumer_detriment.pdf

[23] Competition issues are out of the scope of this paper; however, it should be pointed out that another aspect of this phenomenon was pointed out by the European Commission when establishing that Google was found to abuse its dominant position when it positioned its own comparison shopping services above others (https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).

cludes new commercial practices within its black list, since a higher ranking or any prominent placement of commercial offers within online search results by the providers of online search functionality has an important impact on consumers.[24]

Dark patterns have emerged as powerful sources of questionable practices merged into websites' designs. The Notice on the Unfair Commercial Practices Directive[25] points to dark patterns as a type of malicious nudging, generally incorporated into digital design interfaces. According to the Notice, dark patterns could be data-driven and personalized, or implemented on a more general basis, tapping into heuristics and behavioral biases, such as default effects or scarcity biases. Although dark patterns have no legal definition, if they are applied in the context of business-to-consumer commercial relationships, then the Unfair Commercial Practices Directive can be used to challenge the fairness of such practices.

Dark patterns keep appearing in both Members States authorities' decisions and policy papers as well. A new study published by the European Commission proposes a new taxonomy on dark patterns, whereby there are two axes: 1) the component of the choice architecture that is affected by the unfair commercial practice; 2) the component of the decision-making process that a practice targets in order to effect a behavioral change (European Commission, 2022a; EDPB, 2022).

Dark patterns seem to become the focal point of consumer protection enforcement outside of the EU as well: the US Federal Trade Commission issued a policy statement (Federal Trade Commission, 2021) with regard to dark patterns in 2021.

5. Enforcement context of EU law: CPC – Consumer Protection Cooperation Regulation – (EU) 2017/2394

Digital platforms, as already stated above, produce an ever-changing landscape in digital marketing, of new persuasive practices and patterns. The globalized nature of digital platforms calls for the need for international cooperation when tackling those practices – by whitening the EU, the Consumer Protection Cooperation Network has emerged as a champion of consumer protection enforcement concerning digital platforms.

The CPC is in application since January 2020. The previous, version of consumer protection cooperation,[26] adopted in 2004, already took a big step when requiring all Member States to establish a public authority (a regulatory body) for consumer protection issues, including those with a private law (individual) enforcement tradition. It is a network of authorities, enabling EU-wide cooperation. However, following up a review on the fitness of the earlier regulation, the Commission concluded that it was not sufficient to address the enforcement challenges of

[24] Unfair Commercial Practices Directive, Annex I, 11a.: "Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results."

[25] Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), OJ C 526, 29.12.2021, p. 1–129.

[26] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) Text with EEA relevance, OJ L 364, 9.12.2004, p. 1–11.

the Single Market effectively, including the challenges of the Digital Single Market.[27] The Digital Single Market Strategy for Europe identified the need to enhance consumer trust through more rapid, agile and consistent enforcement of consumer rules.[28]

In the next part of the paper, I briefly outline the enforcement structure created by the CPC and give an overview of the results it has brought in the past years. Finally, I point to a recent example where CPC and Member State enforcement brought parallel results.

5.1. Structure of the enforcement mechanism

The CPC (building on its predecessor) sets up a web-like enforcement structure: in each and every Member State; there is a designated single liaison office and other competent authorities with jurisdiction in different areas of consumer protection law. The CPC network is responsible for the enforcement of 26 consumer protection measures listed in the Annex of the CPC.

The other members within the network are as follows:

- Single liaison offices[29] are public authorities responsible for coordinating the investigation and enforcement activities of the competent authorities and other CPC actors, if applicable. Each Member State has one single liaison office.[30]
- Competent authorities[31] are public authorities investigating and enforcing consumer law. Member States have to designate at least one competent authority.
- Designated bodies[32] may be instructed by competent authorities under the national laws to obtain evidence or to take enforcement measures. The use of designated bodies depends on the national laws of each Member State and their use needs to be agreed upon under the cooperation mechanism.
- External entities[33] are entities such as consumer and trade associations, European Consumer Centres, or designated bodies that can participate in the CPC alert mechanism.[34]

The above bodies have jurisdiction under the CPC to tackle consumer protection infringements of a cross-border nature. Based on the size of the infringement, the CPC differentiates between

1.) intra-Union infringements (with the consumer and trader being in different Member States),
2.) widespread infringements (at least two other Member States are affected by the infringement),
3.) widespread infringements with a Union dimension (two-thirds of Member States are affected by the infringement).[35]

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[27] CPC preamble (1).

[28] CPC preamble (2).

[29] CPC Article 3 Section (7).

[30] For the list of single liaison offices and competent authorities, see List of Single liaison officers and competent authority - CPC Network - cpc - EC Public Wiki (europa.eu)

[31] CPC Article 3 Section (6).

[32] CPC Article 3 Section (8).

[33] CPC Article 8 Section (1).

[34] BEUC (the European Consumer Organization) has filed such an alert concerning TikTok based on multiple consumer law infringements in February 2021 (BEUC, 2021).

[35] CPC Article 3 Sections (2), (3) and (4).

The CPC sets up a structure whereby the above bodies utilize different means of mutual assistance in order to avoid and remedy consumer protection infringement. These means of mutual assistance could take place between two regulatory bodies in two Member States or, in the case of widespread infringement, could take the form of coordinated action, whereby several competent authorities act together with one authority coordinating the enforcement measures. The means of mutual assistance consist of:

1.) Exchange of information on request
2.) Exchange of information without a request
3.) Requests for enforcement measures
4.) Coordinated actions (in the case of widespread infringements).[36]

The CPC specifically points to the fact that, in the digital ecosystem, competent authorities must be able to stop infringements quickly and effectively. When faced with serious infringements, agencies need to be able to apply interim measures, including the removal of content from an online interface or ordering the explicit display of a warning to consumers. Furthermore, when no other course of action is effective, the competent authorities have the power to order the explicit display of a warning to consumers when they access an online interface, or to order the removal or modification of digital content.[37]

As to the role of the Commission, the CPC clearly states that the Commission's role is one of close cooperation with Member States to prevent large-scale infringements from occurring. Coordinated action tackling a widespread infringement with a Union dimension must always be coordinated by the Commission.[38]

5.2. CPC enforcement results

In the biannual review of the functioning of the CPC, the Commission states that, since the CPC has been applicable, CPC authorities have cooperated on 312 mutual requests, of which 231 were requests to take enforcement measures. The CPC network and the Commission issued 89 alerts of suspected breaches of consumer law. Those alerts covered a wide range of EU consumer law issues, relating to practices by webshops, online marketplaces and other online platforms (European Commission, 2022b, section 3.2).

As to the most high-profile cases with respect to digital platforms, the CPC has brought coordinated actions and also reached commitments with:[39]

- Facebook – reviewed unfair contract terms with regard to profiling
- Booking.com – reviewed its representation of prices / pricing models
- Airbnb – reviewed it representation of prices / pricing models
- Google – reviewed transparency measures in search results and geo-blocking in Google Store
- AliExpress – reviewed its right to withdrawal issues and its transparency of ranking
- Ongoing action with regards to TikTok – aggressive marketing techniques, hidden marketing

[36] Note that coordinated actions against a widespread infringement with a Union dimension shall always be coordinated by the Commission.

[37] CPC preamble (14).

[38] CPC preamble (29).

[39] Source: the European Commission's website on coordinated actions carried out by the CPC network, Coordinated actions | European Commission (europa.eu)

5.3. CPC enforcement vis-a-vis digital platforms: the Hungarian experience

5.3.1. The Hungarian enforcement structure

The Hungarian single liaison office is defined in Section 43/A. § (3) of Act CLV of 1997 on Consumer Protection as the consumer protection authority – the role of the single liaison office is assumed by the minister responsible for consumer protection.[40]

In Hungary – not unlike other Member states – the most substantial consumer protection enforcement work has been done in the area of unfair commercial practices. According to Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices, enforcement authorities are divided between Government Offices, the Hungarian National Bank and the Hungarian Competition Authority (HCA), based on the size of the alleged infringement of law (whether competition is affected).[41]

Cases against digital platforms have been brought by the HCA, including high profile cases such as Vj-85/2016 against Facebook, Vj-88/2016 against Google, Vj-17/2018 against booking.com and Vj-24/2020 against TikTok.

According to Section 28. § (1) of the Act on Unfair Commercial Practices, the HCA is responsible for enforcing the CPC when competition is affected. Means of mutual assistance and their respective consequences are regulated in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition.

According to Section 80/H. § (2) of the Act on Competition, if the HCA is requested to supply information pursuant to the CPC, a competition supervision procedure shall be initiated for this purpose. In such cases, the proceedings shall be closed by the decision of the case handler on the transmission of the information collected. Furthermore, (3) of the same section states that if the case handler or the competition council proceeding in the case requests enforcement measures to be taken pursuant to the CPC, it may, with reference to this fact, terminate the competition supervision procedure with a decision.

According to the above, coordination and the handling of cases between the Commission or another Member State authority and the HCA is governed by a clear set of rules. However, there still could be instances where a Member State authority proceeds with its own investigation parallel to the CPC actions (HCA, 2021).

5.3.2. Interaction between an HCA procedure and a coordinated action: the booking.com case

The CPC authorities, with the coordination of the Netherlands Authority for Consumers and Markets (ACM), had been assessing booking.com's practices throughout 2019. Finally, CPC has closed its coordinated action concerning booking.com upon its commitment to make changes to its commercial practices. The commitments included, among others:

- making clear to consumers that any statement such as "last room available!" refers only to the offer on the Booking.com platform,
- not presenting an offer as being time-limited if the same price will still be available afterwards,

[40] Governmental decree 387/2016. (XII. 2.) on the designation of the consumer protection authority.

[41] For the exact provisions on the division of authorities, see Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices, Sections 10. § and 11. §.

- clarifying how results are ranked and, whether payments have influenced its position,
- ensuring that it is clear when a price comparison is based on different circumstances,
- ensuring that price comparisons presented as discounts represent genuine savings,
- displaying the total price that the consumers will have to pay in a clear and prominent way,
- presenting sold-out accommodation in a position in the search results that is appropriate to the search criteria.[42]

The HCA opened a case against booking.com under case number VJ-17/2018. Investigating whether booking.com had been engaging in unfair commercial practices, the HCA closed the case by imposing a fine of HUF 2.5 billion on booking.com while banning it from continuing its aggressive sales methods. According to the decision of the HCA, booking.com engaged in unfair commercial practices against consumers by, among others,

1.) misleadingly advertising some of its accommodation with a free cancellation option and
2.) exerting undue psychological pressure on consumers to make early bookings.

The HCA found that booking.com's commercial practices infringed the Act on Unfair Commercial Practices in the following aspects:

- communication of "free cancellation" of accommodation,
- pressure selling tactics at each stage of the accommodation search and booking process. Using attention grabbing information, which gave consumers the impression that the accommodation they were viewing was subject to high demand and limited availability. This practice, according to the HCA, is likely to exert psychological pressure and disrupts the consumer decision-making process (a phenomenon described in the literature as the FOMO effect)
- the company had not exercised the required level of professional care when displaying special voucher payment forms.

During the proceedings, booking.com repeatedly stated that the HCA should merge its investigation with the ongoing CPC coordinated action – according to the HCA's decision, following up on numerous alignments between the HCA and various agencies of the CPC.[43] Although the investigations affected similar practices, they were not based on the same legal basis, nor did they cover the same timespan. Furthermore, the HCA stressed that, even in the press release on the closing of the CPC case, booking.com accepted the following: *"The CPC authorities herein inform Booking.com that the CPC Network accepts these commitments, without prejudice to any other assessment of compliance with consumer law principles that national authorities may raise in the context of national administrative or judicial proceedings."*[44]

These proceedings shed light on the complex nature of EU-wide cooperation between Member State regulatory bodies and the Commission: in order to avoid any conflict between EU and Member State enforcement; continuous and substantive coordination is needed between Member States.

[42] For the full list of commitments, see European Commission (2020a).

[43] Vj-17/2018, Section 373-379.

[44] VJ-17/2018, Section 376.

4. Conclusion – the road from here

This paper has provided an example of how enforcement mechanisms of a once individual remedy-based area of law have changed in the past decades in order to grow as a powerful tool to deliver EU consumer protection policy. The following years will underline the importance of enforcement issues in the field of consumer protection: more research in the field of behavioral economics will most probably provide new approach and a more nuanced view of consumer decision-making, while a coordinated enforcement regime will deliver policies based on these findings in every Member state.

Consumer protection – although once not a classical field of regulation – emerged in the recent decades as one of the flagships of European legislation. Even without a crystal ball, one can anticipate that the importance of consumer protection will not diminish, but rather grow in parallel with the growth of the ever-changing digital ecosystem.

Amongst these circumstances, the need for more cooperation and alignment will only grow – consumer protection enforcement against digital platforms shows that a consistently high level of consumer protection throughout the Member States is an integral element in order to be able to change the practices of digital platforms.

With the method shown above of coordinated enforcement mechanism, consumer protection might have the flexibility to regulate new market phenomena and thus continue to be a showcase for policy-based intervention within the EU.

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Consumer protection under the Brussels I bis and Rome I Regulations

Dominika Moravcová*

* JUDr. Ing. Dominika Moravcová, MBA, Doctoral type of study, Faculty of Law, Pan-European University, Slovakia. E-mail: dominika.moravec@gmail.com

Abstract

The trend towards globalisation and the completion of the European Union's internal market has also led to an increase in the incidence of a foreign element in international trade. The topic of my paper is precisely consumer protection within the European Union under the limits of judicial cooperation, which is touched upon in the key Regulations – the Brussels I bis and Rome I Regulations. As the Covid-19 pandemic has led to an increase in online purchases, often from foreign shops, we consider this topic to be topical. This paper will focus on consumer protection under selected Regulations. Based on the judgments of the Court of Justice of the European Union, we will deal with some of the more general provisions in order to establish the scope of consumer protection under these Regulations in practice.

Keywords

consumer protection, the Brussels I bis Regulation, the Rome I Regulation, jurisdiction, applicable law.

Introduction

The completion of the European Union's internal market and the ever-deeper cooperation between the Member States are causing an increase in the incidence of relations with a foreign element within the European Union. The free movement of goods, services, capital, citizens and workers has ensured that consumers across the European Union have the opportunity to access goods and services from the other Member States under terms and conditions similar to those originating in their home countries. The COVID-19 pandemic and lockdowns with the temporary closure of retail boutiques have also translated into an increased interest in e-commerce (Eurostat, 2022). In the case of e-commerce, the borders between the Member States are further blurred and consumers shopping from the comfort of their home may not even realise that they are entering into a relationship with a foreign element. Overall, e-commerce makes it easier for consumers to access offers from foreign retailers without having to travel abroad. Consumer protection at the European Union level is quite wide-ranging. Through its legislation, the European Union has a positive impact on the consumer's inherently weaker position in consumer contracts, while respecting the rights of entrepreneurs.

The scope of the article does not allow a focus on consumer protection in its entirety, as it is an extremely extensive field. We have chosen consumer protection under the Brussels I bis[1] and Rome I[2] Regulations as the subject of this article. The selected Regulations are key instruments governing judicial cooperation in civil and commercial matters. They contain a general regime for determining the applicable law and jurisdiction in relationships with a foreign element. In their provisions, both Regulations provide protection for consumers in consumer contracts under certain conditions. As these are *lex generalis* provisions, we are of the opinion that, in the context of consumer contracts with a foreign element, knowledge of these provisions is crucial for a subsequent understanding of the other *lex specialis* provisions. This legislation aims to ensure that, under certain conditions, the consumer is protected by a system which allocates jurisdiction to the courts closest to them and which ensures that the consumer relationship is governed by law that is close to the consumer. The article deals with the determination of jurisdiction and applicable law in consumer contracts under the regime of the selected regulations.

The main objective of the present article is to analyse the key consumer protection provisions of the Rome I and Brussels I bis Regulations and to identify the problematic parts of this legislation. Subsequently, we will supplement the identified space and vague provisions with the relevant case-law of the Court of Justice of the European Union. At the end of the article, we will deal with the evaluation of the legal regulations discussed and the proposal for the improvement and clarification of these provisions.

1. General consumer protection regime under the selected regulations

This part of the article will deal with consumer protection in selected regulations in general. Under the Brussels I bis Regulation, we will focus on determining the jurisdiction of the courts in consumer contracts; in other words, how the consumer is protected when the courts of which state have jurisdiction over a consumer contract is determined. The Brussels I bis Regulation contains special provisions dealing with the determination of jurisdiction where the presence of a weaker party in the proceedings is identified. One of the weaker parties covered by the Brussels I bis Regulation is the consumer. The Regulation deals with the determination of jurisdiction in the case of consumer contracts, both in cases of prorogation of jurisdiction (whether explicit or tacit) and where there is a lack of this choice. The protection of the weaker party under the Brussels I bis Regulation is intended to help the weaker party to compensate for its *de facto* weaker position in the proceedings stemming from the relationship between the economically stronger party and the economically weaker and less legally experienced party. For this reason, it can also be referred to as protective or compulsory jurisdiction. The aim of the adjustment of this jurisdiction was, in particular, to make the weaker party more comfortable when participating in the proceedings, which should be allocated to his/her country of domicile. This means that the weaker party should be sued in the country of their domicile (passive standing) and also that the weaker party should be able to sue in the country of their domicile (active

[1] 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 "Regulation (EU) No 1215/2012"). http://data.europa.eu/eli/reg/2012/1215/oj

[2] 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 "Regulation (EC) No 593/2008"). http://data.europa.eu/eli/reg/2008/593/oj

standing). Of course, all in such a way that the legitimate expectations of the entrepreneur are not undermined. As the Court of Justice of the European Union has also stated in its judgment, a genuine *forum actoris* is being established in favour of the weaker party to the contract - the consumer.[3] The importance of protecting the weaker party is underlined by the fact that it is directly enshrined in the Recital 18 of the preamble to the Brussels I bis Regulation, as follows: "In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."[4] It follows that the provisions dedicated to the protection of the weaker party act as *lex specialis* to the general provisions. The aim of this legislation is in essence to ensure that, while respecting the principles of legal certainty and predictability, the consumer's access to the courts is not hindered by the jurisdiction of courts in a country that is distant from his own. On the contrary, his inherently weaker position should be compensated for by the possibility of allocating the dispute to the courts of his own country, which he knows and which will clearly facilitate his access to court, whether technically, financially, economically, administratively or linguistically and so on.

The Rome I Regulation forms a complex together with the Brussels I bis Regulation by adding to it with the determination of applicable law. The Rome I Regulation, by specifically regulating consumer contracts, helps the consumer to compensate for his/her weaker position, which, as in Brussels I bis, results from an economic imbalance. In order to benefit the weaker party, the Rome I Regulation seeks to determine the applicable law, the provisions of which would be closer to the weaker party, which he would know or understand, and the consumer would have more comfortable access to the law.

In each case under consideration, we recommend first determining the jurisdiction of the courts and then the applicable law that will govern the entire relationship. It is therefore essential that these Regulations are interpreted and applied in a correlated manner so that interpretations do not contradict each other and so that they are dealt with uniformly throughout the European Union. Even in the Recital 24 of the preamble to Rome I Regulation itself, states that the Rome I Regulation shall be interpreted comprehensively with the Brussels I bis Regulation.[5]

We are of the opinion that the provisions on consumer protection are relatively clear in both Regulations, but the practice often brings situations that the legislator did not take into account when drafting the legal act. For this reason, it happens in practice that the interpretation of these provisions may not be clear. The number of questions for a preliminary ruling in this area referred by the Member States to the Court of Justice of the European Union suggests that some of the provisions may appear rather vague. That is why, also in the context of this article, it is necessary to work with the relevant case-law, from which we can extract a great deal of information that will help us to understand the selected provisions better.

Before dealing specifically with consumer protection in the selected Regulations, we would like to add that both Regulations are used to address relationships with a foreign element in the field of civil and commercial matters (*ratione materiae scope*).[6] We can say that, in the case of consumer contracts, these are contracts for the sale of goods and services, but also license

[3] See also Judgment of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, C-498/16, EU:C:2018:37.

[4] Recital 18 of Preamble to the Regulation (EU) No 1215/2012.

[5] Recital 18 of Preamble to the Regulation (EC) No 593/2008.

[6] Unless they are negatively defined by other provisions of the Selected Regulations.

agreements for the use of software, which are nowadays concluded predominantly via the internet (Beek et al., 2016, 4). Both Regulations have territorial scope within the European Union, except Denmark in Rome I, which has made use of the opt-out clause and does not participate in this Regulation. As regards the *ratione personae scope*, it is given *erga omnes* in the case of Rome I Regulation and it is given under Brussels I bis if the defendant is domiciled in one of the Member States. *Ratione temporis* of the Brussels I bis is enshrined in Article 66, the Regulation shall apply only to legal proceedings instituted on or after 10 January 2015.[7] The Rome I Regulation shall apply to contracts concluded after 17 December 2009.[8] The following chapters will deal specifically with consumer protection under the provisions of the selected Regulations.

2. Consumer protection under the Brussels I bis Regulation

As mentioned above, the whole purpose of the regulation of consumer contracts in the Brussels I bis Regulation is to ensure that the consumers have recourse to and be sued in the courts of their country. We note that this only works if certain conditions are met, as not every consumer automatically uses the protection that the Brussels I bis determines. We will also deal with this selection in the next few lines. The consumer, for the purposes of the protection of the Brussels I bis Regulation, is the person who concludes the contract pursuant to Article 17(1) "...for a purpose which can be regarded as being outside his trade or profession..."[9] In the judgment *Bertrand v Paul Ott KG*., the Court of Justice of the European Union stated that the jurisdictional advantage "applies to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that they are private final consumers".[10] The Regulation, therefore, protects the final consumer. In the light of the judgment of the Court of Justice of the European Union in *Francesco Benincasa v Dentalkit Srl*., according to settled case-law, those provisions apply only to private final consumers who are not engaged in a trade or professional activity.[11]

Another interesting judgment in the field of defining the consumer under Brussels I bis is *AU v Reliantco Investments*. AU opened a trading account with this company in order to trade financial instruments, using the domain name of a trading company and acting as the company's development director. The revenue contract they entered into referred to their acceptance of the terms and conditions, which included a choice of jurisdiction clause in favour of the Cypriot courts. AU claimed that there was a loss on its trading account due to manipulation and sought, inter alia, the imposition of non-contractual civil liability for non-compliance with the consumer protection provisions. It referred to the Brussels I bis Regulation and invoked the jurisdiction of the Romanian courts. For the purposes of the present article, we are interested to know whether AU can at all act as a weaker party - a consumer - in the proceedings. The Court of Justice of the European Union has held that such a person could, in principle, act as a consumer but only in circumstances where the conclusion of the contract does not fall within the scope of that person's professional or business activity. It has also said that it was for the national courts to verify

7 Article 66 of the Regulation (EU) No 1215/2012.

8 Article 28 of the Regulation (EC) No 593/2008.

9 Article 17(1) of the Regulation (EU) No 1215/2012.

10 Judgment of 21 June 1978, *Bertrand v Paul Ott KG.*, C- 150/77, EU:C:1978:137.

11 Judgment of 3 July 1997, *Francesco Benincasa v Dentalkit Srl.*, C-269/95, EU:C:1997:337.

whether this condition was met.[12] An identical interpretation was given in the case of a resident of the Czech Republic*, Jana Petruchová v. FIBO Group Holdings Limited*, a Cypriot brokerage company. The contract provided for an agreement conferring jurisdiction on the Cypriot courts. According to this judgment, Mrs. Petruchová is classified as a consumer; again, if the condition that the contract does not fall within the scope of her professional activity is fulfilled.[13]

Thus, a party acting in the course of their business would not be able to benefit as a consumer from this provision. On the other side of the contract is the entrepreneur, who, for the purposes of this article, is referred to as the professional or seller.

Article 17(1) sets out the scope of protection for contracts for the sale of goods on instalment credit terms, contract for a loan repayable in instalments, or for any other form of credit, made to finance the sale of goods and for all other consumer contracts.[14] While the first two categories fall here without an exception and regardless of whether the professional is doing business in the consumer's country or not, for all other contracts an additional condition has to be fulfilled. Brussels I bis Regulation requires that all other contracts must be cases of the professional pursuing commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State,[15] in order to persuade the consumer to make a purchase from him. But what does it mean that the entrepreneur is directing activities to the consumer's country? This provision may be questionable and poses a wide scope for legal analysis, and even more so in an e-commerce context. In our view, this condition pursues the interests of the entrepreneur in a very appropriate way and pursues his legitimate expectations. Simply written, if a professional directs his activities to the consumer's country, he should be aware that, under Brussels I bis Regulation, he could find himself before the courts of that country. However, if the professional is not interested in a consumer from that country and does not direct his business to that country, the fact that he would be sued in the courts of that country would be in complete conflict with his legitimate expectations. Despite the fact that the consumer is referred to as the weaker party, we should not put entrepreneurs, as significant economic players, in an unpredictable legal position. At this point, we have to deal with the interpretation of what it means to direct activity to the consumer's country. The situation is the simplest in cases where the foreign entrepreneur operates his business and pursues commercial activities directly in the consumer's country. Here, we do not think that there is any doubt as to whether the activity is directed to that country. In the standard form of trading through bricks-and-mortar stores, we can argue that if the bricks-and-mortar store in the foreign country has undertaken activities to induce the consumer to purchase from its foreign bricks-and-mortar store, for example, by various marketing activities, we can say that it has directed the activity to the consumer's country and must be aware that it is thereby establishing the jurisdiction of the courts of that country. As an example, imagine a holiday in Greece, where an Austrian consumer bought a bracelet in a local beach shop. Naturally, the trader did not take any action to induce this consumer to buy the bracelet and it would therefore be inconceivable that he could be sued in an Austrian court. Conversely, suppose that a Hungarian consumer buys goods in the Austrian outlet centre in Parndorf. He was persuaded to buy by advertisements on

[12] Judgment of 2 April 2020, *AU v Reliantco Investments LTD and Reliantco Investments LTD Limassol Sucursala Bucureşti*, C-500/18, EU:C:2020:264.

[13] Judgment of 3 October 2019, *Jana Petruchová v FIBO Group Holdings Limited*, C-208/18, EU:C:2019:825.

[14] Article 17(1) of the Regulation (EU) No 1215/2012.

[15] Article 17(1) of the Regulation (EU) No 1215/2012.

Hungarian radio, magazines and other media, outdoor advertising on Hungarian territory and so on. In this case, it could already be said that the Austrian entrepreneur directed the activity to the consumer's country and was interested in that consumer concluding a consumer contract with him on that basis.

In the case of e-commerce however, these boundaries are not entirely clear. We therefore need to identify whether the mere availability of a web application is already considered to be directing activity into the consumer's country, or where the boundary is regarding when we can talk about this direction and when we cannot. This relatively brief provision raises many questions, particularly in the age of e-commerce. We can supplement this provision with the case-law of the Court of Justice of the European Union, which has dealt with this issue in a number of its judgments. We will look briefly at the other provisions of Article 17 of Brussels I bis Regulation and then turn to the case-law of the Court of Justice of the European Union.

Article 17(2) of Brussels I bis Regulation further deals with cases where an entrepreneur is not domiciled in a Member State but has an establishment, agency or another branch there and the contract relates to the activities of that structure; that entrepreneur would be deemed to be a party domiciled in that Member State. Article 17(3) further negatively excludes contracts of transport from its scope. An exception is made for transport contracts which, for an inclusive price, provide a combination of travel and accommodation.[16] In such a contract, the consumer's position remains unchanged. From the whole of Article 17, the most crucial issue from our point of view remains dealing with the question of the direction of the activity to the consumer's country. Since the Rome I Regulation contains an identical clause with regard to consumers and the Regulations should be interpreted in conjunction with each other, this interpretation is equally applicable in the case of the Rome I Regulation.

We can extract a great deal of information from the judgment of the Court of Justice of the European Union in the *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* case. That judgment joined the cases of Mr Pammer v Reederei KarlSchluter and Mr Heller v Hotel Alpenhof, and the Court of Justice of the European Union dealt with two questions for a preliminary ruling. First, the national court asked whether a contract for a voyage by cargo ship is part of a contract of carriage that combines transport and accommodation for a single price. The Court of Justice of the European Union, in view of the fact that the passenger's stay on the ship was also to be arranged, held that this contract is a contract which provides, for one price, accommodation together with transport as part of the carriage. The second question is key to understanding the direction of activity to the consumer's country. The national court asked whether the fact that a website is available on the internet in the consumer's country is sufficient to constitute consumer-directed activity within the meaning of the Brussels I bis legislation. The Court of Justice of the European Union has ruled that the mere accessibility of a web application is not sufficient to be able to speak of directing activity to that country. The fact that the language and currency of the consumer's country are used does not change the situation because, in this case, they were the same as the country of the entrepreneur. The Court of Justice of the European Union commented that these situations are examined on an *ad hoc* basis and we do not have a precise definition of what can and cannot be considered as direction. In each such case, the court is obliged to examine the case with regard to whether it involves the international nature of the activity, the use of a currency and language other than those pertaining to the country of the entrepreneur, advertising in the country of the consumer,

[16] Article 17(2,3) of the Regulation (EU) No 1215/2012.

the use of a top-level domain that is not a top-level domain in the country of the entrepreneur, etc.[17] On this basis, we can therefore say that the fact that we buy online from a website in another Member State does not automatically mean that we are protected by the Brussels regime. The key is to establish in each case whether the entrepreneur has taken action to prompt consumers from that country to buy from his site.

Here we would like to note that it is questionable whether one activity developed by an entrepreneur is sufficient to be able to talk about a direction of activity to this country. We are of the opinion that, in the context of consumer protection, it should be irrelevant how many activities were developed, because the consumer is not obliged to know whether the activity that convinced him was the only activity of the entrepreneur or was just one of the activities. As regards the direction itself, we are talking about direction using any means. "The idea is that the consumer must not be obligated to research whether the professional is in any qualified manner domiciled in the country where the consumer has his/her habitual residence or not." (Bělohlávek, 2010, 1146). We would also like to add that, in accordance with the *Lokman Emrek v Vlado Sabranovic* judgment, these provisions do "not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely an internet site, and the conclusion of the contract with that consumer. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity".[18]

The Pammer judgment described above is followed by the judgment in the case *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*. This dealt with the purchase of a car in Germany, and the consumer had accessed the offer of cars from that company via the internet from her residence in Austria. Matters of fact were considered by the national court, which found that the condition of the activity being directed to the consumer's country was within the meaning of the Pammer judgment to be satisfied. The question referred for a preliminary ruling was whether the clause on the direction of the activities to the country of the consumer was limited to contracts concluded at a distance. Although the Regulation does not impose such a condition, Recital 24 of the preamble to Rome I, which refers to distance contracts, can be confusing. The Court of Justice of the European Union therefore clarified and confirmed in this judgment that it is not required that the contract between the consumer and the trader be concluded at a distance for the purposes of the provision in question.[19] As M. Mankowski points out, the methods of delivery abroad, the location of the establishment in a nearby border area, the advertising content and other factors may cause the entrepreneur's intention to direct the activities to the consumer's country. It is for the national court to assess this and determine whether there is such evidence of the direction of activity (Mankowski & Magnus, 2016). We would add, in passing, the conclusions of the *Rüdiger Hobohm v Benedikt Kampik Ltd & Co. KG and Others* judgment, where the Court of Justice of the European Union declared that, even if these provisions on the direction of activities "that may be applied to a contract concluded between a consumer and a professional which on its own does not come within the scope of the commercial or professional activity 'directed' by that professional 'to' the Member State of the consumer's domicile, but

[17] Judgment of 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09)*, C-585/08, EU:C:2010:740.

[18] Judgment of 17 October 2013, *Lokman Emrek v Vlado Sabranovic*, C-218/12, EU:C:2013:666.

[19] Judgment of 6 September 2012, *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*, C-190/11, EU:C:2012:542.

which is closely linked to a contract concluded beforehand by those same parties in the context of such an activity... It depends on the national court's assessment of whether the parties are identical, „whether the economic objective of those contracts concerning the same specific subject-matter is identical and whether the second contract complements the first contract in that it seeks to make it possible for the economic objective of that first contract to be achieved."[20]

Although Article 17(1) and the related case-law tell us quite clearly who is a consumer and what we consider to be a consumer contract within the meaning of the Regulation, the practice can bring cases where we can see that even a seemingly clear provision can have room for interpretation. This is the case, for example, in the judgment of the Court of Justice of the European Union in the case of *Renate Ilsinger v Martin Dreschers*. Mrs. Ilsinger from Austria received a notification from Schlank and Schick GmbH about the possibility of winning 20,000 EUR. In addition to sending the required certificate back to the company, which was to be a condition for payment of the prize in question, she also placed a non-binding order with the company for a trial order. The company contested the jurisdiction of this court on the ground that the action did not fall within the Brussels I bis Regulation consumer protection provisions. The Austrian court, therefore, referred the question for a preliminary ruling of whether the contract is a contract covered by the Brussels I bis Regulation's consumer protection. The Court of Justice of the European Union held that the payment of the prize was covered by the consumer protection article only if the company was legally obliged to pay the prize money to Mrs Ilsinger. In the absence of a legal obligation to do so, the contract would have consumer status under the regime of Brussels I bis Regulation only if Mrs Ilsinger had actually placed an order with Schlank and Schick GmbH company.[21]

An interesting judgment in this field is the case of *Johann Gruber v Bay Wa AG*. Mr Gruber, an Austrian farmer, lives on a farm which he occupies for both private purposes and for his business, as he also runs a livestock farm. The area that is used for private residential purposes is slightly more than 60%. The remaining part is intended for business purposes, for storing machines, feed and the like. Based on a magazine that was delivered to his home, he found an advertisement for a German near-border company called Bay Wa. The magazine did not directly advertise the roof tiles he was interested in, only other goods, so he called the shop directly to enquire about their availability. He visited the shop in person and mentioned to the vendor during the quotation that he owned a farm for agricultural production and wanted to cover it with roof tiles. He did not elaborate on whether he lived there or if it was all just for business. After purchasing and having the tiles laid in, Mr. Gruber was not satisfied with the roof due to unacceptably significant variations in colour despite the warranty that they would be uniform. For this reason, he invoked the warranty and sought a refund of the purchase price as well as coverage for all expenses associated with taking down the old roof tiles and laying the new ones, as well as other costs. He brought an action before the Austrian court, but Bay Wa contested its jurisdiction, in particular on the ground that it did not consider the contract to be a consumer contract. The details of the jurisdiction of the courts will not be of interest to us for the purposes of this paper, but the interpretation of this situation is however relevant for the purposes of the Rome I Regulation. The Court of Justice of the European Union stated that, in a contract that has both a private and a business purpose, the consumer cannot rely on protection

[20] Judgment of 23 December 2015, *Rüdiger Hobohm v Benedikt Kampik Ltd & Co. KG and Others*, C-297/14, EU:C:2015:844.

[21] Judgment of 14 May 2009, *Renate Ilsinger v Martin Dreschers*, C-180/06, EU:C:2009:303.

unless the business purpose is only marginal and of negligible importance in the overall situation. That is a matter for the national court, which must take the facts of the case into account. It does not have to take the facts that the other party might have known at the time of contracting into account, except where the party claiming to be a consumer had expressed himself in such a way that the other party might have thought that he was dealing with an entrepreneur.[22]

Another interesting case is *A. B. and B. B. v Personal Exchange International Limited*. In this judgment, the Court of Justice of the European Union also granted consumer status to an online poker player who makes substantial profits from his game but "has neither officially declared such activity nor offered it to third parties as a paid service".[23]

After correctly identifying in the present case whether the consumer protection of the Brussels I bis Regulation within the meaning of Article 17 is present, we move on to the following provisions of Article 18 or 19, depending on whether or not a prorogation of jurisdiction has been reached. If we had a prorogation of jurisdiction, we would determine jurisdiction in a consumer contract according to this agreement. Brussels I bis Regulation also emphasises consumer protection in this case, in that an agreement can only depart from the other provisions of this section if it is entered into after the dispute has arisen and if it allows the consumer to bring proceedings in courts other than those indicated in this Section, or if both parties are habitually domiciled in the same Member State and the agreement confers jurisdiction on those courts. However, this cannot be contrary to the law of that Member State.[24] As can be seen, the freedom of contract is also limited in this case so that the consumer cannot be disadvantaged. Someone qualifying as a legally lay consumer might not be aware of all the consequences of a prorogation of jurisdiction agreement. Consumer protection is also present in the so-called subordination to jurisdiction within the meaning of Article 26(1) of Brussel I bis Regulation. In this *sui generis* prorogation, the jurisdiction of the court is based on the defendant's entering the proceedings (Slašťan, n.d.). However, Article 26(2) confers on the consumer the advantage that the court is obliged to ensure that the defendant is informed of his right to contest the jurisdiction.[25]

According to Article 18, in the absence of such an admissible agreement between the parties, a consumer who satisfies the conditions for the protection of this Section of Brussels I bis Regulation may sue the other party either in the courts of the place of domicile of that party or in the courts of the State where the consumer is domiciled. Here, we can see that the fact that the entrepreneur has directed his activities to the consumer's country means that he must accept the consumer's option to sue him in the courts of his domicile. Even more protection is provided by the subsequent paragraph, which allows the entrepreneur to sue the consumer only in the courts of the Member State in which the consumer is domiciled. The last paragraph of this Article deals further with counter-claims.[26] As can be seen, Brussels I bis Regulation provides broad protection to the consumer in the sense that any dispute arising from a consumer contract shall be allocated to the consumer's country of domicile. The legislator probably took into account the possibilities of the consumer as a weaker party to participate in proceedings in another Member State, possible language barriers, administrative burdens and other circumstances. In

[22] Judgment of 20 January 2005, *Johann Gruber v Bay Wa AG.*, C-464/01, EU:C:2005:32.

[23] Judgment of 10 December 2020, *A. B. and B. B. v Personal Exchange International Limited*, C-774/19, EU:C:2020:1015.

[24] Article 19 of the Regulation (EU) No 1215/2012.

[25] Article 26(2) of the Regulation (EU) No 1215/2012.

[26] Article 18 of the Regulation (EU) No 1215/2012.

the next chapter, we will discuss the protection afforded to consumers by the Rome I Regulation in determining the applicable law. Much of the interpretation provided in this chapter is also applicable to the interpretation of the Rome I Regulation.

3. Consumer protection under the Rome I Regulation

The Rome I Regulation, as we have already mentioned, contains conflict-of-law rules through which we are able to determine the law applicable to contractual obligations falling within the scope of the Regulation. If it were a non-contractual obligation, for example, product liability, we cannot apply the Rome I Regulation and the applicable law would have to be determined on the basis of the Rome II Regulation.[27]

In determining the applicable law, we must look for a match between the material freedom of choice of law and the substantive protection of consumers. Rome I Regulation preserves the autonomy of the contracting parties by determining the freedom of choice. In determining the applicable law, we must find a balance between the choice of law and consumer protection. Rome 1 preserves the parties' autonomy of choice. At the same time, the *lex specialis* regulation seeks to compensate for the factual inequality and the weaker position of the consumer *vis-à-vis* the entrepreneur, which is generally due to the consumer's relative inexperience and, more often than not, their inability to negotiate special terms and conditions (Slašťan & Siman, 2018). As with Brussels I bis Regulation, however, the fact that we have a consumer present as one party does not necessarily mean that this consumer is under the special protection of the Regulations. Since Rome I is interpreted comprehensively with Brussels I bis, we can also base the Rome I Regulation on the definition of the consumer as defined in Article 17 of the Brussels I bis Regulation and the aforementioned case-law. A consumer is a natural person who enters into a contract for a purpose that can be regarded as being outside his trade or profession. The other party to the contract, the professional, unlike the consumer, acts in the exercise of his trade or profession. Article 6(1) of the Rome I Regulation provides that the consumer contract "shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities."[28] [29]

In the case of pursuing professional activities in the consumer's country directly, the situation is again more obvious. As A.J. Bělohlávek states, "It is not relevant whether the business activity is pursued through the medium of the professional's principal registered office, business premises or otherwise" (Bělohlávek, 2010, 1146). Referring to Recital 24 of the preamble to Rome I Regulation, a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 (amended by the new Brussels 1 bis) specifies that "to be applicable, it is

[27] 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). http://data.europa.eu/eli/reg/2007/864/oj.

[28] Article 6(1) of the Regulation (EC) No 593/2008.

[29] Paragraph 4 of the quoted Article excludes exhaustively enumerated contracts from the scope of this Article.

not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State. A contract must also be concluded within the framework of its activities …the mere fact that an Internet site is accessible is not sufficient" to talk about a direction of activities; it is essential that "this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor".[30] Again, as with Brussels I bis Regulation, we have a provision on the direction of activities to the country of the consumer, where we refer to the interpretation given above in the relevant chapter.

Consumer protection in the Rome I Regulation also focuses on the choice of law. This is an interesting element, particularly with regard to e-commerce, where it can be covered in particular by the provisions of general terms and conditions. Article 6(2) of Rome I Regulation provides that this choice cannot deprive the consumer of the protection which he would have been afforded by the mandatory provisions of the law which would have been applicable in the absence of the choice.[31] It follows that, even assuming that we as consumers agree to a choice of law clause, we are guaranteed at least a basic range of core rights that would be available to us in the absence of a choice. Combined with the Brussels I bis jurisdiction regime, we would therefore find ourselves as consumers in a significantly more favourable situation guaranteed by this regime.

One of the key judgments dealing with consumer protection under the Rome I Regulation is the case of *Verein für Konsumenteninformation* ("VKI") v Amazon EU Sarl ("Amazon"), a Luxembourg company that sells online to a number of countries, including Austria. The general terms and conditions on the amazon.de website contained a number of points against which the VKI brought an action before an Austrian court to have them banned by the court. Among them, it referred to a choice of law clause in favour of Luxembourg law. In the preliminary ruling procedure, the national courts asked, among other things, whether a negotiated choice could constitute an unfair trading practice. In that case, the Court of Justice of the European Union held that the choice of law in the terms in question would only be an unfair practice if it misled the consumers into believing that only the agreed law applied to the contract and did not provide them with comprehensive information that they could also rely on the protection of Article 6(2) Rome I Regulation.[32] A similar interpretation was given in the case of *Verein für Konsumenteninformation v TVP Treuhand*.[33]

Conclusion

The aim of the present article was to analyse consumer protection under selected Brussels I bis and Rome I Regulations and to identify gaps in this legal regulation. We are of the opinion that gaps in regulation or some vague provisions can be covered by the relevant case-law of the Court of Justice of the European Union. Nevertheless, the consumers concerned are often not sufficiently well informed and we therefore think that a possible revision of these Regulations

[30] Recital 24 of Preamble to the Regulation (EC) No 593/2008.

[31] Article 6(2) of the Regulation (EC) No 593/2008.

[32] Judgment of 28 July 2016, *Verein für Konsumenteninformation v Amazon EU Sàrl.*, C-191/15, EU:C:2016:612.

[33] Judgment of 3 October 2019, *Verein für Konsumenteninformation v TVP Treuhand- und Verwaltungsgesellschaft* für *Publikumsfonds mbH & Co KG.*, C-272/18, EU:C:2019:827.

could also be more reflective of e-commerce and could incorporate the most important interpretations that we extract from the case-law of the Court of Justice of the European Union.

A major issue in the area of e-commerce appears to be the rather vague provision on directing activities to the consumer's country, which, especially in the online world, does not have strictly defined boundaries. In our view, the regulation in question is set up in the selected Regulations to strike an effective balance between consumer protection on the one hand and preserving legitimate expectations on the part of the entrepreneur. Simply stated, if a professional has actively taken steps to influence a consumer from another Member State to make a purchase on his website, he must automatically assume that he may find himself before the courts of that State and that the legal relationship between him and the consumer may be governed by the law of the country of the consumer's habitual domicile. Conversely, if a professional is only interested in selling within his own country and a foreign consumer looks up his web application on the internet and orders goods from it, it would not be fair, in our view, to expect the professional to count on the relationship being governed by the law of the consumer's country or that he/she may be sued/or sue in the courts of the consumer's country.[34]

Although we respect and perceive the weaker position of the consumer in consumer contracts, with this article we would also like to draw attention to the position of the entrepreneur. Small enterprises have easier access to the market in some sectors because doing business online does not necessarily require a high initial investment. This small or yet inexperienced entrepreneur may not have all the information on consumer protection at his disposal and may also not have knowledge of the relevant case-law and may therefore find himself in a situation in practice that he did not foresee. This lack of knowledge may affect compliance with consumer protection in practice. We are of the opinion that, at the European Union level, in the framework of judicial cooperation, entrepreneurs should automatically be informed of the essentials of consumer protection under the discussed Regulations. We suggest that, when establishing companies with activities aimed at the sale of goods and services to final consumers, the relevant public authorities should provide entrepreneurs with a document or guidance on how core consumer protection is ensured. We are of the opinion that if entrepreneurs had a clearer understanding of this issue, they would not be surprised later on in practice if they are sued in the courts of another Member State or if a consumer contract is governed by law other than their own. Of course, we do not dispute the weaker position of the consumer, we just think that increased knowledge on the side of the entrepreneur would establish clearer rules and that entrepreneurs, especially in the e-commerce sector, would know how they must behave if they want the jurisdiction and applicable law of their state to be maintained.

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[34] We very much welcome the adoption of Regulation 524/2013 on consumer ODR, the subject matter of which is "facilitating the independent, impartial, transparent effective, fast and fair out-of-court resolution of disputes between consumers and traders online" especially with regard to the digital dimension of the internal market. As a lex specialis, this Regulation provides for a very effective out-of-court dispute resolution of online consumer disputes. For more details: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524

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European administration of consular protection

Erzsébet Csatlós*

* PhD, Senior lecturer, Faculty of Law and Political Sciences, University of Szeged, Public Law Institute. E-mail: csatlos.e@juris.u-szeged.hu

Abstract

This paper seeks to review the evolution of consular protection management in the European Union. The process of Europeanisation has reached its current profile through three stages of evolution and we are likely to see further institutionalisation, with several available alternatives. The historical analysis outlines the rationale for a further process of Europeanisation in the light of changes in the legislative powers of the EU, exploring the nature of legal regulatedness and aligning it with the development of fundamental rights, and presents a prognosis for the next stage of development in the light of experience to date. The research findings, based on an analysis of normative rules of various origins, regulatory and binding, preparatory documents, official statistics and reports as primary sources, and literature on specific aspects of the subject, also suggest that an effective consular protection policy will require changes in the tasks and competences in the next development stage. The existing consular enforcement apparatus in the Member States should be better integrated with the network of EU delegations, at least for some of the specified consular protection tasks. This raises further regulatory issues, but it is undeniable that the Europeanisation of consular protection administration is moving in this direction.

Keywords

consular protection, Europeanisation, European administration, emergency travel document, EU citizen.

The history of the consul as a legal instrument reveals a highly diverse picture, but cooperation between different actors under different jurisdictions has always been a key element in the performance of its tasks (Csatlós, 2019a, 47–48). In the modern era, consular administration has traditionally been an administrative field strongly linked to the state's external relations and external policy. In the course of performing consular functions, numerous legal relationships intersect, but their basis is always that of cooperation between states, which is increasingly influenced by the European Union: consular protection of unrepresented EU citizens in third states is a fundamental right,[1] and, as a result, the provisions of the directive now have greater

[1] The Charter of Fundamental Rights of the European Union. OJ C 326 26.10.2012. p. 391–407. [hereinafter: Charter of Fundamental Rights], Article 46.

material, procedural and organisational impact on national consular administration than earlier. The consular protection policy, initially regulated under the aegis of governmental publicity, has now been incorporated into the complex, multi-level organisation of European public administration (Csatlós, 2021c, 45–46), but the process of development of the legal institution is far from being complete. The field is becoming so Europeanised (i.e. EU law is interweaving national consular administration) in such a way that there is in fact no direct mandate. While, as a rule, there is no harmonisation of substantive law, it is the legislation, now in the form of a directive, that ensures coordination and cooperation between the European administrative bodies involved indirectly and, especially in a crisis, directly in the tasks and powers of consular protection policy, which, due to its personal scope, ensures the exercise and enforceability of fundamental rights. This links to the organisational background in the procedural field, and the emergence of a common legal instrument, namely the EU emergency travel document, and the development of the legal framework surrounding it are developing in such a way that the next reform phase could lead to institutional changes, parallel with the appreciation of the EU delegations. This could be a further argument for the necessity of a single set of European procedural rules, not only in terms of client guarantees, but also for the further development of a predictable, transparent EU administration.

1. Consular protection as a public task: framework for implementation

Consular protection covers the assistance provided by the State to its own nationals abroad and, less frequently, to nationals of other countries,[2] in certain life situations that make them vulnerable: these are mainly official acts and other service tasks performed by a consular officer. In Hungary, the Fundamental Law, like the Constitution, stipulates that every Hungarian citizen shall have the right to enjoy the protection of Hungary during his or her stay abroad.[3] This is a generally recognised premise of inter-state relations based on customary law that personal sovereignty, or rather protection, follows the citizen abroad in this respect (O'Brien, 2001, 313). Its exercise requires the consent of the host state: the functions that may be performed there by a consular officer of the sending state are always the subject of an agreement between the sending and the host state (Csarada, 1901, 251; Teghze, 1930, 295); the Vienna Convention on Consular Relations only names the typical, customarily recognised consular functions.[4] This means that a consular officer of one state may be permitted to do something on the territory of one state, while a consul accredited to another state does not have such powers there. The consular officer is obliged to respect not only the internal legal rules of the sending State but also those of the receiving State. This framework can be filled by the sending state with tasks and powers for the consular officer, the so-called consular law, which is part of national law. The consular authority can carry out its tasks in the territory of a foreign State within the framework of public international law, but within the limits set by its national law and within the limits of the national law of the host State, and, because of the specific nature of its organisation and activities, in practice by relying on relations with other bodies. These

[2] Vienna Convention on Consular Relations. Vienna, 24 April 1963. United Nations, Treaty Series, vol. 596, p. 261, Article 8 (promulgated in Hungary by Decree-Law No 13 of 1987, the Vienna Convention): *"Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State."*

[3] Article XXVII of the Fundamental Law of Hungary. cf. § 69 (3) of the Constitution of the Republic of Hungary

[4] Article 5 of the Vienna Convention.

legally regulated relationships, governed by various legal rules, can be summarised as "cooperative relationships", which are based on a system of relations between the bodies concerned, primarily in order to establish or implement a relationship of authority or service between the consular authority and the citizen. The legal relationships in the field of consular administration may be diverse in nature, but they have in common that the rights and obligations of the parties in this type of administrative relationship are therefore not simply determined by administrative law, but by a body of pieces of legislation, so that the rights and obligations of the entities involved in the performance of the task and the applicable law depend on the nature of the relationship.

Consular representation is a *branch of public administration seconded abroad*; its purpose is, inter alia, to ensure that the domestic administration is accessible to the citizen abroad and to protect the interests of the citizen in the host State by means of personal sovereignty. As a *public* task, administrative law is its most important source of law, based on and influenced by international law. *The consular authority can carry out its tasks in the territory of a foreign State within the framework of public international law, but within the limits set by its national law and within the limits of the national law of the host State, and, because of the specific nature of its organisation and activities, in practice by relying on relations with other bodies.*[5]

In carrying out its consular protection tasks, which may be official and non-official, the consular authority cooperates in this public international law framework, in principle:

a) with the authorities and other bodies of the host State: these are coordinate relations, the content of which is determined by public international law and the law of the host State over the law of the sending State;
b) with the consular authorities of another State and as determined by international law, in particular when contact is made in the case of a national of that State;[6] and
c) with the authorities and bodies of its own sending state, with the latter both in relations of control and supervision (hierarchical) and in relations of cooperation based on the interdependence of each other's activities in the performance of tasks (Csatlós, 2017, 35–40).

While diplomatic missions are meant to liaise with the central authorities of the host state, consular missions tend to cooperate with local authorities of the host state competent in the consular district, in exceptional cases outside the consular district, in the context of consular tasks. The competent central authorities of the host State will be consulted only when and to the extent permitted by the laws, other legislation and customs of the host State or international agreements concluded in this regard. The basis of the legal relationship of cooperation between authorities and the trigger for further legal relationships is most often the obligation of notification as a legal fact by the host State. In certain situations affecting nationals of the sending State, the authorities of the receiving State are obliged to notify the consular service of the sending

[5] All this, together with the two sets of norms of national law and international law, is what *Lorenz von Stein called international administrative law*, while *Donato Donati* reserved this concept for the broad field of administrative matters of international organisations. He referred to the activities of public authorities, which are filled with national law but take place within the framework of public international law, as *international administrative law*. On the normative background to the implementation of consular protection, aside from the naming issues, see: Vogel (1986, p. 3–4); Csatlós (2019, p. 49).

[6] cf. Articles 7 and 8 of the Vienna Convention, and the entire EU consular protection policy is based on this theorem.

State,[7] but there may also be cases where the consular officer, in providing consular protection, approaches a body or authority, for example in connection with legal aid cases.[8]

Consular representations are foreign public administrations which are incorporated into the system of domestic administrative organisation[9] on the basis of national law, in a supremacy relationship. Consulates usually function as the (main) consular department of the diplomatic mission and, regardless of their geographical location in the host state (even in several places, since unlike a diplomatic mission, a consular office may be located in several places, or even in a neighbouring state where there is no diplomatic mission but consular administration is intended to be provided) they are under the direct control of a diplomatic mission (Csatlós, 2020, 168–169, 174). In the context of *performance of tasks*, the consular officer has autonomous tasks and powers in certain matters, while in other cases he typically functions as an intermediate authority, thus establishing a link between the client and the administration of the home state: transmits an application or performs a specific procedural act, which is what distinguishes it from a simple referral. It is subject to national regulation as to which cases it can act in this capacity and what procedural powers it holds (Csatlós, 2020, 163–165).

There is no uniform content of consular protection, it varies from state to state what is provided under this heading to the category of persons (national, resident, domiciled, resident) it intends to protect. The palette is colourful, as is the nature of the activities they manifest in: official case, action, advice, and therefore it depends on the sending and receiving States and an individual case what legal relationships intersect each other.[10] In many cases, these legal relationships cannot be separated from one another, but are interdependent and overlap.

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[7] See also: LaGrand (Germany v. United States of America) Judgment, I.C.J. Reports 2001, p. 466, paragraphs 123–125.

[8] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. [Promulgated in Hungary by: Act XXXVI of 2005] Sections 8, 9, and 21. Hungary has made the following reservation to the Convention (Article 3): "Hungary is against the direct service of documents on its territory by diplomatic or consular representatives of foreign states, unless the addressee is a national of the sending state of the diplomatic or consular representative. Documents to be served through consular channels shall be received by the Ministry of Justice." (Csatlós, 2019, 55–56).

[9] An atypical case is cooperation with an Honorary Consul. The institution of Honorary Consul is well known and generally accepted in many countries of the world, mainly because of the financial burden of a professional consular officer. The role of the honorary consul is defined by the sending state, which is narrower than that of a professional consul and sometimes only symbolic: he is therefore effectively subordinate to the diplomatic mission responsible for the territory and, in the case of a professional consular officer, their powers must be coordinated on the basis of an organisational hierarchy and an administrative relationship of supremacy. The Honorary Consul mainly provides assistance, information and transmission of documents, but does not typically have any official powers. Their action in official proceedings may therefore at most give rise to a relationship of cooperation with the authorities of the host State or, depending on the law of the host State, they may act as a representative for the purpose of defending the interests of the nationals, and therefore they are not entitled to take procedural steps. Cf. Vienna Convention, Chapter 3; Csatlós (2019, p. 56–57). See also: Dela (2014, 71), Stringer (2007, 5–12).

[10] Cf. Recital (5) of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, OJ L 106, 24.4.2015. p. 1–13, hereinafter Council Directive (EU) 2015/637. The picture is also very diverse across EU Member States as to the level and way in which consular protection is regulated, based on surveys conducted in 2010: Faro & Moraru (2010, 609, 611–613), cf. Schweighofer (2012, 94), Csatlós (2019, 84).

2. The Europeanisation of consular protection management – step by step

2.1. First phase: the intergovernmental nature of the common policy

The EU consular protection policy was born with the Maastricht Treaty of 1992 as the EU citizens*' right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State*.[11] It may not follow clearly from this, but it does follow from all the legal acts that have been adopted since then invoking the provision as a legal basis, that it covers consular protection and consular functions,[12] mainly in typical life situations.[13] At the first stage, the implementation of the policy did not go beyond the *intergovernmental cooperation nature* of the second pillar (common foreign and security policy) and its instruments: the Treaty provision called on the Member States to adopt the necessary provisions among themselves and to enter into international negotiations to provide protection.[14]

At that time, without any harmonisation of consular law, the Member States' diplomatic missions and consular posts were still carrying out their tasks independently,[15] with maximum respect for the Member States' external relations.[16] The details of the assistance to be provided in specific circumstances were not regulated and the relationship between the consular authority and the national authorities was based on *guidelines*.[17] As such, the legal relationship was not regulated by a legal act; cooperation went just beyond the characteristics of classical intergovernmental relations and was in practice based on the autonomous performance of tasks at the level of the indirect administration. Although in the form of *guidelines*, the voluntary lead State

[11] Treaty on European Union. OJ C 191, 29.7.1992 1–112. Article 8c [hereinafter referred to as the Maastricht Treaty].

[12] It is also recognised in international law where consular functions are carried out by a diplomatic mission. See. Vienna Convention on Diplomatic Relations. Vienna, 18 April 1961. United Nations, Treaty Series, vol. 500, p. 95. [Promulgated in Hungary by: Decree-Law No. 22 of 1965] Articles 3(2) and 70.

[13] Decision of the Representatives of the Governments of the Member States Meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ L 314, 28.12.1995. 73–76, Article 5 (1). The protection referred to in Article 1 shall comprise: (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union. (2) In addition, Member States' diplomatic representations or consular agents serving in a non-member State may, insofar as it is within their powers, also come to the assistance of any citizen of the Union who so requests in other circumstances.

[14] Maastricht Treaty, Article 8c, last sentence.

[15] As is typical of the European Administrative Area, the EU institutions do not have their own executive apparatus in the Member States; it is the national administrations that function as such (Torma, 2011, 197).

[16] cf. Hideg (2019, 73).

[17] Guidelines for further implementing a number of provisions under Decision 95/553/EC. PESC 833 COCON 10 11113/08. Brussels, 24 June 2008.; Guidelines on Consular Protection of EU Citizens in Third Countries. 10109/2/06 REV 2 PESC 534 COCON 14. Brussels, 5 November 2010.; Guidelines on Consular Protection of EU Citizens in Third Countries. PESC 534 COCON 14 10109/2/06 REV 2. Brussels, 16 June 2006.; Guidelines on Consular Protection of EU Citizens in Third Countries. COCON 40 PESC 1371 15613/10. Brussels, 5 November 2010.

role is regulated as a framework wherein several Member States are represented.[18] However, the introduction of a simplified type of emergency travel document to help EU citizens who have lost their travel document in a third country or whose travel document has expired during their stay has not brought any significant change in the organisation, procedure or substance of consular administration in the Member States.[19]

2.2. Second phase: integration into the European administrative system

The Lisbon Treaty has completely redefined, directly and indirectly, the EU's consular protection policy by seeking to overcome the limits of intergovernmental cooperation. While continuing to respect the external autonomy of the Member States in this regard and the fact that each Member State is in principle responsible for the consular protection of its own nationals,[20] and without aiming at any further harmonisation of substantive law, the Council of the European Union was granted the right to regulate the necessary coordination and cooperation measures by means of a directive, in the framework of a consultation procedure.[21] As for the task, the obligation is not in fact to provide the same level of consular protection, but, *analysing the wording of the relevant provisions and preparatory documents, and exploring the objective of the legislator,* to ensure, in accordance with national law, equal treatment with their own nationals, in particular in certain qualified situations. On this basis, Council Directive 2015/637, adopted as a result of a multiannual procedure to prepare the reform of the previous Decision, created a mechanism for cooperation and a *procedural regime* for the requirement of equal treatment between the authorities and bodies of the Member States with consular responsibilities in general and in explicit crisis situations.[22] The provisions aim at establishing a link between the representation on the spot of the EU Member State and the EU citizen. Concrete consular action by the requested Member State's diplomatic mission or consular post, which is foreign by nationality but represented in the place where the problem arises, will only be taken under its own consular law[23] if the home state is unable or unwilling to act on the matter.[24] It should be underlined that a procedural obligation also arises under the Directive if the Member State (diplomatic mission or consular post) becomes aware that an unrepresented citizen has been placed in an emergency situation, such as those listed in Article 9.[25] While the Directive still does not provide for uniform consular assistance, it is an improvement in terms of efficien-

[18] European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06) OJ C 317 12.12.2008.

[19] Decision of the representatives of the governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document OJ L 168, 6.7.1996 4–11.

[20] Council Directive (EU) 2015/637, Recital (6); Article 2.

[21] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007, p. 1–229 Point 36.

[22] Council Directive (EU) 2015/637 Article 10 cf. Article 13.

[23] According to Article 20(2)(c) TFEU and Article 23 TFEU, Member States must provide consular protection to unrepresented citizens under the same conditions as to their own nationals. Within this framework, the preamble to Council Directive (EU) 2015/637 states in recital (5) that the Directive does not affect Member States' competence to determine the scope of the protection to be provided to their own nationals.

[24] cf. Council Directive (EU) 2015/637, Article 3

[25] Council Directive (EU) 2015/637, Article 10(2).

cy to require that, where the State acting on the spot provides assistance to the accompanying family member of a non-EU national in the case of its own national, it should also do so to the non-EU national who requests assistance and to the accompanying family member of the non-EU national.[26] This is also likely to be based on the concept of family member under national law, interpreted in the light of the concept of family member in EU law, and obviously where there are no other obstacles to it, such as foreign policy.[27] Providing the same service under the same conditions, resulting from different national legislation, does not imply equal treatment, as recognised in the preamble of EU Directive 2015/637 itself: "*Member States might not be in a position to deliver certain types of consular protection, such as emergency travel documents, to third-country family members*".[28]

The crisis procedures of the new regulation also take into account and involve the direct administrative structure of the EU, both through the possibility to activate the EU Civilian Crisis Management Mechanism and by using the *European External Action Service* (EEAS). The EEAS has no powers for an autonomous consular role, but *may* have powers to support the coordination of consular tasks carried out by Member States' missions in the event of a crisis,[29] and also enjoys the support of approximately 150 delegations representing the EU in third countries and international organisations, if requested by Member States.[30] The EU law does not place delegations and Member States' diplomatic missions and consular posts in a hierarchical relationship, and their role is complementary. In such situations, the framework for the legal relationship between the different bodies is given, but the content is *ad hoc*, as for example in the event of a mass consular protection need there is no predefined set of responsibilities for organisational

[26] Council Directive 2015/637/EC, Article 5.

[27] Summary table of the conditions under which Member States provide consular protection to family members of non-EU citizens, according to 2010 data: Csatlós (2019, 127–129). Hungarian consular law, for example, repeats the above provision on family members in its implementing rules, but the word family member is otherwise only used in the common forms for the costs of consular protection, otherwise it is used in conjunction with the Consular Protection Act to refer to relatives and close relatives under the Civil Code. The consular service shall provide consular protection to a family member who is not himself an EU citizen and who is accompanied by an EU citizen unrepresented in a third country, to the same extent and under the same conditions as it would provide in the case of a non-EU citizen family member of a Hungarian citizen, in accordance with its internal legislation or practice. Beyond that, the scope of consular protection may be extended on the basis of a case-by-case agreement concluded at the specific request of the consular authority of the Member State, provided that this does not infringe the requirements of national and EU law. See Section 14/B (5) of Foreign Minister's Decree 17/2001 (XI. 15.) on the detailed rules of consular protection, and Section 20 (2) of Act XLVI of 2001 on Consular Protection.

[28] Council Directive (EU) 2015/637, recital (9). See in this context: Emergency Travel Document (ETD) - Presidency reflection paper. COCON 14, CFSP/PESC 523, COTRA 13, 11955/15, Brussels, 17 September 2015. 9. According to this, eight Member States issue several types of emergency travel documents, nine use a paper format, three use a booklet format and three use a paper *laissez-passer*, while one Member State uses it in booklet format, seven Member States issue a paper format as temporary passport, and two Member States issue a paper format travel document as emergency passport and six issue it in booklet format. Csatlós (2019, 94).

[29] Council Directive (EU) 2015/637 Article 13(3)-(4).

[30] Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU). OJ L 201, 3.8.2010, p. 30–40, Article 5(10); Council Directive (EU) 2015/637, Article 11, see also: Articles 12 to 13

legal issues in crisis situations, and what is provided as guidance is based on a flexible willingness to help. The organisational legal relationship is sui generis and does not correspond to the principles governing the system of administrative organisation within the state, and loyal cooperation and solidarity are the cohesive forces that hold the system together, essentially in the context of the consular protection obligation under EU law. However, principles are no substitute for *erga omnes* organisational and liability rules, especially in the crossroads of legal relationships created at the intersection of different jurisdictions. Nevertheless, this phase of development can be seen as the real beginning of the construction of a complex European public administration. Council Directive 2015/637 builds on the exclusive consular authority role of the indirect level of administration, while at the same time the direct level of administration appears as an actor, as the background country providing the common infrastructure. Moreover, in addition to the emphasis on inter-state cooperation with third countries, the procedural regularisation of procedural acts between authorities and bodies of different Member States is a major development

In this context, it is worth mentioning the development of fundamental rights: the Charter of Fundamental Rights not only guarantees the right to consular protection, but also contains the administrative framework of the rule of law that is linked to the enforcement of this right, which is manifested, *inter alia*, in the right to good administration and the related right to effective remedy. This, in turn, presupposes proactive action on the part of the Member State, including legislation, especially where consular protection is not provided for in specific legal provisions, and thus a high degree of discretion is required. These potential law enforcement issues can primarily be approached from a theoretical perspective, as the available statistics show a low incidence of cases, which states record differently (Faro & Moraru, 2010, 597; Schweighofer, 2012, 76).

2.3. Phase three: laying the foundations for EU administrative procedural law

The task of replacing travel documents was already identified as the most common consular protection measure in the 2015 surveys,[31] and the Commission summarised the challenges and responses to consular protection policy in its 2015-2020 report. The report states that, during this period, the Commission responded to 10 complaints, 8 letters/one-off enquiries and 8 questions from the European Parliament on this issue. Again, these mainly related to the issue of emergency travel documents for return purposes or the lack of consular protection or its discriminatory nature.[32] These are to be addressed by a 2019 Directive, now adopted, namely *Council Directive 2019/997 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP.* This has paved the way for the Europeanisation of EU consular protection policy and, with it, a new phase in the development of European public

[31] Consular Affairs Working Party Report of 16 April 2016. Consular Cooperation Initiatives – Final report presented by the CCI Core Team to the EU Working Party for Consular Affairs COCON – 8. CFSP/PESC 345, 29 April 2016 Brussels. 3. For more on this, see: Csatlós (2019, 92).

[32] Report from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Under Article 25 TFEU Brussels, 15.12.2020. COM/2020/731 final. On progress towards effective EU citizenship 2016-2020 23.

administration. Although preparations are still underway to apply the rules,[33] the provisions provide for a leap forward in terms of Europeanisation compared to the 2015 Directive, which was a *lex generalis*.

The new directive will bring along the so-far strongest involvement of the direct level of public administration. There will still be no harmonisation of substantive law, but the creation of a new type of travel document will not only strengthen the sense of EU citizenship, but also the quasi-state character of the EU. A passport is closely linked to proof of citizenship; it is an internationally recognised document (Hargitai, 1995, 710), and therefore the right to issue passports is a matter of discretion for the state, as is the way in which it regulates the substantive and procedural rules for issuing different types of travel document (Lee, 1961, 176; Torpey, 2000, 161–162; Hagedorn, 2008, para. 7). The EU has already tried to incorporate the emergency travel document into this system, but this time with stronger instruments. The Commission has been given executive legislative powers[34] and a mandate[35] to produce a document that meets the highest possible security and technical standards in line with international ICAO standards and which can be a real alternative to a passport for the period of the holder's return. Furthermore, to ensure its acceptance, the Directive breaks with the nearly 30-year-old concept of calling on Member States to reach agreements with third countries to ensure that the EU consular protection policy is successfully applied to all EU citizens, with the Member State body being the implementing body for all related tasks on the ground.[36] This time, however, the EU's direct level of administration will be given more responsibilities and powers: the EEAS will forward specimens of the EU's uniform format for emergency travel documents and stamps to EU delegations in third countries. This already implies a more extensive network of missions and representations than the Member States.[37] The delegations will be the ones to inform the competent authorities of the relevant third countries about the use of the EU provisional travel document, its uniform format and its main security features, and will provide them with specimen examples of the uniform format and stamp of the EU provisional travel document as a reference. If there is no Union delegation in a third country, the represented Member States shall decide, in the framework of local consular cooperation, which Member State shall notify the competent authorities of that third country.[38] This not only strengthens the EU as a single entity and external actor, but also leads to a shift of responsibilities towards the national apparatus.[39]

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[33] The Commission will adopt implementing acts containing further technical specifications for EU emergency travel documents. Within 24 months of their adoption, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. Member States shall ultimately apply this Directive 36 months after the adoption by the Commission of its implementing acts laying down further technical specifications. Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP OJ L 163, 20.6.2019, p. 1–12. [hereinafter: Council Directive (EU) 2019/997] Articles 18–19.

[34] Council Directive (EU) 2019/997 Article 9.

[35] Council Directive (EU) 2019/997 Article 11.

[36] cf. Article 8 of the Vienna Convention.

[37] All Member States have a mission in only four third countries outside the EU: the USA, India, China and Russia, and statistically the EU has five Member States with a mission in more than half of the world's countries. See: EEAS (2022); Moraru (2021).

[38] Council Directive (EU) 2019/997 Article 13(2)-(3), (5).

[39] See in this context: Torma & Ritó (2021, 111).

A milestone in administrative procedural law is the further reflection on the cooperation procedure: the Directive creates a directly applicable *administrative procedural rule* for the cooperation stage between authorities of several Member States, from the submission of the request to the adoption of the decision; that is, for the areas of exercising functions and powers outside national law.[40] By setting a time limit for all procedural steps, it makes not only the duration of the procedure predictable, which means issuing a travel document within a maximum of 7 working days of the application if the conditions are complied with, but also the uniformity of assistance, irrespective of the forum. It thus brings the image of good administration under the democratic rule of law one step closer to the EU citizen, which is otherwise required by the EU,[41] while at the same time the uniformity of assistance is fully ensured.

The role of inter-state cooperation is fading and the role of the public authority cooperation mechanism under the aegis of EU law is strengthening; its regulation is improving and the European administrative unit of consular protection is being built in parallel. The reform of the travel document was triggered by the fact that most of the consular protection provisions aimed at replacing the travel document, but the previous instrument was not fully successful, neither from a document security aspect nor in terms of general acceptance. In addition, the future introduction of a uniform procedural fee – instead of the current national law tariff, which varies widely[42] – and the possibility of introducing an electronic emergency travel document are also on the agenda.[43]

The system is nuanced by the fact that, while assistance for unrepresented citizens in relation to the emergency travel document must be provided at the embassy or consulate of any Member State, Directive 2015/637 allows Member States to continue to conclude practical arrangements in order to share responsibility. In such cases, Member States receiving applications for an EU emergency travel document will have to assess, on a case-by-case basis, whether it can be issued or whether the case must be referred to the embassy or consulate designated as competent under an existing agreement.[44] However, no time limit has been set for this, while it is clear that each procedural step is pushing the actual issuance of the travel document further and further away. EU law only provides that such agreements must be published by the EU and the Member States in order to ensure transparency for EU citizens.[45] So far, either there have been no such agreements or the existence of such arrangements is not indicated on the Commission's information page, which only provides a search for whether the country of origin is represented in the territory of a given third country, but does not provide any information on which Member State is represented if the country of nationality is unrepresented.[46] Obviously, there are and will be diplomatic missions and consular posts that do not and will not have the

[40] Council Directive (EU) 2019/997 Article 4.

[41] More on this: Csatlós (2019b, 16–17); Csatlós (2019c); Csatlós (2021d); Csatlós (2019d).

[42] Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Effective consular protection in third countries: the contribution of the European Union Action Plan 2007-2009 Impact Assessment Brussels, 5.12.2007, SEC(2007) 1600. 5. Csatlós (2019a, 96).

[43] See: Recital 22, Articles 8, 9 and 11, 12 and Annexes I and II to Council Directive (EU) 2019/997.

[44] Council Directive (EU) 2019/997 (recital 7).

[45] Council Directive (EU) 2015/637 Article 7.

[46] See: Find an embassy/consulate. https://ec.europa.eu/consularprotection/representation-offices_en

technical conditions for issuing documents,[47] or may not have been authorised to perform this type of (official) task, and this all clouds the picture of efficiency. On the one hand, it would have been useful to set a fixed deadline for the transfer of documents, for the sake of completeness, and, on the other hand, in order to ensure that the information is complete, the website needs to become more user-friendly and provide genuine and rapid assistance in the future.[48] At present, there is neither an obligation to inform nor a referral obligation for Member States' diplomatic missions and consular posts to refer a client who has made a request to them for a consular protection measure for which they have no competence to refer the case or to inform him or her of which Member State's diplomatic mission or consular post to contact.

2.4. The next phase: the transfer of responsibilities to a direct European administrative level?

2.4.1. (Side) effects of COVID19 on consular administration

At the outbreak of the pandemic, the experience and inherent necessity of consular protection cooperation in crisis situations further reinforced the picture of a move towards the Europeanisation of consular administration. The repatriation of millions of EU citizens suddenly stranded on the territory of a third state could only be achieved with EU funding and action, with significant use of the EU Civilian Crisis Management Mechanism (and its organisational background). This resulted in the repatriation of some 600,000 EU citizens (EEAS, 2020; Csatlós, 2021a, 34–36; Csatlós, 2021b, 19–21). To deal with similar crises, to remain both organisationally and financially transparent and within the limits of legality required in other areas, and to replace the UK's executive apparatus, which is a huge external representation network that was lost due to Brexit, requires further Europeanisation, which the Commission has already begun to do at the level of identifying the intention and the problem to be solved.[49] The review of the Consular Protection Directive, which entered into force in 2018, and the way forward was due in 2021,[50] and COVID19 and Brexit have set the way forward in terms of tasks. There are difficulties in informing EU citizens about travel conditions; there is no concrete legal basis for the coordination role of delegations to deal with a crisis situation, and existing legislation is full of uncertainties regarding the (co-)financing of assistance to represented EU citizens. The rules apply to the *un*represented EU citizen, but necessity (the global crisis at the outbreak of the pandemic) has overridden them, and in many cases, due to lack of capacity, represented citizens were no better off than those who, in the absence of their own, had to rely on consular protection from a foreign Member State. In this context, one of the alternatives proposed is for consular protection

[47] See: Csatlós (2019a, 102–103).

[48] As Becánics, for example, has pointed out, the protection procedure without practical arrangements in crisis situations can lead to a particularly acute problem: the uncoordinated division of tasks between Member States in terms of action and assistance results in a chaotic situation (Becánics, 2018, 163).

[49] European Commission. Consular protection - review of EU rules. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12830-Konzuli-vedelem-az-unios-szabalyok-felulvizsgalata_hu[hereinafter: Impact assessment study 2021] B. paragraph 2. cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021. A Union of vitality in a world of fragility. Brussels, 19.10.2020. COM(2020) 690 final, 6.

[50] Article 19(1)(of the Directive (EU) 2015/637.

tasks to be taken over either by joint consular units or by EU delegations themselves. A third option is to maintain the *status quo*.[51]

It is questionable whether, based on the lessons learned in 2020, it is rational to even consider a business-as-usual approach and not to improve cooperation, especially as the amendment would still not affect Member States' consular protection activities not covered by emergency situations. However, it is also worth pointing out that the Barnier report in 2006 had already proposed the creation of a European consular code that would explicitly regulate cooperation between the consular authorities of the Member States and between delegations. Such cooperation should also cover third countries where no Member State has consular representation. He stressed the crucial importance of establishing a set of rules in each third state, in a kind of stand-in system, to determine which Member State is responsible for which other Member States' EU citizens. He also spoke of the establishment of a common consular corps and the introduction of uniform operational rules (Barnier, 2006, 24–25; Csatlós, 2019a, 147–148). In the end, these options were rejected and, under the Treaty provisions, the delegations carry out their activities in close cooperation with the diplomatic and consular representations of the Member States[52] and their role is complementary, rather than an alternative to the Member States' missions in the field of consular protection; this is clear from the regulations.[53] However, EU delegations are already required, under the provisions of Directive 2015/637, "*to make general information available about the assistance that unrepresented citizens could be entitled to, particularly about agreed practical arrangements if applicable*."[54] This could even mean that delegations will refer the EU citizen to the appropriate place in light of consular protection measures and procedures, if there is an alternative.

2.4.2. Greater involvement of delegations in consular protection tasks

While there is no experience of which is the more successful option, there are several arguments in favour of joint action in crisis situations, and even of increasing the use of existing departments that can be considered common, namely delegations.[55]

The intergovernmental cooperation basis should be replaced by joint action on behalf of the EU, not only in relation to the adoption of the emergency travel document, so that assistance is based on a secure legal basis not only for EU citizens, but also for accompanying (non-EU) family members, given the extension of the protected range of persons since 2018. However, consular protection may take forms such as the issuing emergency travel documents, which Member States are not in a position to grant to third-country family members. In this respect,

[51] Impact Assessment 2021, Section B.2.

[52] Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, 13–390, Article 32.

[53] Council Directive (EU) 2015/637, Articles 11–13. cf. European Union guidelines on the implementation of the consular Lead State concept. OJ C 317, 12.12.2008, p. 6–8, 5.2.

[54] Council Directive (EU) 2015/637 Article 11.

[55] The idea of so-called 'Euro consulates' was previously rejected in the 2006 Green Paper on consular protection, mainly under the influence of the large states, France, the UK and Portugal, as well as Austria and Ireland, fearing an increase in the Commission's powers of representation. Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Effective consular protection in third countries: the contribution of the European Union Action Plan 2007-2009 Impact Assessment Brussels, 5.12.2007, SEC(2007) 1600. 14.; Fernández (2011).

the Directive also gives Member States a very wide margin of discretion as to how they implement the travel document rules,[56] again increasing the diversity of measures, even with the best of intentions. Even if full harmonisation is not possible on a substantive legal basis, the adequacy of information and the precise regulation of procedural steps between local diplomatic missions and consular posts, with set deadlines, could compensate for the differences. The assistance of delegations under the same rules would also be an important factor in reducing duplication of jurisdiction and eliminating both elements of luck and *forum shopping*. Currently, the EU citizen's choice of jurisdiction is the rule of law in the light of the presumption of good faith: the general rule is that an EU citizen can turn to the diplomatic mission or consular post of *any* EU country if he or she cannot turn to his own.[57] As for the next steps, even if all rules are taken together, there are initially several alternatives, whether a work-sharing agreement exists or not, and only in the case of issuing an emergency travel document is the path paved with predictable procedural steps and a time limit. The key lies in the proper procedural regulation of cooperation, which, even in the absence of substantive harmonisation, can establish the desirability of legality by channelling requests to the appropriate forum. However, a prerequisite for this is that, in view of the activities of the diplomatic missions and consular posts in the same third country, the conclusion of working arrangements (which, even if they exist, are not public and do not tally with the aim of eliminating information problems) should become an obligation rather than an option[58], and that flexibility should become secondary. Under the other alternative, this could be triggered by upgrading the role of EU delegations, and with this the common regulation and implementation of consular protection measures in crisis situations.

In both cases, the implementation of a general EU Code of Administrative Procedure, completely independent of consular protection, is a thought-provoking idea, as procedural guarantees for cooperation between authorities and bodies under different jurisdictions are currently missing from the Directives and entitlement is the fundamental principle of the Charter of Fundamental Rights; the question is to what extent they can be considered as directly applicable (FRA, 2020, 28 cf. 30–31) to replace a procedural code. The principle, like the general legal principles of solidarity and loyal cooperation, legal certainty and predictability, helps interpretation, but does not create powers in an organisational sense; it cannot replace precise liability rules in a way that is consistent with transparent and predictable regulation for the EU citizen.[59]

2.4.3. Further regulation of the cooperation mechanism

Following the line of procedural law regulation that started with the reform of the emergency travel document, it would also be appropriate to set procedural deadlines for each procedural act in the amendment of Council Directive (EU) 2015/637, which would bring the heterogeneous national consular protection rules closer to a transparent, predictable procedure in line with European values, at least at the level of timeliness, even under normal circumstances. The Directive envisaged that "*To fill the gap caused by the absence of an embassy or consulate of the citizen's own Member State, a clear and stable set of rules needs to be laid down*",[60] so the

[56] Council Directive (EU) 2019/997 Article 7.

[57] Council Directive (EU) 2015/637 Article 1.

[58] cf. Council Directive (EU) 2015/637 Article 7(2)-(3).

[59] On the *best-efforts* obligation, see: Klamert (2014, 33, 240–241, 242).

[60] Council Directive (EU) 2015/637 (recital 7).

objective is set: all that is missing is the development of the instrument. In any case, making procedural acts subject to a procedural time limit in all circumstances would be essential; again, not only for issuing a travel document, but also in order to ensure a reliable and predictable procedure, especially in dealing with difficulties inherent in substantive legal differences and challenges such as issues concerning family members or dual or multiple nationals. If the provisions are extended to access to the common database of visas issued by Member States, assistance could also be provided to other categories of persons lawfully residing in the EU. Not to mention the possibility of extending the use of the emergency travel document to nationals or to the territory, but the decision is currently in the hands of the Member States.[61] Conversely, unified action by a common forum, such as the inclusion of mandatory referral in a directive and a division of labour between locally represented Member States, could create unity on the basis of competence. If procedural rules were to ensure that consular protection requiring a formal procedure could be accessed on the territory of all third countries in a one-stop-shop model, uncertainties (anomalies) such as the extent to which popular tourist destinations, typically tropical destinations, which are physically distant from Europe and difficult to return home from, but which are at the same time part of a Member State and therefore *de iure* are not third countries, are considered as third country territory for the exercise of EU civil rights.[62]

Last but not least, although not a typical area, the question of remedies must also be considered in the light of the regulation of the procedure. The exercise of the right of appeal should not be hindered by the need for flexibility in dealing with emergency situations: an appropriate regulatory environment for discretionary decisions can create legality, and the key to this requires the development of procedural law in an area that is a white space for EU consular protection policy. Accessibility, speed and flexibility justify that the parallel jurisdiction of Member States' diplomatic missions and consular posts should not be abolished by a reform, at least as regards the admissibility of applications. At the same time, it would be appropriate to include delegations as potential fora and to regulate the division of labour between Member States' diplomatic missions and consular posts better, so that, if an official procedure, such as issuing a travel document, is necessary, assistance through smooth cooperation is guaranteed in all third countries. In this context, it would be appropriate to include in the Directive the working arrangement framework and the obligation to refer on the basis of this framework, clarifying the exact content of the (pro-

[61] See: the Council's legislative powers and their limits: Article 23 TFEU.

[62] Interpretation in the light of the lex generalis suggests that any state which is not a Member State of the EU, i.e. its relationship with the EU is neutral in this respect. A third State is any country whose nationals are not citizens of the EU within the meaning of Article 20 TFEU: EEA Member States, Switzerland, and States at any stage of the accession process, and vice versa: a territory which, although situated outside Europe, belongs to a Member State and is subject to the territorial application of the Treaties is not considered a third State. These are the outermost regions; the Overseas Countries or Territories Associated with the Union (OCT); and territories with sui generis status which do not fall into the first two groups. For details of these, see: Csatlós (2019a) 106–108. The outermost regions are fully covered by EU law unless otherwise specified, while the overseas countries and territories are neither part of the EU nor third states and, in practice and in the absence of specific provisions they are not covered by the general provisions of the Treaties (Kochenov, 2012, 739–740). In this context, see: Judgment of 11 February 1999, Antillean Rice Mills NV, European Rice Brokers AVV and Guyana Investments AVV v Commission of the European Communities, C-390/95, EU:C:1999:66, paragraph 36; Judgment of 12 February 1992, Bernard Leplat v Territoire de la Polynésie française, C-260/90, EU:C:1992:66, paragraph 10; Judgment of 22 November 2001, Kingdom of the Netherlands v Council of the European Union, C-110/97, EU:C:2001:620, paragraph 46.

cedural) obligation on the part of the national authorities. To give the EU itself, rather than the Member State, the power to issue a travel document through its delegations would require a more radical change of powers[63] than the possibility of taking coordination and cooperation measures.[64]

As for the EU citizen's opinion, surveys in 2020 show that 9 out of 10 respondents would prefer to turn to the EU Delegation if they needed consular assistance in a third country in which their own Member State was not represented, while just under a third of respondents know what they can do if their rights as EU citizens are not respected (European Commission, 2020, 39, 48). Such a transfer of tasks and powers would, however, lead back to a regulation of procedural steps that would provide a reassuring solution, not only for the basic procedure but also for the potential remedy phase – and the related questions of jurisdiction and forum. This would entail a further Europeanisation of consular protection policy.

3. Summary

A new era of cooperation between the Member States of the European Union began when consular assistance to an unrepresented EU citizen in a third state was defined as a right and subsequently acquired a recognised fundamental rights status following the last major Treaty reform. The parallel evolution of the requirements for a multilevel administrative structure has also developed in a way that has given new meaning to cooperation. Consular relations, which were once based on purely inter-state cooperation, have now been supplemented by an official cooperation mechanism and, as the latest innovations take the form of directives, there will also be examples of inter-state cooperation being displaced by a form of cooperation with a supranational actor. The reform of the emergency travel document is therefore in itself a significant milestone in the development of European administrative procedural law, by formulating the relationship between authorities in a predictable and transparent manner, suitable for direct effect. It will also strengthen the legal status of the EU and allow action on behalf of all EU citizens before third countries for the international acceptance of an EU travel document that will contribute to a more tangible enjoyment of this right of EU citizenship.

The Europeanisation of administration does not stop there: burdened by Brexit and through it the loss of the UK's extensive system of external representation, and in parallel the lessons of the pandemic, the Commission is advocating a new draft legislative act to strengthen collaboration further through cooperation and coordination provisions. In the light of the lessons of the recent past, the further Europeanisation of consular protection, the necessary intertwining of the direct and indirect European administrative structure and, at the same time, the development of European administrative procedural law is inevitable, since it is important to highlight and regulate those procedural acts and legal institutions which constitute the guarantees of the enforcement of fundamental rights.

[63] See in this context the legal basis for the *laissez-passer* that can be issued to members and staff of the EU institutions in the interest of the EU: Council Regulation (EU) No 1417/2013 of 17 December 2013 laying down the form of the laissez-passer issued by the European Union. OJ L 353, 28.12.2013, 26–39.

[64] cf. Article 23 TFEU.

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Evidence in administrative proceedings – proof by audio-visual record, proof by the content of the website and other means of proof lacking explicit regulation in the Code of Administrative Procedure

Kateřina Frumarová*

* Kateřina Frumarová, Doc., JUDr., Ph.D., Associate Professor of Administrative Law, Head of Department of Administrative and Financial Law, Faculty of Law, Palacky University, Olomouc, Czech Republic. She is also Evaluator of the National Accreditation Office of the Czech Republic and external reviewer for the evaluation of research, development and innovation results for the Czech government. E-mail: katerina.frumarova@upol.cz,

Abstract

Evidence is one of the most important parts of any administrative procedure. The Czech Code of Administrative Procedure (hereinafter "Code") contains the basic legal regulation of evidence in administrative proceedings and a demonstrative list of evidence. The administrative authorities are therefore not limited in the proceedings to the explicitly stated means of proof. However, the fundamental problem is that the Code regulates the implementation of only those means of proof which it expressly mentions. The Code is completely silent in relation to other means of proof and the course of their implementation. Nevertheless, in many cases, administrative authorities also need to take other means of proof (not regulated by the Code), in particular proof by means of audio-visual recording or proving the content of websites. The author will therefore focus on answering the questions that cause the greatest problems in this context in practice: "What rules must be followed in obtaining this evidence for it to be legal evidence? Under what conditions and by what procedure should the administrative authorities take this evidence? To what extent can analogy be followed in the implementation of this evidence?" The answers to these questions will be demonstrated mainly in relation to audio-visual evidence and the evidence of the content of the website. This is because of the evidence that is gaining in frequency and importance with regard to the development of modern society and information technology. Based on the analysis of the current administrative practice and case law, *de lege ferenda* proposals will also be formulated in relation to the current (non)regulation of this evidence in the Code.

Keywords

administrative proceedings, Code of Administrative Procedure, evidence, proof by audio-visual record, proof by website content.

Introduction

It is important for any legal process that the matter is decided in a lawful and factually correct manner. It is therefore essential for the competent public authority conducting the proceedings to have sufficient information to issue a decision (Průcha, 2019, 178). Probably the most voluminous group of documents for issuing decisions by administrative bodies is evidence. Evidence is therefore one of the most important parts of any administrative procedure. However, the Code,[1] as a general and basic legal regulation governing administrative proceedings, does not characterise the concept of evidence. However, with the help of administrative doctrine and case law, the institution of evidence can be defined. It is a set of acts by the administrative body performed *ex officio*, the aim of which is to ensure that the decision corresponds to the circumstances of a particular case and is in accordance with laws and other regulations.[2]

The evidentiary process has several stages. The administrative authority must first consider which facts must be proved and by what means. Furthermore, the administrative body must deal with the proposals by the participants in the proceedings to introduce evidence. The administrative authority then needs to obtain and adduce evidence. At the final stage, the administrative body must evaluate the evidence presented and draw appropriate conclusions from it for a decision based on its merits (Fiala et al., 2020, 275–276). In this respect, the administrative body is bound in particular by the principle of legality[3] as well as the principle of material truth, as expressed in § 3 of the Code. This means that the administrative body must proceed in such a way as to find out the state of affairs about which there are no reasonable doubts, to the extent necessary for the compliance of its action with the requirements set out in § 2 of the Administrative Procedure Code.[4]

The documents for administrative decisions including the evidence are always primarily provided by the administrative body. It is a manifestation of the investigative principle, which is typical of Czech administrative proceedings. Thus, traditionally, the general regulation of administrative proceedings establishes the responsibility of an administrative body for the appropriate discovery of the factual basis for issuing a decision on the merits. However, this construction is partially modified, respectively supplemented by the obligation of the parties to provide all co-operation in obtaining the documents, as well as the burden of proof in connection with the stated allegations.[5] Proposing evidence is an important procedural right of the parties and, due to the dominant principle of the unity of proceedings, the parties are entitled to adduce evidence throughout the proceedings until a decision is issued. At the same time, however, it is also an

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1 Zákon č. 500/2004 Sb., správní řád. [Act No. 500/2004 Coll., Code of Administrative Procedure], Sbírka zákonů [Czech Official Gazette].

2 Rozsudek Krajského soudu v Hradci Králové [Judgment of the Regional Court in Hradec Králové], 15 February 2007, 51 Ca 9/2006.

3 Čl. 2 Ústavy ČR a čl. 2 Listiny základních práv a svobod [Art. 2 of the Constitution of the Czech Republic and Article 2 of the Charter of Fundamental Rights and Freedoms].

4 "*As the Supreme Administrative Court reiterates, in relation to the facts, the law establishes an obligation for administrative authorities to proceed in such a way as to establish the state of affairs of which there is no reasonable doubt … It is a rationalized version of the principle of material truth*." Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 26 March 2008, 9 As 64/2007.

5 Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 14 March 2019, 1 As 367/2018.

obligation, because, according to the Code, the participants are obliged to indicate the evidence in support of their claims (§ 52). Thus, even in administrative proceedings, the procedural activity of the participants is reflected in the duty of assertion and in the duty of evidence (Skulová et al., 2020, 158). Typically, the procedural activity of the participants in the proceedings will primarily be manifested in proceedings where the participant applies for a certain authorization to be issued (e.g. a permit or concession.). On the contrary, in proceedings where an obligation is to be imposed, the evidence will mainly relate to the exercise of the rights of the defence (e.g. misdemeanour proceedings).

Although the administrative body is not bound by requests by the participants to submit their evidence, it must always ensure there is the evidence necessary to establish the state of affairs. In that regard, it must be emphasized that the administrative authority does not have unlimited discretion of how to deal with the participants' proposals for the introduction of evidence. Although it is not obliged to introduce all the evidence proposed by the participants, if it fails to do so, it must then state, in the reasons for each administrative decision, why this has happened. The administrative body is therefore not only entitled, but also obliged to weigh which evidence needs to be provided with due care, considering what basis for the decision must be provided in order to give a lawful and factually correct decision on the merits.[6]

The Code stipulates that, as part of the introduction of evidence, the administrative body may use all means that are capable of ascertaining the state of affairs and which are not obtained or performed in contravention of the legal regulations.[7] The Administrative Procedure Code explicitly lists documents, searches, witness testimony and expert opinions as examples of evidence.[8] However, this list is only demonstrative, so it is possible to use other means of evidence other than those explicitly mentioned here. The administrative authorities are therefore not limited in the proceedings to those four explicitly stated types of evidence. However, the fundamental problem is that the Code regulates the implementation of only those means of evidence that it explicitly mentions. It is completely silent in relation to the other means of proof and the method of introducing other evidence.

Nevertheless, in many cases, administrative authorities also need to provide evidence that is not regulated at all by the Code. Such means of evidence may include, in particular, evidence by means of an audio-visual recording, proving the content of the website. We cannot omit evidence by questioning the party to the proceedings or carrying out a formal identification of an object or person (although it is not very common). However, with these means of proof and their assessment, problems often arise in practice. In particular, there is no legal basis for answering the following key issues: "*What rules must be followed in order for evidence to be obtained in accordance with the law? Under what conditions and using what procedure should the administrative authorities introduce this evidence? To what extent can an analogy be followed in the process of the introduction of evidence*?" The answers to these questions will be demonstrated mainly in relation to the audio-visual evidence and the evidence of the content of the website. These are the means of evidence which, with regard to the development of modern society and information technology, are gaining in frequency and importance. However, other means of evidence not regulated by the Code will not be left out either. Based on the analysis

6 Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 13 November 2009, 5 As 29/2009.

7 For more details see Vedral (2012, 519 et seq).

8 More details on these means of proof see Jemelka et al. (2016, 288–308).

of the current administrative practice and case law, *de lege ferenda* proposals will also be formulated in relation to the current (non)regulation of this type of evidence in the Administrative Procedure Code.

Evidence through audio-visual recording

Given that companies are experiencing a period of rapid technological growth, audio-visual recording has become one of the important means of proof. Although the frequency of its use in administrative proceedings is increasing, it is unfortunately not included in the demonstrative list of evidence in the Code. Therefore, there is no legal regulation for its implementation in administrative proceedings. The initial question that was addressed in this regard was whether or not it was a separate type of evidence. The case-law concludes in that regard that the screening of an audio-visual recording may be regarded as a specific case of search, since it is closest in nature to it.[9] However, the question is whether it should not be considered as a separate type of evidence. After all, evidence by audio-visual recording shows certain differences and specifics compared to proof by search, both in terms of the method of its acquisition and subsequent realization. I therefore personally tend to conclude that it would be appropriate to include the evidence by audio-visual recording as a separate type of proof in the list of evidence in the Code and at the same time to enshrine its implementation, at least in its basic features.

However, the main problem that arises in connection with this means of evidence in Czech administrative practice is a situation where such audio-visual recordings (e.g. camera system recordings, recordings made on a mobile phone, etc.) are made without the consent of the persons concerned. The point is that, in such cases, the right of these persons to privacy (Wagnerová et al., 2012, 186 et seq) may be endangered or even violated. These means of evidence most often occur in administrative tort proceedings, especially in misdemeanour proceedings. As there is no legal regulation of the procedure in such cases, the solution is derived from the case law (of Czech courts and the European Court of Human Rights).

When assessing the admissibility of audio-visual recordings made without the consent of those persons intercepted as evidence in administrative proceedings, it is always necessary to assess first whether there is a conflict between the right to privacy on the one hand and another public interest on the other.[10] Therefore, the administrative body must primarily examine whether the record is at all capable of interfering with the protected private sphere of a natural person. Above all, it will be necessary to find out whether the record could interfere with the privacy of the person in any way. There is certainly a fundamental difference in the perception of privacy, for example in residential areas on the one hand and in public areas marked with a warning of camera surveillance on the other.[11]

Unless any interference with the personal rights in question is ruled out, the next step to be taken in assessing the applicability of the audio-visual recording must be to find out who pro-

[9] The Supreme Administrative Court states that "*there is no reason why the projection of a video should be constituted as a separate type of evidence if the legislator themselves, knowing that the video will certainly be a frequent means of proving the facts, has not done so*." Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 26 November 2008, sp. zn. 2 As 59/2008.

[10] For example, the interest in punishing the perpetrator of the offense, the interest in nature conservation, and more.

[11] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 18 November 2011, 2 As 45/2010.

vided it. There is a fundamental difference between whether the recording was made by a public authority or whether the author is a private person. If there was a vertical relationship between the author of the record and the person concerned (whose personal rights were affected by the record), such a procedure must be expressly envisaged by law and all conditions required by law must strictly be met.

If there is a horizontal relationship between these subjects, such a record and its use as evidence in administrative proceedings cannot be ruled out *a priori*, even if not all the legal requirements associated with making such a record have been met. In such a case, however, it will be necessary to consider whether, for example, the interest in clarifying the infringement in a particular case outweighs the interest in preserving the privacy of the recorded person.[12] For example, the Czech Supreme Administrative Court has accepted the possibility of using a video recording taken by a journalist as evidence in the matter of an administrative offence by a taxi service operator.[13] Furthermore, the court did not rule out the possibility of using a recording of a telephone conversation between the supplier's sales manager and the customer's employee in order to determine whether prohibited agreements were concluded and complied with, which could lead to distortions of fair competition and thus to tortious conduct.[14] As in proceedings on administrative offences, it is necessary to proceed in other administrative proceedings as well. It is always necessary to assess whether the protection of a particular public interest prevails in a given procedure over the protection of the privacy of the person in the audio-visual recording.

In the case where the audio-visual recording was made by a public authority without the consent of the person concerned, it is necessary to assess, from the point of view of its applicability in the proceedings, whether such a procedure was expressly envisaged by law and whether all conditions required by law were strictly met. Within this assessment, the classic three-stage test is applied: a legal basis – a legitimate aim – a necessity / proportionality.

The first condition examined is therefore the existence of a legal basis for the acquisition of an audio-visual recording (and thus essentially for a certain interference with the right to privacy) by a public authority. In addition to the basic requirement for the very existence of binding legislation, such legislation must also provide protection against arbitrary interference with the rights of the individual and be clear enough to provide individuals with adequate information on the circumstances and conditions under which public authorities may resort to a recording.[15] Another condition for finding "compliance with the law" is the availability of the legislation. If the legislation then gives the state authorities a certain discretion in this respect, it must also determine its scope, or conditions that must be met. From this point of view, the key decision of the Supreme Administrative Court stated: "*There is no legal basis in the Czech legal system for*

[12] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 2 August 2013, 4 As 28/2013.

[13] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 28 November 2007, 7 As 7/2007.

[14] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 31 October 2013, 8 Afs 40/2012. See also Rozsudek Nejvyššího soudu [Judgment of the Supreme Court], 11. 5. 2005, 30 Cdo 64/2004, where the court stated that "the calls of natural persons, which take place in the exercise of a profession, business or public activity, are generally not in the nature of personal expressions. Evidence by audio recording of such a call is therefore admissible in civil proceedings."

[15] Judgment of ECHR in Case of Khan v. the United Kingdom, 12 May 2000, no. 35394/97; or Judgment of ECHR in Case of Bykov v. Russia, 10 March 2009, no. 4378/02.

the secret making of audio-visual recordings by public authorities for administrative purposes if they interfere with the "private life" of natural persons. Section 51 of the Administrative Procedure Code is not such a basis, according to which all means of evidence which are suitable for ascertaining the state of affairs and which are not obtained or performed in contravention of legal regulations may be used to introduce evidence."[16]

The second condition is that the interference – in our case, the use of an audio-visual recording and the resulting interference with the right to privacy – leads to a legitimate aim. These goals are defined in the Charter of Fundamental Rights and Freedoms and in the Convention for the Protection of Human Rights and Freedoms in so-called "legally vague terms" – such as state security, national security, public order, public security, crime prevention, protection of health or morals, protection of the rights and freedoms of others, nature protection and more. Some of these terms are then defined by law; some of them, although widely used (e.g. the term "public order"), are not clearly defined by the legal system, and are therefore interpreted by the case law of the courts. From a constitutional point of view, it is irrelevant whether these terms are delineated by the legislator or interpreted by case law; it is decisive that they must not be expanded further.[17]

The third condition stipulates that an interference with rights must be inevitable, or necessary in a democratic society. Even these concepts are not further defined in the Charter of Fundamental Rights and Freedoms or in the Convention, but it is clear that they entail a certain urgent social need, the concretisation of which represents room for discretion and justification by the legislator. In connection with the assessment of the necessity of intervention by a public authority in the rights and freedoms of the individual, the Czech Constitutional Court ruled that "*if the constitutional order of the Czech Republic allows a breakthrough in the protection of rights, this is done solely and exclusively in the interest of the protection of a democratic society, or in the interest of the constitutionally guaranteed fundamental rights and freedoms of others. In order not to exceed the limits of necessity, there must be a system of adequate and sufficient safeguards, consisting of appropriate legislation and the effective monitoring of compliance.*"[18]

If an audio-visual recording made by a public authority without the consent of the defendant is to be used as evidence then all the above criteria must be met cumulatively. Thus, if the first of them is not already met, there is no need to examine the existence of other criteria. If these criteria are not met, it is an illegal means of evidence and it cannot be used in administrative proceedings.

From a European point of view, it can be stated that the ECtHR is quite benevolent in its decision-making practice as regards the assessment of the admissibility of evidence (Kmec et al., 2012, 762). The question of the admissibility of evidence falls primarily within the scope of national law and therefore the fact that the evidence was taken in breach of national law or other rights or freedoms guaranteed by the Convention (other than the right to a fair trial) does not necessarily constitute a violation of Article 6 of the Convention.[19] In Heglas v. The Czech Republic,

[16] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 5 November 2009, 1 Afs 60/2009.

[17] Nález pléna Ústavního soudu ČR [Judgment of the Constitutional Court of the Czech Republic], 20 May 2008, no. 355/2008 Sb.

[18] Nález pléna Ústavního soudu ČR [Judgment of the Constitutional Court of the Czech Republic], 20 May 2008, no. 355/2008 Sb.

[19] Judgment of ECHR, in Case of Schenk v. Switzerland, 12 July 1988, no. 10862/84.

the ECtHR concluded: "*The court (i.e. the ECtHR) therefore does not, in principle, rule on the admissibility of certain types of evidence, such as evidence obtained illegally under national law, or due to the complainant's fault. It must assess whether the proceedings, including the manner in which the evidence was obtained, were fair as a whole.*"[20] At the same time, the ECtHR does not in itself consider that a person has been found guilty on the basis of evidence obtained in breach of the law as a violation of the principle of the presumption of innocence guaranteed by Article 6 of the Convention.[21]

The Czech Supreme Administrative Court also assumes that the mere use of evidence obtained in violation of the law (incl. audio-visual recording) and thus a violation of the relevant procedural regulations may not in itself result in the illegality of the decision in the case.[22] The relevance and seriousness of the evidence used for the conclusions reached by the competent authority, which will be reflected in the decision on the substance, must always be assessed. For example, in a situation where the offence is proved by evidence other than an illegal audio-visual recording, this is not a defect which would render the decision illegal. Reversing such a decision would be "*mere formalism*". On the other hand, this does not preclude a situation where an illegal audio-visual recording will be the main or even the only item of probative value and the decision will have to be annulled.

Proving website content

The content of websites is increasingly becoming the subject of evidence in administrative (and judicial) proceedings in the Czech Republic. Unfortunately, the Code does not regulate this form or how to process it. The procedure is therefore so far only inferred by the case law of administrative courts. The case law generally acknowledges that there are several ways to prove the content of a website. Both the screenshot and the printed page are acceptable. Particular attention must be paid to the credibility and sufficient capture of the real content of the website.[23]

A credible way of capturing website content depends on what aspect of the website content needs to be proved in administrative proceedings. If it is necessary to prove the existence of a statement in the text published on the website, it is sufficient to print a part of the page with text without graphic elements.[24] However, if it is not only the text, but also the graphic elements accompanying it (e.g. pictures of goods, illustrations, etc.), capturing the content of the page must be done so that the relevant graphic elements are not distorted or eliminated. The method of capturing website content also determines whether the question is if specific information with a specific content was published on the website (e.g. whether a defamatory article was published on the Internet) or whether the absence of certain information on the website was proved (for example, failure to specify mandatory advertising requirements). While in the first case the printing of a website documenting only the existence of a proven fact would suffice, in the second case it is necessary to capture the appearance of the website more comprehensively.

[20] Judgment of ECHR, in Case of Heglas v. the Czech Republic, 1 March 2007, no. 5935/02.

[21] Judgment of ECHR, in Case of Schenk v. Switzerland, 12 July 1988, no. 10862/84.

[22] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 2 August 2013, 4 As 28/2013.

[23] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 24 August 2016, 1 As 80/2016.

[24] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 4 March 2009, Pst 1/2008.

It is necessary to document all elements of the website that would actually be able to carry a certain message that is to be absent from the site.

The "time fixation" of this means of evidence is also important. The point is that "*the content of the same website, given the nature of the internet, can be – and usually is – changing over time*".[25] It is therefore important for the administrative body to record the status of the website on which it relied at the time of its decision (either by printing or by storing it on an electronic data carrier). This capture is particularly important for the subsequent judicial review of an administrative decision. Indeed, there is no guarantee that the information on the website at the time of the judicial review will be the same as that at the time of the administrative authority's decision.[26]

For the sake of completeness, it should be added that evidence in the form of a notary record certifying the existence of "electronic" evidence (the existence of a website with a certain content on a certain date) is also admissible.

Other means of evidence not expressly regulated by the Administrative Procedure Code

Evidence in the form of an audio-visual recording or a website is not the only means of proof not provided for in the Code, and yet it is or may be used in administrative proceedings.

An example is hearing of a party to the proceedings, which is not explicitly mentioned in the list of evidence in the Administrative Procedure Code and the Code does not contain any regulation of its implementation. However, the Code envisages it in relation to contentious proceedings, when it stipulates in § 141 that a participant in the disputed proceedings may be heard if the facts of the case cannot be proved otherwise. However, it does not specify anything else, especially not the method of implementation.

The hearing of a party to the proceedings is also mentioned in the Act on Liability for Misdemeanours and Proceedings Concerning Them (Section 82). Specifically, it is an interrogation of the accused. In contrast to the Code, there is at least a minimal adjustment of the procedure for the implementation of this means of evidence. In particular, it sets out some important principles, namely that the accused has the right not to testify. The administrative body must also not force the accused to resign or confess. The ban on self-incrimination is therefore strongly respected. The administrative body shall inform the accused, before the interrogation, of their right not to testify and of the prohibition to conduct the interrogation.

Evidence can also be taken by questioning a party to the proceedings in such those administrative proceedings for which it is not expressly regulated by law, but its applicability is considerably limited. Hearing a party is not intended to enable them to state their claims on decisive facts, nor to comment on other evidence adduced in that form. In administrative proceedings, the submissions, proposals and other procedural acts of the party to the proceedings primarily serve this purpose.[27]

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[25] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 15 March 2009, 1 As 30/2009.

[26] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 12 April 2011, 1 As 33/2011. The Supreme Administrative Court also commented on the possibility of proving the content of the Wikipedia online encyclopaedia. The court stated that the administrative authorities are not restricted in the choice of evidence under the Administrative Procedure Code. Although the evidence provided by an open web encyclopaedia may be less credible, it is certainly not *a priori* inadmissible. Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 20 May 2015, 4 As 58/2015.

[27] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 6 February 2014, 6 A 147/2013.

Given that the Code, as a general regulation on administrative proceedings, does not specify the procedure for questioning the participant, the situation has to be resolved by analogy. It can therefore be considered that, if the hearing of a party to the proceedings is carried out, the administrative body shall proceed by analogy according to the legal regulation of the examination of a witness. This is contained in Code in Section 55. However, the procedure must be applied appropriately; it is necessary to distinguish between the position of a witness on the one hand and the position of a party in the case on the other. In particular, the extent to which the duty of a witness, to testify truthfully at all times and not to conceal any facts is open to question, especially in proceedings where a participant has an obligation imposed. Even in view of this fact, it would again be appropriate to regulate this evidence and the procedure for its implementation, at least with the basic features in the Code. Its regulation in the Code is all the more important because, in cases where a participant is a legal entity and a person in the position of the statutory body of that legal entity is to be heard then, according to the case-law, it is necessary to proceed in the same way as when questioning a participant.[28] Where a person acts in a dual position, as a party to the proceedings and as a witness, it is necessary to distinguish carefully when such a person acts as a witness giving their testimony and when they testify as a party to the proceedings.

Another means of proof that is not regulated in the Administrative Procedure Code is identification. It is a means of proof used in criminal law and regulated in the Code of Criminal Procedure (Section 104b), being a procedural act consisting of the identification of an object – namely persons or things and the aim is to determine their identity beyond doubt. I agree with the case-law that, although the Code does not regulate the conditions for the introduction of evidence by its identification, it can be used as evidence in administrative proceedings.[29] By analogy, the regulation in the Code of Criminal Procedure would have to be followed.

Conclusion

Undoubtedly, it can be argued that, as society changes and evolves, as does the means and technologies it uses, so does the structure and nature of the evidence used in administrative proceedings. We can state that new means of evidence are increasing and that they often play a crucial role in proving certain facts in the proceedings. A typical example might be audio-visual evidence or evidence of website content. However, although these means of evidence are increasingly used in administrative proceedings, their explicit legal regulation is lacking. The most important legal regulation in the area of Czech administrative procedural law is not applicable to their regulation. This shortcoming is all the more noticeable because it is these types of evidence that are widely used in administrative tort proceedings. These are serious cases affecting the rights and legitimate interests of the addressees of public administration and ensuring their protection, and at the same time concerning the basic attributes of a democratic society and the rule of law. On the one hand, there is the right to a proper and fair trial and the right to privacy; on the other hand, the legitimate interest of society and the state in the proper and objective finding of an infringement and its just punishment.

[28] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 31 March 2010, 1 Afs 58/2009.

[29] Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 15 January 2009, 7 Azs 22/2008.

The problem is not that there are doubts about the use of these forms of evidence in administrative proceedings. The Code contains only an indicative list of means of evidence, so it is not a "numerus clausus" in this respect. However, there are fundamental doubts; first, under what conditions to regard such evidence (in particular audio-visual recordings) as evidence obtained in a lawful manner. This is a crucial issue, as the introduction of illegal evidence in the proceedings has an impact on the legality of the decision on the merits. Second, a significant problem caused by the absence of legislation is also the fact that at least the basic rules for the procedure for introducing such evidence are completely missing. This can also have a number of consequences, such as limiting the possibility of a subsequent judicial review of the issued decision (in cases when the administrative body did not properly capture and fix the website and its content in the file). The advantage of the current situation is that these shortcomings of legislation are currently being replaced by the Czech administrative courts (often based on the case law of the ECtHR). It is the case law of the Czech courts that defines the conditions for the applicability of these "non-regulated" means of evidence in administrative proceedings, as well as the basic rules for their implementation in proceedings. Courts often base their conclusions on the analogy of legis.

In view of all the above, I therefore think that the Administrative Code should reflect social development and its reflection in the field of communications and information technologies. Therefore, it would be appropriate for the Code not only to regulate the traditional and historically older means of proof, but also to regulate the modern ones, in particular evidence via audio-visual recordings and the proof by the content of websites. Given the frequency of use of the interrogation, it would be appropriate to pay attention to this means of proof as well.

In relation to all such means of evidence, in particular the rules governing the legality of the introduction of the evidence, its credibility and preservation should be added to the Code. At the same time, the procedure for their implementation within the evidence in the proceedings should be outlined. Of course, this amendment to the Code would not preclude the need to assess such evidence and its admissibility in each specific case, but it would at least set out the basic conditions and procedures that would facilitate such an assessment by the administrative authorities. This would also contribute to greater legal certainty for the addressees of public administration.

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Contributions to the interpretation of the concept of autonomy in the light of the model change in Hungary

Zsuzsanna Árva*

* University of Debrecen, Faculty of Law and Political Sciences, Department of Administrative Law, senior professor. E-mail: arva.zsuzsanna@law.unideb.hu

Abstract

The notion of university autonomy is a principle that is often invoked in higher education discourse, despite the fact that its precise content needs clarification. Although there is a rich domestic and international literature on the autonomy of higher education over the historical period, the principles set out therein cannot provide the necessary starting point, since the concept of autonomy varies from one historical period to another and cannot be regulated definitively. Due to the model changes in Hungary, the concept of autonomy has come to the fore again, so it is necessary to examine what is generally understood by the concept in the Hungarian literature and to what extent it is in line with international terminology. To this end, this study reviews the domestic constitutional court case law on the concept of autonomy and its changes, and then discusses the international standards of university autonomy, as defined by the European University Association, its components and the aspects of international comparative studies. It then discusses the position of Hungarian higher education institutions among European universities and, points to possible changes.

Keywords

freedom of teaching and learning, university autonomy, higher education institutional system, university model change, organisational autonomy

1. Introduction

The institutional reforms in Hungary in 2020 and 2021 and the debates around them have brought the concept of university autonomy back to the fore. Despite the many and frequent references to university autonomy in higher education discourses, its precise content needs to be examined. Although there is a rich literature on autonomy in higher education up to 1990, and especially in the historical period, we have to agree with Gábor Hamza that the concept of autonomy varies from one historical period to another; it cannot be regulated definitively and can be interpreted in several different ways (Hamza, 2013, 239–240). Thus, although the historical development of the concept of autonomy is an important issue, a different starting point should be chosen for examining the contemporary changes.

The concept of autonomy is inescapable in Hungarian public law literature and higher education discourse, and almost all works refer to it; however, there are very few works that clarify its content.

An important factor in this context, as Gábor Hamza points out, is that university autonomy should not be confused with the notion of academic freedom, which Hamza associates with the civil liberties of the individual, while autonomy is clearly a characteristic of the institution (Hamza, 2013, 230). However, it is precisely the undoubted connection with the concept of academic freedom that has also been the reason that the Hungarian literature has mostly invoked the issue of higher education autonomy as a principle closely connected to the legislative changes affecting higher education in Hungary, drawing on its historical traditions. As Miklós Kocsis has noted in several studies, autonomy in general is a misunderstood concept in the Hungarian higher education discourse (Kocsis, 2010, 132), which is certainly plausible insofar as the Hungarian concept of autonomy is not sufficiently clarified and is not always in line with international trends and interpretations.

Considering that recent legislative changes have brought the issue back to the fore, it is worth examining what is generally understood by the term in Hungarian literature, and to what extent this is in line with international terminology. Among the former, I will also examine separately the constitutional court decisions that have had a significant impact on Hungarian public law literature, which have strongly influenced the shaping of the concept, while, with regard to the international aspect, I will take the conceptual framework and terminology of recent comparative research as a basis, comparing it with the Hungarian discourse.

2. The Constitutional Court's attempts to interpret autonomy

2.1. Approaches to the concept of autonomy between 1993 and 2005

The first independent higher education act in Hungary was Act LXXX of 1993, which laid down the foundations of higher education until 2006. The legislation defined institutes of higher education as a professionally autonomous legal entity with self-government,[1] in relation to which the concept of autonomy is explicitly mentioned in the chapter title of Part Four (Self-government/[autonomy] and supervision of higher education institutions), without doubt identifying it with self-government at the level of legislation.

The informal reasoning attached to the proposed law also makes several references to autonomy, on the basis of which the following elements can be identified:

- The law considers the concepts of freedom of learning and teaching and university autonomy to be mutually dependent on each other.[2]
- Autonomy is a concept that needs to be protected, and the institution must also be protected from interference by state bodies.[3]
- "Institutional autonomy is based on the freedom of the staff and students of the institution", a freedom which, according to the context, applies in part to institutional norm-setting.[4]

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1 Act LXXX of 1993 on Higher Education, Article 2(1).

2 "From the freedom of learning, teaching and academic research follows the autonomy (self-governance) of institutes of higher education."

3 One of the main objectives of the Proposal was to protect the autonomy of higher education, and therefore governance powers are usually conferred at the highest level of all legal sources, i.e. by law.

4 The Proposal defines the limits of the self-government (autonomy) of institutes of higher education in line with the existing legislation, but in a clearer way. According to the Proposal, all matters which are not expressly referred to the competence of a state or local government body by law or other legislation issued on the basis of a statutory authorisation fall within the competence of the institution.

In the latter context, it is important to note that the creation of internal institutional norms is still an important factor in higher education.[5]

It can therefore be concluded that autonomy became a concept closely related to freedom of teaching and learning, and later rather confused with it, the main factor being freedom and protection against state interference, which the legislator did not define in more concrete terms. The same tendency can be seen in these processes as in the case of local governments, with the state granting extensive self-government to institutes of higher education as a counteraction to the previous period. This was also reflected in the fact that, strangely enough, it was possible for the institution to determine the level of training and the name of the course.[6]

Some Constitutional Court decisions in this period already touched on the concept of autonomy in higher education, although this was done without interpreting it. It can be outlined from the decisions that, based on the concept of autonomy at that time, the freedom of the institution could only be limited by law. Thus, Constitutional Court decision no. 35/1995 (VI. 2.) AB confirmed the right of the institution to decide on the admission procedure, the study and examination rules and the disciplinary proceedings.[7] Then, in the same year, Constitutional Court decision no. 40/1995 (VI. 15.) AB, as part of the economic stabilisation package, ordered the annulment of the government decision-level rules on the number of the teaching staff, referring to the principle of autonomy, and stipulating that institutes of higher education are not under the control of the Government.

More significant findings are contained in a decision taken in 1999, which already foreshadowed the contours of subsequent decisions from 2005-2011. Decision no. 870/B/1997 considered the activities of institutes of higher education as an institutional form of freedom of teaching, for which the legislator granted the institution a high degree of autonomy, which the decision identified with the rights of self-government guaranteed by law. On this basis, the institution has the right to decide on all institutional matters that are not referred to the competence of the state or local government by law or other legislation based on the authorisation granted by law. However, the state may limit this right by law or by other legislation issued on the basis of a statutory authorisation, such as the unification of higher education, or the provision of basic requirements for the course on which a diploma is based.[8]

This decision thus defined, in a forward-looking way, the essential elements of autonomy, which is a right of self-government, the basis of which is laid down by law, but which can be limited both by law and by implementing government decrees.[9]

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[5] See Article 51(1) of Act LXXX of 1993 on Higher Education. At the same time, Article 11(1)(a) of the currently effective Act CCIV of 2011 on National Higher Education already stipulates that the regulations also contain provisions that are not excluded by other legislation.

[6] The Supreme Court ruled in decision no. KGD2004. 60 that the determination of the level of the degree is also a matter of university autonomy, referring to Article 70/G (1) of the Constitution being in effect at that time. Thus, for the degree programmes issued until 2006, the degree catalogue did not even include the exact name of the qualification for some degrees (e.g. law), so, in the spirit of university autonomy, graduates with the same degree could obtain differently named qualifications in different institutions. At the same time, an important motivation for both the court decision and the legislation was the reference to Article 70/G (1) of the Fundamental Law, which defined the freedom of teaching and learning, i.e. the freedom of education, thus inextricably linking the concept of domestic autonomy to the freedom of education.

[7] Constitutional Court decision no. 35/1995. AB, ABH 1995, 163, 166–167.

[8] Constitutional Court decision no. 870/B/1997 AB, ABH 1999, 611, 613.

[9] The question relating to the level of the legal source was raised in Constitutional Court decision no. 51/2004 (XII. 8.) AB, which classified the rules on the course structure as falling within the scope of the law. ABH 2004, 679.

2.2. A time of transition: 2005

The new law, passed in 2005, sought to contain the almost unlimited concept of autonomy or, in other words, attempted to limit it. The adopted legislation was subject to a prior norm control procedure, which resulted in Constitutional Court decision no. 41/2005 (X. 27.) AB. The decision considered the autonomy of higher education as a defining characteristic of institutes of higher education, under which the higher education institution operates autonomously and independently of the Government and the state administration.[10]

The core of her argument is that the existence of an institution does not in itself guarantee autonomy. At the heart of autonomy is the freedom of academic practitioners to engage in academic activity without interference. This should also be guaranteed by the organisational rules governing decisions on research and education, which also include independence from the executive branch. According to the petition, the main custodian of autonomy is the university community itself as a self-government. By contrast, the law actually passed gave certain powers to a governing body that is partly independent of academics, which powers would have enabled that body to influence the conduct of academic activity, whereas, according to the petition, "academic freedom, the freedom of teaching and learning are achieved through the autonomy of institutes of higher education".[11]

Since this argumentation therefore not only establishes a link but almost identifies freedom of teaching and learning with autonomy, the direct consequence is therefore that, according to the submission, any legal regulation that restricts autonomy is a violation of Article 70/G of the Constitution.

The Constitutional Court also highlighted the importance of the issue by pointing out that the freedom of academic activity is not only directly related to other fundamental rights (communication rights, etc.), but its restriction also has a social impact and, based on historical experience, freedom of academic activity is a fundamental guarantee of progress, which is also the basis of individual autonomy. "The free pursuit academic theories, statements and truths, and the free flow of academic ideas and opinions, are thus prerequisites for the development of society as a whole, of humanity, and a guarantee of the free development of the individual."[12]

In the course of its interpretation, the panel noted that, in the practice of the Constitutional Court, the functioning and autonomy of institutes of higher education institutions was a rule related to Articles 70/F and 70/G of the Constitution in the period between 1990 and 2005. According to Article 70/G, academic freedom and freedom of teaching were considered a kind of right of communication, which is generally enjoyed by all, but whose main guardians are the practitioners of academia. The purpose of science is knowledge and, in this context, the neutrality of the state with regard to scientific truths is a constitutional requirement, while the freedom of academic research and the dissemination of scientific knowledge must be guaranteed to the practitioners of academia. According to the Constitutional Court's interpretation, "in a broader sense, freedom of science also belongs to the freedom of expression in general",[13] which is therefore subject to the rules on restrictions of communication rights.

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[10] Marianna Fazekas argues that the 2005 legislation has resulted in an overall more confusing regulatory system by concretising certain elements of autonomy (Fazekas, 2008, 158).

[11] Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 460.

[12] 34/1994. (VI. 24.) ABH 1994, 177, 182.

[13] Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 471.

The Constitutional Court, comparing the text of the Magna Charta Universitatum, the national legislation and the texts of the Ministerial reasoning attached to the legislation, found that the autonomy of higher education covers teaching, research, the internal organisation of the institution, its operation and the autonomy of financial management, and its subjects are the institution, the teacher, the researcher, the student and their community. The limit to the autonomous exercise of rights is a claim by other right holders.

Thus, in the interpretation, autonomy is inextricably intertwined with the freedom of science as a civil liberty, in connection with which the panel emphasised the now well-established principle in relation to economic, social and cultural rights that it is not sufficient for the state not to restrict the right, but it is also necessary to guarantee its institutional framework, where scientific, educational and research activities can freely take place, since the state has an obligation to protect institutions. On this basis, rules must be developed to guarantee the free exercise of scientific, educational and research activities. The essence of free academic activity is the free implementation of academic values, free from outside influence.[14]

Thus, the decision was in line with the petitioner's concept of autonomy, and at the same time it almost inextricably linked the concepts of freedom of teaching and learning and autonomy, on the basis of which we have to agree with the dissenting opinion of László Kiss, Judge of the Constitutional Court, according to which the mere existence of the governing (and as the dissenting opinion states: more correctly, leading) body, and even the "touching" of the higher education institution[15] may be unconstitutional, since, according to the decision, the autonomy of higher education is a guarantee that the higher education institution is autonomous and independent from the Government and the state administration.

Following the majority decision, the elements of higher education's autonomy can be summarised as follows:

Autonomy in a narrow sense is academic freedom, which therefore applies to academic, research and educational matters, while, in a broader sense, it is organisational, operational and financial management autonomy, which includes self-governance. The safeguards are:

- The National Assembly determines the basic rules governing institutes of higher education, in particular the establishment, closure, central budgetary support, *et al,* of institutes of higher education.

- Ensuring internal norm-setting, whereby the internal life, organisation and functioning of the institute of higher education is determined by the institutional rules adopted by the institution itself.

- The creation of a representative body and a self-governing body of the institute of higher education itself, i.e. a community of teachers, researchers and students. These bodies can take both normative and individual decisions, and the right to submit appeals to the courts against the latter is guaranteed.

- Financial management autonomy, with state support for higher education as a guarantee of academic freedom. In this context, the primary concern is to ensure that the performance criteria are in line with academic criteria, and that market utility and political expediency are in no way the sole considerations.

With regard to autonomy, the panel also referred to its practice in relation to local governments and, although it stated that the university as an autonomous public institution cannot be

[14] Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 473–474.

[15] Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 489.

identified with local governments in organisational terms, the findings in relation to autonomy (self-governance) can be applied *mutatis mutandis*. In particular, such an element is the establishment of the organisational structure, with the possibility of restrictive rules to promote the economic efficiency and organisational rationality of the institute of higher education.[16]

The majority decision was accompanied by a dissenting opinion by Judge László Kiss, in which he also mentioned the possibilities of comparison with local governments, but he also established a rather precise and logically interrelated set of five criteria, as follows:

- Independent legal personality, which is a prerequisite for the independent establishment of legal relations. This element was not emphasised in the majority decision.

- Use and independent exercise of its own powers, prohibition of withdrawal of powers. However, the dissenting opinion also points out that, as in the case of local governments, it is desirable to subject the exercise of powers in this area to judicial control and it is necessary that the law guarantees the withdrawal of powers in both a positive and negative sense.

- The autonomous development of the organisational and operational structure – within the legal framework – and autonomous decision-making in personnel/staff matters. According to the dissenting opinion, the limitation to this statutory regulation is the Constitution itself: the law may also impose restrictive provisions, provided the Constitution is taken into account and it is possible that its detailed rules are already laid down by regulations.

- Economic autonomy, right of disposal over its own assets. In this context, the dissenting opinion also draws attention to the fact that if the institute of higher education does not manage its own funds from its own revenue, autonomy is only apparent, since the expectations of the funding body may prevail.

- The right of autonomous (internal) regulation, i.e. the possibility to establish internal norms within the framework of the law.

Thus, although the dissenting opinion recognises that institutes of higher education are the custodians of the freedom of teaching and learning, it does not derive the concept of higher education autonomy from it, but from the general content of self-governance. He also stresses that, on the one hand, state control can and should prevail alongside autonomy, since, just as with local governments, institutes of higher education cannot exist as a state within the state, and on the other hand, the possibility of laying down detailed rules through regulations in areas such as awarding qualifications and diplomas is not excluded.

A common element, however, is the possibility of norm-setting, which still has a significant impact today.

In summary, the 2005 decision linked autonomy to the freedom of teaching and learning in general, while the dissenting opinion linked it to the level and depth of the legal regulation, again stressing that the freedom of teaching and learning can be achieved if the law mainly provides guarantees, while the precise delimitation of powers may allow for different levels of regulation as compared to the law.

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[16] Thus, the panel did not consider as unconstitutional the control of the academic and educational activities of institutes of higher education on the basis of economic and organisational rationalisation criteria, the imposition of economic requirements by the maintainer, and the provision of budgetary means and allowances conditional on performance. Furthermore, the allocation of budgetary support exceeding the funds necessary for the operation of the institution and for the performance of its scientific, research and educational tasks according to performance criteria – precisely defined in advance and in accordance with academic criteria – was not considered unconstitutional either.

The clear implication of the norm control decision is thus the intertwining with the freedom of teaching and learning and the direct consequence that autonomy means the prohibition of state interference. The only "lost" area was that the institutions no longer had the right to appeal directly to the Constitutional Court.

2.3. Act CXXXIX of 2005 on Higher Education

The law promulgated in 2005 and the reasoning provided to it were drafted on the basis of the Constitutional Court's above-mentioned opinion and transferred decision-making powers from the governing body to the Senate, emphasising the possibility of norm-setting and the possibility of deciding on academic, cultural and economic matters.

In several respects (establishment, operation, statutory detailed rules), the reasoning repeated the elements of the Constitutional Court decision and also referred to its interpretation of autonomy, conferring on the Hungarian Accreditation Committee and the Higher Education and Scientific Council independent legal personality, in connection with which the reasoning also refers to European Community practice.

Later, in the course of the amendment of the Act, Constitutional Court decision no. 39/2006 (IX. 27.) AB was adopted within the framework of prior norm control, which declared certain decision-making powers related to the Economic Council and the Rector unconstitutional, regardless of their connection with the freedom of teaching and learning. Already at that time, the Constitutional Court judge László Kiss had drawn attention to an extremely important aspect: the decision distinguished between state and non-state institutes of higher education in relation to the rights of the maintainer, while Miklós Kocsis assessed this as a decision that made the institution independent of the founder and, through the rights of the maintainer, independent of the state (Kocsis, 2010, 78).

Constitutional Court decision no. 62/2009. (VI. 16.) AB was also adopted in relation to the rights of the Economic Council and summarised the decisions taken so far concerning autonomy. According to the panel's interpretation, three – already well known – elements of autonomy were distinguished:

- the autonomy of academia as a right to make decisions on academic matters,
- organisational autonomy as the organisational and operational autonomy of the higher education institution,
- financial management autonomy as the free use of funds.

The 2009 decision focused on independence from the Government and the state administration, and, according to the decision, autonomy is primarily derived from Articles 70/F and 70/G of the Constitution, and from which specific fundamental rights such as freedom of teaching, which also extends to the regulation of admissions, can be derived. At the same time, it also acknowledged that the Government also has duties and powers in relation to education policy, pursuant to Article 35(1)(f) of the Constitution. On the basis of a comparison of the two provisions, the decision concluded that the autonomy of institutes of higher education does not preclude the Government from imposing constraints, but the regulation must be based on objective criteria that exclude arbitrary interference by the Government and/or the state administration, and the basis for the regulation must be defined at the level of the law, in relation to which the Government may adopt implementing rules.

These starting points were used for the assessment of the Economic Council as well.[17] The decision also stated that the economic autonomy of institutes of higher education is not an end in itself, but a guarantee of academic freedom. Thus, the level of protection depends mainly on the relationship between the academic and business activities. If the economic activity is only tangentially related to academic freedom and the freedom of teaching, this protection is also lower. In the latter cases, too, it is a requirement – stemming from Article 70/G of the Constitution – that the actual decision is made by a body with higher education autonomy, but the legislator has greater freedom in determining the limits of the decision.

2.4. The Higher Education Act and the model change (2011 to date)

Act CCIV of 2011 on National Higher Education (hereinafter: the Higher Education Act) defines institutes of higher education as organisations established for the purpose of education, scientific research and artistic creation as their core activities, which operate as institutions funded from the central budget and have legal personality. Thus, unlike the Act adopted in 1993, which included self-governance, and also contrary to the 2005 Act,[18] the legislation now only refers to legal personality and operation as a budgetary institution (Fazekas, 2008, 157). At the same time, in the field of internal norm-setting, which many studies consider to be the essence of self-governance, there is a much broader provision than before in Article 11 of the Higher Education Act, according to which any rules may be made which are not excluded by other legislation.[19]

In 2019 and 2020, and – following the ninth amendment to the Fundamental Law – also in 2021, there were several significant legislative changes related to higher education autonomy, the essence of which was that, in the case of state-maintained institutions, the state has established maintenance foundations with special rules for the board of trustees and provided assets to these foundations.

Under the ninth amendment to the Fundamental Law, public interest trust foundations performing public functions have been given constitutional status. The legal institution of trust foundations, which can be regarded as a predecessor, was created and regulated by Act XIII of 2019 as a *lex specialis* compared to the Civil Code. Then, Act CXLVIII of 2020 on the regulation of higher education and the amendment of certain related acts established the concept of a public interest trust foundation performing public functions as of 1 January 2021. Under the law, the public interest objectives included, among others, higher education and research. Annex 1 of Act XIII of 2019 already named 13 such institutions, with one more to join from 1 February 2021. Following the amendment of the Fundamental Law, a cardinal act establishes the rules applicable to these foundations as *lex specialis*.

The scheme also differs from private law foundations in that the board of trustees of the foundation is appointed by the state only at the time of its establishment, and the board of trustees itself subsequently has the right to appoint the trustees to fill any vacancies, so the state is effectively relinquishing its founder's rights in favour of the board of trustees. As a result of the legislation, several public universities in Hungary have changed their model, ceasing

[17] Constitutional Court decision no. 62/2009. (VI. 16.) AB, ABH 2009, 553, 577–581. See also Constitutional Court decision no. 41/2005 (X. 27.) AB, ABH 2005, 459, 476.

[18] Article 1(1) and Article 10(1) of Act CXXXIX of 2005 on Higher Education.

[19] Article 11(1) (a) of the Higher Education Act.

to be state-maintained and becoming state-recognised universities maintained by foundations. Foundations are subject to a minimum capital requirement of HUF 600 million, which does not include assets held by the foundation in fiduciary asset management. Autonomy was introduced as a specific element in the regulation, emphasising the cooperation between the Senate and the board of trustees of the foundation, and explicitly stating that the regulation preserves higher education autonomy with regard to the content and methods of research and education.

Thus, while, in administrative terms, the classical dual nature of the governance of higher education institutions, i.e. the separation of organisational and professional governance, can be observed, the new legislation has now also linked autonomy with the concept of the freedom of teaching and learning, instead of emphasising self-governance. In the case of the University of Theatre and Film Arts, one of the first institutions to be affected by the model change, the Constitutional Court also had to take a position in connection with the impact of the change on the autonomy of higher education.

Constitutional Court decision no. 21/2021. (VI. 22.) examined the issue of the rights of founders and maintainers and the issue of autonomy at the same time. The petition submitted by the judges repeats the elements that appeared in the previous decisions concerning the 1993 and 2005 Acts. These include independence from the executive branch in matters directly related to academic activity, and the organisational and economic rules that go with it. The petitioner, however, complained about the influence of the maintainer, which, in his view, would void the right of self-government.

In general, the decision stressed the importance of the guarantee system in the context of the legal rules. This is in line with the trend towards which the Constitutional Court's rulings have been moving since 2006. Thus, while in the initial period the elements of a quasi state-within-the-state autonomy were outlined, from 2009-2010, they shifted towards the idea that autonomy is not an interest in itself, but that organisational rules must be interpreted in their context, so that several solutions can be envisaged to meet the requirements. The resolution defined the concept of maintainer control in a manner similar to the one used in public administration, which, in conjunction with the "autonomy guaranteed by the Fundamental Law", declared that maintainer control cannot include exclusive decision-making in areas where the higher education institution has autonomy. This is also in line with the concept of the Higher Education Act, which stipulates that the autonomy of higher education institutions with regard to the academic subject and content of education and research must not be infringed by the control exercised by the maintainer. The custodian of the autonomy of the higher education institution is the Senate, which still has the right to legal remedies (litigation) if the autonomy of the higher education institution granted by the Higher Education Act is infringed by the actions of the maintainer.[20]

Nor has it changed the fact that, in the context of autonomy, the starting point was the provisions of the Fundamental Law relating to the right to education, which can thus be a benchmark for the individual rights and their holders and from which several types of institutional solutions can be derived from Article X (3) of the Fundamental Law.[21] Thus, the principle that the framework of organisational rules must be defined by law and must ensure the research and teaching autonomy of the higher education institution remains valid. The basic requirement in this context is Article 1(1) of the Higher Education Act, which applies equally to all higher education institutions, regardless of the maintainer. In contrast, there is a substantial difference

[20] Article 75(1) of the Higher Education Act.

[21] Constitutional Court decision no. 21/2021 (VI. 22.) AB, Statement of Reasons, para. [42].

between state and non-state higher education institutions in terms of financial management, since the rules of financial management of state-maintained institutions are determined by the Government and their financial management is supervised by the Government.

The decision thus went back to the initial foundations, again considering the organisational system as the central element of autonomy, which can, however, be defined by law and, in this respect, several solutions are possible, provided that an appropriate guarantee system is developed. At the same time, in full agreement with his earlier dissenting opinion, László Kiss also states that the powers exercised by the organisation, in particular the Senate, should not be examined in general, but element by element, as they may affect the autonomy of higher education in different ways. Thus, overall, in connection with the decision, which caused a feeling of loss among many, it can also be stated that the starting point of the petition determined the framework nature of the decision, since the panel was not required to make a general interpretation of the Constitution on the basis of the petition.[22] At the same time, Balázs Schanda pointed out that, although the autonomy related decisions focus on the institution's autonomy in education and research, this does not mean that economic issues cannot have an impact in this direction. In the dissenting opinion, Judge Béla Pokol also expressed the view that the panel could have interpreted the concept of autonomy more broadly, providing some points of reference. In addition, the opinion argues that the reform was implemented in the right direction, because of the academic communities, academic assessment and their political context and implications: but these arguments were not reflected in the decision, and hence he could not support it as a whole.

2.5. Conclusions based on Hungarian Constitutional Court decisions

Although the control by the maintainer and the professionals has an administrative content, the Constitutional Court did not refer to it in its decision no. 21/2021 (VI. 22.), nor did it use it in its final decision. Béla Pokol's unique dissenting opinion reflects the extreme caution of the panel on this issue. Especially in light of the fact that, at the time of the decision, it was already known that more than 20 Hungarian institutions would change their model in 2021 and continue to operate as non-state institutions.

It is also noteworthy that, in relation to university autonomy, the Constitutional Court is keen to use the tool of tautology in the scientific sense to explain autonomy on the basis of autonomy itself. On this notion, it does not really break away from the starting point that the origin of autonomy in higher education is freedom of teaching and learning, which – as Gábor Hamza agrees – is the correlation between the right to freedom of expression and the right to education. It looks at organisational and financial management issues exclusively through the same lens, although it has already pointed out that autonomy is an organisational issue to be examined separately.

Although there is an increasingly rich literature on autonomy in the international literature, the Constitutional Court has made little use of it. However, it is precisely the Constitutional Court decisions that have mapped out the European practice on a number of issues (fair trial principle, objective sanctions and many others), which is also known and exists in the context of autonomy. The new decision did not set any substantive cornerstones and also avoided the

[22] At the same time, it should be noted that the petition and the reasoning of the decision did not (and could not have) dealt with the interpretation of the Fundamental Law, but instead only established that the specific provision was contrary to the Fundamental Law.

elements of control by the maintainer. Particularly important at this point is the distinction, to which Gábor Hamza also draws attention, that while autonomy is linked to the institution, the freedom of teaching and learning is a criterion of constitutional right.

3. International standards

3.1. The Magna Charta Universitatum and autonomy

Although the history of autonomy in higher education has been dealt with by Miklós Kocsis on several occasions, international concepts of autonomy hardly ever appear in the Hungarian literature and, when they do, they are closely linked to the concept of freedom of teaching and learning, as in the case of Constitutional Court decisions.[23]

Perhaps the most important element, which is inescapably reflected in both Constitutional Court decisions and professional articles, is the outline of the Magna Charta, which contains the following principles:

- "The university is an autonomous institution which produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.
- The unity of teaching and research; Teaching and research in universities must be inseparable if their tuition is not to lag behind changing needs, the demands of society, and advances in scientific knowledge.
- Freedom in research and training is the fundamental principle of university life, and governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement.
- "A university is the trustee of the European humanist tradition; its constant care is to attain universal knowledge; to fulfil its vocation it transcends geographical and political frontiers, and affirms the vital need for different cultures to know and influence each other." (Magna Charta Universitatum, 1988)

The Magna Charta, signed in 1988, also briefly sets out the means to achieve the principles, while stressing that different social and cultural contexts may have different concrete solutions, which may change over time, and that the concept of autonomy is not a permanent one. However, the Magna Charta did not define the universal nature of autonomy, because although the text contains the term autonomy, as mentioned above, and the principles are closely related to it, they are not a definition of autonomy and mainly discuss cultural and ideological issues among the principles, and the economic elements mainly appear among the means.

Going further, Miklós Kocsis states that the Magna Charta considers intellectual independence to be more important than economic independence (Kocsis, 2010, 55), which, in my opinion, cannot be read from the document in this form, since the means of implementing the principles (selection of students and teachers, mobility, scholarships) are rather economic in nature. Rather, the Charta is not explicitly designed to define autonomy, but to set out certain operational ideals for universities. In this respect, the international literature is also more cautious in its assessment of the Magna Charta's nature. The European Higher Education Area argues that the

[23] The same can be found in Gergely G. Karácsony's article; he also takes the Humboldtian idea as the basis of interpretation, since the two concepts are indeed closely intertwined in Hungarian literature (G. Karácsony, 2022).

document aims to define the self-definition of universities and to set out so-called governance principles, including the freedom of teaching and learning and autonomy (European Higher Education Area, 1988), and the same is specified in other publications as well (Adendorff, 2012). On this basis, it can be said that, although university autonomy is a value that belongs to universities, the Magna Charta does not define its exact concept, but only gives some points of reference.

3.2. Elements of autonomy in the present era

There have been a number of international studies and comparisons on the issue of autonomy in higher education, ranging from various summary works by the OECD to a major study by Thomas Estermann, head of the European University Association (hereinafter EUA). Within the framework of this publication, it is not possible to present the international development and standards of university autonomy in depth, so I will focus primarily on their defining elements and, according to the research, on the situation of Hungarian institutions.

International research on autonomy in higher education, similarly to Gábor Hamza's summary paper, states that autonomy is a concept that is changing in time and space, and is strongly influenced by the modernisation processes affecting universities, while at the same time autonomy reform has repercussions on university modernisation as well (Estermann, 2015). At the same time, the concept of autonomy can be found in international academia, in public policy, in legal and fundamental rights related documents, and highlighting that increasing university autonomy is an important step towards modernisation. It is also important to note that there is a rich literature on university autonomy in the international literature, which has resulted in several definitions of the concept. Each of these models seeks to strike a balance between the appropriate degree of autonomy and its enhancement, and the accountability, social and socio-cultural embeddedness of the institution. The studies also stress that there is no single, ideal model for all countries in this field either, but that there are good practices and guiding principles that should be known and taken into account in the national system concerned. One such principle is the Salamanca Declaration of 2001, which linked the principles of autonomy and accountability and called for greater management freedom and adequate funding for universities to increase competitiveness, while deeming over-regulation harmful.

In 2007, the Lisbon Declaration was adopted within the framework of the EUA, which distinguished between four areas of autonomy, as outlined in the studies: organisational autonomy, financial autonomy, staffing autonomy and academic autonomy. The 'Autonomy Scorecard project', launched by the EUA, then looked at the 28 higher education structures of 26 EU countries, and compared them to the structures of 3 different federal states, due to Germany's federal structure. Data collection first started in 2007 (Estermann & Nokkala, 2009) and continued between 2009 and 2011 based on questionnaire surveys, processing the responses from these 26 countries, including Hungary. The questionnaires were sent to the rectors' conferences of the countries concerned and were evaluated for the first time in 2011, based on the methodology and weighting system developed in 2010, and the new results were published in 2017 again (Estermann et al., 2017). The scoring was based on the following main criteria:

- organisational autonomy (a)
- budget setting, economic autonomy (b)
- staffing autonomy (c)
- freedom of teaching and learning (d).

ad a) With regard to organisational autonomy, it is important to emphasise that it is based

on common European rules, but, due to its framework character, national legislation is granted a great deal of freedom, as the specific cultural, social and legal context must be taken into account, adapting to changes over time. Seven main aspects were identified in this respect, three of which concerned institutional management/leadership. Thus, the selection procedure, the range of criteria that can be taken into account in the selection process and the removal of the head of the institution from office are important issues, but so is the extent to which external actors can participate in the governing body of the institution, the extent to which the institution is free to determine its own structure and whether it can establish legal entities. The seven criteria are to be assessed according to additional sub-criteria, for example, the latter according to the type of legal entity, i.e. whether only a non-profit or any legal entity can be established, and whether there are any restrictions on it.[24]

Among the main trends, two main solutions can be identified in terms of leadership: in Southern and Eastern European countries, the head of the institution is chosen by the institution from among the members of the academic community on a *primus inter pares* basis, while in Western models there is a managerial type of leadership. Moreover, a mix of the two elements can be observed, where the institution is under dual management (Estermann et al., 2011, 23). In addition, there are significant differences in that some systems link the position of rector to an academic degree or promotion level, while others consider managerial leadership to be more relevant, and whether or not the level of the requirement is fixed by law. Although most countries have maximised the length of the rector's term of office, there are also significant differences in the length of the rector's term of office and in the number and composition of the governing body. For example, while the vast majority of Western universities require the participation of external persons, in Italian, British and Estonian universities this is only an option, while in some Eastern European universities, such as in Poland and Latvia, it is excluded. It is noteworthy and illustrative of the structural differences that the three Baltic countries, for example, have three different solutions in this respect, and even with regard to the participation of external members, several subtypes can be distinguished, which also shows that the issue requires a more in-depth analysis in relation to the reasons and socio-historical differences. (Estermann et al., 2011, 25–27)

ad b) In the context of economic autonomy, the issue of public funding is paramount, but an important aspect is the autonomy of financial management and the disposal over residual funds, whether the institution can retain them or have the possibility to borrow, whether it has the right to dispose of property, possibly ownership rights, and whether it is free to set tuition fees for EU and non-EU students at different levels, such as in bachelor's, master's and doctoral degree programmes.[25]

Setting the budget of the institution may be subject to specific constraints. In general, the countries of Eastern Europe are characterised by strong constraints on the use of funds, mainly in terms of the use of individual grants between the different areas. In the latter case, there is neither free redistribution nor free use of revenues. However, a certain degree of constraint can be observed in all institutions; for instance, in almost all cases, the university's real estate assets are considered to be marketable only to a limited extent, while in other cases they may be completely unmarketable, and expenditure above a certain amount may be subject to authorisation, and the amount of tuition fees that can be charged to students may also be subject to constraints.

[24] https://www.university-autonomy.eu/dimensions/organisational/

[25] https://www.university-autonomy.eu/dimensions/financial/

Generally speaking, universities in Eastern Europe are more financially constrained and, on top of that, the procedures for spending money are strictly regulated, making the system, which is also bound by substantive law regulations, quite bureaucratic. At the same time, these latter institutions can also count on state subsidies based on government decisions.

ad c) With regard to staff, it is mainly the institution's autonomy that is important in the selection of the leaders for both the teaching and the administrative staff, as well as autonomous decisions on salaries and wages, and personnel decisions, such as termination of employment, continued employment or promotions.[26] In terms of staffing, the main constraints may be the public service schemes and the constraints imposed there.

ad d) The last segment is the academic dimension of autonomy, the yardstick of which is primarily not the freedom of teaching and learning, but administrative restrictions, such as the number of students to be admitted or the process of accreditation of new degree programmes. The freedom of teaching and learning include the freedom to decide on capacity numbers, to decide on admission-related options, to start or stop new bachelor's, master's or doctoral degree programmes, to define language requirements and the content of the degree programmes, to define the training and output framework, and to assure quality.[27]

Within these, there are also additional sets of specific requirements. Thus, the definition of decisions on admission numbers is already tangentially included in the Magna Charta, and other documents consider it an important element of autonomy as well. In this respect, full autonomy is achieved when the institution has a general autonomous decision-making power. A worse situation is when the institution can decide independently on the capacity number of students on fee-paying courses, but the number of students on state-funded courses can be determined by the state. It is a similar situation, when the issue can be settled through negotiations between the institution and external actors, while the least autonomous scenario is when an external governing body takes the individual decisions. In this context, the possibility of an overcapacity procedure should specifically be assessed. However, it is noteworthy that there is a wide variation in the different aspects across the countries examined. There are even significant differences between countries in the extent to which the mandatory elements of the training and output requirements are seen as actual constraints by different institutions. (Estermann et al., 2011, 44–52)

The complexity of the evaluation process is indicated by the fact that the result is expressed as a percentage, with both a nominal and a weighted value being disclosed. In the 2011 survey, Hungarian universities were ranked 17th out of 28, tied with France. Great Britain came first with a score of 100%, while the Hungarian score was 59% and Luxembourg came last with 31% (Estermann et al., 2011, 53). As the survey considered scores between 60% and 40% as medium-low and countries above 60% as medium-high, it can be concluded that Hungary scored in the middle of the European average. This situation has not changed significantly in the 2017 evaluation, with the creation of the post of chancellor in 2014, the creation of rules on the accreditation of courses and the setting of the amount of tuition fees as new elements among the changes highlighted.[28] In terms of the aggregate result, the nominal result has thus changed to 60% and the weighted result to 56%. In terms of rankings, Hungarian universities scored best in terms of the freedom of teaching and learning and worst in terms of financial autonomy. The

[26] https://www.university-autonomy.eu/dimensions/staffing/

[27] https://www.university-autonomy.eu/dimensions/academic/

[28] https://www.university-autonomy.eu/countries/hungary/

lack of access to loans, the lack of ability to retain savings and the problems relating to ownership rights of buildings were major shortcomings, as were gaps in the way that tuition fees payable by national and EU students were determined.

As regards the criteria, it is easy to imagine that a new study would produce a different result, as several criteria have changed significantly, such as the definition of training and output requirements[29] or the right to dispose of assets due to the change of model. However, the above list clearly shows that autonomy in higher education is not only an ideal based on the freedom of teaching and learning, but is now a concrete set of criteria, the understanding of which could yield important results, as the importance of autonomy is stressed by international governmental and academic organisations and supported by empirical research. Autonomy is undoubtedly closely linked to the quality of research in terms of economic autonomy, which therefore has a direct impact on the ranking of universities (Estermann, 2015). The EUA Trend study also showed a direct correlation between the development potential of the university and its ability to generate income, and also highlighted that all these factors can also have a reverse impact on autonomy, which is seen by both government actors and universities themselves as one of the most important elements for development.

4. Summary

It may be stated that a common feature of previous Constitutional Court decisions is that they examine autonomy only in its historical and domestic context and do not deal with its international developments. This is interesting because, on the one hand, there is a strong international literature on the autonomy of higher education and, on the other hand, the Constitutional Court often refers to international standards in relation to other types of principles (such as the principle of fair trial in the law of misdemeanours or the administration of justice). However, this has hardly happened in the context of higher education autonomy.

Another characteristic feature is that the Constitutional Court basically interprets the question of higher education autonomy from the content of the freedom of teaching and learning. The definition of autonomy in higher education has therefore become a question of terminology rather than that of content. At the same time, the Constitutional Court has become increasingly reticent on the content elements, and the 2021 decision did not even undertake to assess the model change. It is true that the motion itself would have only given a theoretical opportunity to express the position, but the decision as a whole was not intended to interpret it. The current practice in Hungary can therefore be summarised as one giving the legislator a fairly wide room to manoeuvre within the legal framework, provided that it provides the institution with appropriate guarantees. With regard to the latter, however, there is no more concrete guidance in the latest case law of the Constitutional Court, developed in 2021. All that can be concluded is that, in the opinion of the panel, the current legislation allows for several possible solutions that are in line with the Fundamental Law.

In the international literature, a set of criteria is used, based on a number of aspects, which are well defined and detailed, with weighted scoring. This scoring system is also open for revision.

So while the Hungarian Constitutional Court, in its collective decisions, abandoned its definition of autonomy as being linked to the freedom of teaching and learning for the first time

[29] See the Higher Education Act Chapter 7/A.

in 2021, at the international level, although the link between autonomy and the freedom of teaching and learning is also undeniable, it is not the only factor. In the Hungarian literature, it is mainly at the level of dissenting opinions that elements have appeared that have attempted to distinguish the two concepts, and it is a particularly interesting interaction that while in the Hungarian literature the decline of autonomy has been continuously examined (Nagy, 2017) since the 2005 law, this is not easily justified on the basis of the set of criteria and requires more thorough investigation, since the freedom of teaching and learning, considered as the starting point in Hungary, is only one of the four main components. Unjustifiably little attention is paid, however, to institutional norm-setting, which has been appearing as a constant element among the different elements of autonomy, such as the possibility of establishing organisational rules and defining internal operations, and which also deserves further study.

On this basis, the impact of the model change on university autonomy cannot be easily verified, since this article could not undertake a detailed analysis of the aspects – this is being done by the EUA with the involvement of several institutions – but it is certain that the economic-financial autonomy from the state, which was rated the worst so far, has certainly improved at first sight. However, it remains to be seen how much the situation in Hungarian higher education has actually changed.

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Fair and effective public administration

Péter Váczi*

* Associate Professor, Széchenyi István University, Ferenc Deák Faculty of Law and Political Science, Department of Constitutional Law and Political Sciences E-mail: vaczip@sze.hu

Abstract

Administrative procedure is classically the area of law where public administration has direct contact with citizens. Consequently, these cases entail a risk of violating the fundamental rights of citizens, which is certainly not desirable in a constitutional state. In today's administrative systems, administrative procedural law is becoming increasingly important. In practice, the main trends are limiting the executive power of the state to constitutional limits, guaranteeing the fundamental rights of citizens, and creating "good public administration".

For many, the question may arise: are good administrative procedures merely a desirable moral objective, without any legal effect, or are there legal elements that make it both binding and effective?

Keywords

good administration, due process, client protection, judicial review

> "*Parallel to the extension of the scope of effective public administration, the increasing need for guarantees of legality appears, and parallel to the increase in the scope of the executive's powers of intervention appears the tendency to develop the organs of public opinion, the organs of general rule-making and the organs of value regulation more effectively, and to subordinate the executive to the values represented by these organs.*" (Bibó, 2016, 128)

1. The importance of client protection

The root of the emergence of procedural principles was the recognition of the importance of client protection (Kirkham, 2004), which is reflected in administrative law at two levels: first, in a negative sense, it prevents public authorities from taking actions that could adversely affect the rights and legitimate interests of clients, and, second, in a positive sense, it requires public authorities to carry out their law enforcement activities in a way that serves the rights and legitimate interests of clients. Client protection must be interpreted in a very broad sense, to include all provisions that relate to the powers or obligations, or even the objectives, of public administrations (Fortsakis, 2005, 208).

European case law fulfils the idea of client protection through a set of basic principles, which are effective means of ensuring that clients are meaningfully protected against the actions of public administrations. As can be seen from the series of recommendations by the Council of

Europe, the idea of good administrative procedure has long been present in the development of European law, but only in a scattered way, without any concrete conclusions being drawn from it or a uniform set of requirements being formulated. Despite the existence of tangible legal documents on the subject, the lack of binding force has meant that these documents have at best had a role only as potential considerations in the process of law-making and, even more marginally, in the application of the law.

Perhaps the biggest issue is that European legal systems have traditionally paid great attention to the system of guarantees of judicial review, which of course serves as an important safeguard, but this pushed other legal instruments and other equally important principles somewhat into the background. Case-law certainly plays an important role in the development process of European law, but, by its very nature, it only provides for case-by-case oversight rather than a complete and comprehensive system of guarantees. Therefore it is necessary to build up additional control mechanisms and safeguards in administrative law, which, while ensuring legality, are capable of making everyday administration both faster and cheaper (Solé, 2002, 1527–1529).

The exclusivity and importance of judicial protection has been the subject of many debates in the literature. Some argue that judicial review is not the only, or even the primary, factor in protecting the legality of public administration (Craig, 2004, 108). Must the courts or other mechanisms play a primary (or even exclusive) role in ensuring good administrative procedure?

The red light theory advocates the idea of a minimalist state, in which the main function of administrative law is to prevent the abuse of state power and to eliminate *ultra vires* through various legal means, mainly judicial review. According to this view, administrative law is nothing more than the law of checks and balances on government power, which limits the executive to a legal framework while at the same time it protects citizens from abuses and the government's ‚running amok' (Beatson et al., 2002, 2). According to the red light theory, the courts are responsible for ensuring good administrative procedure, while the emphasis is on administrative law as a kind of external constraint on government control, through the independence of administrative authorities (Ponce, 2005, 554). According to this concept, the courts and the administrative authorities are warring parties, the former using the weapon of administrative law against the latter in a battle over the abuse of government power. A completely different approach is the so-called "green light theory", which, contrary to its name, does not welcome unrestrictedly free state action. While the proponents of the red light theory favour judicial control over the executive, the followers of the green-light theory tend to put their hope in the political process. They believe that the courts may become a barrier to progress, that their control is unrepresentative and therefore undemocratic, and that their influence must be kept to a minimum. But then, how and by what can good administrative proceedings be ensured (Verebélyi, 2004)? In short, by setting guidelines and accountability. By laying down requirements such as transparent governance, ensuring access to information, and restricting discretion into a clear legal framework. These legal principles immediately bring about internal control in public administration, rather than external control such as judicial review. A further advantage is that while judicial review is retrospective, ruling on a specific decision, the principles of good administrative procedure are forward-looking, in that they define the limits of the procedure and set the course for its conduct.[1]

[1] Of course, the above two theories cannot be separated in such a clear-cut way; in reality, administrative systems recognise and bear in mind both, combining the advantages of both systems. The optimal solution can therefore be captured somewhere between the two, in the framework of a kind of "yellow light" theory, which recognises both the controlling and the reactive nature of administrative law, leaving room for courts and extra-judicial mechanisms to achieve good administrative procedure. See: Beatson et al. (2002, 2–5).

2. Red light theory: the primacy of judicial review

Although traditional administrative law has not always been interested in making good decisions, it has certainly been interested in the judicial review of unlawful decisions. This is an old, somewhat negative approach, in the sense that it argues against arbitrariness rather than in favour of good administration (Harlow & Rawlings, 1997, 29).

The first versions of the constitutional rule of law concept already recognised that violations could occur in the operation of the executive as well as in other social relations, and that therefore "the violated rule of law must be restored in this area as well", thus reinterpreting the classical adjudicative function by subjecting administrative decisions to judicial review (Takács, 1993, 263). Traditional administrative law emphasised the importance of judicial review, but this alone does not guarantee good administrative procedure. This is because of the traditional principle of separation of powers – accepted both in Anglo-Saxon states and on the continent (Solé, 2002, 1506).

Natural persons are entitled to a judicial review of administrative decisions affecting their rights or interests, either directly or by means of an objection. Before going to court, administrative remedies are usually available, which in some cases are complementary. These may relate to the factual basis of the decision or the legality of the decision. Natural persons should not suffer any disadvantage as a result of challenging the decisions of administrative authorities (Petrik, 1991).

It is also essential to bear in mind the means of control and sanction applicable in the event of failure to comply with the due process requirement. In this respect, the instrument of judicial review, which can be used to enforce lawful decisions by the public administration, is of particular importance (Kilényi, 1991). Judicial review can have a prominent role in disciplining administrative action by monitoring compliance with legal requirements during the procedure, thereby facilitating appropriate decision-making. Judicial review can take several forms, but the view that the procedural aspect of the case takes precedence and that, if such errors or deficiencies are found, the court does not review the merits of the decision has become increasingly obsolete. This solution, however, is increasingly resented by citizens, who feel that they cannot expect effective legal protection from the courts, as they feel that the merits of their case are not being advanced by judicial review (Solé, 2002, 1519–1520).

"Where there is an entitlement, there must be a remedy," – the Latin saying goes.[2] The possibility of reviewing administrative decisions and thus holding public administrations accountable is traditionally seen as one of the first and most fundamental steps against the arbitrariness of the executive. Where the law ends, tyranny begins, and judicial review is the most effective defence against oppression. The purpose of judicial review is to force the administration to comply with procedural rules, otherwise the decision will be annulled, and the courts thus indirectly ensure the enforcement of good administrative procedure, with maximum respect for the separation of powers. Judicial protection prevents the administration from acting rashly and hastily by forcing it to comply with fundamental constitutional and other legal requirements (Solé, 2002, 1520).

Looking beyond Europe, it is worth noting the specificity of US administrative law, in that it traditionally allows for judicial review of administrative decisions, both substantive and procedural. The court has the power to annul a specific rule on the grounds that it is substantively

[2] "*Ubi jus ibi remedium*." Quoted by Millett (2002, 309).

wrong, but in most cases this is not the route taken. It is not said that it should be repealed because it is wrong, but that it should be repealed because the decision-making process was not sufficiently open to stakeholders and society or because all relevant facts were not sufficiently examined. According to numerous authors, there are political rather than purely legal considerations behind such thinking. A judge cannot say that a decision made by a friend of the official is fundamentally wrong and therefore invalid, as this would be in open defiance of the government. Instead, he will say that there was a substantive error in the procedure that renders the decision invalid (Shapiro, 1996, 36–38).

3. Green light theory: The principle of due process

In contrast to the above theory, a new perspective has emerged across Europe that focuses on the quality of the decision – in particular discretionary decisions – and emphasises good decision-making and good administrative procedure. Accordingly, public administrations must not only be lawful, but must also make correct, appropriate decisions, because that is simply what people expect of them. That is why it can't do nothing, even if it is empowered to do anything (Solé, 2002, 1506).

The right to a fair trial is itself a category of justice and therefore a value-based concept. The Fundamental Law of Hungary (hereinafter: the Fundamental Law) does not provide for a subjective right to substantive justice in the area of fair trial, nor does it provide for the exclusion of judgments that are contrary to the law. These are the aims and tasks of the rule of law, and, in order to achieve them, it must establish appropriate institutions – primarily those providing procedural guarantees – and guarantee the relevant subjective rights. The Fundamental Law therefore gives entitlement to a procedure that is necessary and, in the majority of cases, appropriate to ensure substantive justice (procedural justice). The main function of the right to a fair trial is to provide a legal framework (a system of guarantees) for the enforceability of other rights. Accepting the jurisprudence of the Hungarian Constitutional Court with regard to the limits to the detectability of the truth, it is not possible to assess solely on the final product of the procedure whether a fair decision has been reached in a specific case, and whether justice has been done. As such, the quality of the proceedings is more reliably measured by procedural justice, i.e. the way in which the decision was reached, in which the judiciary produced the final product (Bárd, 2004, 48–49).

In the absence of procedural principles that follow from the formal rule of law, the doctrine of substantive rule of law cannot be enforced in practice. The principle of due process is derived from the principle of objective, substantive justice and means its enforcement in practice. The parallel enforcement of principles on both the substantive and formal sides of the rule of law is necessary for being able to talk about the rule of law (Szaniszló, 2017, 431). According to the consistent practice of the Constitutional Court, procedural guarantees derive from the principles of the rule of law and legal certainty and are essential for the predictability of the functioning of certain legal institutions.[3] Procedural guarantees for the enforcement of rights and obligations derive from the constitutional principle of legal certainty. In a procedure that operates without adequate procedural guarantees, legal certainty is compromised.[4]

[3] See Decision 11/1992 (V. 5.) AB, ABH 1992, 77, 85.

[4] See Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383.

In the series of acts constituting civil transformation, the major procedural codes (Article LIV of 1868 on the Code of Civil Legislative Procedure, Article I of 1911 on the Code of Civil Procedure, Article XXXIII of 1896 on the Code of Criminal Procedure) all guaranteed the right of access to the courts, the impartiality and independence of judges through rules of disqualification and conflict of interest, and the right of appeal. The right to a fair trial, which is currently regulated at the level of the Fundamental Law and principles, was therefore present in elements in the Hungarian legal system before the charter Constitution. Although the Constitution (Act XX of 1949 as amended by Act XXXI of 1989) did not recognise the concept of due process *expressis verbis*, the Constitutional Court derived it from the Constitution by relating procedural guarantees arising from legal certainty to the right to an impartial tribunal. In doing so, the Constitutional Court also took into account the relevant provisions of international conventions, both the International Covenant on Civil and Political Rights (hereinafter the ICCPR) and the relevant provisions of the European Convention on Human Rights (hereinafter the ECHR).[5] The principle of a fair trial is defined by the ICCPR as follows: "*In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*" In the ECHR's words: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*." On the one hand, the Charter of Fundamental Rights of the European Union includes, in relation to administrative procedure, the right to good administration in Article 41 ("*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*.") and, on the other hand, the right to a fair trial in Article 47 ("*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*.")

The Fundamental Law also refers to the requirement of due process in the National Avowal when it states: "*We hold that democracy is only possible where the State serves its citizens and administers their affairs in an equitable manner, without prejudice or abuse.*" At first sight, the principle appears to be a mere declaration, without binding legal force, but subsequent provisions of the Fundamental Law point in the direction of strengthening its binding force. The most important and classic area of procedural rights is the administration of justice, but the Fundamental Law also includes the most essential guarantees of administrative procedure, unlike the previous Constitution. The principle thus covers all public activities where citizens encounter public bodies as public authorities. One of the major achievements of the Fundamental Law is that the chapter on fundamental rights also devotes specific articles (Articles XXIV and XXVII) to the judicial and administrative aspects of due process.

The starting point for the Constitutional Court in its examination of the right to a fair trial is that the requirement of a fair trial is a quality that can be assessed by taking into account the procedure in its entirety and the circumstances of the case.[6] In its judgments, it has defined the specific criteria implied by a fair trial on a case-by-case basis. The Constitutional Court emphasised that there is no other fundamental right or constitutional objective that can be weighed against the right to a fair trial, because it is itself the result of a balancing exercise.[7] Notwith-

[5] Decision 21/2014 (VII. 15.) AB, ABH 2014, 582.

[6] Decision 6/1998 (III. 11.) AB, ABH 1998, 91.

[7] Decision 14/2002 (III. 20.) AB, ABH 2002, 101, Decision 15/2002 (III. 29.) AB, ABH 2002, 116, Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, Decision 14/2004 (V. 7.) AB, ABH 2004, 241.

standing the absence of details, as well as the observance of all the detailed rules, the procedure may be inequitable, unjust or unfair.[8]

The issue of fairness is amplified in the context of judicial discretion within due process. As has been known since Plato, general rules never fully fit the specific facts for which they were created by the legislator. Perfect justice does not therefore presuppose perfect rules, but may be achieved by perfect discretion, whereby the legislator examines the social situation in question carefully and comprehensively, rather than mechanically applying the law as it stands, without fully examining the situation. Unfortunately, the perfect instrument of discretion is called into question by the imperfections of humans, who apply it in biased, unreasonable and other inappropriate ways. The application of law in general can be described as an area of progression from discretion to written law over time. As social reality poses a new problem, the most appropriate first step would be to create an authority with appropriate discretionary powers, which is flexible and able to react quickly; in short, perfect for emergencies. However, as the flaws of deliberation are revealed, the focus shifts increasingly towards legislation, and the pattern can be described as follows: to do the job quickly through deliberation, and then to create the right rule, protecting citizens from the potential dangers of deliberation (Shapiro, 1996, 31).

According to János Sári, "the inadequacy of normative instruments to perform most of the modern functions of the state can lead to a high degree of vulnerability of the citizen" (Sári, 1995, 156). Hence, a flexible law enforcement attitude may point in the direction of justice in the case of certain unreasonable or fossilised rules, but it is a double-edged sword, since it can easily lead to injustice in the event of inappropriate application. The most sensitive area of discretion is the field of administrative law enforcement, and it is therefore essential that discretionary activity be conducted along certain legal principles.

In some cases, the decision of the administrative authority is clearly predetermined by the law, but in other cases the law gives the authorities a margin of discretion and merely sets limits within which the administration has a degree of discretion. An administrative authority vested with discretionary powers must not only comply with the applicable law, but must generally act in a fair and equitable manner. Discretionary power, in general terms, is when the public administration is empowered by law to choose from a range of legitimate options, and not on the basis of "legislation" (Ponce, 2005, 553). This choice involves balancing public and private interests using non-legislative values in order to establish a general interest that is not defined by law. The choice itself therefore cannot be considered to have legal content, but administrative law must nevertheless ensure legal protection for such choices in order to protect the individual. It is from this latter perspective that the importance of judicial review as a means of protection against arbitrary decisions can be grasped (Solé, 2002, 1504–1505).

If a given institution has a wide margin of discretion, some may already feel that the exercise of the client's rights can only have a limited influence on the decision, and that it is therefore a useless and burdensome obligation for the authority in such cases. At the same time, since it is precisely in this area that judicial control is the weakest, the guarantee role of procedural principles is, in my view, even more pronounced. This view is reinforced by the case-law of the European Court of Justice, which has pointed out in a number of judgments that the wide discretionary power of public authorities must not lead to the erosion of certain procedural principles (*de La Serre*, 2006, 241–242). In any event, the discretionary powers of the public administration must be limited, in accordance with the requirement of good administration deriving

[8] Decision 6/1998 (III. 11.) AB, ABH 1998, 91.

from the common tradition of the rule of law in the European States (Cananea, 2003, 568). In the European Union, the Court of Justice generally grants administrative authorities wide discretionary powers.[9] Since it does not seek to substitute the administrative authority's decision with its own judgement, it only examines whether the procedural rules have been complied with by the acting authority, whether the facts have been properly established and whether there has been no abuse of power. This narrow scope of review makes the role of procedural principles particularly important. This view was confirmed in the *Technische Universität* case, where the Court of Justice explained that, where the public administration has such a power of appraisal, respect for the rights guaranteed by the Community legal order are of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present. (Schwarze, 2004, 94–95; Cassese, 2004, 32).

Summary

Alongside judicial review, the issue of administrative procedural safeguards, which is in fact the general way in which the public interest function of the administration is carried out, is a key issue for good administrative procedure (Solé, 2002, 1507). The understanding of administrative procedure and its principles is somewhat ambivalent in the legal literature. According to the instrumental theory, the procedure is merely a means to an end, to reach an appropriate and effective decision, while the gateway theory holds that procedural principles have value in themselves, as they are fundamental to the achievement of substantive rights (Kanska, 2004, 301). The popularity of the principle that public administrations must follow well-defined rules to make the right decision has increased dramatically in recent decades. On the one hand, the principle of the importance of procedural rules is linked to the idea of good governance, and on the other hand, the need to establish the reasons on which a decision is based is proof that the administrative authorities have acted appropriately, weighing all relevant interests and taking all the data collected into account (Solé, 2002, 1507–1508).

The above issue is markedly different in English common law and continental legal systems. In the former, the fairness of an administrative act is matched by the possibility of being subject to a "quasi-judicial" review at the time of its adoption, so that the authority has one eye on the possibility of a subsequent judicial review. This rather procedural approach to rights is closely linked to the institutional practice of administrative courts, which can perform functions that are elsewhere the responsibility of the government (e.g. remedies within the ministry). In the Anglo-Saxon tradition, once a decision becomes final, the right of appeal to the courts becomes more restricted, the legal basis for review is limited and the range of remedies available is reduced. By contrast, in the continental administrative legal system, the fairness of the procedure is guaranteed by the possibility of review by an independent judicial forum. The individual has the possibility to challenge the administrative act, but in most cases this is only possible after the administrative decision (Bignami, 2004, 63).

Attempts to specify the administrative procedure in legal terms must never lose sight of the purpose of the procedure. The first and foremost aim of procedural law must be the realisation of

[9] For more on the problem of administrative discretion in the European Union, see. Ibáñez (2000, 204–237).

substantive law, in our case administrative (or other public) substantive law. Public law, as is well known from the ancient Roman division into private law and public law, is at the service of social welfare and the public interest, and it is this objective that procedural law must ultimately pursue. The protection of individual rights is undoubtedly an essential objective, but it is inherently secondary to the public interest (Kanska, 2004, 323). There is, however, a common intersection; good governance, which ensures both the protection of the rights of individuals and hence the protection of the interests of the social majority. Where do the values of good governance come from and how do they relate to administrative law? Generally speaking, they can be traced back to two main Western traditions of public administration. First, to the classical service model of public administration, dominated by the public interest. Second, to the new organisational principles of administration that swept through European public administrations in the 1990s, when the lean values of economics, such as efficiency, took over from more people-friendly principles (Harlow, 2006, 200).

Administrative law has undergone many changes over the course of the 20th century, with a functional evolution from the maintenance of legal and social order to the emphasis on welfare and legal safeguards through the performance of public functions. Until recently, the administrative system and administrative law have been seen as the last bastion of nationalism and statism, each rooted in the political and social traditions of its own legal system. This perception is being challenged today. It has been shown that this area is also full of borrowed, imported and transplanted institutions that clearly derive from the legal systems and legal solutions of other countries or European organisations, so that the isolated national character is hardly sustainable. Among the latter, the influence of the Council of Europe and the European Union is clearly visible. However, the above change has not overturned the traditional paradigm that administrative action leads to a decision that is essentially different from decisions between private individuals, since it is of a public authority (official) character. A paradigm shift can be observed, however, in the increased attention paid to procedural issues of the actions of public authority, with the growing emphasis on the requirement of due process and its guarantees (Cananea, 2003, 576–577).

As István Bibó has already pointed out, when examining the legality of public administration, one should not start from a static system, but "*constantly rethink, again and again renew the forms in which the legality of public administration has appeared*.[10]" The system of safeguards for the legality of public administration is therefore not a once-and-for-all system, but one that must be rethought and redefined from time to time. "*The correct distribution of social coercion is called order ... the correct distribution of social freedom is called justice ... The ideals of order and justice ... are the absolute measures of correct law ... The increase of objective coercion is valuable as long as it is accompanied by an increase in order and is not at the expense of justice; the increase of objective freedom is valuable as long as it is accompanied by an increase in justice and is not at the expense of order.*" (Bibó, 2011, 32)

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Academic associations in the field of administrative sciences in Central and Eastern Europe, or what could be the medium-term objectives of the newly established Central and Eastern European Society for Administrative Sciences?

Ádám Rixer*

* Professor, Head of Faculty, Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Department of Administrative Law. E-mail: rixer.adam@kre.hu

Abstract

When we search for the significant players of administrative sciences on both the domestic and international level, we find – amongst others, amongst departments of universities, think-tanks and committees of academies of sciences – also organisations that can be treated as parts of civil society, especially scientific societies, particularly scientific associations. My current paper deals exclusively with the latter ones (with scientific associations) and my main goal is to enlist those functions that can be or even should be provided by our newly created *Central and Eastern European Society for Administrative Sciences*.

To provide the catalogue, the elements of which are based on scientific evidence, my paper covers a) the main roles of contemporary scientific associations; b) the general features of Hungarian civil society; c) the names and main features of the contemporary scientific associations in administrative sciences in Hungary; and d) also the results of an international survey conducted among 142 representatives of administrative sciences of 18 countries in our region, especially of those countries which were formerly socialist states.

And finally, with the help of these facts collected I aim to show, and offer some fairly new possible functions to invent in the interest of our 'beloved' Society.

Keywords

administrative sciences, scientific societies (associations), functions of scientific societies, Central and Eastern European Society for Administrative Sciences.

Introduction

In 2021, the Central and Eastern European Administrative Sciences Association (hereinafter: the Association or ASA) was established; and since I have long been engaged in the study of the current processes of administrative sciences in Hungary, and in particular the science of administrative law, and, independently of the former, I also research the characteristics of Hungarian civil society, the question arose: what are the aims of this new scientific association, and, what is even more interesting: what are the desirable or possible goals, the objectives to be achieved or achievable in the medium term, in the third decade of the 21st century, in the case of a Hungarian Administrative Sciences Association aspiring for an international space?

Such an examination can only be made really lively and useful by the insights that emerge from the data collected, but in which directions can we hope to gain useful knowledge, and which facts can be systematised and generalised?

Clearly, a good starting point for this work might be:

- on the one hand, to identify, assess and offer as a possible model the main characteristics, historical development, current functions and practices of the better-known American administrative sciences societies, and, on the other hand, to present the main characteristics of specifically European international administrative sciences organisations that are typically regional in their activities, with a special reference to the main roles assumed by these entities and the more relevant functions they perform. In this context, an overview of the roles played by civil society-type organisations that are not active in the field of administrative sciences can also play an important role;
- on the other hand, a review of the general situation of Hungarian civil society and, more narrowly, an assessment of the situation of Hungarian scientific associations operating in the form of civil society organisations can be beneficial. The general situation of civil society in Hungary is of interest to us insofar as the general characteristics of NGOs and the characteristics of the wider community, will necessarily apply to some extent to autonomous scientific organisations;
- third, an enumeration of the existing Hungarian Administrative Sciences associations (and foundations) and a record of some common features may be useful; and,
- fourth, surveys of the existence and contemporary characteristics of Administrative Sciences associations in other former socialist countries may also serve as an important point of reference.

Made difficult by the essentially unprecedented nature of the Hungarian literature, this paper, although of a foundational nature, aims to address all four of these approaches in a substantive manner, even if in some respects it does so only to the extent of making the most necessary observations. Thus, in addition to the outline of international contexts and the few generalisations that follow from the situation of civil society in Hungary, the review of existing Hungarian Administrative Sciences societies and the generalisations that can be drawn from them and the data from my survey of representatives of administrative sciences in the former socialist countries will also contribute to the formulation of well-founded recommendations at the end of my work.

1. Scientific associations in Europe and around the world

The uninterrupted development, the possibility of historical and professional development without caesurae, of some “Western” scientific organisations is enviable from the perspective of the

former socialist states. A good example of this continuity in the field of administrative sciences is the American Society for Administrative Sciences (ASPA); its activities, which began in the 1920s, have remained uninterrupted and have been able to play a role in the emergence of Administrative Sciences as a profession in the USA: in addition to its diverse but narrowly focused professional activities (e.g., accreditation activities, promoting the development of independent academic schools, ensuring the separation of professional groups within the organisation), it has also developed awards, scholarships, competitions and ethical standards (Pugh, 1989, 1). The example of the ASPA illustrates the organic development of the relationship with political science, history, economics and other fields, which is at the same time a process of organic detachment. In line with Anglo-Saxon features, a former chair of the organisation, Mary E. Guy (2003, 642–643), has also argued in one of her works that the greatest difficulty within the organisation has long been the coexistence and parallel presence of seemingly distant fields: the study of the more political science-nature government activity, and practical approaches of a legal nature, which are connected to the adjudication and interpretation of specific cases. Although we know what we mean by administrative sciences and what is meant by it in the USA, their centres of gravity are in different places; the important questions that we are asking today are the same ones that were raised there a good seventy years ago, namely to what extent should legal science be highlighted among the sub-specialties of administrative sciences within the framework of the association, and should we accept the expanding concept of the science of administrative law, even if the latter is highlighted? (Rixer, 2020, 55–58) These questions are among those to which the Association's membership and its leaders will have to provide answers, recurrently and periodically.

In the field of evaluating scientific impact and effectiveness, beyond the now classic approaches to evaluation within science (e.g. number of citations), there is a growing emphasis in the international literature on all continents on approaches that emphasise the relationship between science and society, and ultimately promote the importance and measurement of direct impact on society. With some generalisation, this scientific shift seeks to "redress" the previous deficit in the science-society relationship through a meaningful dialogue (Fecher et al., 2021), where the value of individual research is not only confirmed by measures of impact on science, but also by the impact on practice and the wider social context, which also becomes measurable over time (Wolf et al., 2013, 104). This change of perspective also means that the practical forms of interaction, which provide the substantive framework for the presentation, communication and ultimately the practical incorporation of experiences and scientific findings, are becoming more important in the context of the dissemination and exploitation of scientific insights (Fecher et al., 2021, 3). The difference between the impact within scientific circles and the impact on society as a whole and on policy-making is reflected in a previous paper on the success of scientific cooperation established with the EU in Belarus, Moldova and Ukraine (EaP countries): while successful cooperation in the scientific field was achieved and the results were visible in the respective scientific fields, the impact on policy-making and society as a whole was not evident in most cases (Toshkov et al., 2019, 3).

An intriguing question is the extent to which individuals working in the legal-administrative field who are substantively engaged with science (i.e. regularly engaged in teaching and producing academic writing for the public), who in principle may form the backbone of the membership of professional associations, are direct participants in public and political, and broadly speaking, legislative and law-making processes; in other words, to what extent they also directly influence the actual, substantive processes of the legal-administrative sphere. An interesting analogy is offered by a survey conducted amongst European political scientists in

2022, which found that, in addition to their academic work, only about a quarter of the representatives of the field were not involved in the direct shaping of political processes as political advisors, experts, etc. (Timmermans et al., 2022, 365). What would be the results of a similar survey to be conducted amongst the representatives of the wider administrative sciences is an intriguing question.

1.1. Functions of scientific societies (associations)

The question of what the functions of a scientific association might be was already raised decades ago. According to the German Schimank (1988, 69), there are at least four functions: firstly, a function of communication within a discipline or sub-discipline; secondly, a professional function, which supports individual career paths and also promotes the collective rights and interests of the representatives of the discipline; thirdly, a transfer function, through which the results of the representatives of science are communicated to the wider public; and a promotional function, through which the scientific community can influence political and scientific policy decisions.

Delicado has studied the specificity of scientific associations in Portugal, a European country similar to Hungary in size and development level (Delicado et al., 2014, 439). He distinguished five functions that they perform: communication within the community, research promotion, dissemination of results, professional advocacy and an advisory role. He concluded that most of these organisations have strengthened over time in their outward activities beyond their membership, and concluded that their internationalisation also spectacularly reflects their practices (ways of operating) in their relations with domestic political and other actors.

There are also examples in the literature of approaches that attempt to generalise by comparing the creation and development of specific European scientific associations: Boncourt (2017, 10) has obtained results that are useful for us by comparing the creation and developmental stages of eight scientific associations at European level, covering five social science fields (although law or management science were not included). He found that the reasons for the emergence of these organisations were often due to tensions between scientific paradigms, and in more than one case to differences between specific scientific institutions, or to geopolitical tensions. It is interesting to note that the vast majority of the organisations studied were not able to achieve fully the objectives they had set out when they were set up, and that their objectives, research topics and research agendas changed significantly along the way. He also points out that there are no such professional organisations covering the whole of Europe, and that their impact is mainly restricted to a limited geographical area. The latter statement is confirmed by the existence and activities of NISPACee in our region of Central and Eastern Europe. Boncourt refers to these aspects (results) as European characteristics (which of course does not exclude the possibility that they may be observed on other continents...). He also noted that most (Western European) scientific NGOs defined the scientific paradigms of their own field in many cases in opposition to or even with reference to (based on) the relevant approaches of American science (Boncourt, 2017, 15). He also recognised the "pattern" that the smaller the country in which the organisation (he uses the term European association) is established, the greater the likelihood that it can count on government financial support in its own country (Boncourt, 2017, 20).

2. Civil society, NGOs and (administrative) sciences in Hungary

It may be stated at the outset that, among the *main* arenas for pursuing administrative sciences, the NGO framework is only one of them, even though it is a field with increasing importance.

Thus, in addition to the Administrative (Law) Sciences Departments of higher education institutions, usually with no legal personality, and the public law and administrative law sciences research workshops set up alongside them; the think-tanks that also exist in Hungary; the committees, subcommittees and other entities of the Hungarian Academy of Sciences; and the academic workshops of certain journals not affiliated to the aforementioned organisations, the role of "classical" civil society associations is also becoming more appreciated.

The umbrella term "civil society organisation", introduced by Act CLXXV of 2011 on the Freedom of Association, Non-profit Status and the Operation and Support of Civil Organisations, covers two essential forms: associations and foundations. Based on the literature in this field, the characteristics of a civil/non-profit organisation, going somewhat beyond legal regulation, are the existence of an organisation that is ideologically independent of government through self-government, the prohibition of distributing profits among its members, and the emphasis on volunteering and self-directed activity (Kaprinay, 2015, 100). In the context of the conceptual definition of civil society, we have to note that it is important to delineate it from the "similar" activities and organisational forms of state and economic actors, especially in Hungary, where the so-called parastate-pseudo civil society solutions traditionally predominate (Sárközy, 2004, 5), and the latter statement is especially true for the wider educational-research, if you like, scientific sphere; to mention only the latest developments, in the recent year(s), for example, public interest trusts with public functions, managing assets provided free of charge by the state, have appeared in the Hungarian higher education sector.

Looking back over the past three decades or so, the civic characteristics of the Western model have not been strengthened to the extent hoped for after the regime change, and the mobilisation techniques imported from the West have not been directly applicable (at least not with the same effectiveness or consequences) (Gagyi & Ivancheva, 2017, 282). Many authors continue to refer to civil societies in Hungary, and in post-socialist states in general, as "weak" (Wallace et al., 2012, 3). Weakness is of course to be understood in relation to the ideal situation (constellation) of a limited/self-constraining state, and, compared to the latter, a strong civil society, in the context of the practices of the "advanced West", developed in the previous century (Ost, 1993, 453). One of the essential roles of civil society is to confront the will of the state with the values, aspirations and practices it represents through the publicity and articulation of its interests – and this can be an essential task for a professional or academic society of a civil nature, which focuses on administrative phenomena. As a phenomenon, civic engagement has a close logical and practical link with the "governance" *modus operandi* of the state that has become predominantly established in OECD countries and has come to the forefront in recent decades, where public affairs are dealt with by networks (networks of strategic partners), composed of public institutions, private entrepreneurs and NGOs. While the principle is universally accepted, the internal proportions of each factor may differ significantly due to national specificities (Jenei & Kuti, 2011, 16). Differences arise, among other things, from "the institutional capacities and mechanisms that operate in a given state to achieve national consensus, and the extent to which mechanisms of social corporatism that can strengthen and complement representative democracy are in place" (Jenei & Kuti, 2011, 16). There is no reason to assume that, in the case of explicitly academically-oriented institutes of civic education, professional associations, foundations, the centuries-old patterns of social development and the general characteristics of civil society do not or only to a limited extent prevail, so that these contexts should also be reflected when the aims, operational framework and possibilities of a given organisation become a subject of discussion.

2.1. Traditional public policy characteristics determining all NGOs in Hungary

In the modernisation of the Hungarian state – by the standards of Western reform trends – the imbalances between the state and the market have persisted for centuries (Jenei, 2010, 94); and the Hungarian model of public policy-making is still dominated by a top-down approach, where institutional mechanisms for the involvement of advocacy-integrative organisations often function only formally (Jenei, 2010, 95). Traditionally, paternalism, intolerance and the transformation of personal relationships into political ones have been characteristic features of Hungarian political culture (Kulcsár, 1987, 336), not least the existence of corruption, which is more prevalent than the regional average (Ernst & Young, 2010). Among the classic phenomena of governance failure are the theoretical difficulties in setting public policy objectives and the uncertainties over their measurability, including the systematic lack of ex ante and ex post impact assessments, and the influence exerted by powerful interest groups (Hajnal, 2008, 33). The traditional characteristics of civil society in Hungary are that it is fragile and reactive, because it is undercapitalised and typically lacks links towards some form of unity with state actors (Kövér, 2015). This is complemented, as we shall see, by the interruptions of scientific associations, the need to start again constantly and the lack of models, inherited from socialism and that still persist today.

2.2. Latest developments and their effect on NGOs in our area

Recent developments show, in a peculiar way, both the signs of a centralising state switching to crisis mode, which in some approaches is turning populist and necessarily growing, and the signs of a dynamic and continuous transformation, even expansion, of civil society. The latter changes are partly driven by the new contents (e.g. sharing economy) and new arenas (e.g. digital communities) of citizenship in its broadest sense (Rixer, 2019, 56), and partly by the nature of crises, where migration, war, epidemics and other pressures bring with them a range of civic activities that the state alone, with its existing resources, would not be able to conduct. It is also true for the region in general, but in the case of Hungary in particular, that it can be argued that the internal relations of the civil sphere and the relations between civil society and the state are highly politicised, and that there is also an inevitable identity dispute and intensive search for identity in this relationship (Rixer, 2017).

3. The Hungarian situation

For a long time, in the literature, there was a lack of studies including a substantive evaluation that specifically addressed the current Hungarian administrative sciences and their characteristics, and it follows that there was also a lack of surveys on the civilian-type of voluntary professional organisations operating in the field, which also formulated scientific objectives. This is why the April 2013 decision of the Subcommittee on Administrative Sciences of the Legal Sciences Committee of Department IX of the Hungarian Academy of Sciences (HAS), which called for the launch of a study to assess the state of Hungarian administrative sciences at that time, primarily by reviewing the literature on public administration and mapping the schools and scientific workshops that were active and also engaged in public administration research, was forward-looking and a response to the actual needs of the administrative sciences sector. This study has not yet been completed, at least not in the above-mentioned framework, but the issue has grown in importance and the first academic attempts to address it have been made (Rixer, 2020).

In this review of professional-civil organisations, which (also) aims at the scientific study of Hungarian public administration, we do not attempt to provide a complete catalogue of the entities that have previously operated in the field; the immediate aim of this chapter is to identify the main organisations that have existed in the recent past and are currently active and to draw general conclusions about them. It should be noted at the outset that, although it did not operate as a non-governmental organisation (not as a scientific association) during its existence between 1931 and 1944, the Magyary type Hungarian Institute of Public Administration still serves as an example for those who set up a workshop, professional association, educational institution or anything similar for the scientific conduct of public administration in Hungary: Zoltán Magyary's international embeddedness and wide-ranging knowledge, his substantial impact on the institutions of public administration and research related to them in Hungary, his influence on thinking about the state and public law, and his ability to motivate his colleagues and his wider environment, together make him an unavoidable example to this day (Lőrincz, 2010).

The beginnings of the "cultivation of public administration and administrative law in the framework of academic associations' in Hungarian-language science date back to the early 20th century: the Hungarian Lawyers' Association's Committee for Public Law and Public Administration, or the Transylvanian Museum Association's Law, Economics and Social Sciences Section, organised a series of very serious professional events and publications on contemporary problems of public administration.

Since the second half of the 1940s, the social life in the area under review has also largely died out, since "[the] socialist political socio-economic system did not really allow civil society to organise itself. In the decades of socialism, politics tended to prevent real, grassroots social self-organisation and to replace it with quasi-social organisations, rather than supporting it" (Sipos, 2008, 538). Among the highly controlled organisations of this period, which also promised to strengthen the scientific aspect, the Lawyers' Association should be highlighted, which at one time had an independent Committee for Public Administration. However, the term "scientific association" was also in use at this time, and in addition to the task of promoting dialogue within the profession in the narrow sense, the possibility and need to pass on information to other interested parties and external actors – as part of the scientific nature of the profession – also emerged (Györe, 1978).

Towards the end of the 1980s, signs of a sharpening began to emerge, and it was then that the pre-war public scientific scene was partly destroyed, some of the institutional knowledge and civic skills accumulated earlier were lost, and the personal continuities had largely disappeared – so that the organisation of scientific associations began relatively slowly and with considerable state support and even state participation. Despite the obvious strengthening of the legal transition, it was not driven by organised civil society, and the weakness of the civil sphere was not only in political, social, religious and other areas, but also in other, more or less autonomous areas, such as the characteristics, integrity, scientific self-image and degree of "dependence on power" of scientific communities. A good example of the above, i.e. of the close relationship of newly established NGOs with state actors, is the Foundation for the Development of Democratic Local Administrations, established in 1990 by the Ministry of the Interior, which also undertook to carry out and support scientific research and to disseminate the results to a professional audience, or the Hungarian Faculty of Public Administration, which was established in the form of an association at the same time.

Among the associations that still exist today, we should also mention the *Magyary Zoltán e-Administrative Sciences Association*, founded in 2005, the credo of which "(...) is the interdisciplinarity of e-government, therefore it tries to promote the electronization of public admin-

istration by involving experts from many disciplines" (Juhász, 2006, 21). It should be stressed that the association's credo states that its aim is to "create synergy that transcends changes of government, ideological fault-lines and party political battles on an issue that determines the future of the country" (Juhász, 2006, 27). The take-off of e-government can be seen in the name and objectives of other associations in the field: also in 2005, the *Mobile Public Administration Information Association* (Belényesi, 2011, 56) was established at the *First International Conference on M-Government*, organised by the Department of Organisation of Public Administration and Urban Studies (KSZUT) of the Faculty of Administrative Sciences at Corvinus University of Budapest (BCE KIK). The profile of this scientific association is integrating the technological potential of mobile devices, namely mobile phones, into the workflow of public administration and public services, thus promoting step by step the development of a client-friendly public administration that is always open to all. For many years, the main product of the association was the operation of an English-language Internet portal (*www.mgsg.org*) that monitored and published international news on mobile communications services.

The *E-Government Foundation for the Modernisation of Public Administration*, which was also established at the BCE as a research backbone of the KSZUT, aims to study and implement the rapidly developing achievements of information technology in local and central administration, and to educate on the emerging methods (Belényesi, 2011, 56). E-Government Studies, a series of textbooks published by the Foundation, had a total of 36 volumes between 2003 and 2009.

Following the mention of the predecessors, the *Hungarian Lawyers' Association* (MJE), which still operates today, should also be mentioned among the organisations presented. In the narrower field covered by this paper, the *MJE's Public Law Section* and its *Scientific Committee* are to be mentioned. As the MJE's founding document states, "The purpose of the Association, as defined in its Statutes, is to promote the general social interests of the legal profession, to develop Hungarian legal life, to cultivate jurisprudence and to promote professional and academic cooperation between lawyers working in different fields of legal life".

The *Association of Administrative Judges* and its *Scientific Council*, established in 2008, are still active in the field of Administrative Sciences. It should be noted that the advocacy role, as one of the essential roles of the Association, was raised at the time of its foundation and in subsequent debates (Ságiné, 2008).

As we are moving forward in time after the regime change, the process of "civilising" the field of administrative sciences is accelerating: the *Hungarian Faculty of Public Administration* has meanwhile ceased to exist after an agony of about two decades, also with litigation, and the gap left in its wake was partly filled by the short-lived *Hungarian Association of Public Administration*, which operated between 2009 and 2012, and then by the *Hungarian Public Administration Society*. The latter, formally, still has county branches even today (2022). It is important that these organisations defined themselves primarily as professional advocacy groups, and, as part of this and in connection with this, they expressed and supported scientific endeavours.

The *Association for the Science of Administrative Sciences* was established in 2015 (in its external communication: Közigazgatástudományi Egyesület) "to create better communication and cooperation between people working in public administration, organised on a voluntary and democratic basis. As a result, they can provide each other with professional assistance in certain specific cases" (*sic!*) (www.civilek.hu, 2022). The association sees itself, as its founding document states, as an advocacy organisation and its early activity was mainly the organisation of communities. It should be noted that both the *Hungarian Association for Administrative Sciences* and the *Association for the Administrative Sciences* have been operating with low intensity, with no substantial activity in the 2020s.

Another key player in the field is the *Administrative Procedural Law Association* (KEJE), founded in 2018, which aims to research administrative law, more precisely administrative procedural law, and to support and develop the relevant law enforcement, providing professional forums for its members and interested parties. In 2021, the KEJE also announced and organised a National Administrative Procedural Law Case Solving Competition.

The above-mentioned associations constitute the *first large group* of scientific associations (foundations) active in the field of administrative sciences in Hungary and listed in the court register in 2022: this group includes those entities with a founding document or mission statement that explicitly states their intention to conduct scientific research into administrative sciences, administrative law or public law as a main objective or at least one of its essential objectives.

However, in addition to the above-mentioned organisations, it is essential to include, in the list of Hungarian administrative sciences research actors, those entities for which scientific work, scientific organisation, etc. is not the core element of their activities. This second group includes all those entities which, for various reasons and to varying degrees, have the intention of processing administrative phenomena in a scientific manner, but this is by no means their main profile. There is a link, but a more distant one, between the objectives of the organisation and the scientific pursuit of administrative sciences. These organisations consciously and regularly involve representatives of science and outstanding figures in administrative sciences in their work by organising conferences, other professional events, international exchanges and publications, while their core activities are not of a scientific nature. The *National Association of Notaries* or the *National Association of Local* Governments (TÖOSZ) are certainly examples of such organisations. These are professional advocacy organisations, organised in the form of associations, which operate in close symbiosis with public administration, and which also carry out scientific activities (even as a subsidiary function). The "inverse" of this category of organisations are scientific associations, the main profile of which is scientific, but their portfolio does not include public administration as a subject of study as an exclusive or primary activity. In Hungary, this could be the case, for example, of the *Political Science Association*, which previously had a public policy section.

In the field under review, the *Magyary Zoltán People's High School Society*, founded on 1 June 1995, can be considered as a specific note of colour. The Society was founded with the aim of preserving and cultivating the intellectual legacy of Zoltán Magyary and, as part of this, to relaunch the people's high school training that existed in the area between 1940 and 1944. For many years, most of the participants in the courses have been representatives of the municipalities of Tata and the surrounding area, members of NGOs, volunteers and interested citizens Emphasis was placed on the aim of providing practical knowledge with a theoretical basis and a systematic form, often in the form of lectures by eminent representatives of the social sciences in Hungary. In any case, *scientific dissemination as such has a special place* among the possible orientations of scientific associations and other grass-roots organisations, in our case in the field of administrative sciences, in that it also provides information and knowledge on public administration and the organisation of the state in an exciting and interesting form, while at the same time presenting the results of contemporary science. The strengthening of the field is demonstrated by the emergence of new phenomena, not analysed in detail here, such as the expanding concept of *community science* (Gaálné, 2020). It is to be highlighted that the Society, within the framework of the public cultural agreement concluded with the City of Tata in 2016, is carrying out an increasingly diverse range of public cultural tasks, with the mission of actively participating in the cultural and community life of the region, including the presentation and dissemination of public, legal and historical knowledge.

In addition to the entities with a scientific profile, this "second" group also includes scientific associations dealing with certain other sub-disciplines of administrative sciences and border studies, in particular through scientific societies for regional studies, sociology, psychology and management sciences.

The above list of elements and the tasks assigned to each of them form the broader institutional and professional context against which the reasons for and the circumstances of the creation of the *ASA*, which became operational in 2021, and the objectives and roles of the organisation can be understood. The mission statement of the founding fathers of the ASA reads as follows: "Our primary objective (...) is to create a forum for administrative sciences, administrative law scholars, academics and leading practitioners from the 'Visegrad countries' in flourishing and meaningful cooperation. (...) This international cooperation has been joined, as it has developed and strengthened, by a growing number of research networks, such as the Information and Organization Centre for Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe, which is affiliated to the Bialystok Law Faculty. (...) An important goal of the association is to ensure the high professional standing of the international journal of administrative sciences, which was completely reorganised with (and because of) the foundation of the ASA, titled: Institutiones Administrationis – Journal of Administrative Sciences" (www.kte.sze.hu, 2022). It has also been set out which sub-disciplines of administrative sciences the ASA wishes to focus on: "The aim of the Association is to promote and disseminate knowledge of the administrative sciences in Central and Eastern Europe, with particular emphasis on the public law, regulatory, governance, administrative, administrative law and public finance aspects of the functioning and organisation of public administration, and to promote cooperation between professionals in these fields" (www.adjukossze.hu, 2022).

On the basis of the facts set out in this chapter, the correlations of Hungarian administrative sciences studies that I have explored in my previous research and discussions with Hungarian researchers in the field, the following summary observations can be made about the existing (or former) scientific associations in the field:

1.) Almost without exception, these associations are founded by one or two "powerful people".
2.) There is a lack of awareness of the need to train the next generation of leaders, and a lack of conscious succession planning. Newer generations tend to pursue their own scientific goals by setting up new professional organisations. In Hungary, on average, a new scientific association or foundation is created every 3 years in the scientific field under review.
3.) Around 70% of the organisations reviewed were established alongside university departments.
4.) The predominance of legal themes, including procedural law, is a characteristic feature; in the post-2000 period; procedural law and digitalisation are the two dominant keywords. We find that, for most organisations, the actual presence of these areas is over-represented, even compared to the roles assumed in the founding documents.
5.) The organisations under review are directly or indirectly funded by public (budget) resources, with a minimal presence of private donors or substantial financial contributions from members.
6.) There is an inner circle of NGOs "adjacent" also to administrative sciences research, the members of which consider this research as their main or one of their main objectives. The main entities belonging to this group are listed in Table 1.

Table 1. Main administrative sciences research NGOs in Hungary as registered in 2022. (Own editing)

Name of civil organisation	**English name**	**Date of establishment**
Demokratikus Helyi Közigazgatás Fejlesztéséért Alapítvány	The Foundation for Democratic Local Public Administration	1990
E-Government Alapítvány	E-government Foundation	2002
Magyary Zoltán E-közigazgatástudományi Egyesület	Magyary ssociation of e-Administration Science	2005
Mobil-közigazgatási Információs Egyesület	Association for Information on M-Government	2005
Közigazgatási Bírák Egyesületének Tudományos Tanácsa	Association of Hungarian Administrative Judges, Scientific Council	2008
Magyar Közigazgatási Társaság	Hungarian Society for Public Administration	2011
Közigazgatás Tudományi Egyesület	Association for Administrative Sciences	2015
Közigazgatási Eljárásjogi Egyesület	Administrative Procedural Law Association	2018
Közép és Kelet-Európai Közigazgatástudományi Egyesület	Central and Eastern European Society for Administrative Sciences	2021
Magyar Jogász Egylet Közjogi Szakosztálya	Hungarian Lawyers Association, Section for Public Law	(1879, if predecessors are taken into account)

One of the aims of this paper is to formulate sound proposals for the ASA regarding its *further* roles in science and the tasks it can/should take on. In order to identify the possible and desirable functions of the ASA in the following chapters, firstly, in an earlier chapter, we reviewed the situation and typical contemporary functions of scientific associations at European level and in general; secondly, we formulated some characteristics of the Hungarian administrative sciences associations today, and thirdly, now focusing on administrative sciences, in the following chapter we will discuss the Central and Eastern European region (in a simplified manner, the former socialist countries in a situation comparable to that of Hungary); we will summarise the results of a survey of representatives of administrative sciences. These will enable me to formulate and record a sound position on the possible or desirable role of the ASA at the end of this paper.

4. Administrative sciences NGOs in the former socialist countries

In the *Introduction*, I pointed out that a good starting point for examining the possible aims of ASA could be to look at what is happening in other former socialist countries in the same field: do NGOs exist in the field of the discipline under review and, if so, what are their tasks? To answer this question, I sent out a series of questions in English to 142 researchers in 18 countries. I contacted practitioners in administrative sciences in the former socialist countries, ensuring a representation of sub-disciplines other than law. For the former socialist countries of Eastern and Central Europe, I did not distinguish whether and to what extent their perception of socialism at the time differed from that of the Soviet Union (the successor states of Yugoslavia and Albania were therefore included).

In the end, excluding Hungary, *41* substantive responses were received from *11* countries (these are Albania, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Poland, Lithuania, Romania, Slovakia, Slovenia, Poland, Romania and Slovakia) to the following questions:

1.) Are there any scientific societies in your country running within administrative sciences?
2.) If so, then are there any subdisciplines of administrative sciences that are overrepresented within the scientific priorities of those associations?
3.) To what extent are they independent of the state (financially, etc.)?
4.) What are the main functions fulfilled by them (towards their members and/or towards the wider public)?

Due to the uncertainty of the facts and data revealed (for example, it is difficult to verify whether the organisations cited by the respondents as examples existed or were actually operating at the time of the publication of the paper), I have presented mostly aggregated data; that is, I have not listed the organisations, their names and characteristics of individual countries. This type of presentation is also perfectly suited to drawing generalised conclusions, in order to capture, in a factual way, the main common features and the trends of change affecting a larger number of actors. Without going into all the details, what has emerged from the responses?

1.) Including Hungary, 6 out of 12 countries have been able to identify at least one genuine NGO (typically an association or foundation). Where there is no scientific entity organised as a classical NGO, there is a local academy of science or a committee organised by the ministry of education or science to carry out a similar science-organising role, bringing together the scientific community. It is noticeable that the further east we go, the fewer NGOs there are. Several respondents also gave unsolicited explanations, embedded in their answers, as to why they think there are no or few administrative sciences associations in their country: According to Wojciech Federczyk, a Polish researcher, scientific societies before ‘89 could only exist under state organisation, and the gap left by this monopoly has not been entirely filled by administrative sciences in the region to date.[1]
2.) Researchers from all 12 countries (!) mentioned meetings of administrative sciences

[1] “Due to the policy pursued before 1989, scientific societies other than public ones could not develop their activities. At that time, scientific activity was “monopolised” by the state. As can be seen, this is a gap that has not been filled to date.” Wojciech Federczyk, 2022. 03 10. e-mail.

departments (typically: administrative law departments), the importance of their formal or informal contacts: there is a tendency to organise contacts and cooperation between administrative sciences departments (mostly in the form of meetings, joint research and joint textbooks). In fact, half of the respondents (!) also reported that these collaborations had started, but over time they stalled or became rare or irregular, and in two cases (Lithuania, Bulgaria) they even ceased altogether in recent years. It is interesting to note that this process has followed a similar pattern in Hungary: there was a boom in the 2000s in organised meetings of administrative law departments, but after 2010 these died out, at least initiatives to involve all departments. It is also worth mentioning here that most of the academic associations that have been set up in the region are institutionally linked to a particular administrative law department.

3.) Almost without exception, academic associations and civil society organisations are growing in the region as a whole from jurisprudence; the predominant approach and choice of subject matter is legal, even if the growing importance and prevalence of political science approaches is also noticeable.

4.) A characteristic feature – also due to the average size of the countries of the Central and Eastern European region – is the low number of people professionally involved in administrative law or administrative sciences in the broadest sense in a country.

5.) All civil society organisations organise conferences for their members and for the wider professional public, either in person or online; in general, the organisation of events and conferences is the typical form of activity. Joint projects are particularly rare, mentioned by only two respondents (and they referred to previous collaborations). It is worth mentioning that about 2/3 of all the NGOs mentioned publish one or more journals; this proportion reaches 4/5 (!) when we include newsletters and various electronic *working papers*.

6.) It is interesting to note that the history of the development of local administrative sciences studies has been covered in monographic work(s) in most places, *but that there is a general lack of works on the current state of the discipline.* In this respect, researchers in the region prefer to focus on the past rather than the present.

7.) There are also professional NGOs set up by members of staff in public administration, although their scientific activities are not of primary importance: in these cases, they tend to have a complementary profile, serving advocacy or other professional purposes. About one third of all the organisations surveyed fall into this category.

8.) There are also non-generalist professional/scientific NGOs dealing with only one essential element or aspect of Administrative Sciences, either related to a "specialised" field of Administrative Sciences (e.g. environment, consumer protection, especially in the case of the Czechs and Poles) or focusing their research on a cross-cutting, "functional" issue (e.g. the context of digitalisation).

9.) Among the tasks carried out or to be carried out by professional associations, the need for cooperation with the media and the need for a specific presence in social media, and more generally the importance of social contacts and the desire to communicate scientific results to a wider social public were also mentioned by several actors.

10.) The majority of respondents mentioned NISPACee (The Network of Institutes and Schools of Administrative Sciences in Central and Eastern Europe), an international administrative sciences organisation registered in Slovakia, as a model and/or a key non-profit actor in the region.

5. Conclusions and suggestions

This paper has reviewed the academic associations in the wider region in the field of administrative sciences and their various aspects of operation, with a view to drawing sound conclusions and making recommendations that could be of use to the ASA.

One of the fundamental characteristics of the sciences is the high degree of parallelism: researchers in the field, while sometimes exploring similar or identical topics, often explore different subject areas, sometimes overlapping and sometimes very divergent ideas. This diversity is certainly a necessary element for successful scientific research, but the persistent fragmentation of scientific communities, with a small number of researchers, and the fact that they are only able to engage in meaningful scientific discourse on a very narrow range of topics, also poses a real danger of isolation, both internal (towards their own members) and external (towards the frontiers, towards representatives of other disciplines, towards the wider international community and towards non-professional audiences). The creation of the ASA is a single, but decisive step towards avoiding this internal and external isolation. If we look for the underlying reasons for the creation of this entity, which also aspires to a regional role, then – among other factors – the emergence of international visibility as an independent aspect in various performance expectations and evaluations, and the requirement of multi-, inter- and even transdisciplinarity, which has become inescapable, are also pushing researchers in Hungary towards these forms of cooperation. The exciting question is, of course, whether and how ASA as a new arena will change the current logics, existing networks and "points of preference" of scientific collaboration (Evans et al., 2011, 381). We will be able to answer this question in a few years' time. What is already relevant and worthy of consideration is the question of some of the new functions that could be proposed for ASA in the medium term.

The additional roles and tasks I propose for consideration are as follows:

1.) To take on the task of modernising science, in so far as the value of individual research is nowadays not only confirmed by the metrics of its direct impact on the discipline, either at individual or at community level, but also by the impact on practice and the wider social environment, which will also become measurable over time. Taking on a function that goes beyond the organisation of internal relations and the internal flow of information would be in line with contemporary trends in scientific development, and could be seen as a new and modern conception of the role. This function is obviously inseparable from the increased use of social media.
2.) As regards future directions, the question of whether further sub-disciplines of Administrative Sciences outside Administrative Sciences law will be involved is a kind of watershed, since the answer to this question also answers whether the ASA will define itself as a comprehensive platform of administrative law that consciously builds links between the sub-disciplines. The development of these links and a policy of conscious opening up seems to be justified to some extent.
3.) Although we know that the culture of debate is less developed in Hungary than further west, and that Hungarian administrative sciences cannot escape its effects, it is justified to organise events where the organisers consciously strive to ensure that *all relevant views on the issue are represented, and that there is an opportunity for reflection.* By practicing "active neutrality", it is essential to avoid the phenomenon that has become

rampant in Hungarian social science, whereby "national and illiberal" approaches are heard at one event, while "globalist and liberal" approaches are heard at another – on the same topic – avoiding any kind of meaningful, professional dialogue.

4.) In the light of the Hungarian history, one of the most important tasks could be to ensure that the organisation remains viable after the founders' departure or death, i.e. to develop and implement a *meaningful organisational development and youth development plan*, so that the next generation can take over the "baton" of the ASA in a few years or decades, without having to think about founding a new association.

5.) The accelerating decline in the number of Hungarian speakers, the rise of English language and the greater internationalisation of administrative sciences studies, as outlined above, are all factors that make *the protection and conscious development of the Hungarian legal and administrative language* an independent task. This can take many forms, from terminological debates to proposals for the renewal of the terminology.

All of the above proposals are valid positions with regard to possible future goals, but they also have in common that they cannot be achieved without conscious efforts, decisions by associations and persistent work: without commitment they will remain mere pipe dreams.

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The motivations for and barriers to cloud technologies in the field of transportation[1]

Simon Nagy*

* PhD student, Department of Transport Technology and Economics, Faculty of Transportation Engineering and Vehicle Engineering, Budapest University of Technology and Economics; Transportation engineer, National Data Economy Knowledge Centre, Neumann Nonprofit Ltd. E-mail: nagy.simon@kjk.bme.hu, nagy.simon@natuk.hu

Abstract

Cloud technologies have gained high popularity in recent years. Due to the digital transformation in past decades, information- and infocommunication technologies (ICT) have become highly recognized in all sectors. Cloud technologies have appeared as scalable, agile, secured and global solutions. Next to their advantages, however, several barriers have been identified. In this paper, we review the main cloud computing models and the advantages of and barriers to cloud technologies, as well as their application in the special case of transportation. Based on the review, we introduce the role of the National Data Economy Knowledge Centre in transportation development, especially focusing on proposed cloud applications.

Keywords

cloud computing, urban transportation, information technology.

1. Introduction

More than half of the world's population lives in cities, according to the United Nations (UN, 2018). City governments are facing several major problems, one of which is the operation, maintenance, and development of urban transportation systems. Urban transportation systems consist of passenger and freight subsectors (Mehrotra et al., 2018, 491–518). Transportation services are also classified as air, road, rail, and water-based systems. In this paper, we consider *road and rail transportation, in both the freight and passenger subsector.*

This paper argues that there are several advantages of and barriers to cloud computing, while the transportation system is a complex application environment. High heterogeneity is

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identified in the context of stakeholders and data sources, as well as methods of data collection, storage, and processing. I concluded that cloud technologies are key to addressing the increasing magnitude and complexity of transportation data. Finally, I briefly introduce the role, and proposed projects of the National Data Economy Knowledge Centre, as a possible solution for the challenges described.

2. The background and concept of cloud computing

The concept of smart cities has emerged in the last decades. Although there is still no generally accepted definition, approaches (Meijer & Bolívar, 2015, 391–408) show several similarities, for example:

- smart city concepts are used to identify a large spectrum of *heterogeneous* solutions, and *city programmes* (Dameri, 2013, 2544–2551),
- smart cities are identified as *complex systems*; one of their subsystems is smart mobility (Nagy & Csiszár, 2020, 117–127),
- smart cities are energy efficient, and aim to minimize negative externalities; *green mobility* is identified in the context of transportation (Lazaroiu & Roscia, 2012, 326–332) and
- smart cities aim to achieve a higher quality of life, as well as a more sustainable operation through the application of various ICT solutions.

Cloud computing is one of the many instruments in ICTs. Generally, cloud computing is defined as a "model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources" (Mell & Grance, 2011, 1–7). It could best be described as a framework, utilising network capacities including and incorporating several solutions and services. Solutions and services share numerous characteristics (Stieninger & Nedbal, 2014, 59–68; Moghaddam et al., 2015, 1–6), such as:

- *on-demand self-service,* meaning that no active interaction is required,
- *broad, and cross-platform network access,* as cloud computing services are distributed on the network and available for all operating systems, both desktop and mobile.
- *rapid elasticity* or *agility,* meaning resources are rapidly and automatically deployed, depending on the demand, resulting in a dynamic and autonomous agile service,
- *measured service,* enabling dynamic measurement and monitoring of service performance,
- *isolation* of services, serving security and performance goals, and
- *distribution,* as cloud computing services are globally distributed using various IT resources.

Cloud computing includes several services models (Youseff et al., 2008, 1–10). *Software-as-a-Service* (SaaS) is a software delivery model which provides the user with access to business functions remotely, through the cloud (Sun et al., 2007, 558–569). SaaS applications are accessible from various devices through an interface or from a browser. Users do not manage the back-end cloud infrastructure. *Platform-as-a-Service* (PaaS) is a cloud software environment, which unites data and communication between computing elements, and provides a universal platform. Finally, *Infrastructure-as-a-Service* (IaaS) provides hardware (computational resource) virtually and on-demand.

Cloud services are deployed in multiple forms (Savu, 2011, 1–4). *Private clouds* provide exclusive infrastructure to an organisation, which are either maintained internally or by the service provider. Private clouds are only accessible for the organization. *Community* or *public clouds* are shared across a specific community. The infrastructure is used by different entities, which can be both individual users and organisations. Public clouds usually utilize the biggest infrastructure. Finally, *hybrid clouds* are a composition of two or more clouds, where some clouds remain private, but are bound to public and/or community clouds.

3. Information systems and data management of the transportation sector

Transportation is a special field in which all types of entities are found as stakeholders, from individuals (passengers) through private small companies to multinational private and big public companies. The high heterogeneity of stakeholders results a wide variety of information systems, from data collection through data processing and analysis to data utilization.

Similarly, to information systems (and stakeholder types), there are many instruments of data collection. First there is *crowdsourcing* (Misra et al., 2014, 1–8; Saxton et al., 2013, 2–20), which utilises social computing, using a network of collaborators to solve a problem; one type of crowdsourcing is *web-based,* which fits into cloud systems well, and enables cloud technologies to be applied. Machine-based data collection is represented by *sensors,* which are used for many applications, such as traffic volume count, speed data and, licence plate recognition. The data collected by sensors are stored in the databases of companies' information systems and can be migrated into cloud storage. Another popular mode of data collection is *surveys to identify the optimum service configuration.* In this context, we introduce the two most popular types: (i) *stated preference* (SP) (Hensher, 1994, 107–133), and (ii) *revealed preference* (RP). In SP data collection, the individual is either asked to rate or rank their preferences among a set of combinations of attributes, or to choose *one* combination of attributes. Preference modelling is based on the principle that every consumer seeks to maximise utility, and the benefits they gain from all products and service and the underlying utility functions can be measured with sufficient certainty if the attributes and their levels (e.g., speed, frequency, price and comfort) are presented in a statistically balanced design (Richter, 1966, 635–645). RP define utility functions by building models from observing actual consumer behaviour. Bothe often used in transport planning for mode choice modelling, mobility management, mobility plan design *inter alia,* and in this context avoid the frequent criticism that smart cities are designed and built without adequate input from the systems' existing and potential users.

3.1. Smart cities, smart mobility, and big data

In the past decade or so, new concepts emerged, namely *smart cities, smart mobility,* and *big data.* Smart cities are cities which utilise ICTs in order to achieve a higher level of sustainability and quality of life (Nagy & Csiszár, 2020, 117–127; Vecchio et al., 2019). Smart cities are complex systems, with various, interconnected application subsystems, one of which is smart mobility. Big data and smart mobility are interrelated as well. Big data is defined as a complex technological environment, which enables the collection, processing, and utilization of datasets which are so large and complex that conventional database-management systems cannot process them.

Next to the heterogeneity of organizations and data collection methods introduced above, the *heterogeneity of data* is an important factor. One of the main challenges of the application

of big data and cloud computing is that data are collected from various sources (Neilson et al., 2019, 35–44). Some sources, such as roadside sensors produce easy-to-use data. Other sources, for example user activity collected by smartphones, require processing before usage.

As vehicle and transportation technology advances, new opportunities emerge for data collection. One of the most relevant advances are *vehicular networks* and *connected vehicle technologies* (Ali et al., 2015, 1–4). Data can be directly from vehicles, as they are equipped with sensors and communication systems.

4. Adoption of cloud computing in transportation

Migration of enterprise information systems into the cloud is advantageous for all stakeholders, though multiple barriers and challenging tasks are observed. Heterogeneity is observed in the context of

- stakeholder size,
- complexity of ICTs used by the stakeholders, containing a wide variety of devices with different operating systems, different data collection methods,
- collected and handled data, ranging from security-critical to non-critical, as well as from public to personal/private,
- network access and bandwidth, which is also influenced by the proportion of citizens having access to a mobile network, and the proportion of open-access Wi-Fi networks in metro areas,
- legal environment of data collection and handling, etc.

Therefore, to apply cloud technologies on a broad basis, different adoption strategies are required. Furthermore, adoption cannot be done exclusively by considering technological and IT aspects. In this section, I review the main advantages of and barriers to cloud technologies in transportation.

4.1. Advantages of cloud technologies

Cloud computing has several key advantages (Avram, 2014, 529–534; Ullah & Babar, 2019, 81–118) First, computational resources are scalable. Through software APIs, cloud-based services are scaled up and down dynamically, resulting in a cost-effective and rapidly deployable service model (Dubey & Wagle, 2007, 1–12).

Cloud computing processes also have high agility, meaning almost immediate access for hardware resources, without the need for expensive investments. Temporary resources can easily be deployed for research and development purposes. In this way it lowers or removes the barriers to IT development.

Cloud applications drastically reduce the cost of entry in order for smaller organisations to benefit from computing-intensive business applications. These applications were only available earlier for companies with high hardware capacity.

Using cloud resources and applications also means that, next to the globalisation of an enterprise, its data globalises as well. Cloud service providers have data centres around the world, which are inter-connected. Corporate data can therefore be accessed through the network, or even transferred to the closest data centre if needed. This results in reduced globalisation costs, as the firm does not need to carry their data.

Cloud services are also safe and secured. Although security, or rather uncertainty, is understood as a barrier, cloud platforms are secured in various ways (Muttik & Barton, 2009, 1–6). Potential threats are eliminated using complex methods, such as filtering, malware protection, blockchain and DDoS protection, as well as various security protocols.

4.2. Barriers of cloud technologies

The first barrier to be mentioned is security. Although cloud platforms and services are secured by various methods, uncertainty among potential users is significant. Cloud services are exposed by attacks on APIs, publishers and web portals, as well as interfaces (Hussain et al., 2017, 57–65). Attacks can be aimed at hardware, software and data. Ristenpart et al. (2009, 199–212) concludes, that risks arise from sharing physical infrastructure among users. In the context of transportation, security is especially important. Data from various sources are collected and stored, much of which can be security-critical, such as traffic collection of license plate numbers, tracking passenger movements through their end-devices etc.

Operating a cloud system requires staff on the organizations' side as well. Migrating data and certain functions into the cloud is a complex and novel field. Cloud architects, DevOps engineers, and cloud engineers have to hold specific and advanced skills. In this case, the organisation must choose to either hire its own cloud engineer employees or hire a third party to manage its cloud system, which also includes data management.

Legal issues can also be observed, especially in the context of data and information privacy. Although cloud service providers can deploy better security mechanisms in their service than individual users or organizations; platform sharing, lack of data control and third-party services make security a major worry (Cheng & Lai, 2012, 241–251).

5. Discussion – role of the National Data Economy Knowledge Centre

In the previous sections, I introduced cloud services and computing models and the complexity of the transportation sector, as well as the main advantages and barriers. I identified that privacy and security are major issues.

In Hungary, the transportation division of the National Data Economy Knowledge Centre carries out research and innovation in this direction. In order to solve the problems of high heterogeneity, we introduced two major projects.

- *a complex road traffic information system,* which contains installation and operational standards for roadside and vehicle sensors,
- *a smart transportation integration framework,* which introduces a novel method for the application of cloud computing with the special aim of enhancing the integration level of urban transportation.
- The simultaneous deployment of these projects has the following impacts:
- standardization of databases, as the integration framework introduces a framework for data storage,
- high level of data security, as databases are managed by the National Data Economy Knowledge Centre,
- decision support in the context of transportation development, maintenance and operation, and
- data availability for research and development tasks.

It is beyond the scope of this study to decide whether an existing, commercial cloud service (e.g. Microsoft Azure, Amazon Web Service etc.) should be used or an entirely new network should be designed and deployed by the National Data Economy Knowledge Centre.

6. Conclusion

Information technologies have advanced greatly in recent years. In this paper, I reviewed cloud computing, and the related concepts of big data and smart cities. The application of cloud computing is advantageous yet challenging. All barriers arise from sharing physical infrastructure amongst users. In the context of transportation, the solution can be the inclusion of a national control organization, as with National Data Economy Knowledge Centre in Hungary. The cloud system must be deployed and supervised by the National Data Economy Knowledge Centre to ensure secure operation. By using cloud computing methods, the integration level of transportation can be enhanced. Integration is defined between organisations and between subsectors. The utilisation of cloud technologies enables decision support for operation, maintenance and development tasks, as well as data for research and development purposes.

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A systematic approach to connected services in the urban environment[1]

Péter Ákos Szilassy*, Bence Jenőfi**

* PhD Student, Department of Transport Technology and Economics, Faculty of Transportation Engineering and Vehicle Engineering, Budapest University of Technology and Economics; employee, Neumann Nonprofit Ltd. – National Data Economy Knowledge Centre. E-mail: szilassy.peter@natuk.hu
** Employee, Neumann Nonprofit Ltd. – National Data Economy Knowledge Centre.

Abstract

As the global trend of people moving into cities grows, local governments are evermore pressured to keep improving their services while serving a rising number of customers. The quality of life perceived by city dwellers, however, is influenced by a composition of all services they use, regardless of their public or private nature. Alternatively, residents judge cities based on a comprehensive experience. As such, private and public entities are jointly motivated to improve on this to retain and grow their customer base. Providing these services under a unified platform, moreover, may result in a consolidated cost of provision as well as higher revenue potential via cross- and upselling offers on personalised terms. Further on, it may enable cities to link discounted access to generally demanded or popular services to the utilisation of or preference for services with positive externalities for the public, in line with the city's strategy. In this article, the economic benefits of such a tight, so-called 'City as a Service' level of integration will be examined.

Keywords

Smart city, Public services, Service integration, City as a Service, Urban efficiency.

1. Introduction

Most services related to urban life have a high overlap in their customer base. In recent times, citizens could witness increased collaboration between providers, resulting in the integration of numerous such services. The basis of all this is that they know their users' habits and patterns of using their service and they are accounted for in data-based systems. Of course, this primarily requires users (residents) to opt into data sharing, but in most cases this is a prerequisite of service provision or taking advantage of benefits originating from higher levels of service integration.

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This way, public utilities can be integrated with mobility services. Healthcare services can also be combined with sports services, or leisure services can form a unified service with programmes provided by public institutions. In this article, we cannot review all urban services for all potential integrations, but at the same time we would like to show how we can use interconnected services in a more customer-friendly and integrated way.

All this is increasingly desired by citizens who use the city's public services, as they also experience a high level of integration and better user experience of other, non-public, services, such as Uber[2] or N26[3] and Lime. As such, urban service providers need to meet this this emerging need.

Meanwhile, there is a globally trending concept commonly referred to as a smart city. It's a collective term for data collecting and processing solutions enabling data-based – sometimes in real/near time – decision making/support in an urban environment. In addition, due to rising living standards, an ever-greater number of people choose to drive, thus consuming more energy. As a result, a growing demand for services that reduce congestion and waiting times in both transport and municipal administration, as well as public healthcare is expected. Due to the overlap of beneficiaries of these services, their combined improvement may bring about efficiency gains on the provider side, while introducing otherwise non-feasible added value offerings for citizens. Therefore, the positive cross-sectoral externalities underline the importance of an ecosystem model.

The article is arranged as follows. After the introduction, the literature is presented in Chapter 2, followed by a description of the methodology in Chapter 3, in which we can also learn about the services. Chapter 4 shows the application of the methodology through a case study, leading up to Chapter 5, where the conclusions are drawn.

2. Literature review

Based on the criteria described, the design and implementation of the smart city concept has already started in many places. Major cities in developed regions have concluded that smart cities are the key to further development, while cities in developing regions considered smart cities as a chance to leap forward. In both cases this is urged by congestion, the general drive for sustainability and need to mitigate various economic and social problems. Evaluating and analysing the quality of services is a well-researched field of science in many cities and articles.

The concept of smart cities in practice focuses on urban transformation based on sustainability. Sustainability itself has been researched in many places, based on environmental (Goodland, 1995; Jacyna et al., 2015; Jacyna & Merkisz, 2015; Veleva et al., 2003), social (Olakitan, 2019; Rafiaani et al., 2018) and economic (Dabbous & Tarhini, 2019; Goerner et al., 2009) factors. Because every country and city can be described by their institutional as well as the respective dimensions above, smart cities need to consider and adhere to sustainability considerations.

Although quality has been defined in many ways over the years, it supplements sustainability with another layer of assessment of services in smart cities. Consequently, several studies have analysed them from a quality perspective. Their approach applied TCQSM (de Oña & de Oña, 2015), TQM, Lean, and Six Sigma (Näslund, 2008) to classify the characteristics of urban

[2] Lime And Uber Partnership Expands Into Europe. https://www.li.me/blog/lime-uber-partnership-expands-into-europe

[3] Lime and N26 Partnership Encourages Riders To Move Freely, With Two Free Months of Lime Prime. https://www.li.me/en-po/blog/lime-and-n26-continue-partnership

services. Systems formalised by quality control concepts can also eliminate functional barriers and increase cross-functional processes.

If cross-sectoral projects and services are considered, integrated infrastructure management is justified not only by a general desire, but also by the scarcity of resources. (Scott & Pasqualetti, 2010). Efficiency is a fundamental interest and, in many cases, an elementary necessity. Water and electricity supply can also be made more efficient, which is not the main consideration in a non-environmentally conscious city. In addition to the scarce availability of resources, the rising cost of energy is a more important driver for more efficient operations. It has been shown in many European urban studies (Barraqué et al., 2011; Hillenbrand et al., 2008; Moss, 2008) that a decrease in the level of consumption also endangers the maintenance and modernisation of networks built in the 80-90s. The entire network was built due to the apparently ever-increasing demand induced by urbanisation. As a result, there have often been excessive developments. Nowadays, changing patterns and dispersing and atomising overall demand therefore require not only new technical solutions but also results in economic weakening.

Consequently, cross-sectoral projects and interactions should be sought not only because of the scarcity of resources and international trends, but mainly because of changes in the pattern of supply and demand. More research has been done on this and it is related to the ideas developed for rethinking urban infrastructure (Schöneich, 2012; Rutherford, 2014).

3. Methodology

3.1. Types of urban services

The range of urban services is wide, and these may be handled differently in different countries and cities. Often, a task considered to be of great public interest is not done by city or state-owned companies but by NGOs or other charitable organisations.

Therefore, this article is limited to services that appear on a daily or at most annual basis. These sectors can be distinguished between public services: (Table 1.)

- Utility services
- Transport services
- Support services and public healthcare
- Public institutions
- Sport and leisure services

Utility services:
Utility services include electricity, natural gas, district heating, district cooling, drinking water, wastewater, refuse collection and chimney sweeping. These are the most basic services that create and serve daily housing. Without the above, urban life could not be sustained.

Mobility services:
It is also essential to provide transport services to connect the labour force with employers via the most efficient commute possible for car owners and public transport users alike. It manifests in a wide variety of ways, ranging from the traditional trains, subways, trams and buses, all the way to new micro and shared mobility services, such as public bicycle systems e-scooters, e-bikes and e-mopeds. In addition, there are services for motorists, such as car-sharing, road maintenance and parking services.

Support and healthcare services:
This sector includes services that provide a healthy urban environment while also preventing potential public health emergencies. The following important services can be distinguished: mental health services, funeral service, emergency response, forest management, public building facility protection, Street cleansing and gas furnace maintenance.

Public institutions:
Public institutions host government services, libraries, museums, church services, cinemas, theatres, opera houses and public safety services.

Sport and leisure services:
It is necessary for the city to provide services not only for work, housing, transport and public affairs, but also for leisure and recreation purposes. The following services can be considered in this category: baths & spas swimming and sport facilities as well as cultural services, and public parks.

Table 1. Services and service sectors

Utility services	**Mobility services**	**Support and healthcare services**	**Public institutions**	**Sport and leisure services**
Electricity	Bus services	Public and mental health services	Government services	Baths, spas, swimming pools
Natural gas	Tram services	Funeral service	Library, museums, churches	Sport fields, sport tracks
District heating	Subway services	Emergency management	Cinema, theatre, opera	Public parks, recreation
District cooling	Train services	Forest protection	Public safety	
Drinking water	Ancillary mobility services (e.g., funicular, ships)	Public building, facility protection		
Waste collection	Public bike system	Street cleansing, maintenance		
Chimney sweeping	E-micromobility (e.g., e-scooter, e-bike, e-moped)			
	Car sharing			
	Taxi			
	Parking			

3.2. Integration of service providers

Although the services provided are in most cases separated to different legal entities provided backed by different service providers, sometimes they are very separate, but many times they are organized under a common group, in a holding company.

It can be said that the development of various smart cities is based on progress in the following important areas:

- Water
- Energy
- Waste
- Mobility
- Healthcare
- Economic Development and Housing
- Security
- Government
- Engagement and Community

Not only progress is important, but also the development of individual services and the creation of integration and service offer packages between companies.

Exploiting operational synergies between companies is very much needed, because exploiting the coordinated central coordination and internal service roles (logistics, finance, planning, HR, law, regulation, procurement, facility operation) and the additional benefits of economies of scale are basic interests. The synergies could give much more opportunity to companies which are operating separately and related only to the residents as the users. The sectoral division of the service is shown in Table 2.

Table 2. Service providers

Utility companies	Mobility companies	Support and Healthcare c.	Public institution c.	Leisure companies
Waste management c.	Bus service provider	Stormwater management c.	Municipalities, civil administration	Baths, spas maintainer c.
Electricity producer and supplier c.	Tram service provider	Disaster management c.	Entertainment facilities	Sport facility maintainer c.
Gas supplier	Subway service provider	Animal control service	Police	Leisure centres
Water treatment and distribution c.	Train service provider	Hospitals, health care facilities	Fire service	Urban gardener public c.
District heating supplier	Other service provider	Ambulance		Public area maintainer c.
District cooling supplier	Micro mobility provider	Burial office c.		
Sewerage c.	Car sharing c.	Forestry		
Chimney sweeping c.	Petrol station c.	Public cleanliness c.		
	Charging station c.	Road maintainer c.		
	Parking inspection c.			
	Road maintainer c.			

Searching synergies, several levels can be distinguished considering integration and cooperation. For simplicity, there are 3 levels:

0, None: Non-integrated, non-cooperating urban service providers.
1, Low: Some collaboration can be observed, but only based on individual interests, not providers operating in a united system.
2, Medium: Service providers appearing in a city service holding company in a common system, seeking cooperation in several projects, searching for common interests.
3, High: An urban service provider as part of a holding company, in which the divisions and sub-areas work closely together and also provide packages to citizens of different profiles.

Integration has not only a development trend, but also a sequence. Integration takes place within the different sectors (Utility, Mobility, Support and Healthcare) and then between the sectors. The greatest integration usually starts with the utility holding company. The largest and one of the most important integrations is when the utility provider merges with the urban transport management centre, including parking and all public transport actors, such as car sharing or micro mobility. ("c." is an abbreviation of company)

3.3. User profiles

The services are used by a wide variety of people. For this reason, different companies distinguish customer personas and create customer profiles accordingly. This study acknowledges this differentiation and goes one step further, taking social status besides purchasing power into account, as it has a big impact on habits. To illustrate this, 12 examples of such personae have been created, however, this is not to claim that it is they are representative of any particular society. Nonetheless, the 12 example profiles below can show the different set of people with potentially different habits to be served by the same provider on a par when it comes to service level. These consumers are included in Table 3. With regard to annual income, London annual earnings data for 2020 were taken into account.

Table 3. Introduction of personas

Persona	No.	Name	Gender	Age	Profession	Marital status	Income per year	Children
Child	1	Sara	female	14	Student	Single	0	0
Student	2	John	male	21	Student	Single	0	0
Analyst	4	Dave	male	24	Data analyst	Single	25000	0
Designer	5	Selina	female	27	Graphic designer	Single	30000	0
Housewife	3	Maggie	female	37	Housewife	Married	10000	3
Manager	6	Mary	female	38	Manager accountant	Married	35000	1
Director	7	Brian	male	43	Marketing director	Single	80000	0
Banker	8	Justin	male	45	Businessman - finance	Divorced	70000	2
Bookkeeper	9	Teresa	female	57	Bookkeeper	Married	18000	4
Lawyer	10	Richard	male	65	Attorney	Married	100000	3
Pensioner - poor	11	Elisabeth	female	76	Retired administrator	Widowed	5000	3
Pensioner - rich	12	Charles	male	87	Retired salesman	Married	40000	2

There are big differences between different user profiles. The most basic reason for the differentiation is the age of the users, but there is a difference in the users' finances, namely their

monthly / annual income in GBP. Another important difference is their occupation, which also has a big impact on their incomes and opportunities. The number of children is also an important metric because it is projected onto people's habits and opportunities. For example, a mother with small children cannot move and access services so easily, while a man who does not raise children can use more services. In this sense, even a person's gender is an important datum, as along with their marital status and presence and age of children.

If the profiles are examined from an international point of view, there can certainly be profile shifts and changes between the users in different societies. Different social classes are likely to look different in other countries. Nevertheless, this article wants to point out how much correlation there can be between different unconnected services.

Considering the very important factors that change the habits, the services used were evaluated, which is shown in detail in the Table 4.

Table 4. Users and used services

Used services		Sara	John	Dave	Selina	Maggie	Mary	Brian	Justin	Teresa	Richard	Elisa	Charles
Utility companies	Water & energy supplier	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Water treatment and distribution c.	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	District heating/cooling supplier	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Waste management c.	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Chimney sweeping c.	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Mobility companies	Public transport company (bus, tram, subway, train, other)	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	No	Yes	No
	Micro mobility provider	Likely	Yes	Yes	Yes	No	No	Yes	No	No	No	No	No
	Car sharing c.	No	Yes	Yes	Yes	No	Yes	No	Yes	No	No	No	Yes
	Parking/road inspection c.	No	No	No	No	No	No	Yes	No	No	Yes	No	No
	Petrol/charging station c.	No	No	No	No	No	No	Yes	No	No	Yes	No	No
Support and Healthcare c.	Vis major management	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely
	Hospitals, health care facilities	Yes	Yes	Likely	Likely	Yes	Yes	Likely	No	Likely	No	Yes	Yes
	Animal control service	Likely	Likely	No	Yes	No	Likely	No	No	Yes	No	No	No
	Public/road/forest/air cleanliness c.	No	Yes	No	No	Likely	Likely	Yes	Likely	Yes	Yes	No	No
	Burial office c.	No	No	No	No	Yes	Yes	Yes	Yes	No	No	No	No
Public institution c.	Municipalities, civil administration	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Entertainment facilities	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No	No
	Emergency services (police, fire department)	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely	Likely
Leisure companies	Leisure centres	Yes	Yes	No	Yes	No	No	Yes	Yes	No	Likely	No	No
	Sport facility and spa/ bath maintainer c.	Yes	Yes	No	No	No	No	Yes	No	No	No	No	No
	Urban garden and public area maintainer c.	Yes	Yes	No	Yes	Yes	Yes	No	Yes	No	No	No	Yes

Searching for positive effects among services

It is exactly known what kind of services different people use. Hence, it can be inferred what services people with a given user profile use on a regular basis. For this reason, different sectors interacting with each other can have a positive externality on each other's operation and service expansion, as well as on the development of services consumed by users.

The search for these potential positive cross effects and opportunities for cross-sectoral co-operation have also been carried out, which is shown in Table 5.

Table 5. Comparison of different services interacting with each other

Synergies /cross-sectoral utility		Utility companies	Mobility companies	Support and Healthcare c.	Public institution c.	Leisure companies
Utility companies	Water & energy supplier	Yes	Yes	No	Yes	Possible
	Water treatment and distribution c.	Yes	No	Possible	Yes	Possible
	District heating/cooling supplier	Yes	No	Possible	Yes	No
	Waste management c.	Yes	Possible	No	Yes	Possible
	Chimney sweeping c.	Possible	No	No	No	No
Mobility companies	Public transport company (bus, tram, subway, train, other)	Yes	Yes	Possible	Yes	Yes
	Micro mobility provider	Yes	Yes	Possible	Yes	Yes
	Car sharing c.	Yes	Yes	Possible	Yes	Yes
	Parking/road inspection c.	Possible	Yes	Yes	Yes	Yes
	Petrol/charging station c.	Yes	Yes	Possible	Yes	Yes
Support and Healthcare c.	Vis major management	Yes	Yes	Yes	Yes	Possible
	Hospitals, health care facilities	Yes	Yes	Yes	Possible	Possible
	Animal control service	No	Possible	Possible	Possible	Possible
	Public/road/forest/air cleanliness c.	Yes	Yes	Yes	No	Possible
	Burial office c.	No	Possible	Yes	Possible	Possible
Public institution c.	Municipalities, civil administration	Yes	Yes	Yes	Yes	Yes
	Entertainment facilities	Yes	No	Yes	Yes	Possible
	Emergency services (police, fire department)	Possible	Yes	Yes	Yes	Yes
Leisure companies	Leisure centres	Yes	Yes	Yes	Yes	Yes
	Sport facility and spa/bath maintainer c.	Yes	Possible	Yes	Yes	Yes
	Urban garden and public area maintainer c.	Yes	Possible	Yes	Possible	Possible

Positive incentives to counteract negative externalities

Many incentives and measures can be used to encourage people to change their habits towards an economically, socially and environmentally sustainable alternative. In the case of public utilities, the transition from natural gas to electricity can be encouraged, which can make our environment more sustainable in the long run, if we generate electricity from clean energies.

In the case of transport, support measures could be directed towards micro mobility. Although this isn't an alternative for everyone, using micro mobility services can speed up the daily commute for many people. This requires, however, to make micro mobility much cheaper and more accessible. Good practice for such an approach has been implemented in combination with public transport in Helsinki, Antwerp, Vienna and Munich. (e.g., Whim, Moovster applications)

Though not eliminating all cars from the streets, the number of parking spaces can be greatly reduced, especially in the densest part of the city centre, which can be transformed into a park or a smaller green area.

Personalised service packages.

There may be different examples on how to set up different service packages for people with different profiles.

Nowadays, car sharing services by energy service providers, fuel companies and car manufacturers are the most common, which is not just a simple service, but can be supplemented with discounts on energy/fuel consumption for the first two.

In the field of smart mobility, the definition and application of individual zones for monthly passes can be a solution (Szilassy et al., 2022), which was examined in an earlier study.

Considering public healthcare, the automatic and cloud storage of personal data and medical records can be a great option, but individual packages can also be created for sports and entertainment passes.

Result and discussion

Based on the above, there is great interoperability and common project opportunities between different public service sectors. Taking advantage of these is in the best interests of the various public service firms, because if they cannot do it then market players may come and do it for them. It may not be necessary for public utilities and the city government to implement every service in an integrated way, but there is a great opportunity for a city to embark on such a project and make the city more liveable, smarter and more integrated.

However, different personalities require different services, for which different packages can be put together. Compiling such packages is the responsibility of the service providers, which vary from country to country, from city to city.

Public utilities and transport, on the other hand, are permanent services that can be found in many cities and are mostly among the tasks of the city. The process of integration of these has already begun in many places.

In Copenhagen is called the integrative organisation as the Greater Copenhagen Utility. There is a Paris Board of Public Utilities in Paris, but most notably in the German-speaking area, the Stadtwerke (Municipal Utilities) system is widespread, with integrated utilities but, in many cases, urban mobility also. Such a system exists in Berlin, Munich and Vienna.

The Vienna example (Wiener Stadtwerke) is very progressive as it integrates the public utility system through energy, water supply to waste and district heating systems and network operators. Furthermore, the entire transport network and the parking system are integrated together also in the public space as well as car parking facilities. In addition, burial and maintenance of cemeteries as well as the entire IT infrastructure are included.

In total, there are several such forward-looking systems, which Budapest and Prague are trying to establish and introduce. Progress in service integration will be needed to provide an integrated service to cities.

Conclusion

In summary, finding and developing links and synergies between service integration and services is very important and inevitable. The basis of the future development is to identify the service

sectors, the clientele and, the level of integration. Furthermore, it is essential to see what kinds of people, citizens with a personal profile, use the services, and which services these people use and how often.

In addition to these, by finding synergies and benefits between sectors, packages can be put together in which city services can be used for everyone.

The research is recommended to everyone who wants to understand that many more services can be integrated, sold, and used, packaged with public services. They can be useful for city leaders, managers, and decision-makers of public utility service providers and urban transport companies.

In the future, the model can be further developed, many new areas can be included in addition to the above. Integration is a major step forward in most areas and can take place through the use of new technologies, e.g., in field of micro mobility, or even in the monitoring of the road network with sensors.

The hardest part of the whole integration is realizing what can be brought together and how the lives of individuals can be made more efficient and simpler in practice with these integrated services. In this sense, this article wanted to provide guidance for service integrators.

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Book Review

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Monograph Review

Peter Hongler – International Law of Taxation

Jiří Kappel*

* Jiří Kappel, Mgr. Ing., PhD. student at Department of Financial Law and Economics, Faculty of Law, Masaryk University, Czech Republic. Author specializes in tax controversy, corporate income tax, European and international taxation. He is the author of several scientific articles on anti-tax avoidance rules and other taxation issues. Professionally, the author is employed as a managing associate in an international law firm. E-mail: kappel.jiri@gmail.com

In September 2021, Oxford University Press published a fourth book in its Elements of International Law series titled International Law of Taxation which was authored by Peter Hongler. In line with the goal of the series, this book provides a relatively concise excursion into its subject matter yet does not compromise with regard to referenced case law or commentaries by academia.

As the publication is structured from general to more specific issues of the subject matter, it initially focuses on introductory subjects such as the historical development of the international law of taxation and its institutional background before proceeding to the second and most extensive part of the book, covering the sources of this area of international law.

Therefore, in the second chapter, the author provides a detailed description of the international treaties related to taxation, touches upon the sensitive issue of OECD and United Nation Commentaries' relevance for interpretation under the Vienna Convention on Law of Treaties and covers the functioning of the provisions of double tax treaties. In addition, attention is also drawn to customary international law (and explains that it has relatively limited applicability in the area of international tax law), general principles of international law relevant for the subject matter and soft law in the field of taxation and as an influence on EU law. In respect of EU law, the publication discusses the fundamental freedoms and their impact on taxation, in both general terms and in specific cases, state aid, including recent issues of tax rulings being granted to multinational enterprises, and secondary EU legislation in the area of both direct and indirect taxes, together with other legislative proposals and projects. As well as providing a comprehensive discussion of all essential aspects of international tax law, this chapter also reflects recent developments in the area, such as initiatives against tax avoidance, and provides both a theoretical and practical perspective on the issues discussed by providing numerous references and examples.

In the third chapter, the attention of the publication shifts to the relationship between the international law of taxation and other areas of international law, namely trade law where the publication mainly discusses limitations on importation taxes, investment treaty law and its tax-related expropriation aspect, and human rights law and its tax-related procedural and substantive elements.

In the fourth and final chapter, the publication delves into more conceptual problems of the international law of taxation and right from the outset quite rationally points out its weaknesses;

cross-border tax avoidance and disadvantaging the developing countries to name just two. Hongler puts forth that these failures are caused by an absence of values and international tax law principles, flawed international tax policy guiding principles and institutional problems. Subsequently, the publication focuses on four specific areas, first being aggressive tax planning, where the author discusses the outcome of the BEPS initiative and even recent developments regarding global anti-base erosion proposal and regarding minimum tax proposals following Pillar 2. After that, the challenges of taxing the digital economy are discussed, most importantly value creation and the related allocation of taxing powers, and potential solutions culminating in the unified approach of the OECD under Pillar 1. Finally, the publication discusses whether the formulary system may be the solution to the current failures of the international tax system instead of the arm's length principle, and simultaneously points out that neither of these allocation mechanisms currently fulfil distributive duties. In this regard, Hongler seems to argue that current allocation keys should be redrafted to achieve at least minimal distribution through the international tax regime. At the end, the publication briefly argues in favor of destination-based systems and also for environmental taxes and their coordination as a solution to the current environmental crisis.

In the light of the above, the publication can be considered logically structured, as it proceeds from rather general concepts to the very core of the international tax law and its key aspects prior to moving in the end to *de lege ferenda* and moral issues. While all the issues covered are discussed objectively and mostly not prescriptively, the author does not merely rely on the descriptive approach but also analyses the relevant views on various key subjects and provides numerous comments from both a theoretical perspective and practical examples, which corresponds to his combined academic and professional background. Considering the above, it could be concluded that the publication's goal, defined as providing objective insights into the international tax regime in a broader context, has been met and even exceeded and the publication should stand in both the faculty and the law firm libraries alongside other essential publications on the international law of taxation, such as Michael Lang's 3rd edition of his Introduction to the Law of Double Taxation Conventions.