# Institutiones Administrationis

## Journal of Administrative Sciences

Vol. 2 (2022)
**No. 2**

ISSN 2786–1929

SZÉCHENYI EGYETEM
UNIVERSITY OF GYŐR

# Institutiones Administrationis

Journal of Administrative Sciences
Vol. 2 (2022) No. 2

Published by Széchenyi István University
UNIVERSITAS-Győr Nonprofit Ltd.
Hungary-9026, Győr, Egyetem tér 1.

Responsible for publishing: Eszter Tóth

Layout editor: Éva Harkai

ISSN (online) 2786–1929

# Contents

## Articles



## Book Review

# Articles

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 6–22
DOI: 10.54201/iajas.v2i2.52

# Administrative procedural and litigation aspects of the review of governmental actions

**János Fazekas***

* Associate Professor, Eötvös Loránd University, Faculty of Law and Political Sciences, Department of Administrative Law. E-mail: fazekas.janos@ajk.elte.hu

**Abstract**

The main aim of this paper is to investigate the administrative procedural and litigation aspects of judicial review of governmental actions under the scope of the political question doctrine in Hungary. Governmental actions, due to their political nature, are usually excluded from judicial review, which means that an important safeguard of rule of law does not apply to them. As a result, serious constitutional concerns arise, especially when these decisions, in addition to their political nature, have a legal nature, too, or are administrative adjudicative ones. In these cases, procedural safeguards are even more important. The paper therefore examines such borderline cases in the practice of the Hungarian administrative courts and of the Constitutional Court regarding the existence of judicial review in these cases. The research has not comprehensively covered judicial practice, but focuses only on some characteristic decisions. In addition to examining court cases, the paper covers the statutory background and the theoretical foundations as well.

**Keywords**

governmental actions, political question doctrine, judicial review, Hungary, discretionary power.

## 1 Introduction

Judicial review of governmental action is a particularly controversial, even conflicting topic in the science of public law. Namely, they are activities that, due to their primarily political nature, are exempted from judicial review; in other words, in their case, the most important safeguard of the rule of law does not apply. As a result, serious constitutional concerns arise, especially when these decisions, in addition to their political nature, have a legal nature, too, or are administrative adjudicative ones. In such cases, there is usually also a legal situation to be protected; in other words, the importance of procedural law and litigation guarantees increases. In my paper, I will examine how the borderline situation outlined above appears in the practice of Hungarian administrative courts and the Constitutional Court, and the extent to which judicial control can be interpreted in this context. The analysis does not cover the entire case law and Constitutional Court case law, but only a few decisions of a guiding nature. The research, as can be seen, essentially focused on the analysis of case law, but of course does not disregard the normative background and the theoretical foundations of governmental action and judicial control.

## 2 The concept of governmental action and its distinction from public administration

The concept of governmental action is addressed by both jurisprudence and political science, as it is a complex activity that is governed by law but is essentially political in its content and essence. From a public law point of view, our starting point is to distinguish between governmental and administrative acts or, more precisely, between its main control. Of these two, the basic purpose of the government is governmental action, which essentially involves setting strategic goals related to leading the country and providing the necessary resources and means to achieve them. Looking at the issue in the context of the system of separation of powers, it should be added that, although in parliamentary systems the government is the most active in governance, the head of state and the legislature are also involved (Fazekas, 2020, 89; Concha, 1905, 201).

Looking at governance in detail, in both the Hungarian and foreign literature, we find a variety of approaches to what exactly the government and the other state bodies in charge of governance do in implementing the above constitutional division of tasks. Thus, for example, in Lajos Lőrincz's not so much jurisprudential but rather administrative science approach, governance is an activity for defending the social and economic order of the country, increasing the welfare and wealth of the nation, developing the necessary strategy and tactics, and specifying the necessary tools. This requires the following tools: establishing and operating the system of governance, consolidating national unity, developing the economy, ensuring social welfare, protecting the quality of life, ensuring the country's external and internal peace, and representing and defending the country's interests at the international level (Lőrincz, 2005, 131). Another, more legalistic approach (Petrétei et al., 2007, 11–19), which can be associated with the trio of Petrétei, Tilk and Veress, regards governance as a basic state function, which can be perceived in functional, organisational and formal terms. In legal terms, it can be described in tasks and powers, and its system is defined by the constitution, mainly by laying down the framework. The primary purpose of constitutional regulation is to secure the maintenance of the most stable governmental relations possible. At the same time, this legalistic approach also emphasises the political nature of governance, i.e. that it means taking longer-term, strategic decisions through legislation and often through law enforcement, but it must be distinguished from these core functions of the state.

To this, we might add that governance as a political activity typically involves a choice between alternatives that express values (Marosi & Csink, 2009, 115), so governance is not neutral in an ideological sense. Its essence is political decision-making and action; that is, taking discretionary actions with political content. This is emphasised in the classical Hungarian public law literature, among others by István Ereky (Ereky, 1939, 180).

The Anglo-Saxon literature (see, for example, Hague & Harrop, 2004, 268) often words this in such a way that, at the top of the system of governmental system, stands the layer of political leaders, consisting of the head of state, the prime minister (if any) and the cabinet (in our concept, the government). The officials who comprise it are elected by popular vote, based on political criteria (typically this is also the way they lose it). Their role is to set priorities, make decisions and oversee their implementation. They are accountable to the sovereign people.

The concept of governance has, of course, undergone a number of changes over the past decades compared to these classical statements. Accordingly, governance is sometimes referred by either the term *government* or *governance* (Turpin & Tomkins, 2007, 391–400; Bennett, 1996). According to the authors Pollitt and Bouckaert, governance became a popular denomination in the late 1990s, thanks in part to the New Public Management movement. As opposed to traditional government-type approaches, this conception does not really emphasise the hi-

erarchical character of governance, but conceives it instead as a network (Pollitt & Bouckaert, 2011, 21–23).

This suggests that governance is a political activity, which means making the basic decisions necessary for the management of the common affairs of a political community (e.g. a country or a municipality). Its characteristic feature is that these decisions express the value choices of the political force that holds democratic legitimacy for governance. Therefore, the value choices of the sovereign people are reflected indirectly in governance. Since these values are often difficult to grasp from a legal point of view, the choice between them is typically made on the basis of a wide discretionary powers.

Compared to governance as a primarily political activity, public administration is the 'engine room' of the state (Hague & Harrop, 2004, 290), whose task is to implement efficiently the policies set by the political leaders. The characteristics of this bureaucratic administrative apparatus, separated from politics and operating according to special logic, were described in Max Weber's theory of bureaucracy, now becoming a classic in the European social sciences (Weber, 2003, 45–84).

Despite the obvious differences, it is often difficult to distinguish between governance and public administration since, on the one hand, they are organisationally intertwined, for example, within the same ministry, political leaders work alongside professionally selected officials (Körösényi, 1996, 35–62). On the other hand, although legal regulation often tries to separate the two spheres, they are intertwined also functionally, as it is not obvious where the boundaries are drawn between making political decisions and their preparation and implementation, since the two activities are partly performed by the same people (Varga, 2014, 547). Ereky offers a grip on this distinction when he writes, on the basis of contemporary French literature, that governance is basically about deciding more important policy issues, which largely serve to create political unity and to establish coherence between state bodies. The administration, on the other hand, deals with current affairs of minor importance (Ereky, 1939, 122).

Why does jurisprudence need to deal with the distinction between government and administration if, as we have seen, this is a political science issue in its important respects? The importance of the distinction, according to Ereky, lies in being able to decide which decisions can be challenged before a court (in the French system, the Council of State) and which cannot. If a decision concerns longer-term issues of political significance, then no, but if it concerns the management of daily business, then yes. It is up to the government, the political leaders, to decide into which category a particular matter falls, which Ereky sees as dangerous because, in this way, it is essentially possible to exempt any government decision from judicial review. A safeguard against this might be the exhaustive list of governmental actions that have immunity, which can be done on the basis of the practice of the court or the Council of State. Examples include the proclamation (convocation) of the National Assembly, ordering elections, adjourning and dissolving the Parliament, promulgating laws, ordering martial law, diplomatic activities declaring war and other acts of war, pardons and decrees regulating policing (Ereky, 1939, 120–123).

The main question is therefore who exercises control over governmental actions, what kind of control and, in particular, whether there is judicial control, and if so, what the extent of that control is. If there is none, then the control may be political; what is more, according to Ereky, only politicians can control governance, which is exempt from disciplinary and judicial control. This control, from a legal and political point of view, is carried out by parliament through parliamentary government or 'constitutional law courts'. By contrast, the public administration and the judiciary can be controlled by those who themselves carry out this activity or are oth-

erwise professionally qualified to do so, namely the courts of law or the Court of Audit (Ereky, 1939, 180).

If we want to examine the control of governmental actions by means of jurisprudential tools, namely from a dogmatic point of view, we must start from the concept of governmental action. Two conceptual elements of governmental action can be discerned from the foregoing: its primarily political character on the one hand, and its broad discretionary powers (free deliberation) on the other. Thus, in what follows, I will deal with the basic theoretical features of these two main characteristics.

## 3 The political question doctrine

In the era of globalisation, the resilience and flexibility of governmental and administrative systems are a common theme (Hoffman & Fazekas, 2019, 286–297). One of the obvious means of resilience is to provide agencies with broad deliberation, even discretionary powers, as the absence of detailed decision-making criteria and constraints laid down in legislation can enable governments to respond quickly and effectively to continuously changing challenges (Warren, 2003, 35–38). On the other hand, in order to maintain efficiency, government also needs to receive constant feedback on the quality of its work, both in legal and political terms, and to be subject to external scrutiny. This is what the science of public law calls democratic checks and balances. In fact, the Anglo-Saxon doctrine of political questions is nothing other than a theoretical framework for the resolution of the conflict between these two opposing demands, the conflict between broad political discretion and accountability (and, within this, legality) and its resolution.

Government decisions on political questions have a special relationship with the law, or rather with legislation. They are usually governed by constitutional law or administrative law, but sometimes there are essentially no clearly identifiable legal provisions; for example, no clear rule on competence that would reveal which body can make them and under what rules. By their very nature, they are adopted on political questions, and it is not unprecedented that they have no legal effect, and there is no interest protected by them that they would jeopardise or promote their being enforced (Barabás, 2018, 86–90). Consequently, governmental actions cannot be challenged in court, since judges can only adjudicate legal disputes but not political disputes, and cannot assume governmental responsibility, since they have not been empowered by the sovereign people to govern. On the other hand, they cannot violate the principle of the separation of powers (Fazekas, M., 2018, 212). In other words, the doctrine of political questions is a tool in the hands of the court to prevent itself from deciding on the merits of issues where it would be imprudent to do so (Tushnet, 2002, 1204).

The roots of the political question doctrine can be found in Anglo-Saxon, and more specifically American, public law. Following the Supreme Court's inconsistent jurisprudence on the criteria for political issues and thus governmental actions, the United States Supreme Court laid them down in Baker v. Carr [Baker v. Carr 369 U.S. 186, 217 (1962)], in which the Court was called upon to decide a case involving the boundaries of a constituency. In its decision, the Supreme Court set out the alternative criteria for a case to be considered a political question, which cannot be decided by the court: for example, the absence of identifiable and applicable benchmarks for the court to use, or the fact that the question can only be decided on the basis of a starting point that is essentially political in nature.

In European legal systems, the political question doctrine does not prevail either in theory or in judicial practice in the form in which it is found in the United States of America. If we look

at constitutional adjudication as the most 'politicised' area of adjudication, it can be seen that constitutional courts in Europe are generally not part of the ordinary court system and are much more likely to be regarded as political bodies than the Supreme Court in the US. In Europe, the separation between law and politics is not so rigid to begin with. Consequently, while in the USA the Supreme Court only rules on a specific dispute; that is, it only judges one specific aspect of a complex issue, a European constitutional court examines the whole issue, when, for example, it is engaged in abstract review of a norm (Paczolay, 1995, 22).

Nevertheless, the political question doctrine has its own antecedents and variants in European public law thinking and case law. It is true that here this issue generally arises in connection with governmental actions (*Regierungsakt, acte de gouvernement*). The first theoretical construct that can be associated with this issue is the theory of the reason of state (*raison d'etat*), the central idea of which is that the interest of the state is more important than the legality of the act (Miller, 1980, 587).

## 4 Governmental actions from an administrative act theory point of view: the question of free deliberation

Governmental action is very difficult to categorise in the system of administrative actions. This is due to the fact that, as Zoltán Magyary has put it, the significance of the administrative act theory, the genuine purpose of this categorisation, is to find out: "which of the acts of public administration have what legal significance" (Magyary, 1942, 587). Thus, the act theory categorizes the acts of public administration by means of the tools of black letter methodology, in terms of the legal effects on the recipients, i.e. the creation, termination and transformation of rights or obligations. However, governmental actions are not really issued by the administration, rather by the organs of government, even if these two organisational and personal circles are intertwined. On the other hand, it is precisely the legal effect, the change in the legal situation of the addressees, which is not necessarily given in the case of governmental actions; sometimes there is no legal interest to be protected or it is difficult to identify it, and therefore they cannot always be considered acts in the strict sense of the term.

Probably the existence of textbooks and summary works that do not even touch upon governmental actions in Hungary in their chapters on the theory of administrative acts, if they consider the administrative act theory a relevant matter at all – for example, Tamás (1997), does not consider it as such. There is a textbook that does discuss it; however, not in the context of administrative act theory, but in the context of administrative procedural law, in the scope of Act I of 2017 on Administrative Procedure (hereinafter: Kp. or Code), as an administrative activity that does not fall under the scope of the Act, and thus cannot be the subject of an administrative lawsuit (Pribula, 2017, 133).

The school of administrative jurisprudence, of which I am a member, in the textbook chapter written by Marianna Fazekas, classifies administrative acts basically from the point of view of whether they exert any legal effect. If they do, they are considered to be an act, if not, they are considered to be an actual activity. Within this classification, a governmental action belongs to the category of specific, administrative law unilateral acts (Fazekas, 2020, 88–89). However, this classification is problematic on several points. On the one hand, the textbook chapter itself admits that there are also governmental actions in the form of legislation or other normative acts (e.g. measures taken in the course of the extraordinary legal order). On the other hand, it is also questionable whether these acts fall under the regime of administrative law, if they exert any legal effect at all. It might be raised in several cases that their issuance is governed by

constitutional law or international law, again with examples in the area of extraordinary legal order, separation of powers issues (e.g. legislative initiatives) or in the area of defence and international relations.

Among the other types of theories of administrative acts, the classification of governmental actions by András Patyi is the most relevant. In terms of its content, it starts from the distinction between governmental actions and administrative acts and concludes, in the footsteps of Szontagh, that the former does not create any specific legal relationships, while the latter does. Otherwise, he examines governmental actions in the case law of the Constitutional Court; that is, he analyses the decisions of the Constitutional Court that review the constitutionality of certain acts classified as governmental actions or decisions (Patyi, 2017, 135–137).

Governmental actions are therefore difficult to classify from the theory of administrative acts point of view, both in terms of their subject and their object. They have a characteristic that makes them graspable, and that is the broad competence of deliberation or discretionary power with regard to the political content of the decision.

Discretionary power, also known as discretion, is one of the degrees of the legally bound nature of administrative acts. The issue of the legally bound nature of acts concerns the degree of discretion and the legal framework and the limits subject to which the administrative body, the law enforcement practitioner, operates and takes its decisions. Hence, the legally bound nature is as closely related as possible to the limited or unlimited nature of the power that administrative bodies can exercise. Thus, actually, the legal regulation of the issuance of acts, the delimitation of boundaries, is primarily a question of power, and as a result, a political question (Madarász, 1992, 326, 329). The authorisation by a source of law to issue an act must clarify the basic conditions for the issuance of an act. If these issues are not clarified by the legal norm, then in a strict sense we cannot even speak of law enforcement or of the act issued in the course of law enforcement: this is the field of legally unbound acts. It can be seen that legally bound nature means to be bound in a substantive law sense, since the above issues essentially belong in the field of substantive law (Madarász, 1992, 331–333).

Acts issued on the basis of discretionary powers, based on free deliberation, belong to the category of acts that are legally unbound or at least less bound. In the course of issuing such acts, public administration enjoys greater freedom than if it were simply exercising discretionary powers (F. Rozsnyai, 2017, 129–131).

Looking at free deliberation from another point of view, it is a mandate for the administration to act in a specific case in accordance with the objectives of the state, within the general framework of the law, on the basis of its discretion. Discretion in this context means that it is not clearly predictable from the legislation how the administrative body will decide; only that it will take a decision of some kind. The legislator leaves it to the agency to determine the content of that decision. However, with the rise of civil constitutionalism, the principle of the public administration being bound by law has become emphasised. This means that the administration cannot act in the absence of a legal mandate and that the law must also determine the content of the action. The development of administrative law therefore brought along a decline in free deliberation; the more legally bound discretionary powers came to the fore, and the category of less legally bound acts was created (F. Rozsnyai, 2017, 132).

The relationship of free deliberation to legal regulation, to legality, is a fundamental issue in European and American approaches in the legal literature (McHarg, 2017). Many Hungarian scholars of public law have also visited this issue, following German and French examples: Here, Vilmos Szontagh, Móricz Tomcsányi, Győző Concha, János Martonyi, Tibor Madarász and Miklós Molnár are worth mentioning.

## 5 Lessons of procedural law and litigation from the case law of Hungarian administrative judges and the Constitutional Court

The concept of governmental actions appeared for the first time in Hungarian administrative law in the Kp. in the context of the fundamental provisions, in connection with the concept of administrative dispute. The Code states that

> (4) Unless otherwise provided by an Act, no administrative dispute shall take place a) concerning government actions, in particular with respect to national defence, aliens policing and foreign affairs [Kp. Section 4 (4) paragraph a)]

This is apparently a rule of exception, which precludes claims relating to any governmental action from being brought before an administrative court. The rule of exception is necessary because of the concept of the Kp. and the rationale for its creation; namely, to ensure that judicial remedies are generally available against the various acts of the public administration, and thus to ensure that the Kp. provides for legal protection without a legal vacuum. In this context, the explicit aim of drafting the Kp. was also to ensure that administrative adjudication no longer provides legal protection only against the official acts of administrative authorities (F. Rozsnyai, 2016, 33–34). If, in principle, administrative adjudication provides legal protection against all acts of the executive branch, a special rule of exception must be made if the legislator does not intend to grant such protection for a particular type of act. On a theoretical level, it clearly follows from the previous chapters why a governmental action should be excluded from the scope of administrative review (separation of powers, political free deliberation, etc.). According to Marianna Fazekas, another important aspect from the point of view of Hungarian substantive public law is that the Government, as an administrative body, is also subject to the Kp., and although most of the governmental actions issued by it are normative acts (government decrees or normative government decisions), which are not subject to the Kp., there are also individual acts (individual government decisions), which are classified as governmental actions based on their content analysis. In principle, these may come within the scope of the Kp., and therefore require the exclusion rule (Fazekas, M., 2018, 212). Agreeing with this approach essentially, it needs to be seen that governmental actions cannot be exclusively performed by the Government, so the rule of exemption is not only needed because of certain acts of the Government.

It is also noteworthy that the quoted rule of the Kp. singles out, by way of example, three sectors, namely national defence, aliens policing and foreign affairs, which may be typical areas of governmental actions. The wording suggests that there is no place for the administrative judicial route in connection with any administrative act in these sectors, which cannot be a constitutional interpretation that allows the right to legal remedy to apply, since official administrative activity also takes place in these sectors, most visibly in the field of aliens policing. Thus, even in these sectors, it is not exclusively governmental actions that are adopted either. The question of whether an act falls within the concept of governmental actions is a matter for the courts to consider on a case-by-case basis (Barabás, 2018, 90).

That stated, the foreign affairs sector, for example, is of course a typical sector for governmental actions to be issued, as we have seen earlier in the context of conceptual clarification and international examples. This aspect, even if in a specific manner, is already reflected in the Hungarian literature: Zsolt Menyhárt, in his characterisation of the administration of foreign affairs, when interpreting the quoted rule of the Kp., writes that it is logical because “the resolution of a dispute between two or more states cannot fall within the competence of any national court;

the free deliberation is claimed by an international forum". (Menyhárt, 2020, 197) It is remarkable that Menyhárt does not explain the rule of exception in the Kp. by the political nature of governmental actions in the foreign affairs sector, but interprets it in the field of law, conceiving the issue as a legal problem. In essence, it says that the rule is about resolving legal disputes rather than political conflicts, which should be settled according to the rules of international law rather than national law. This raises the question of whether all relevant governmental actions in the field of foreign affairs can be interpreted as disputes subject to the international law regime.

In line with the above, as we have seen at the beginning of the paper, in the context of conceptual clarification, Hungarian administrative law theory has also started to deal with governmental actions and their judicial review in the context of the Kp. (Barabás, 2018; Fazekas, M., 2018; Fazekas, 2020; Pribula, 2017). The concept became visible through the creation of the Kp., which can be interpreted as a specific manifestation of the law-developing function of administrative adjudication and the codification of administrative procedural law. Namely, if the concept of governmental actions is not included in the Code then theory is not necessarily forced to deal with this issue intensively (F. Rozsnyai, 2016, 6).

As we have seen, the adoption of the Kp. was a significant milestone in the process of the domestic emergence of the doctrine of political questions, as it gave the doctrine a clear formulation in legislation. Prior to the Kp., the doctrine appeared mostly in the practice of the Constitutional Court, as I have shown earlier, not without any controversy. Going further, since administrative adjudication at this time was primarily focused on the official decisions of administrative authorities, there was less chance of politically relevant cases being brought to administrative courts. Still, there were such cases. For this reason, I will now first examine these cases, and then those that arose under the regime of the Kp.

The first case that I will examine in this context is the order of the Curia No. Kvk. III.38.043/2019/2, which was issued in 2019 in a case related to a municipal election campaign. The applicant was Gergely Karácsony, candidate for the office of Lord Mayor of Budapest, who filed an objection with the Budapest Election Commission (FVB) because, in September 2019, Gergely Gulyás, Minister of the Prime Minister's Office, made the following statement at a press conference called Kormányinfo (Government Info): "[w]hoever is suitable to be Lord Mayor seeks cooperation with the Government, while unsuitable ones, like Gergely Karácsony, reject the possibility of cooperation and consider the office of Lord Mayor as a war position". According to Karácsony, this statement was unlawful as campaign activity, because it violated, among others, the fairness of the election and equal opportunities for candidates, as it clearly was favourable to the candidate for Lord Mayor of the governing party, István Tarlós, Karácsony's rival.

The National Electoral Commission (hereinafter: NVB) that acted as a result of case transfer, had rejected the objection as, according to its position, Gergely Gulyás participated in the press conference as a minister, and during it he made a statement in the course of his statutory duties as the member of the Government in charge of the development of Budapest and the agglomeration. The minister carries out these tasks in cooperation with the Lord Mayor of Budapest, which is why his statements regarding the agreement previously reached between the Government and Lord Mayor Tarlós and the urban development of Budapest can be evaluated as governmental actions, since he expressed his professional position on a candidate he considered unfit. Moreover, under Section 142 of Act XXXVI of 2013 on the election procedure (hereinafter: Ve.), a governmental action is not part of the election campaign, which is why the basic principles of Ve. are not applicable to it either.

Gergely Karácsony filed a petition for review against the NVB's decision to the Curia as, in his view, the minister's statement had nothing to do with his duties, it could not be considered

as of a professional nature, but was politically motivated, and therefore does not fall under the rule of exception in the Ve. and should be assessed as campaign activity.

The Curia upheld the decision of the NVB. Although it did not dispute that the Minister's statement was unfavourable to Karácsony, it did not classify it as campaign activity but as governmental action, which is covered by Section 4(4)(a) of the Kp. as the underlying rule. Acts falling within the scope of governmental actions are based on free deliberation and discretionary powers, and are mainly of a political nature. They are very slightly or not at all legally bounded and therefore cannot be the subject of an administrative lawsuit. Moreover, their legality cannot be reviewed under the Ve. Furthermore, the Curia agreed with the NVB that the Minister had not exceeded his statutory mandate in making the statement and had not otherwise violated the law. The Curia pointed out that "[t]he fact that the applicant considers that it was not necessary for the Minister to classify a candidate for Lord Mayor unfit to perform his duties does not mean that he did not do so in the course of his duties as defined by legislation, which is not, by law, part of the electoral campaign".

Because it concerned a municipal election campaign, the case received considerable media coverage. Among the articles published, one highlighted the decision of the Curia for stating that "the stance of the Curia on the neutrality required from the state in the fight of political parties cannot be maintained in the future" (Herczeg, 2019). There was an article published that clearly took over the minister's claim of Karácsony's incompetence (Origo, 2019). It is obvious, therefore, that the case was clearly political, which in itself may be a kind of explanation for the decision of the Curia, i.e. that it did not qualify the minister's statement on the merits, in terms of its content, using an argumentation that classically belongs to the doctrine of political questions. In doing so, it acknowledged that, in a ministerial statement as a governmental action, political and non-political (e.g. professional) elements are necessarily intertwined, and in many cases cannot be separated. And this circumstance renders the case essentially unsuitable for the court to decide on the merit in this regard. However, from a procedural law point of view, the question may arise as to why, if this is the case, the Curia did not reject the application as inadmissible, without examining the merits. At the same time, Section 231(1) of the Ve. does not refer to any grounds which would have been applicable in this case, and the Curia therefore upheld the decision of the NVB on the basis of Section 231(5)(a).

In addition to the above, the significance of this decision lies in the fact that the Curia clearly refers to Section 4(4)(a) of the Kp. As an underlying mandatory rule, applicable to the possibility for a governmental action to be reviewed by a court.

In May 2021, the Curia passed the next decision, order No. Kpkf. 40.129/2021/2, in the so-called SZFE case (Eduline, 2020). The background of this case was one of the most serious "culture war" conflicts in recent Hungarian political history, the change in the maintenance of the University of Theatre and Film Arts (hereinafter: SZFE). The first step in this process was taken in 2020, when government actors suggested that the Hungarian state should pass the maintenance of the SZFE into the hands of a foundation. The legislative background for this was Act LXXII of 2020 on the Foundation for Theatre and Film Arts, and grant to the Foundation for Theatre and Film Arts and the University of Theatre and Film Arts (hereinafter: SZFA tv.). The transfer of the maintainer's right was subject to numerous conflicts. On the one hand, the Senate and the Student Self-Government of the SZFE repeatedly expressed their strong disagreement, and the students of the university joined them. On the other hand, the issue, similarly to the media war in the 1990s, appeared from the outset as a kind of ideological confrontation in the context of the so-called culture war. In this context, two opposing positions emerged.

**1** The Government decided to transfer the maintainer's right on the basis of ideological considerations, because it wanted to shape Hungarian theatre and film education according to its own political interests, while at the same time it was promoting its own cadres.

**2** In contrast, the government's interpretation is that the restructuring is necessary partly for professional reasons, because of the shortcomings in the theatre and film training in Hungary, and partly because of the left-liberal ideological predominance in training that has developed in recent decades.

One of the administrative steps in this sequence of events was when the Ministry for Innovation and Technology (hereinafter: ITM), which exercised the maintainer's rights on behalf of the state, and the new maintainer, the Foundation for Theatre and Film Arts, submitted a joint application to the Education Office (hereinafter: OH) in August 2020, requesting the transfer of the maintainer's rights to be entered in a public register. The application was in the form of the so-called FRKP-1110 form, against which, as act ordering the transfer of the maintainer's rights, a student of the SZFE (also a member of the Presidency of the Hungarian Students Council (HÖK) and a member of the Senate) brought an action before the Budapest District Court in November 2020. In the action, he requested, inter alia, the annulment of the form as act, the ordering of the defendant to issue a new act and to provide detailed guidelines for ensuring the guarantees of university autonomy in order to implement the transfer of the maintainer's rights as an administrative act.

In its defence, the defendant ITM also referred, inter alia, to the classification of the form under the theory of administrative acts. It explained that the applicant's rights and obligations were not directly affected by the form, inter alia because it was "an application based on governmental action that cannot be subject of an administrative lawsuit under Section 4 (4) (a) of the Kp. (governmental action), that aimed at conducting the registration procedure related to the transfer of the maintainer's rights pursuant to Section 16 of Government Decree No. 87/2015 (IV. 9.) on the implementation of certain provisions of Act CCIV of 2011 on National Higher Education (hereinafter: Nftv.). The FRKP-1110 form only results in the registration in the public register kept by the OH. The FRKP-1110 form is a pre-established form, which does not qualify as an administrative act within the meaning of Article 4(3) of the Kp."

The court of first instance dismissed the application for lack of jurisdiction and, in its order, referred to Section 4 (4) (a) of the Kp.: it agreed with the reasoning set out in the defendant's defence as regards the nature of the form as a governmental action. It further explained that the form, as an application, cannot be considered as an individual decision because it does not contain an expression of will with a content of a decision and does not settle any matter brought before the administration. The transfer of maintainer's rights, which does not necessarily have to take the form of any formal decision, does not qualify as an act of a law enforcement authority, and does not fall under Act CL of 2016 on the general administrative procedure (hereinafter: Ákr.).

The plaintiff student filed an appeal against the order of the first-instance court, relying on, among other things, Section 4 (4) (a) of the Kp., which he claimed was violated by the order, because the objectives of the Kp.'s creation, such as broadening the means of judicial review and ensuring legal protection without any legal vacuum, must be interpreted strictly. Therefore, the form qualifies as administrative act subject to Section 4(1) and (3)(a) of the Kp., against which creating an independent judicial control is necessary and which may therefore be subject of an administrative dispute. A broad interpretation of the concept of governmental actions would constitute a restriction of the right to turn to the courts, and indeed the whole of paragraph 4 as

a rule of exception is in itself a restriction of that right. Tertiary education is a public task, which is regulated in detail by public law, and being regulated by administrative law is the central element of the concept of administrative dispute in the Kp. [Article 4 (1)]. The purpose of the application is to trigger administrative legal effects through the OH's proceedings.

Subsequently, in its appeal, the applicant submitted that the designation of the university's maintainer falls within the competence of the National Assembly and therefore cannot be considered as a governmental action. When the ITM applied to the OH for the registration of the change of the university's maintainer, it was acting independently in the performance of a public task and not on the basis of an instruction or authorisation from the Government, and therefore that act could not be classified as governmental action. It has legal effect and may be the subject of administrative dispute.

The Curia ruled that the appeal was unfounded and upheld the decision of the court of first instance. It agreed with the court of first instance that the form does not constitute an individual decision under the Kp., has no legal effect and is only intended to register the change of maintainer. Therefore, it does not qualify as an administrative act subject to an administrative action: at most, such action can be brought against the decision closing the OH's procedure. Consequently, the fundamental rights violations alleged in the appeal could not arise in relation to that form.

It also follows from this, and this is the most important element in the reasoning of the decision of the Curia, that "[s]ince the application/form challenged in the action does not qualify an administrative act, it is irrelevant that the court of first instance had not applied the provisions of the Kp. 4(4)(a), because the basis for the refusal was not Section 4(3)(a) of the Kp. but Section 48(1)(b) of the Kp. Consequently, the arguments of the appeal relating to governmental action were irrelevant". In other words, the court of first instance acted lawfully in dismissing the application on the ground that it lacked jurisdiction.

As an assessment of the court's decision(s), it can be concluded that the key element of the case for our purposes is the application for registration of the transfer of the maintainer's rights and, more specifically, the form used for this purpose, which was submitted jointly by the ITM and the Foundation. The Curia, as we have seen, did not consider whether the submission of the form was within the scope of governmental actions to be a relevant question, because it deduced otherwise, that it did not fall within the scope of the Kp. The court of the first instance considered that the submission of the form was a governmental action, which – from a theoretical point of view – can be considered to be disputable. The part with the applicant's argument that this is an administrative act, which is regulated in detail by public law, may be agreed upon. It can be considered as correct, but it does not follow that it is an individual decision under the Kp., which can be challenged in administrative action. The form is an application for registration in the public register kept by the OH of the maintainer's right, pursuant to Articles 35-38 of the Ákr. A client application cannot be challenged in an administrative lawsuit, even if one of the applicants is an administrative body (the ITM), since it indeed does not contain a decision that would exert legal effects on an external entity. However, it is also not a governmental action, as its filing and content are subject to detailed legal rules; it is not submitted under political free deliberation.

A governmental decision issued on the basis of political free deliberation is the act by which the Government decided to transfer the SZFE's maintainer's rights to the Foundation. This decision was Government Decision No. 1380/2020 (VII. 10.) on the establishment of the Foundation for Theatre and Film Arts and on the provision of conditions and resources necessary for the operation of the Foundation and the University of Theatre and Film Arts. The Government

decided to establish the Foundation in this decision, appointed the Minister of Innovation and Technology to exercise the founder's rights and transferred the rights of the University's maintainer to the Foundation. The form, as an application, only served the purposes of implementing this decision.

In order to interpret this, it is worth relying on the concept of acte détachable (detachable act), developed in the French practice of the Council of State and already mentioned in the context of the French approach to governmental action, according to which it is necessary to detach from governmental actions those public law acts which can be qualified as such from the legal point of view and which can be reviewed by an administrative court. This review can, of course, only be limited to the lawfulness of the act, not to its political content. The SZFE case was also clearly brought before the court with the aim of enabling the plaintiff to remedy the violations of constitution it alleges, in particular the violation of the autonomy of tertiary education. However, the violation of rights, if any, did not arise from the submission of the form, but from the government decision, the SZFA tv. and Section 94 (6) of Nftv., which grants the maintainer broad powers, for example, in the adoption of the university's budget and organisational and operational rules. However, in the absence of an actio popularis, the applicant was unable to challenge these before the Constitutional Court, which is presumably why it asked the court to initiate a specific ex post norm review.

It is a different question whether this governmental decision can be reviewed from a legal, constitutional point of view; in other words, whether it should indeed be considered as a governmental action. If the case is brought before the Constitutional Court, it will have to examine whether the transfer of the SZFE to maintenance by a foundation (especially in the light of other similar reorganisations) and the regulation of the rights of the maintainers, including the aforementioned legal provisions, actually violate the constitutional rights and principles mentioned in the complaint, including the autonomy of tertiary education.

The Constitutional Court's Resolution 16/2020. (VII. 8.) AB was passed in the context of one of the most controversial media political events in Hungarian internal politics in recent years, in the so-called KESMA case. The background to the case is the creation of the Central European Press and Media Foundation (hereinafter: KESMA). Established in 2018, KESMA has become the owner of a number of media businesses and is thus, according to some evaluations, currently the main tool for the concentration of pro-government press and media businesses (Kósa & Zoltai, 2018). As one of the elements in this process, the Government has classified, in Government Decree 229/2018 (XII.5.) on the acquisition of ECHO HUNGÁRIA TV Televíziózási, Kommunikációs és Szolgáltató zártkörű Részvénytársaság, Magyar Idők Kiadó Korlátolt Felelősségű Társaság, New Wave Media Group Kommunikációs és Szolgáltató Korlátolt Felelősségű Társaság, and OPUS PRESS Zártkörűen Működő Részvénytársaság by Közép-Európai Sajtó és Média Alapítvány, the acquisition of four media businesses, on the basis of the authorisation granted in Section 24/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Practices (hereinafter: Tpvt.) As a result, the concentration did not have to be notified to the Hungarian Competition Authority (hereinafter "GVH"), as it was outside the scope of the Tpvt., and the National Media and Infocommunications Authority (hereinafter: NMHH) did not have to be involved in the procedure as a specialist authority either.

The MPs who submitted the petition objected to this very thing, saying that, in this way, it cannot be assessed whether the level of independent opinion sources after the merger ensures the enforcement of the right to diverse information in the relevant market of media content services (see Section 171 (2) of Act CLXXXV of 2010 on media services and mass communication). In addition to media pluralism, the petition also claimed the violation of discrimination, as the

Government Decree exempts entities involved in a specific concentration from the procedure of the specialist authority, thus putting other entities in a similar situation at a disadvantage. This results in discrimination in relation to a fundamental right (freedom of the press). In addition, the petitioners also pointed out that Section 24/A of the Tpvt. allows for the classification as being of national strategic importance in the public interest only, and that the Government Decree itself did not in any way make any reference to the public interest served by the merger, and the related official communications only referred to them tangentially, which, in their opinion, were not correct statements in any case. Consequently, in their view, in the absence of a public interest, the merger could not have been declared to be of national strategic importance, and the Government Decree therefore violated Article 15(4) of the Fundamental Law, which provides that a Government Decree may not be contrary to an Act of Parliament.

At this point, it is worth quoting the challenged Section 1 of the Government Decree verbatim:

> The Government, pursuant to Section 24/A of Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition, hereby classifies the merger implemented by the acquisition of control of ECHO HUNGÁRIA TV Televíziózási, Kommunikációs és Szolgáltató Zártkörű Részvénytársaság (registered address: 1149 Budapest, Angol utca 65-69., company registration number: 01-10-045204), Magyar Idők Kiadó Korlátolt Felelősségű Társaság (registered address: 1097 Budapest, Könyves Kálmán körút 12-14., company registration number: 01-09-168017), New Wave Media Group Kommunikációs és Szolgáltató Korlátolt Felelősségű Társaság (registered address: 1072 Budapest, Klauzál utca 30., company registration number: 01-09-189828), and OPUS PRESS Zártkörűen Működő Részvénytársaság (registered address: 1062 Budapest, Andrássy út 59., company registration number: 01-10-048787) by Közép-Európai Sajtó és Média Alapítvány (registered office: 8623 Balatonföldvár, Bethlen Gábor utca 9., registration number: 14-01-0003400) as a concentration of national strategic importance in the public interest.

The statement of reasons of the Constitutional Court resolution focuses on the concepts of national strategy and public interest. The Minister of Justice, who was consulted in the case, gave the Constitutional Court some guidance in this respect, explaining that "the concept of public interest is not static but is constantly changing as a result of value choices, and its definition is therefore a matter for the legislator at any time". In the same way, it is for the Government to decide what it considers to be of national strategic importance, and this is the Government's responsibility, which it cannot share with others. The Constitutional Court essentially accepted and reiterated this reasoning, stating that it cannot itself determine the public interest underlying the regulation: this is a matter for the Government, as it is the general body of the executive branch (Article 15(1) of the Fundamental Law). Similarly, it cannot adjudicate on the correctness of a national strategy. At the same time, it acknowledged that the lack of notification to the GVH and the subsequent competition procedure, as well as the lack of a contribution from the NMHH as specialised authority, does indeed mean that a system of guarantees is abolished, which could lead to a "reduction" in the state's duty to protect the diversity of the press. The panel has therefore set itself the task of examining the public interest behind the classification of the concentration concerned as being of national strategic importance and weighing this against the constitutional requirement of diversity of the press.

The decision stated that the petitions were wrong, that the Government Decree does identify the public interest underlying the national strategic character of the merger of the media

businesses concerned. The Court supports this by its grammatical interpretation of Section 1 of the Government Decree. This public interest, however, "can be overruled only in extreme cases, and this case cannot be considered as such. In the case under scrutiny, there may be a reasonable justification, arising from the specific characteristics of the media market, for more concentrated media activity in a given market segment. In other words, it is clearly not possible to conclude that the merger is in fact not in the public interest. This is sufficient for the Constitutional Court's assessment of the public interest in this respect". It follows from this that the Government Decree is not contrary to the Tpvt, since "the classification as being of national strategic importance took place in the public interest as defined by an act". On this basis, the Constitutional Court dismissed the petition.

Once again, we see the Constitutional Court relying on the doctrine of political questions in a politically sensitive case, even if it does not name that basis of principle. However, it is obvious that it does not do so coherently. It fails to carry out the balancing exercise that it has set for itself, and fails to weigh up the public interest, as defined by Government Decree, against the constitutional requirement of press pluralism. This would be a political balancing exercise, as it would require it to interpret the concept of public interest in the context of the case in question, but it must refrain from doing so. However, it cannot justify its statement that there is no extreme case where the public interest can be overruled in favor of press pluralism. This is based on a grammatically manifestly incorrect interpretation of the law, that the merger of companies is the public interest itself. This interpretation is not even supported by the text of the norm, which states that the Government "hereby classifies the merger … as a concentration of national strategic importance in the public interest". Concentration cannot, by definition, be equated with public interest, since the former is an act and the latter an abstract concept. The public interest must be a reason, a value, or a principle that justifies the concentration as an act.

Why is this incoherent reasoning necessary? In politically sensitive cases, a situation seems to be emerging that is different from foreign examples as if the panel is not trying to push the case aside but, on the contrary, it wants to decide it, as it did, by stating that there is a public interest and dismissing the petition. However, it is trying to do this by keeping up the pretense that its decision is not political but determined on a professional basis.

## 6 Conclusions

It can be seen that the relationship between the doctrine of political questions and the rule of law is a key issue. Exempting governmental actions with political content from judicial review is a clear challenge to the rule of law since, as a result, the independent judiciary will not be able to exercise control over the legality of a part of the executive branch's activities. The classic justification for this is that, in many cases, such acts have no legal effect to begin with; they do not create any legal interest to be protected, and thus judicial control is functionless. We have, however, seen examples of governmental actions exerting legal effect, which may raise the question of the legal position to be protected and thus the question of legal remedy.

The theoretical critiques of the political question theory also focus on this point. There are authors who speak of a trend for the political question doctrine to decline, it can only be applied in a narrow context, even in rule of law, since there is a need for some legal regulation of the merits of the cases and the content of the decisions to be taken in all governmental relations. Consequently, it is also necessary that there should be a judicial remedy against the decision and that the court must be in a position to judge the legality of the decision. This is the so-called process of judicialisation, which Ernő Várnay translated as 'bírósodás' (Várnay, 2017, 13–14).

In this conception, the principle of separation of powers supports judicial review in all cases, even of a governmental action with political content, as it ensures that each branch operates lawfully in its own domain. In other words, in a democracy, no one can justify their own decisions against the constitution and substantive law (Beširević, 2021, 95–96.)

Furthermore, in the case-law of the Hungarian Constitutional Court, the decision in the KESMA case was an example of a body explicitly ruling on an actual policy matter in a way that favoured the Government's side, on the basis of arguable grounds. Moreover, it did not refrain from ruling on the case, but decided on the merits.

If the aim is (and what else could be in a constitutional state it is) to have meaningful and effective judicial control over a governmental action, then it would be appropriate to follow the prudential theory of political questions, as known from American public law jurisprudence, as developed in the Pocket Veto case. The essence of this is that the court (or the Constitutional Court) carefully considers whether politically sensitive cases brought before it are suitable for judicial review and review those that can be reviewed under the constitution. Namely, it draws as narrowly as possible the boundaries of the doctrine of political questions and seeks to ensure that as many acts of the executive as possible are subject to review, provided, of course, that the constitutional conditions for doing so are met (Marosi & Csink, 2009, 116). This is very much needed in the current centralised Hungarian system of governance (Fazekas, J., 2018, 380–387).

However, the above conclusions can be drawn from the work of the Constitutional Court. It is not yet possible to deduce trends and regularities from the case-law of ordinary court, as the Kp. entered into force on 1 January 2018, and therefore the extensive case-law related to governmental action that can be comprehensively examined has not yet been developed. However, this also sets the path in the direction of further research. Furthermore, if we take into account that, as we have seen, there is still plenty of "reserve" for governmental action in the field of specific legislation, it is obvious that the topic will not remain unexploited in the future.

## References

Barabás, G. (2018). Kormányzati tevékenység: a "political question doctrine" a magyar közigazgatási perjogban. In Barabás G., F. Rozsnyai K., & Kovács A. Gy. (Eds.), *Kommentár a közigazgatási perrendtartáshoz* (86–90). Wolters Kluwer Hungary.

Bennett, A. J. (1996). *The American President's Cabinet: from Kennedy to Bush.* Palgrave Macmillan. https://doi.org/10.1007/978-1-349-24880-3

Beširević, V. (2021). Making Sense of the Political Question Doctrine: The Case of Kosovo. *Review of Central and East European Law*, (46)1, 91–130. https://doi.org/10.1163/15730352-bja10041

Concha, Gy. (1905). *Politika. II. kötet, Közigazgatástan.* Grill Károly Kiadóvállalata.

Eduline. (2020). *A modellváltástól, a költözésig - ez történt a Színművészetin 2020-ban.* Eduline. Online: https://eduline.hu/felsooktatas/20201226_szfe_osszefoglalo

Ereky, I. (1939). *Közigazgatás és önkormányzat.* A M. T. Akadémia Jogtudományi Bizottságának Kiadványsorozata 10. szám.

Fazekas, J. (2018). Centralization of Government and Legal Traditions in Hungary. In K. Strada-Rozenberga (Ed.), *Legal Traditions and Legal Identities in Central and Eastern Europe. Collection of research papers of the 76th International Scientific Conference of the University of Latvia* (pp. 380–387.) University of Latvia Press. Online: http://bit.ly/3TIAvlz

Fazekas, M. (2018). Közigazgatási bíráskodás a hatósági ügyeken túl. A közigazgatási perrendtartás tárgyi hatályának néhány kérdése. In Menyhárd A., & Varga I. (Eds.), *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara. A jubileumi év konferenciasorozatának tanulmányai (I.-II. kötet)* (pp. 210–223.). ELTE Eötvös Kiadó.

Fazekas, M. (2020). A kormányzati aktusok. In Fazekas M. (Ed.), *Közigazgatási jog. Általános rész III.* (pp. 88–89.) ELTE Eötvös Kiadó.

F. Rozsnyai, K. (2016). A közigazgatási perrendtartás kodifikációja kapcsán várható lényegesebb közigazgatási perjogi változások. *Versenytükör*, 12(4), 33–40. Online: http://bit.ly/3h-SabIy

F. Rozsnyai, K. (2017). A közigazgatás aktusok jogi kötöttsége. In Fazekas M. (Ed.), *Közigazgatási jog. Általános rész III.* (pp. 129–136.) ELTE Eötvös Kiadó.

Hague, R., & Harrop, M. (2004). *Comparative Government and Politics. An Introduction (6th Ed.).* Palgrave Macmillan.

Herczeg, M. (2019). *Kúria: Az alaptörvény nem írja elő állami szervek semlegességét a választási kampányban.* 444. Online: http://bit.ly/3tDMOFp

Hoffman, I., & Fazekas, J. (2019). Voluntary Municipal Tasks as Tool of the Resilience of the Local Communities. In C. Haruţa, C. M. Hinţea, & O. Moldovan (Eds.), (pp. 286–297.). Accent.

Kósa, A. & Zoltai, Á. (2018). *Liszkay nyaralójában összpontosul a fideszes* média. Népszava. Online: http://bit.ly/3EgQX73

Körösényi, A. (1996). Demokrácia és patronázs. Politikusok és köztisztviselők viszonya. *Politikatudományi Szemle*, 5(4), 35–62. Online: http://bit.ly/3EFb8Np

Lőrincz, L. (2005). *A közigazgatás alapintézményei.* HVG ORAC.

Madarász, T. (1992). *A magyar államigazgatási jog alapjai.* Tankönyvkiadó.

Magyary, Z. (1942). *Magyar közigazgatás. A közigazgatás szerepe a XX. sz. államában. A magyar közigazgatás szervezete, működése és jogi rendje.* Királyi Magyar Egyetemi Nyomda.

Marosi, I., & Csink, L. (2009). Political Questions in the United States and in France. *Studia Iuridica Caroliensia*, 4, 113–124. Online: http://www.kre.hu/portal/doc/sic/2009/sic4_10_marosi-csink.pdf

McHarg, A. (2017). *Administrative Discretion, Administrative Rule-Making and Judicial Review.* http://dx.doi.org/10.2139/ssrn.3044092

Menyhárt, Zs. (2020). A külügyi és külgazdasági igazgatás eljárásai. In Boros A., Patyi A. (Eds.), *A hazai közigazgatási (nem hatósági) eljárások alapvető jellemzői a hatékonyság tükrében* (pp. 191–198). Dialóg Campus.

Miller, A. S. (1980). Reason of State and the Emergent Constitution of Control. *Minnesota Law Review*, 64, 585–633.

Origo. (2019). *Karácsony Gergely most a Kúrián bukott meg.* Origo. Online: http://bit.ly/3UQ7N3y

Paczolay, P. (1995). Alkotmánybíráskodás a politika és a jog határán. In Paczolay P. (Ed.), *Alkotmánybíráskodás, alkotmányértelmezés* (pp. 9–31.). Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar.

Patyi, A. (2017): *A közigazgatási működés jogi alapjai.* Dialóg Campus Kiadó.

Petrétei, J., Tilk, P., & Veress, E. (2007). A kormányzati rendszerekről. In Chronowski N., Drinóczi T. (Eds.), *Európai kormányformák rendszertana* (pp. 9–37). HVG ORAC.

Pollitt, C., & Bouckaert, G. (2011). *Public Management Reform. A Comparative Analysis – New Public Management, Governance, and the Neo-Weberian State (3rd ed.).* Oxford University Press.

Pribula, L. (2017). A közigazgatási cselekvésekkel szemben nyújtott bírósági jogvédelem alkotmányos alapja. A közigazgatási perek hatályos szabályozása. In Árva Zs., Balázs I., Barta A., Pribula L., & Veszprémi B. (Eds.), *Közigazgatási eljárások* (pp. 131–147). Debreceni Egyetemi Kiadó – Debreceni Egyetem Állam- és Jogtudományi Kar Közigazgatási Jogi Tanszék.

Tamás, A. (1997). *A közigazgatási jog elmélete.* Szent István Társulat.

Turpin, C., & Tomkins, A. (2007). *British Government and the Constitution. Text and Materials (6th ed.).* Cambridge University Press. https://doi.org/10.1017/cbo9780511802904

Tushnet, M. (2002). Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine. *North Carolina Law Review* (80) 1203–1235. https://doi.org/10.2139/ssrn.283464

Varga, Zs. A. (2014). Közigazgatás és jogalkotás. In Csehi Z., Koltay A., Landi B., & Pogácsás A. (Eds.), *(L)ex cathedra et praxis. Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából* (pp. 541–555). Pázmány Press.

Várnay, E. (2017). *A kötelezettségszegési eljárások jogiasodása az Európai Unióban.* Debreceni Egyetemi Kiadó.

Warren, K. F. (2003). Administrative Discretion. In J. Rabin (Ed.), *Encyclopedia of Public Administration and Public Policy: A-J.* (pp. 35–38). CRC Press.

Weber, M. (2003). Az uralom szociológiája. In Lőrincz L. (Ed.), *Közigazgatás-tudományi antológia. II. kötet* (pp. 45–84). Unió.

**Legal sources**

Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Restriction of Competition (Tpvt.)

Act CLXXXV of 2010 on Media Services and Mass Media (Mttv.)

Act XXXVI of 2013 on the Election Procedures (Ve.)

Act CL of 2016 on the general administrative procedure (Ákr.)

Act I of 2017 on the Code of Administrative Court Procedure (Kp.)

Act LXXII of 2020 on the Foundation for Theatre and Film Arts, and grant to the Foundation for Theatre and Film Arts and the University of Theatre and Film Arts (SZFA tv.)

87/2015. (IV. 9.) Government Decree CCIV of 2011 on national higher education on the implementation of certain provisions of the Act

229/2018. (XII. 5.) Government decree issued by the Central European Press and Media Foundation to ECHO HUNGÁRIA TV Television, Communication and Service Private Limited Company, Magyar Idők Kiadó Limited Liability Company, New Wave Media Group Communication and Service Limited Liability Company, and on the classification of the acquisition of OPUS PRESS Private Limited Company as of national strategic importance

1380/2020. (VII. 10.) Government decision on the establishment of the Foundation for Theatre and Film and the provision of the necessary conditions and resources for the operation of the Foundation for Theatre and Film and the University of Theatre and Film

Constitutional Court Decision No. 16/2020 (VII. 8.)

Curia, order No. Kpkf. 40.129/2021/2

Curia, order No. Kvk.III.38.043/2019/2

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 23–34
DOI: 10.54201/iajas.v2i2.49

# IV. AML Directive: Problems related to exchange of information between Financial Intelligence Units

**Yana Daudrikh***

* Researcher, Comenius University Bratislava, Faculty of Law, Department of Financial Law. E-mail: yana.daudrikh@flaw.uniba.sk

## Abstract

The presented paper is devoted to application problems in the field of ensuring international cooperation between Financial Intelligence Units. In accordance with the set goal, the author further analyses the existing application problems related to the exchange of information between the Financial Intelligence Units of the European Union. A special part of the paper focuses on the issue of the absence of uniform regulation at the level of the European Union in the area of information exchange between the European Union Financial Intelligence Units and the Financial Intelligence Units of third countries. In addition, the author further analyses the use of communication channels between the Financial Intelligence Units related to the assurance of sufficient protection of personal data.

## Keywords

IV. AML Directive, Financial Intelligence Unit, data protection, FIU.net.

## 1 Introduction

The Financial Intelligence Unit of a Member State of the European Union (EU FIU) serves as the national centre for receiving and analysing reports of suspicious business transactions, as well as other reports related to money laundering and terrorist financing and for reporting the results of its analysis to the competent authorities. All Member States have set up FIUs to collect and analyse information received under the provisions of Directive 91/308/EEC with the aim of establishing links between suspicious financial transactions and underlying criminal activity in order to prevent and to combat money laundering.[1] The legal requirement for the establishment of FIUs in the EU Member States was stipulated by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

[1] Recital 2 of Council Decision (2000/642/JHA) concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information.

The creation of the FIU framework was primarily designed to support law enforcement agencies and courts, which play an equally important role in the investigation of money laundering and terrorist financing. When considering the creation of the FIU, it was authoritative to create a central collection point for receiving and analysing reports on suspicious transactions. The reason for creating a single institution was to promote trust in the system of combating money laundering.

The functions rendered by the EU FIU can be divided into primary and secondary ones. The definition of the primary function is further specified in the recommendation of the Financial Action Task Force (FATF, 2012-2022, 24), which became the basis for Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (AML IV Directive), which has been fully transposed.[2] The primary (core) function of the EU FIU is thus the reception, analysis, and provision of information to the competent authorities. The reception of information by the EU FIU includes collecting and gathering information related to money laundering and terrorist financing from obliged entities. These include, credit institutions, financial institutions, auditors, notaries, gambling service providers, wallet service providers, and the like.[3] Obliged entities have the duty to communicate all suspicious business transactions carried out by their clients to the EU FIU. While the core function of the EU FIU is directly mandated by the AML IV Directive, its secondary functions may include different tasks depending on the FIU model chosen by the Member State (IMF, 2004, 34). We believe that the most important secondary function of the EU FIU is its supervisory role, which includes conducting audits of compliance with the relevant legal regulations by the obliged entities and to impose sanctions whenever failures are identified (imposition of sanctions function). In addition, the FIU's secondary function includes developing guidelines (relating to the submission of opinions on the practical application of the relevant legislative regulations), producing national risk assessments, and performing international cooperation tasks (Dražková, 2021, 64).

Moreover, FIU is responsible for exercising a national risk assessment which is one of the key requirements to identify, assess, and understand the money laundering and terrorist financing risks at the national level of individual member states. The risk assessment takes into account risk factors, as well as the risk assessment developed by the authorities of the European Union and other international institutions. The national risk assessment is updated mainly taking into account the developments and trends of the money laundering and terrorist financing risks. The Financial Intelligence Unit will provide the results of the national risk assessment to the Council of Europe, the European Commission, the participants of the European System of Financial Supervision and other member states for the purpose of preventing the money laundering and financing of terrorism. The Financial Intelligence Unit publishes the final national risk assessment report on its website. The Financial Intelligence Unit continuously informs obliged entities about the risks identified in the national risk assessment and about the measures taken to mitigate them.

It is clear that the entire EU FIU function cannot be defined accurately, mainly due to significant variances between the different EU FIU models. Although the AML IV Directive directly

[2] For more details see: Nanyun & Nasiri (2021).

[3] Article 2 of AML IV Directive.

regulates the obligation for Member States to ensure the greatest possible degree of cooperation between EU FIUs – notwithstanding their model (organizational structure) – we continue to examine a number of application problems at present, which, in our view, are directly linked to the heterogeneity of EU FIU models.

The list of authorities designated as competent for the AML/CTF supervision of financial institutions in the EU is maintained by the European Banking Autority.[4]

It follows from the above that we consider the absence of uniform legislation at the EU level comprehensively regulating the uniform position of FIUs across the EU Member States to be a fundamental obstacle. It led to divergent national legislation on the position of EU FIUs since EU Member States were given the freedom to choose their own FIU model. As a result, the following EU FIU models currently exist: administrative, law enforcement (police), judicial (prosecutor), or hybrid (Brewczyńska, 2021, 2). The inconsistency of the EU FIU models causes various types of issues, related in particular to the response time to information requests and disclosures within the framework of international cooperation between national EU FIUs, or related to the establishment of additional duties for FIUs. There is also still a lack of uniform regulation in the area of information exchange between EU and third-country FIUs. The lack of FIU harmonization across the EU has also caused significant data protection difficulties.

This paper aims to provide a comprehensive analysis of the currently persistent application problems in the field of information exchange between EU FIUs and between EU and third-country FIUs. To pursue this objective, this paper also includes an analysis of the adequacy of the personal data protection regulation at the EU level and the related issue of using communication channels to exchange information between FIUs. These analyses form the theoretical basis for formulating conclusions regarding the inadequacy of the existing legislation in the field of ensuring international cooperation between FIUs. The following methods were used in the paper: induction, deduction, analysis, synthesis, abstraction, and comparison.

## 2 Exchange of information between EU FIUs

Under Article 53 of the AML IV Directive, EU FIUs are obliged to carry out information-sharing. In this context, we can speak of international cooperation between EU FIUs, which is carried out on a reciprocal basis, i.e. each EU FIU acts both as a recipient of the information and as a provider of information. With regard to this task, EU FIUs act as clearing houses (Panevski et al., 2021, 244), their main task being to ensure the receipt and independent analysis of information relevant to the area of money laundering and terrorist financing. As such, we can think of them as serving the "intermediary" role between law enforcement and judicial authorities.

It is important to emphasize that Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU ("AML V Directive") directly distinguishes between competent authorities supervising credit and financial institutions in the area of money laundering and financing of terrorism and supervisors conducting prudential supervision. For example, in the Slovak Republic, the competence of the National Bank of Slovakia to carry out supervision in the field of money laundering and financing of terrorism is thus derived from its power to prudentially regulate and supervise financial market participants (European Banking Authority, 2021, 5).

[4] Online: https://bit.ly/3iP7hox

The provision of information by one EU FIU to an EU FIU from another EU Member State shall be carried out in one of the following ways (Mouzakiti, 2020, 359):

- At the initiative of the EU FIU;
- Expeditious transfer of information from an EU FIU to another EU FIU from another Member State;
- At the request of an FIU from another EU Member State.

Disclosure of information at the initiative of the EU FIU includes information and analysis that – at the EU FIU's own discretion – may be relevant for the purpose of processing or analysing information by an FIU from another EU Member State in relation to money laundering or terrorist financing.[5] It follows from the above that the information provided in this way must clearly be relevant and related to money laundering and terrorist financing. In this case, we see application problems related to the interpretation of the above concepts. While the concept of laundering the proceeds of crime and financing terrorism is further regulated in Article 1 of the AML IV Directive, the question of what is meant by relevance remains ambiguous. EU Member States' FIUs may thus interpret this criterion very differently and hence, at their discretion, not forward information that may have been relevant for another EU Member State. In this context, the European Commission has attempted to define this concept further, stressing that this form of disclosure is primarily used for reports containing a piece of cross-border information, but has still failed to explain the concept in greater detail. With the application of the relevance criterion, the European Commission considers that the analysis of the information received from the obliged entity should not be performed by the disclosing EU FIU but instead by the receiving EU FIU, which can then carry out its own analysis (European Commission, 2019a, 7–8). It is clear from the above that the information provided should contain data directly relevant to another EU Member State, which may be important for the proper functioning of the combating money laundering and terrorist financing framework.

The duty to provide information to an FIU from another EU Member State promptly is primarily linked to reporting any suspicious business transaction that has been submitted to a non-competent EU FIU. The duty to report a suspicious business transaction is generally imposed on obliged entities under the control of the relevant EU FIUs. These include banks, insurance companies, securities dealers, and the like.[6] In line with the territorial principle, the competent EU FIU shall be the FIU of the EU Member State in the territory of which the disclosing obliged entity is located.[7] The exchange of information is thus carried out on the basis of objective factors, consisting of determining that the suspicious business transaction report submitted by the obliged entity is addressed to another competent EU Member State. In this case, the disclosing EU FIU has no power to carry out any analysis or to decide on the justification of the report submitted (European Commission, 2019a, 7). The process of "forwarding" a suspicious transaction report (the STR) is linked to the existence of an application problem related to the duty of the EU FIU to provide feedback to the obliged entity and the disclosing EU FIU on the effectiveness of the submitted STR and the follow-up procedures related thereto.[8] Thus, the duty to provide feedback applies to the EU FIU that received the information from the non-competent EU FIU. Despite its existence, this duty is quite often underestimated by the

[5] Article 53 (1) of AML IV Directive.

[6] Article 2 of AML IV Directive.

[7] Article 33 (2) of AML IV Directive.

[8] Article 46 (3) of AML IV Directive.

relevant EU FIUs, which means that they provide less feedback to obliged entities. The situation is even worse when it comes to the communication between the disclosing EU FIU and the receiving EU FIU, where feedback is virtually non-existent (European Commission, 2019a, 6).

The provision of information at the request of an FIU from another EU Member State is – similarly to the provision of information at its own initiative – subject to its relevance to and connection with money laundering and terrorism financing. The request submitted must contain several pieces of information, such as background information, an adequate statement of reasons for the request, and the purpose for which the information requested will be used.[9] In this case, the question arises as to what constitutes a sufficient statement of reasons for the request? Will a suspicion of money laundering and terrorist financing be considered sufficient, or is it also necessary to produce an analysis of the reasons for such suspicion by the requesting EU FIU? The current regulation also does not address the issue of further action by the disclosing/requesting EU FIU if the statement of reasons is not sufficient on the part of the requesting EU FIU. These are issues that are still topical and have not yet received sufficient attention, which may ultimately be counterproductive and thus discourage EU FIUs from cooperating at the international level.

Another application issue relates to the duty to provide a timely response to a request for information by an FIU from another EU Member State. The AML IV Directive does not specify the maximum length of time for responding to a request for information from another EU FIU, thus it is at the sole discretion of the disclosing EU FIU. In our view, this has served as an impetus for the EU FIU to follow the recommendations of the Egmont Group of FIUs,[10] which recommends that the EU FIU respond to the request within one month (Egmont Group, 2014, 5). In order to ensure a timely exchange of information, the Egmont Group of FIUs has also created a request form containing a number of mandatory details to be provided by the requesting FIU (e.g. name of the FIU, urgency of the request, identification of the relevant entity for the disclosure of information) (Egmont Group, 2017, Annex A).

Despite the absence of a regulation on the maximum time limit for responding to a request from another EU FIU in the AML IV Directive, the European Commission has criticized EU FIUs, stressing that, despite the approval by the Egmont Group of FIUs of the recommendation by the EU FIUs, the given time limit appears to be much longer than the average time limits for exchanging information with other EU authorities, which are calculated in days or up to a maximum of one week. An example is Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, which provides for a time limit of up to three days (European Commission, 2019a, 8). In this context, it is impossible to disagree with the European Commission, that the one-month time limit set is disproportionately long, especially when an urgent request is served by the EU FIU, which may further delay subsequent legal actions taken by it. On the other hand, we also see possible misconduct by the competent EU authorities, which – by their inaction – gave the EU FIU a free hand to decide how long they shall take to respond.

Another application problem lies in the area of ensuring timely access to the requested information by the receiving EU FIU. Under Section 32 (4) of the AML IV Directive, Member

[9] Article 53 (1) of AML IV Directive.

[10] The Egmont Group of Financial Intelligence Units is an international organisation whose aim is to facilitate cooperation and intelligence sharing between FIUs in order to investigate and prevent money laundering and terrorist financing. The Egmont Group was founded in 1995 as an informal network of 24 national FIUs.

States shall ensure that their FIUs have timely access – direct or indirect – to the financial, administrative, and law enforcement information that they require to perform their duties and powers accordingly. Nevertheless, it is clear that, in practice, not all EU FIUs are able to access the data they need. In our view, the fundamental problem is the inconsistent regulation of the organizational status of the EU FIUs. Despite the fact that the AML IV Directive removed the original obstacle, of imposing a duty on the EU Member States to ensure mutual cooperation between EU FIUs irrespective of their organizational status,[11] the unification of the EU FIUs' direct access to all the information they need has not been enforced. As a result, we currently see significant differences between the EU Member States in the ability of EU FIUs to secure direct access to the data they require. For instance, EU FIUs may have limited access to certain databases due to the different organizational positions of EU FIUs (e.g., if organizational position of an EU FIU within the hierarchy of its state institutions (such as law enforcement authorities) is too low, it may not be granted unrestricted access to all relevant databases).

The exchange of information must respect the principle of purpose limitation. EU FIUs may use the information obtained only for the purposes specified in the request for information or the purposes specified by the disclosing EU FIU. When exchanging information and documents, the disclosing EU FIU may specify the conditions and limitations under which the receiving EU FIU may use the information.[12] In this case, the question arises as to what else may be subject to such a restriction. As of now, no uniform standards for information exchange exist at the EU level. In this case, the only recourse seems to be to ask the disclosing FIU for consent to use the information for other purposes as well.

## 3 Use of FIU.net/ESW, and personal data protection

The European Commission places emphasis on ensuring enhanced protection of data provided to another EU FIU. Data is protected at two levels: the method of data transmission (IT system) and the legal framework for ensuring the protection of personal data.

In order to protect personal data, EU FIUs are obliged to use secure communication channels. In this context, the AML IV Directive encourages FIUs to use FIU.net. This is a decentralized network used for exchanging information between EU FIUs. The decentralization of the network means that there is no common database where all the required data are stored, but all the participating EU FIUs have their own database of data that must be connected to FIU.net. This structure ensures that individual EU FIUs have control over their data as well as a certain level of flexibility in terms of data management (Mouzakiti, 2020, 359). The exchange of information is thus carried out on the basis of a request from the EU FIU for specific information. Requests for information may relate to specific suspicious entities as well as to more specific areas of activity by entities. Using the Ma3tch technology, EU FIUs can gain an overview of entities of interest in the other EU Member States and identify their revenues and funds. Using filters (FIU.net currently has about 126 filters); EU FIUs can compare data without requesting any personal data disclosure. If there is a positive hit, an EU FIU may then request the relevant EU FIUs to provide specific personal data of the individuals making a suspicious transaction. In this case, the FIU.net system guides EU FIUs to exchange only those data that are absolutely necessary for them, thus respecting the principle of data protection (Balboni & Macenaite, 2013, 334).

---

[11] Article 52 of AML IV Directive.

[12] Article 54 of AML Directive.

Although FIU.net creates a unified system for the exchange of information between EU FIUs, we also find a number of application problems. The first problem is one of optionality, i.e. the right of EU FIUs to join the FIU.net system. The AML IV Directive does not explicitly require every EU FIU to participate in FIU.net, but only asks the EU Member States to encourage their FIUs to use the system. It follows that it is up to each FIU to decide whether to use the FIU.net system or to choose a completely different approach. In this context, some EU FIUs – citing the complexity and opacity of the FIU.net system – currently continue to use the Egmont Secure Web (ESW). This was developed by the Egmont Group of FIUs and, like FIU.net, is intended to ensure a seamless exchange of information between FIUs. From this perspective, EU FIUs are divided into three types: the first group uses only FIU.net; the second uses ESW as an equivalent alternative to FIU.net; and the third group uses FIU.net as a primary tool, while ESW is used only if the primary system fails or is interrupted (European Commission, 2019a, 10). This inconsistency in the use of information exchange systems between EU FIUs may have a significant impact on the speed of information provided due to compatibility issues between the systems used by EU FIUs.

However, the fundamental question remains the appropriateness of choosing FIU.net as the sole system for information exchange between EU FIUs. It is clear that FIU.net, which was developed by the EU, is a more powerful tool for EU FIUs, especially when it comes to potential network technical issues (e.g. data leakage). On the other hand, we still consider the questionable institutional subordination of FIU.net to be the hindrance here. Since 2016, FIU.net has been integrated under Europol, which has created further opportunities for information sharing between EU FIUs and Europol but, already in 2019, the question was raised of whether Europol' was adequately competent for cooperation in the area of personal data processing in order to perform the role of FIU.net technical administrator. The content of the European Data Protection Supervisor's annual report showed that FIU.net contains personal data that goes beyond the list of data that can be processed by Europol (EDPS, 2019). In fact, Europol processes personal data only for the purpose of crisis control of a person suspected of committing or participating in a criminal offense,[13] whereas EU FIUs have a wider range of competencies and focus, among other things, on suspicious commercial operations in a financial-legal context. On the basis of the decision above, the European Parliament has proposed a temporary transfer of the competencies of the FIU.net administrator to the European Commission and to extend those of Europol to include the possibility of establishing cooperation with the EU FIUs (European Parliament, 2021).

It follows from the above that it is clear that the question of the suitability of the use of FIU.net is directly linked to the duty to ensure sufficient protection of personal data. We believe that the current application problem is the simultaneous application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation – GDPR) and Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the

[13] Article 18 of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (the "Directive 2016/680"), in relation to EU Member States' FIU law-enforcement models. Under Recital 42 of the AML IV Directive, the GDPR applies to the processing of personal data for the purposes of preventing money laundering and terrorist financing, while Directive 2016/680 provides protection for personal data processed in the framework of police and judicial cooperation in criminal matters.[14] This raises the question of the suitability of applying the GDPR to the FIU police model, which has broader competencies toward law enforcement agencies.

Despite the fact that Art 41 of the AML IV Directive obliges all EU FIUs to apply the relevant provisions of the GDPR, some EU Member States continue to apply Directive 2016/680. The reason for taking a different approach is supposedly – in line with the arguments of EU Member States – to fulfil the core task of the EU FIU of detecting crime and the related use of law enforcement data, which ultimately results in EU FIUs effectively acting as law enforcement authorities (Mouzakiti, 2020, 365). Neither the European Commission nor the European Data Protection Supervisor disagreed with the reasoning put forward, pointing out that, despite performing similar tasks, EU FIUs may not be considered law enforcement or judicial authorities (EDPS, 2013). However, it remains debatable whether the competent EU authorities have sufficient competence to determine which data protection framework is appropriate for all FIUs in light of the range of existing FIU models chosen by the EU Member States.

Some EU Member States have gone even further and, instead of opting for one of the two data protection rules (GDPR and Directive 2016/680), they have applied dual (simultaneous) application of the two laws. However, the current application of the two regulations is associated with an application problem, consisting of the different levels of protection of personal data provided by the GDPR and Directive 2016/680. Examples include the prohibition of further processing of personal data regulated by the GDPR and the absence of a similar provision in Directive 2016/680, which regulates only the initial processing of personal data.[15]

Finally, it should be added that, when choosing a specific data protection legislation, or in the case of simultaneous application of two regulations, it remains questionable whether an EU FIU applying the GDPR – when it regards the exchange of information with an EU FIU applying Directive 2016/680 – can consider the protection of personal data provided at all as sufficient.

## 4 Exchange of information between EU and third country FIUs

While a significant part of the AML IV Directive further regulates the cooperation of EU FIUs, regulation of the area of cooperation with FIUs of third countries is completely absent. For this reason, EU FIUs exchange information according to the Egmont Group of FIUs' Charter (Egmont Group, 2018) or implement bilateral agreements or even Memoranda of Understanding.

[14] Recital 42 modifies the references to the ineffective Regulation and Directive, which have been replaced by the GDPR and Directive 2016/680. Under Article 94 of GDPR: "1. Directive 95/46/EC is repealed with effect from 25 May 2018. 2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC shall be construed as references to the European Data Protection Board established by this Regulation".

[15] Compare Article 5 of GDPR with Article 4 of Directive 2016/680.

The exchange of information between EU FIUs and third-country FIUs is thus carried out on a reciprocal basis. It follows that the scope of information provided to third country FIUs may vary, depending on both the type of information requested and on how the protection of personal data is ensured.

The lack of uniform regulation across the EU causes significant problems in how EU FIUs exchange information in accordance with the relevant EU legislation in force. We see application problems at two levels: the power of the EU FIU to conclude bilateral agreements and Memoranda of Understanding and ensuring the protection of personal data.

The European Commission has stressed that cooperation with FIUs of third countries falls under the exclusive external competence of the EU. It added that the current way of ensuring cooperation between EU and third-country FIUs is a manifestation of the arbitrariness of EU Member States acting without the involvement of EU bodies (European Commission, 2019a, 10). In our view, this is an absurd claim, which has no legal basis. At present, no relevant EU legislation further regulates even the principles of exchange of information between EU FIUs and third-country FIUs, let alone the procedural and legal process for ensuring cooperation (e.g. designation of the network for communication, FIU responsibilities, etc.). In this respect, it also seems inappropriate to argue that international agreements and Memoranda of Understanding could only be compatible with the EU's exclusive competence if they covered operational issues exclusively. However, the question arises as to how cooperation in other "non-operational" areas is to be enforced. This problem needs to be seen at a global level; it is not only a problem of the EU FIU providing information to a third country FIU but also the opposite problem, of not being able to obtain the necessary information requested by the EU FIU from third-country FIUs. If we are talking about the fact that money laundering and terrorist financing have no borders and the perpetrators may be located in third countries, it is obvious that EU FIUs will also suffer from a lack of necessary information, which may ultimately contribute to the transfer of perpetrators' illegal activities to third countries.

In the area of personal data protection, similar to the cooperation between EU FIUs, application problems remain due to inconsistent application of the GDPR and Directive 2016/680. EU FIUs, depending on their model, use the appropriate data protection safeguards for them when cooperating with third-country FIUs. The GDPR and Directive 2016/680 both regulate the principles for personal data transfers to third countries, but they differ. The GDPR presents stricter data protection regulations, since Directive 2016/680 does not cover specific areas of data protection. For instance, compared to the GDPR, Directive 2016/680 does not contain provisions on binding corporate rules, nor on data transfers and disclosures that are not allowed by Union law.[16]

The lack of an adequate level of data protection based on suspicious business transactions the GDPR and Directive 2016/680 by third-country FIUs also remains an issue. Not every third country FIU necessarily has a similar data protection regulation in place and thus may be subject to completely different requirements and conditions for ensuring the protection of personal data.[17] The problem has also been highlighted by the European Commission, which has identified a number of issues related to the reluctance of FIUs to exchange information with each other, mainly due to the lack of mutual trust and the fear that such transfers of personal data will not comply with the GDPR (European Commission, 2019b, 16).

---

[16] Compare Article 47 and Article 48 of GDPR.

[17] For more details see: Adetunji (2019).

Finally, EU FIUs are forced to comply with their international obligations and global standards in the fight against money laundering and terrorist financing, which stem, among other things, from the AML IV Directive as well as the FATF Recommendations and Egmont Group of FIU Recommendations. However, in this case, it is essential that EU FIUs comply with the relevant EU legislation when exchanging information with third-country FIUs.

## 5 Conclusion

FIUs are key players in the current fight against money laundering and terrorist financing. They are the only centres for collecting information on suspicious transactions and activity, making them an intermediate link between financial institutions and law enforcement authorities. Given that criminals laundering the proceeds of crime are not constrained by EU borders, it is of the utmost importance to ensure that international cooperation between FIUs functions properly. However, the current legal situation raises a number of issues related to the inadequacy of the legislation and the need for supplementation. Application problems are experienced at all levels of information exchange between FIUs. We consider the biggest problem to be the absence of legal definitions of basic terms and the regulation of the maximum length of time for responding to a request for information from an EU FIU, without which, in our opinion, it is not possible to talk about the overall effectiveness of the exchange of information between EU FIUs. In this context, it is necessary to add the mission definitions of terms, as well as to set the maximum response time to a request from an EU FIU to the AML IV Directive.

The inconsistency of the legislator can also be seen in the communication channels (FIU.net and ESW), the choice of which is left to the individual EU FIUs, which may cause significant problems in the area of data transfer, making it difficult to establish comprehensive international cooperation between EU FIUs. Furthermore, due to the existence of multiple EU FIU models, data exchange between EU FIUs has reached an "impasse", in that there is currently still a lack of consistency between the EU Member States in the application of the GDPR and Directive 2016/680. In our view, despite the existing direct obligation to apply the GDPR to all EU FIUs (also stemming from the AML IV Directive), it is not possible for EU Member States to arbitrarily decide, depending on the type of EU FIU model they use, which legislation they are "willing" to apply. It follows that we can also speak of an incorrect application of the provisions of the AML IV Directive.

The biggest grey area is currently that of cooperation between EU and third-country FIUs. The need to ensure this kind of cooperation is indisputable and cannot be left to the discretion of individual EU Member States. It is therefore questionable why there is not yet a uniform regulation of the basic processes of information exchange between EU and third-country FIUs. In an attempt to eliminate the grey area, EU Member States have attempted to establish cooperation with third-country FIUs by concluding cooperation agreements or Memoranda of Understanding, but this has not been accepted by the European Commission. In this case, we consider it particularly relevant to reflect on the future functioning of these relationships. As a result of the grey area, we believe that, by entering into special agreements and Memoranda of Understanding, the actions of EU FIUs are correct and beneficial for the further development of international cooperation in the field of information exchange.

## References


Adetunji, J. A. (2019). Rethinking the Internal Mechanism of the EGMONT Group in Financial Crime Control. *Journal of Money Laundering Control*, 22(2), 327–338. https://doi.org/10.1108/JMLC-04-2018-0029

Balboni, P., & Macenaite, M. (2013). Privacy by Design and Anonymization Techniques in Action: Case Study of Ma3tch Technology. *Computer Law and Security Review*, 29(4), 330–340. https://doi.org/10.1016/j.clsr.2013.05.005

Brewczyńska, M. (2021). Financial Intelligence Units: Reflections on the Applicable Data Protection Legal Framework. *Computer Law & Security Review*, 43. https://doi.org/10.1016/j.clsr.2021.105612

Dražková, M. (2021). *Opatření v dohledu nad kapitálovým trhem.* C. H. Beck.

Egmont Group of Financial Intelligence Units. (2014). *Operational Guidance for FIU Activities and the Exchange of Information. Approved by the Egmont Group Heads of Financial Intelligence Units, July 2013, revised June 2014.* Online: https://bit.ly/3hbejmX

Egmont Group of Financial Intelligence Units. (2017). *Operational Guidance for FIU Activities and the Exchange of Information. Approved by the Egmont Group Heads of Financial Intelligence Units, July 2013, revised February 2017.* Online: https://bit.ly/3uDDKRk

Egmont Group of Financial Intelligence Units. (2018). *Egmont Group of Financial Intelligence Units Charter. Approved by the Egmont Group Heads of Financial Intelligence Units. Australia: Sydney, July 2013, revised in September 2018.* Online: https://bit.ly/3uzQk3Y

European Banking Authority. (2021, December 16). *Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and financial intelligence units under Directive 2013/36/EU* (EBA/GL/2021/15). Online: https://bit.ly/3BnAcq8

European Commission. (2019a). Report from the Commission to the European Parliament and the Council assessing the framework for cooperation between Financial Intelligence Units (COM/2019/371 final).

European Commission. (2019b). Report from the Commission to the European Parliament and the Council on the assessment of recent alleged money laundering cases involving EU credit institutions (COM/2019/373 final).

European Data Protection Supervisor. (2013, July 4). *Opinion on a proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and a proposal for a Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds.* Online: https://bit.ly/3VL8Zpy

European Data Protection Supervisor. (2019). *Annual report 2019. Publication Office of the European Union.* Online: https://bit.ly/3W36Bdp

European Parliament. (2021, August 2). *Answer given by Ms Johansson on behalf of the European Commission. Parliamentary question – E-005327/20208(ASW).* Online: https://bit.ly/3uE9sxW

FATF. (2012-2022). *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation.* Online: https://www.fatf-gafi.org/recommendations.html

International Monetary Fund. (2004). *Financial Intelligence Units: An Overview.* https://doi.org/10.5089/9781589063495.069

Mouzakiti, F. (2020). Cooperation Between Financial Intelligence Units in the European Union: Stuck in the Middle Between the General Data Protection Regulation and the Police Data Protection Directive. *New Journal of European Criminal Law*, 11(3), 351–374. https://doi.org/10.1177/2032284420943303

Nanyun, N. M., & Nasiri, A. (2021). Role of FATF on Financial Systems of Countries: Successes and Challenges. *Journal of Money Laundering Control*, 24(2), 234–245. https://doi.org/10.1108/JMLC-06-2020-0070

Panevski, D., Peráček, T., & Rentková, K. (2021). Analysis of the Practices of Financial Intelligence Units (FIUs) and Other Anti-money Laundering Agencies within EU. In N. Kryvinska, & A. Poniszewska-Marańda (Eds.), *Developments in Information & Knowledge Management for Business Applications. Studies in Systems, Decision and Control, vol. 376* (pp. 241–269). Springer, Cham. https://doi.org/10.1007/978-3-030-76632-0_8

**Legal sources**

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

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

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (2000/642/JHA).

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 35–45
DOI: 10.54201/iajas.v2i2.33

# Split payment mechanism and STIR – selected tools for improving the efficiency of tax collection on goods and services in the Republic of Poland

**Artur Halasz***

* Assistant Professor, University of Wrocław Department of Financial Law, Faculty of Law, Administration and Economics. E-mail: artur.halasz@uwr.edu.pl

## Abstract

The article describes two selected tools for improving the efficiency of tax collection on goods and services in Poland, which were introduced in 2017, namely split payment and STIR. The introduction of these tools was connected with the Ministry of Finance's intensification of actions related to so-called treasury frauds. The article presents the normative structure of split payment and STIR and also discusses the influence of these tools on the tax on goods and services.

## Keywords

STIR, split payment mechanism, tax on goods and services.

## 1 General comments

Tax on goods and services[1] constitutes the most important source of treasury revenues. As such, efficient collection is absolutely crucial. For this reason, the options for introducing mechanisms that would safeguard TGS collection have been researched in Poland for many years. What needs to be stressed is that TGS and, more generally speaking, VAT, is equally prone to evasion attempts in Poland and in other EU member states. According to the Council of Ministers, an increase in the TGS gap, defined as the difference between theoretically due TGS (theoretical treasury income) and actually collected TGS (real income)[2] has been observed since 2008. "In line with calculations ordered by the European Commission, the VAT gap is ca. 10 billion EUR now". It is worth stressing that the Republic of Poland is among the better Europe

[1] Hereinafter: TGS - which is the Polish equivalent of VAT found in most EU member states.

[2] The gap (apart from "natural" bankruptcies) mostly results from tax frauds (in the form of various actions consisting of illegal activities such as tax frauds and evasion) and existence of the so-called grey zone.

member states when it comes to the degree of tax evasion (a larger gap has been calculated for Romania, Greece and Italy, for example).[3]

In response to the growing scale of frauds and evasions relating to TGS, the Polish legislator introduced numerous laws intended to increase the effectiveness of TGS collection, including the split payment mechanism and the STIR IT system that are the subjects of this paper.

## 2 Split payment mechanism

On 1 July 2018, the provisions of the act of 15 December 2017 amending the law on TGS and other selected laws[4] came into force. They included various changes aimed at providing more stability in revenues from TGS and preventing TGS evasion, which would translate into more tax security, greater stability of running business activities and keeping equal rules for competition.[5] This amendment introduced the split payment mechanism to the Polish tax system, based on a model employed in Azerbaijan (Michalik, 2018, 113).

On February 18 2019, by the Council Implementing Decision (EU) 2019/310,[6] the Council of the European Union, having regard to the Treaty on the Functioning of the European Union and Council Directive 2006/112 / EC of November 28, 2006 on the common system of value added tax,[7] authorised Poland to introducing the split payment model as a measure derogating from Article 226 of the VAT Directive. Pursuant to Article 226 of the VAT Directive, invoices for VAT purposes contain only the data specified therein. It was therefore necessary for Poland to apply to the European Union authorities for authorisation to introduce the split payment model, which is a derogation from Article 226 of the VAT Directive. Poland applied for the possibility of applying this model from January 1 2019 to December 31 2021. The European Commission approved the proposed split payment mechanism to apply in Poland from March 1 2019 to February 28 2022. According to the Council of the European Union in Article 3 of Council Implementing Decision (EU) 2019/3100, the split payment mechanism could apply from 1 March 2019 until 28 February 2022.

Split payment constitutes one of the methods of collecting due tax and, at the same time, one of the solutions aimed at eliminating frauds and increasing TGS collectability (which translates into decreasing the tax gap). The main assumption behind this mechanism was splitting payments for the provided goods or services into the net amount paid by the buyer to the supplier's account and the TGS that would go directly to a separate bank account under the "supervision" of a tax authority. This model makes it possible for tax authorities to monitor and block funds on TGS accounts, thus eliminating the risk of taxpayers disappearing together with TGS paid

[3] Government bill amending the act on tax on goods and services and certain other acts. Online: http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1864.

[4] Act of 15 December 2017 amending the act on tax on goods and services and some other acts (Journal of Law of 2018 item 62; hereinafter: the amendment).

[5] Government bill amending the act on tax on goods and services and certain other acts. Online: http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1864

[6] Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ L 51, 22.2.2019, p. 19–27; hereinafter Implementing Decision (EU) 2019/310).

[7] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1–118; hereinafter: VAT Directive).

by their business partners and unpaid by them.[8] Because of this, "using the split payment mechanism is a safe, from the point of view of the Treasury, method of realising payments, as funds transferred with split payment remain in the closed circle of VAT accounts (Prokop, 2018)." Before introducing the split payment mechanism, Poland took numerous measures to combat tax fraud, in particular the reverse charge mechanism and joint and several liability of the supplier / service provider and the buyer, and the single control file. The European Commission has indicated that the split payment mechanism can bring effective results in the fight against VAT fraud.[9]

On April 5 2022, the Council issued Implementing Decision 2022/559 amending Implementing Decision (EU) 2019/310 with regard to the authorisation granted to Poland for the further application of a special measure derogating from Article 226 Directive 2006/112/EC on the common system of value added tax.[10] The report submitted by the Polish government confirms that the split payment mechanism is working well in the fight against tax fraud. Therefore, the European Commission recommended extending the operation of the split payment mechanism until February 28 2025. In particular, in the justification of its position, the European Commission points out that the introduction by Poland of the split payment mechanism, together with other measures aimed at limiting tax evasion, significantly influenced a reduction in the VAT gap, which fell below the European Union average over a short time.[11] The European Commission notes that, prior to the introduction of the split payment mechanism:

> 1) the number of proceedings brought concerning offences consisting of VAT fraud was 3,507 in 2018 and 3,389 in 2019 (a decrease of 118). In 2020, when the mandatory split payment mechanism became fully operational, the number of such procedures was 2 973, i.e. 416 fewer than in the previous year;
> 2) the amount of budget losses resulting from VAT fraud was PLN 5,168,779,146 in 2018 and PLN 4,716,202,928 in 2019 (a decrease of almost 8,75% year-on-year). In 2020, budget losses amounted to PLN 3,533,646,348, i.e. PLN 1,182,556,580 less than in the previous year (a decrease of almost 25.1%);
> 3) the number of initiated procedures related to VAT carousel fraud was 558 in 2018 and 277 in 2019 (a decrease of 281 year-on-year). In 2020, when the mandatory split payment mechanism was operational, the number of such procedures was 207, i.e. 70 fewer than in the previous year. It was also noted during the period under review that the reported budget losses due to VAT carousel fraud had gradually decreased. Before the entry into force of the mandatory split payment mechanism, the amount of the corresponding budget losses was PLN 4,496,602,940 in 2018 and PLN 2,468,437,745 in 2019 (a decrease of PLN

[8] Letter of the Minister of Development and Finance of 17 February 2017, PT1.054.5.2017.NWQ.93. Online: http://bit.ly/3AvpDRu

[9] Point 11 Implementing Decision (EU) 2019/310.

[10] Council Implementing Decision (EU) 2022/559 of 5 April 2022 amending Implementing Decision (EU) 2019/310 as regards the authorisation granted to Poland to continue to apply the special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ L 108, 7.4.2022, p. 51–59; hereinafter: Implementing Decision (EU) 2022/559).

[11] Proposal for a Council Implementing Decision amending Implementing Decision (EU) 2019/310 authorising Poland to apply a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (COM/2022/58 final). Online: http://bit.ly/3TWjbJY

2,028,165,195 year-on-year). In 2020, these losses amounted to PLN 1,107,992,201, i.e. by PLN 1,360,445,544 less than in the previous year (a decrease of almost 55.1%).[12]

The split payment mechanism is regulated in Chapter 1a, Section XI of the TGS law[13] and is only applicable to payments made since 1 July 2018. This mechanism applies to domestic trade between TGS tax payers (B2B). As such, it does not apply to trade with end-consumers.

In line with Article 108a TGS law, this mechanism is optional for taxpayers. Moreover, it is the buyer of goods or services who has the right to make a payment with the use of the split payment mechanism. Therefore, "the buyer of goods or services remains the exclusive holder of the right to apply this solution. The entity most interested in using this solution, i.e. the invoice issuer, has practically no possibility of opposing its use" (Bartosiewicz, 2018). Incentives for using the split payment mechanism include, if it turns out that the paid invoice does not give a right to deduct the TGS charged or the tax payer made a mistake when deducing the TGS charged, the sanctions provided for in Article 112b item 1 point 1 and item 2 point 1 of the TGS law (determination of additional tax liability) and in Article 112c of the TGS law (increased tax rate for the tax liability) shall not apply. The second incentive for the buyer to use the split payment mechanism is the possibility of avoiding solidary liability in the case of buying goods listed in appendix no 13 to the TGS law if such a liability could apply. Third, the 150% default interest rate does not apply in the event of tax arrears for the tax period for which the taxpayer in the submitted tax declaration showed the amount of input tax, at least 95% of which results from the invoices received by the taxpayer that have been paid using the split payment mechanism. However, such benefits do not apply to a tax payer who knew that the invoice was paid using the split payment mechanism and, *inter alia,* was issued by a non-existent entity or it covers work that was not performed or provides amounts not conforming to the true state of affairs.

In line with Article 108a item 1a TGS law when making payments for the purchased goods or services listed in Annex 15 to the Act, documented by an invoice in which the total amount due exceeds PLN 15,000 or its equivalent expressed in a foreign currency, taxpayers are required to apply the split payment mechanism, using the rules of conversion of amounts used to determine the tax base. If it is found that the taxpayer has made the payment in breach of Article 108a item 1a u.p.t.u., the head of the tax office or the head of the customs and tax office shall establish an additional tax liability in the amount corresponding to 30% of the tax amount for the purchased goods or services listed in Annex 15 to the Act on Taxes, indicated on the invoice to which the payment relates. In relation to natural persons who are liable for the same act for a fiscal misdemeanour or for a fiscal offence, no additional tax liability is established. However, this sanction does not apply if the supplier or service provider has settled the entire amount of tax resulting from the invoice, which was paid in violation of Article 108a item 1a TGS law.

The split payment mechanism relies on the facts that, first, the amount corresponding to the whole or total of the tax resulting from the received invoice is paid to a VAT account; and second, that a partial or total amount corresponding to new sales amount resulting from the received invoice is paid to a bank account or account in a savings and credit union for which there is a VAT account or is settled in another manner. It needs to be explained what the so-called VAT account is. It is a special bank account of the supplier (service provider). The amendment provides that banks or savings and credit unions have an obligation to open one for every TGS

[12] Ibidem.

[13] I.e. Journal of Law of 2021 item 685; hereinafter: TGS law

payer having its settlement account and an analogous personal account for business purposes in that savings and credit union. It is assumed that monies collected on the VAT account are at the taxpayer's disposal, but the possibilities of disposing of it are limited to paying TGS liabilities or an amount corresponding to TGS from invoices received from its business partner. However, in Article 108b item 1 TGS law, the legislator indicated that, at the taxpayer's request, the head of internal revenue may give, by means of a resolution, consent for the monies collected on VAT bank account indicated by the taxpayer to be transferred to another bank account or savings and credit union account indicated by it for which there is a VAT account. It is important that the taxpayer is entitled to file a complaint against this decision. The request may also be submitted by a non-taxable entity that has funds in the VAT account and an entity without a registered office or a permanent place of business in the territory of the country.

The tax authority (head of Internal Revenue) has 60 days for issuing a resolution determining the amount that can be transferred. In event case of refusal to transfer these monies to the account indicated by the taxpayer, the head of Internal Revenue is obliged to issue a decision.

An interesting solution is the joint and several liability of the taxpayer with the supplier of goods or service provider for the failure by this contractor to settle the tax resulting from this supply of goods or other provision of services up to the amount received on the VAT account. This solution occurs when the payment is made in the manner specified above to a taxpayer other than the one indicated in the invoice documenting the taxed activity. However, this liability is excluded in the event that the taxpayer makes a payment to the VAT account of the supplier of goods, or the service provider indicated on the invoice referred to in item 3 point 3, or returns the received payment to the VAT account of the taxpayer from whom the payment was received, immediately after receiving information of its receipt, in the amount gotten on the VAT account.

It is worth stressing that split payment is made in Polish zloty with a transfer order created by a bank or savings and credit union intended for making payments in the split payment mechanism. In the transfer order, the tax payer must indicate:

1) the amount corresponding to the whole or part of the tax amount resulting from the invoice to be paid in the split payment mechanism;
2) the amount corresponding to the whole or part of the gross sales value;
3) the number of the invoice to which the payment is related;
4) the tax identification number of the supplier of goods or service provider.

The split payment mechanism, in addition to the above-mentioned functionalities and advantages of limiting the possibility of tax fraud, may have some inconveniences. Transferring the wrong amount of tax in the split payment mechanism is particularly problematic and rather difficult to eliminate – unfortunately, in such cases the seller should be consulted, but he will not be able to refund the VAT account. Therefore, the seller must refund this amount using his settlement account, while an overpayment will be made on the VAT account.

## 3 STIR

STIR (Polish "System Teleinformatyczny Izby Rozliczeniowej" – Clearing House IT System) was created by the Ministry of Finance to provide a mechanism that would efficiently protect the interests of the Treasury against TGS frauds (Kopyściańska, 2019b, 151). This mechanism

was introduced to the Tax Ordnance[14] with the law of 24 November 2017 on amendments to selected laws targeted at limiting treasury frauds.[15] STIR is used to determine risk factors used by the Head of National Revenue Administration (hereinafter: NRA Head) to analyse risk. STIR is used as a channel for transferring information, data and requests both to the NRA Head and from it (e.g. information on the risk factor to the NRA Head, banks and SKOK[16] and requests of the NRA Head to block the account of an eligible entity[17]).

For TGS, STIR serves the purpose of determining the risk of fraud. The subject literature mentions that such a solution is intended to seal the TGS collection system (Kopyściańska, 2019b, 151). In the years 2015–2016, fiscal audits discovered a reduction in treasury incomes of ca. 19.8 billion zloty as a result of TGS frauds (Kopyściańska, 2019b, 153).

Regulations relating to STIR have been included in Section IIIB of Tax Ordinance, titled "Counteracting use of the financial sector for tax frauds". In Article 119zg point 6 Tax Ordinance, the legislator introduces a definition of STIR, according to which it is understood as "an IT system of the clearing house meeting minimum requirements for IT systems determined in the provisions of law issued on the basis of Article 18 of the act of 17 February 2005 on digitalization of entities providing public administration services". In line with Article 119zha § 1 Tax Ordinance, the intended use of STIR is to:

1) receive and process data for the purpose of determining risk factors;
2) transfer data and information on risk factors to the Central Tax Data Record and IT system of banks and savings and credit unions;
3) intermediate in transfers of data, information and requests between the Head of NRA, banks and savings and credit unions.

Moreover, STIR can optionally be used also in cases where individual provisions of law allow for using the IT system described therein without indicating the entity operating such a system for the purpose of implementing goals determined in these provisions. However, the conditions for using STIR include an agreement between the minister competent for public finance or the NRA Head and the clearing house determining the method of using STIR for processing data or information determined in Article 119zha § 2 Tax Ordinance. The agreement may also determine the method of financing the costs connected with using STIR. The subject literature stresses that the "accepted solution is aimed at optimal use of the functionalities of the STIR system" (Teszner, 2022, 1230).

The clearing house is the entity responsible for creating and managing STIR. Its obligations can be divided into: 1) subject-matter obligations and 2) technical obligations - connected with running it (Teszner, 2022, 1233). In particular, essential issues connected with STIR opera-

[14] Act of 29 August 1997 Tax Ordinance (i.e. Journal of Laws of 2018 item 800); hereinafter: Tax Ordinance

[15] Journal Laws of 2021, item 1154.

[16] Credit and Savings Unions.

[17] In line with Article 119zg point 4, Act of 29 August 1997 Tax Ordinance (i.e. Journal of Laws of 2018 item 800; hereinafter: Tax Ordinance), eligible entity shall be understood as: 1) a natural person being an entrepreneur within the understanding of Article 4 item 1 of the act of 06 March 2018 - Entrepreneurs' Law); 2) a natural person engaging in gainful employment at his or her own account, who is not an entrepreneur within the understanding of the act of 06 March 2018 - Entrepreneurs' Law; 3) a legal person; 4) an organizational entity without legal personality to which the act assigns legal capacity.

tions include developing algorithms listed in Article 119zn § 3 Tax Ordinance or determining the risk factors. These activities are performed exclusively by authorised employees of the clearing house, meaning that they cannot be commissioned to external entities. This is because copyright-protected algorithms, on the basis of which a risk factor is determined, are subject to secrecy and, in line with Article 305r Tax Ordinance, making such information public or using it without authorisation is subject to criminal proceedings. The clearing house may commission an external entity with a task connected to technical operation, repairing or changes in system functionality. Such an order needs to be based on a written agreement approved by the NRA Head.

At this point, it is worth pointing to the political position of the Head of KAS.[18] Pursuant to Article 11 of the Act of 16 November 2016 on the National Revenue Administration,[19] the NRA Head is an authority of the National Revenue Administration. The tasks of the Head of KAS include:

1) supervision of the activities of the director of the National Tax Information, directors of tax administration chambers, heads of tax offices, heads of customs and tax offices, the director of the National Tax School, and directors, competent in KAS matters, of organisational units in the office supporting the minister competent for public finances;
2) shaping the personnel and training policy in KAS organisational units;
3) implementing the state budget to the extent specified for KAS;
4) performing customs and fiscal control in terms of the correctness and truthfulness of the asset declarations submitted by persons employed in KAS organisational units and by officers;
5) counteracting tax avoidance;
6) cooperating with competent authorities of other countries, as well as international organizations and international institutions;
7) providing physical and technical protection to persons employed in KAS organisational units and to officers, and in justified cases also to other persons, bodies and state institutions;
8) conducting analytical, forecasting and research activities and risk analysis.[20]

Moreover, the Head of the NRA is an authority of a higher rank in relation to the directors of the tax administration chamber. The NRA Head, in order to ensure the efficient and effective performance of tasks, in particular supervision of the activities of the director of the National Tax Information, directors of tax administration chambers, heads of tax offices, heads of customs and tax offices, school director and directors of organizational units of the office supporting the minister and shaping personnel and training policy at KAS, may issue orders.[21]

In line with Article 119zn § 1 Tax Ordinance, the NRA Head performs risk analysis for the use of activities of banks and savings and credit unions for purposes connected with fiscal frauds, including TGS frauds. The clearing house determines the risk factor in STIR automat-

[18] National Revenue Administration.

[19] Act of 16 November 2016 on the National Revenue Administration (i.e. Journal of Law of 2022 item 813; hereinafter: NRA Act).

[20] Article 14 item 1 NRA Act.

[21] Article 14 item 3 NRA Act.

ically and it makes it at least once a day, based on automated processing, provided that the purposes and conditions specified in the Tax Ordinance are met. This processing may be based on personal data revealing racial or ethnic origin and biometric data, provided that the purposes and conditions set out in the Tax Ordinance are met. This factor is determined with reference to the eligible entity on the basis of algorithms developed by the clearing house, taking the best practices of the bank and savings and credit unions sector relating to counteracting activities bring used for crimes and fiscal crimes into account, and:

1) economic criteria consisting of the eligible entity's assessment of the transaction with the use of its account in an economic setting, in particular from the point of view of the goals of its business activities or making transactions not justified by the character of the activities;
2) geographical criteria, consisting of making transactions with entities from countries with high risk of fiscal fraud;
3) subject-matter criteria, consisting of eligible entities running high risk business activities from the perspective of susceptibility to fiscal frauds;
4) behavioural criteria, consisting of atypical, as for a given situation, behaviour by the eligible entity;
5) relational criteria, consisting of the existence of links between the eligible entity and other entities as to which there is a risk that they may participate in activities related to fiscal frauds or organise such actions.

The clearing house presents information on risk factors exclusively to the Head of NRA, the bank and savings and credit union in relation to the account of eligible entities managed by 1) this bank or savings and credit union; 2) other banks and savings and credit union if opening their first account for the eligible entity by this bank or savings and credit union.

Based on information and data mentioned in Article 119zp § 1 Tax Ordinance, the clearing house presents the NRA Head at least once a day with:

1) information on accounts of eligible entities managed and opened by banks and savings and credit unions.
2) information on total amounts of credits and debits to accounts of the eligible entities relating to transactions crediting or debiting account mentioned in Article 119zp § 1 point 3 Tax Ordinance;
3) daily breakdown of transactions relating to accounts of the eligible entities for transactions other than those listed in point 2.

Moreover, for the purpose of verifying supplementing information held by the NRA Head and necessary for performing tasks related to preventing the use of the financial sector for fiscal frauds, the NRA Head may request that the bank or savings and credit union present additional information specified in Article 119zs § 1 Tax Ordinance.

The results of risk analysis are crucial for the NRA Head, as on this basis s/he may request the account of the eligible entity to be blocked for a period not exceeding 72 hours if it results from the information that this entity may use the business of banks or savings and credit unions for purposes related to fiscal frauds and other activities aiming at a fiscal fraud. Moreover, this blocking must be necessary to counteract the illegal process. The significant competences of the NRA Head include possibilities of extending this blocking. In line with Article 119zw Tax Or-

dinance, the NRA Head may prolong, by means of a resolution, the blocking period of account of the eligible entity for a specified period not exceeding 3 months if there is justified threat that the eligible entity will fail to perform the existing or future tax obligation or obligation from tax liabilities of third parties exceeding the PLN equivalent of EUR 10,000 converted with mean currency exchange rate published by the National Bank of Poland on the last day of the year preceding the year in which the resolution was passed. It is worth mentioning that blocking is not absolute as, upon the application of the eligible entity, the NRA Head may, by means of a resolution, agree to withdraw, from the blocked account of the eligible entity monies, *inter alia,* for payment of remuneration for work based on job contracts concluded at least 3 months before the account was blocked together with advance payment for PIT and contributions to social security schemes due together with the remuneration. This is done upon presentation of a payroll copy and a document from ZUS, the Social Insurance Institution, confirming registration of the employee(s) for insurance purposes based on a job contract. Moreover, the NRA Head may, by means of a resolution, agree on:

1) payment of tax liability or customs liabilities before the payment deadline from the blocked account of the eligible party upon application of the eligible entity, detailing the tax or customs liability, its amount and head of the internal revenue office competent for collecting it;
2) releasing monies from the blocked account of the eligible entity upon its request, in special, justified cases.

The NRA Head may also, by means of a resolution, release monies from the blocked account of the eligible entity for payment of outstanding tax or duty together with late payment interest in cases of:

1) filing a return, corrected return or customs declaration;
2) issuing a final decision determining the amount of tax or customs liability, confirming the existence of overdue tax or duty;
3) making the decision determining the amount of tax or customs liabilities, or confirming the existence of overdue tax or duty immediately enforceable.

A complaint may be filed against an above-mentioned resolution passed by the NRA Head and it shall be examined without delay, but no later than within 7 days of receiving it. In line with Article 239, in connection with Article 221 § 1, this complaint is examined by the NRA Head.

Article 119zzc § 1 Tax Ordinance provides for a catalogue of situations when the account block may be suspended, among others as a result of examining a complaint over the resolution on blocking the account.

Account blockage has its consequences in TGS for the eligible entity. In the case of blocking its account in line with Article 96 item 9 point 5 TGS law, the head of Internal Revenue routinely deletes the payer from the record of VAT tax payers without the necessity of informing it, if the information is clearly indicative of the tax payer engaging in activities aimed at using the business of banks or savings and credit unions for purposes related to fiscal frauds.[22] There-

[22] What is essential is that there is no legal definition of a "fiscal fraud", therefore it seems necessary to interpret this phrase based on linguistic criteria.

fore, applying account blocks and deleting tax payers' records from VAT makes such an entity unable to use its VAT account. In practice, blocking the TGS settlement count will prevent the taxpayer from using its VAT account.[23]

## 4 Summary

The introduction of both the split payment mechanism and the STIR IT system is connected with Ministry of Finance intensifying actions related to the so-called "fiscal frauds". There is no doubt that increasing problems with TGS frauds required the state to apply new measures for fighting tax frauds. Despite treasury revenues from TGS increasing in the last years, it is still too early for a final assessment of the split payment mechanism and STIR.

The advantages and disadvantages of the described tools can be presented. For the split payment mechanism, the major advantages include, among others, quicker reimbursement of TGS, and the exclusion of solidary liability or protection against increased interest rates. The major disadvantages including "blocking" money: as a rule the tax payer cannot use the TGS money. It is the buyer who has the right of choice regarding split payment and there are doubts emerging related to possible violation of VAT neutrality rules by this settlement system (Kopyściańska, 2019a, 149).

From the point of view of fighting TGS frauds and evasions, the STIR IT system is a much-needed tool. However, the main disadvantage of this system includes increasing areas of uncertainty relating to running business activities in Poland (Kopyściańska, 2019b, 165). The unclear criteria for developing algorithms put honest tax payers at risk of their accounts being blocked, which may influence their financial liquidity.

## References

Bartosiewicz, A. (2018). *VAT Commentary*. Wolters Kluwer.

Kopyściańska, K. (2019a). Mechanizm Podzielonej Płatności – Split payment. In K. Kopyściańska, & E. Skwierczyńska (Eds.), *Zmiany w podatku od towarów i usług w latach 2017–2018* (pp. 137–149). Uniwersytet Wrocławski. https://doi.org/10.34616/23.19.016

Kopyściańska, K. (2019b). System teleinformatyczny – STIR. In K. Kopyściańska, & E. Skwierczyńska (Eds.), *Zmiany w podatku od towarów i usług w latach 2017–2018* (pp. 151–165). Uniwersytet Wrocławski. https://doi.org/10.34616/23.19.016

Michalik, T. (2018). Podzielona płatność (split payment) jako model walki z nadużyciami i oszustwami w podatku od wartości dodanej. In B. Brzeziński, K. Lasiński-Sulecki, & W. Morawski (Eds.), *Poprawa efektywności systemu podatkowego. Nowe narzędzia prawne w VAT i akcyzie*. Wolters Kluwer.

Prokop, D. (2018). Appendices. Objaśnienia podatkowe z 29.06.2018 r. Stosowanie mechanizmu podzielonej płatności (MPP). In D. Prokop (Ed.), *Mechanizm podzielonej płatności. Split payment*. Wolters Kluwer.

Teszner, K. (2022). Article 119zha Application of STIR. In L. Etel (Ed.), Tax Ordinance Commentary (pp. 1229–1230). Wolters Kluwer.

[23] Response to MP question of the Ministry of Finance of 16 March 2018, PT8.054.14.2018.TXZ.129E. Online: http://bit.ly/3Xk3mzB

Teszner, K. (2022). Article 119zi Osoby I podmioty zewnętrzne wykonujące obowiązki izby rozliczeniowej. In L. Etel (Ed.), Tax Ordinance Commentary (pp. 1233–1235). Wolters Kluwer.

**Legal sources**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1–118).

Act of 29 August 1997 Tax Ordinance (i.e. Journal of Laws of 2018 item 800).

Act of 16 November 2016 on the National Revenue Administration (i.e. Journal of Law of 2022 item 813).

Act of 24 November 2017 on amendments to selected laws targeted at limiting treasury frauds (Journal Laws of 2021, item 1154).

Act of 15 December 2017 amending the act on tax on goods and services and some other acts (Journal of Law of 2018 item 62).

Act of 11 March 2004 on tax on goods and services (i.e. Journal of Law of 2018 item 2174).

Act of 24 November 2017 on the amendment of certain acts to counter the use of the sector to tax extortion (Journal of Law of 2017 item 2491).

Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ L 51, 22.2.2019, p. 19–27).

Council Implementing Decision (EU) 2022/559 of 5 April 2022 amending Implementing Decision (EU) 2019/310 as regards the authorisation granted to Poland to continue to apply the special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ L 108, 7.4.2022, p. 51–59).

Government bill on the act on tax on goods and services. Online: http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1864

Proposal for a Council Implementing Decision amending Implementing Decision (EU) 2019/310 authorising Poland to apply a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (COM/2022/58 final). Online: http://bit.ly/3TWjbJY

Letter of the Minister of Development and Finance of 17 February 2017, PT1.054.5.2017. NWQ.93. Online: http://bit.ly/3AvpDRu

Response to MP question of the Ministry of Finance of 16 March 2018, PT8.054.14.2018. TXZ.129E. Online: http://bit.ly/3Xk3mzB

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 46–60
DOI: 10.54201/iajas.v2i2.53

# The Development History and Economic Characteristics of the Hungarian Local Tax System from the Change of the Regime until the Pandemic

**Csaba Lentner*, Szilárd Hegedűs****

* Full Professor at the Department of Governance and Public Policy, Faculty of Public Governance and International Studies, University of Public Service, Head of Széll Kálmán Public Finance Lab. E-mail: Lentner.Csaba@uni-nke.hu
** Researcher at the Department of Governance and Public Policy, Faculty of Public Governance and International Studies, University of Public Service, Head of Széll Kálmán Public Finance Lab & Budapest Business School, Faculty of Finance and Accounting. E-mail: Hegedus.Szilard@uni-bge.hu

## Abstract

The objective of the study is to present Hungarian local tax regulations from the change of the regime, in transition term until the period of COVID-19, with special attention in the light of changes in the legal system and their economic effects. We have divided the past three decades into three periods and, within these, we have examined local taxation item by item. In addition to the period from the change of the regime and the EU accession period, as well as the interval from EU integration to the state financial reforms of 2010, the study also pays special attention to the legislative changes introduced because of the pandemic. We are looking to answer how the local tax regulations affected the revenues of local governments and what kind of tax-mix developed in the decades following the change of the regime. The main conclusion of the study is that the changes in the local tax system have been significant since 2010, as some types of tax were phased out, while new tax types with an open list appeared. The analysis of the legal dynamics of the short period following the pandemic led to the conclusion that Hungarian local governments' room to maneuver decreased because of the measures affecting the local tax system, and the decision-making was mainly justified by the economic conditions caused by the pandemic.

## Keywords

local tax system, regulatory dynamics, local government management, Hungary.

## 1 Introduction

Public tasks are performed at the central budget, regional and local government level. The local self-government subsystem of the Hungarian public finances in its current form was created after the change of the regime, in which economic independence is guaranteed by local tax

regulation. Like most European countries, Hungarian local government financing uses multi-channel financing. In the Hungarian system, state subsidies and contributions, ceded central taxes and local taxes had and continue to play a decisive role. The study focuses on the local tax system, presents the relevant tax literature, the local tax system created after the change of the regime, and on its main directions of change. The role of local taxation in the economy is presented with the development of local tax revenues and their proportional weight in the GDP. An important part of the research is the presentation of the tax changes following the pandemic, in chronological order, within the framework of legal dynamic studies. The study formulated the research question of how regulation fulfilled its economic role over the last more than three decades and in what ways it affected the function of the local governments. The nature of our research, spanning several decades, can have a significant and unique value.

## 2 Literature review

The public financial aspects of local tax regulation probably stem from the fact that the state is not able to implement certain tasks at the same level of service throughout the country, so it is necessary to delegate tasks. There are two ways to do this: one is deconcentration, while the other is decentralization (Csipkés & Veres, 2018). Fiscal decentralization theories first appeared in the United States, as the government structure there required cooperation between government levels, which arose from the federal state system (Horváth et al., 2014). In connection with the group of theories, Musgrave (1959) and Musgrave & Musgrave (1989) defined the economic functions of the state, in which, in addition to the classical three (stabilization, allocation, redistribution), the author considered the regulatory function to be decisive. It was also established that the public tasks to be performed, their level, and taxation are also assigned to them by cooperation with each other at the various government levels. Tiebout's (1961) mobility hypothesis applies to the latter, according to which, when choosing between different cities (and this line of thinking can also be applied to municipalities), the population considers the level of public services provided, the related tax burden, and makes a choice by comparing these costs and benefits and they choose their residence accordingly.[1] Oates (1972) highlighted the allocation function among Musgrave's economic functions as a task that can be delegated effectively to the local level. Dafflon (2006) opined, regarding the first-generation theory of fiscal federalism, that, according to the theory's assumptions, there are pure local public goods, there are no external effects, and a clear correlation can be shown between paying taxes and benefiting from public goods.[2] According to Lane (1995), the pure model of public finance cannot be maximally effective, since the division of tasks between government levels is strongly influenced by political factors. According to Bailey (1999), territorial allocation is a form of sharing public tasks, which is accompanied by freedom of decision and budget freedom (Horváth M. et al., 2014).

In addition to the economic soundness of the principles of local taxation, it is necessary to develop an appropriate taxation system and environment. According to Kitchen (2004), local tax policy plays a key role in local economic development, and therefore the predictability of taxes is extremely important. Since there are no clear patterns in local taxation per country, le-

[1] This kind of consideration for choosing a place of residence is increasingly coming to the fore in today's Hungary, especially during the strengthening of the flexibility of the workforce.

[2] Qiao et al. (2019) showed a correlation between fiscal decentralization and local democracy.

gal comparison is difficult. However, a common feature is that the levied taxes provide (partial) financial cover for the performance of public tasks, and, as a result, the local authorities must use an appropriate tax-mix. This is also important in the sense that it is a general characteristic that a significant part of public expenditure is financed with subsidies received from higher levels of public administration and with shared revenues, so local autonomy depends to a large extent on a well-developed local tax system (Bird & Slack, 2002; Holm-Hadulla, 2020). In addition to the appropriate tax system, the existence of trust in the local authority and in the functioning of the state is of decisive importance.[3]

## 3 Regulation of the Hungarian local taxes after the change of the regime

Plósz (2019) defines two patterns among the types of municipal financing. One is the expenditure-oriented model, while the other is the income-oriented model. The latter became naturalized in Hungary after the change of the regime, the consequence of which was that local governments were granted taxing powers, which was laid down in Act C of 1990 on local taxes, according to which local governments create a decree on the range of local taxes, possible discounts, and exemptions (Fábián, 2017; Fábián, 2020a; Fábián, 2020b).

### 3.1 Changes in the local tax laws from 1990-2019

The preamble of Act C of 1990 states that, with the establishment of local governments, in addition to the democratic exercise of public power, their important task is to provide public tasks and public services, for which the creation of a framework for independent management is essential. The first part of the law contains the general provisions that assert the right for local governments (community, city, capital, district governments (Article 1 (1) of the cited law) to levy tax. Section 13 of Act LIX of 2020[4] made it possible for county governments to impose taxes, with the stipulation that they cannot introduce taxes on individual settlements. Regarding settlement taxes, Section 39 of Act LXXIV of 2014[5] made their introduction possible. The right to impose taxes in relation to the capital and its districts could be regulated by a decree of the capital assembly, it was made more concrete in 2001, in that the capital city can introduce building tax, land tax, communal tax for private individuals and communal tax for businesses, and local business tax, which requires the agreement of most of the districts. This provision was amended in 2010, since when communal tax and tourism tax can be levied on private persons by the district municipalities, while business tax can be introduced by the metropolitan government (Section 24 of Act XC of 2010).[6] Regarding the system of communal taxes, it can cover all tax objects that are not taxed by the central or the local tax. The tax is a targeted tax, as it can be used for development purposes and for the fulfilment of social tasks.

The local regulations are binding in nature, which means that they cover private individuals, legal entities, and unincorporated associations. Paragraphs (2–6) of Section 3 and Paragraph A

[3] See the scientific correlations of trust in state and local public administration in more detail in the research results linked to the University of Public Service. Mainly: Kis (2018); Hutkai et al. (2019, 21); Parragh & Kis (2020, 344).

[4] Act on the special economic zone and amending certain related acts.

[5] Act amending certain tax laws and other related acts and Act CXXII of 2010 on the National Tax and Customs Administration.

[6] This Act is no longer in force, but it was a live provision in 2011, when it was introduced.

of Section 3 respectively specify local tax exemptions, the scope of which was gradually expanded after the system change.

The law of local taxes (Act C of 1990) contains framework regulations, which means that it defines the range of taxes that can be introduced, as well as the related restrictions. Pursuant to Section 7, the taxpayer is obliged to pay only one type of tax in relation to wealth-type taxes, it must be determined whether the local governments apply a corrected sales value or a square meter proportional tax rate. The legislation also does not allow the application of a tax rate higher than the tax maximum, and an increase in the tax burden between years is also not possible. Section nine identifies the competent tax authorities; in this respect, the local government tax authority, i.e. the notary acts legally in the area in which the tax type has been introduced; its superior body is the government office.

The second chapter of the Act regulates the types of taxes, which it divides into property-type taxes, communal-type taxes, and business tax. Regarding the construction tax, there is a theoretical possibility for value-based taxation, since local authorities can also determine the tax base based on the adjusted sales value. In practice, local governments rarely use this solution, as it would have significant administrative requirements, and, on the other hand, the costs could also be considerable, which would result in damage to the principle of economy of tax collection. In practice, therefore, the value-based real estate taxation used in Slovakia and the Czech Republic did not develop. Regarding the building tax (as well as the municipal tax, land tax, and tourism tax), the legal upper limit did not change after 2010, which will later be valued by the Ministry responsible for public finances. This is calculated by multiplying the tax maximum of the year preceding the current year by the value of the consumer price index three years ago. This method ensures that the value of the itemized tax is preserved. In terms of building tax, the tax base is the useful floor area, with certain correction items. The upper limit of the itemized tax rate rose from HUF 100 per square meter to HUF 1,100 gradually until 2011 and has remained unchanged since then.

The other property tax that can be levied is land tax, the object of which is a plot of land in the area of jurisdiction of the local government; the subject of the tax, similar to the construction tax, is the owner of the plot on the first day of the tax year. With this type of tax, there is also the possibility of a value-based land tax, but, for the same reasons as for the construction tax, local governments do not use this. Compared to 1990, the rate of the tax increased from HUF 100/$m^2$ to HUF 200/$m^2$ in 1996, which has not changed in law since then, but at the same time, the legislator applies valorisation to this type of tax as well.

Another well-defined goal of the framework regulations was to provide municipalities with a sufficient number of alternatives based on the population's ability to pay when developing the local tax system. The introduction of municipal taxes instead of property taxes provides an opportunity for this. Until 2010, there were three types of municipal taxes: municipal tax for individuals, municipal tax for entrepreneurs, and tourist tax. The communal tax on businesses was an alternative to the local business tax for local authorities, but it was withdrawn by Act XC of 2010. The latter type of tax was based on the average statistical number of employees, for which the upper limit was HUF 2,000/persons. In practice, however, it brought very little revenue to local governments, and its maintenance was not justified. The cessation was also facilitated by the state's additional support system, which preferred a local business tax to no tax. Individuals' communal tax is paid by those who are subject to construction tax, as well as by individuals over 18 years of age who have the right to lease property that is not owned by an individual in the municipality's area of jurisdiction. The introduction of no tax mainly benefits those local authorities responsible for areas where the population's ability to pay is low. The

amount of the tax, or its legal upper limit, gradually increased from HUF 3,000 per taxable item to HUF 17,000 in 2012, and has remained unchanged since then, but the tax maximum has been valorised. Since the tourism tax was introduced, it covers stays as non-permanent residents and holiday homes in the municipality's area of jurisdiction. The amount of the latter, introduced into law as Act XC of 2010, was HUF 900/m$^2$ at that time. The tax on tourism activities in the classical sense can be determined item-wise or value-proportionately; local governments mainly use the itemized tax based on statistics.

The backbone of the local tax system is the local business tax, which could be levied on permanent business activities as well as temporary activities until 2021. Due to the concept of the tax type, it defines the business activity, the concept of which is like that of the entrepreneur used in value added tax (VAT). Perhaps the calculation of the tax base of this type of tax has undergone the biggest transformation, since:

- Between 1991 and 1993, the net sales revenue of the product sold and the service provided was the basis of the tax;
- From 1993, the net sales revenue could be reduced by the purchase value of the goods sold or the value of subcontractors' performance;
- From 1998, the cost of materials also became deductible;
- Since 2001, due to a change in the accounting law, subcontractor performance has been replaced by the value of mediated services;
- costs of applied research and experimental development became deductible from the tax base;
- From 2011, subcontractor performance became deductible again;
- In 2013, the purchase value of the goods sold and the accountability of the value of the mediated services decreased progressively (Kecső & Tombor, 2020).

The concept of the local business tax followed the example of the Italian IRAP tax, and consequently it came into the crossfire of disputes during the accession to the European Union, but it did not meet the criteria for value added tax, and as a result, it could remain in the legal order. The upper limit of the tax rate increased gradually, from the 0.3 percent rate at the time of introduction to two percent in 2000[7] and has remained unchanged since then. There have been many criticisms of this tax type:

- It is not a sector-neutral tax, as it affects the service sector to a greater extent;
- It is economic cycle-sensitive, which significantly worsens local governments' room for maneuver of in crisis years;
- In many cases, the use of low tax rates is the result of companies registering in a municipality to take advantage of the low tax rate, and therefore the tax sharing mechanism is typical, which may lead to the creation of local tax havens (Szabó & Kovács, 2018).
- It is unequal, as it largely depends on territorial development.

From 2015, the Hungarian local tax system resolved its framework-type regulation with the introduction of the open-list settlement tax. The essence of this tax type is that the local authority can tax taxable objects that are not subject to either central or local tax. As a result, the spirit

[7] In 1998, for example, it was 1.4 percent, in 1999 it was 1.7 percent.

of the European Charter of Local Governments was transposed into local tax regulation. Of course, there are also limiting factors for this type of tax, so a business cannot be hit by the tax burden, and the application of local taxes is becoming increasingly common.

### 3.2 Development of the local tax revenues in the local government subsystem

For our analysis, we divided the development of local tax revenues into three stages. The data are available in the database of the Hungarian Central Statistical Office (hereinafter: KSH) from 1995, hence this represents the starting value. The end of the first stage is marked by the accession to the European Union in 2004. The analysis criteria are as follows:

– changes in tax revenues over time,
– composition of tax revenues,
– significant changes in tax types.

*1. Table: Evolution of the local tax revenues between 1995 and 2003 (in million HUF)*

| Tax name according to national classification | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|---|---|---|---|
| Other remitted central taxes | 6 | 10 | 23 | 125 | 8 | 10 | 10 | 12 | 11 |
| Vehicle tax (local) | 1 497 | 4 445 | 5,034 | 5,716 | 7 185 | 12,241 | 9,000 | 9 334 | 19,206 |
| Building tax | 4 144 | 8 313 | 10,752 | 13,056 | 16,629 | 19,215 | 26,259 | 29 178 | 34,098 |
| Tourist tax on buildings | 363 | 461 | 524 | 637 | 824 | 892 | 1 170 | 1 091 | 1 247 |
| Communal tax for individuals | 1 305 | 1 910 | 2 262 | 2,765 | 3 422 | 4,557 | 5,087 | 5,578 | 6 308 |
| Local business tax | 38 190 | 66 130 | 92 357 | 123 304 | 171,072 | 186,823 | 226,460 | 252,603 | 271,995 |
| Tourist tax | 859 | 1 571 | 2 185 | 2 622 | 2 182 | 2,943 | 3 277 | 3 224 | 3 316 |
| Luxury tax | – | – | – | – | – | – | – | – | – |
| Land tax | 813 | 1 296 | 1 717 | 1 811 | 2 262 | 1 983 | 3 242 | 3,943 | 4 476 |
| Settlement tax (other types) | – | – | – | – | – | – | – | – | – |
| Residence tax (income type) | – | – | – | – | – | – | – | – | – |
| Settlement tax (property type) | – | – | – | – | – | – | – | – | – |
| Municipal tax for businesses | 517 | 756 | 895 | 1 094 | 1 354 | 1 192 | 1 192 | 1 156 | 1 148 |
| **Total local taxes** | **46 191** | **80,437** | **110,692** | **145,289** | **197,745** | **217,605** | **266,687** | **296,773** | **322,588** |

Source: own editing based on the KSH[8]

Regarding the land tax, it can be concluded that it produced a significant increase between 1995 and 2003, since during this period the tax revenue increased 5.5-fold. From the data series, it can be concluded that there was a slight decline in 1999, but from 2000 there is a considerable increase again. The share of the tax type is low, starting from 1.76 percent of the total income in the examined time series, and despite the increase in the share, it closed at 1.39 percent in 2003. Regarding local tax regulations, it was possible to introduce not only a property-type tax, but also a communal tax. One of them was paid by private individuals, while the other was paid by businesses. The communal tax on private individuals was the second lowest source in the system, since on average two percent of all local tax revenue came from this revenue title between 1995 and 2003. The municipal tax on enterprises represented an even smaller share, only 0.67 percent. Regarding the construction tax, it can be stated that it increased dynamically in the examined years, as the income

[8] Online: https://www.ksh.hu/stadat_files/gdp/hu/gdp0026.html

from this type of tax increased by a multiple of 8.2 times over the course of eight years. Examining the growth rate, it is noticeable that the most significant increase in tax revenue was in 1996, and in subsequent years the increase stabilized at over 20 percent. The year 2001 also showed a significant increase, when tax revenue increased by 36.6 percent, after which the tax rate stabilized at over ten percent growth. The proportion of non-taxable persons was the most significant in 1996 and in 2003, with a proportion exceeding ten percent; from 1997 the proportion began to decrease, but began to increase again from 2000. The KSH reports the tourism tax in two categories, that payable on buildings and classic tourism tax. The share of this type of tax represented a continuously decreasing share in the local tax mix during the period under review, even though the revenues from it increased in nominal value. Regarding the share of tax revenue, the share of tax was below 3 percent of all local tax revenue in each year under review. It is clear from the data that the backbone of the revenue sources is the local business tax. The income from this source increased 7.12 times over during the examined period, with continuous growth. At the macro level, the revenue from business tax accounts for 84.43 percent of local tax revenue on average.

It can be deduced from the results of the period that no significant changes occurred on the revenue side of the local tax system until 2003; a dynamic increase can be observed in this period, by when the determining role of the local business tax was already established, followed by the construction tax in the ranking (Table 1).

The milestone for the examination of the local system is the period following the accession to the European Union until 2010 (Table 2).

*2. Table: Development of the local tax revenues between 2004 and 2010 (in million HUF)*

| Tax name according to national classification | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|---|---|---|---|---|---|---|
| Other remitted central taxes | 29 | 21 | 22 | 36 | 38 | 38 | 51 |
| Vehicle tax (local) | 29,403 | 31,636 | 32,934 | 41,657 | 42,251 | 40,468 | 45 118 |
| Building tax | 38,240 | 44,440 | 47,895 | 54,556 | 61,916 | 66,683 | 71,025 |
| Tourist tax on buildings | 1 188 | 1 257 | 1 278 | 1 412 | 1 491 | 1 450 | 1 515 |
| Communal tax for individuals | 7 161 | 7,954 | 8,275 | 9,069 | 9,739 | 10,077 | 10 124 |
| Local business tax | 310,535 | 334,077 | 380 158 | 427 134 | 465,075 | 472 155 | 443,093 |
| Tourist tax | 3 549 | 3,858 | 4 357 | 4,935 | 5,468 | 5 481 | 5,798 |
| Luxury tax | – | – | 104 | 134 | 171 | 3 | – |
| Land tax | 5 346 | 5 184 | 5 705 | 6,900 | 8,328 | 9 114 | 9,861 |
| Settlement tax (other types) | – | – | – | – | – | – | – |
| Residence tax (income type) | – | – | – | – | – | – | – |
| Settlement tax (property type) | – | – | – | – | – | – | – |
| Municipal tax for businesses | 1 164 | 1 153 | 1 268 | 1 261 | 1 325 | 1 291 | 1 170 |
| **Total local taxes** | **367 183** | **397,923** | **449,040** | **505 401** | **553 513** | **566,254** | 542,586 |

own editing based on the KSH[9]

Even after joining the European Union, the structure of local tax revenues was not radically transformed, given that the lowest revenue came from the luxury tax,[10] followed by the communal tax of businesses, then land tax, and tourism tax. The two most significant tax sources were the building tax and local business tax. Compared to the reference year of 2004, the larg-

[9] Online: https://www.ksh.hu/stadat_files/gdp/hu/gdp0026.html

[10] Act CXXI of 2005 introduced the luxury tax as a local tax, which was levied on high-value real estate.

est increase can be observed in the construction tax, with a growth rate of 86% in 2010. The second largest increase was produced by the local business tax, followed by the communal tax on individuals. Taking all types of taxes together, the most significant increases in relation to local tax types were in 2005 and 2007. The examined period is also affected by the impact of the economic crisis that hit Hungary in 2008. Looking at these three years separately, it can be concluded that the growth of tax revenues did not stop during the years of the crisis. A 6.26% drop between 2009 and 2010 can only be observed in the local business tax. This therefore clearly shows that the local business tax, which forms the backbone of the local tax system, is significantly sensitive to cyclical effects. As such, based on the figures, it can be concluded that property-type taxes are more crisis-resistant than the local business tax, but at the same time they are limited, so they are not able to make up for the tax losses resulting from lost turnover.[11]

Compared to the previous examined period, the consistency of tax revenues did not change radically. The share of construction tax increased compared to the 1995-2003 period, by 1.8 percent, while the share of other taxes fell. A decrease of 0.6 percent can be observed in the local business tax. Based on the data, it can be concluded that EU accession did not significantly transform the local tax system, although there were serious disputes regarding the local business tax. However, the impact of the crisis was already clearly visible with the decline in local business tax revenues. The effect of this factor on total tax revenues is already indicated in 2010, since it was the first year, except for 2001, when total local tax revenues decreased.

From 2011, a significant change took place in the local self-government system, as the structure of tasks, the previous decentralized system, and their financing were significantly transformed (Table 3).

*3. Table: Development of the local tax revenues between 2011 and 2020 (in million HUF)*

| Tax name according to national classification | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|
| Other remitted central taxes | 64 | 63 | 85 | 24 | 23 | 26 | 21 | 20 | 18 | 15 |
| Vehicle tax (local) | 46,576 | 46,488 | 16,004 | 16 173 | 16,660 | 16,620 | 17 401 | 18 192 | 19,224 | 125 |
| Building tax | 80,987 | 96,318 | 102,719 | 105,022 | 111,963 | 117,521 | 123 130 | 126,277 | 127,594 | 130,529 |
| Tourist tax on buildings | 58 | 30 | 21 | 198 | 26 | 8 | 8 | – | – | – |
| Communal tax for individuals | 11,099 | 13 161 | 13 175 | 13 002 | 13,451 | 14,589 | 14,765 | 14,621 | 14,566 | 14,770 |
| Local business tax | 457 308 | 471 031 | 500,868 | 523 125 | 584,380 | 608,982 | 638,731 | 711 276 | 788 308 | 729,000 |
| Tourist tax | 6,761 | 7,682 | 8 411 | 9 126 | 10,475 | 11,676 | 13,602 | 14,863 | 16,249 | 3,953 |
| Luxury tax | – | – | – | – | – | – | – | – | – | – |
| Land tax | 10,310 | 17,523 | 19,395 | 17,938 | 19 102 | 22 112 | 24,018 | 23 165 | 24,095 | 26 168 |
| Settlement tax (other types) | – | – | – | – | 227 | 743 | 816 | 534 | 453 | 443 |
| Residence tax (income type) | – | – | – | – | 14 | 5 | 6 | – | – | – |
| Settlement tax (property type) | – | – | – | – | 217 | 269 | 273 | 281 | 224 | 178 |
| Communal tax for businesses | 102 | 16 | 2 | – | – | – | – | – | – | – |
| **Total local taxes** | **566,625** | 605,761 | 644,591 | 668,411 | 739,855 | 775,905 | 815 349 | 891 017 | 971 489 | 905 041 |

own editing based on the KSH[12]

[11] A good example of this is the luxury tax, which was not originally imposed to relieve the business tax, but it fulfilled the expectations placed on it.

[12] Online: https://www.ksh.hu/stadat_files/gdp/hu/gdp0026.html

In the period after 2011, many changes took place, which are well presented in the data in Table 3:

- From 2010, the communal tax on businesses was phased out, which had largely lost its importance even before that;
- From 2010, the tourist tax paid upon buildings, which taxed holiday homes, was also abolished;
- From 2015, settlement taxes were introduced.

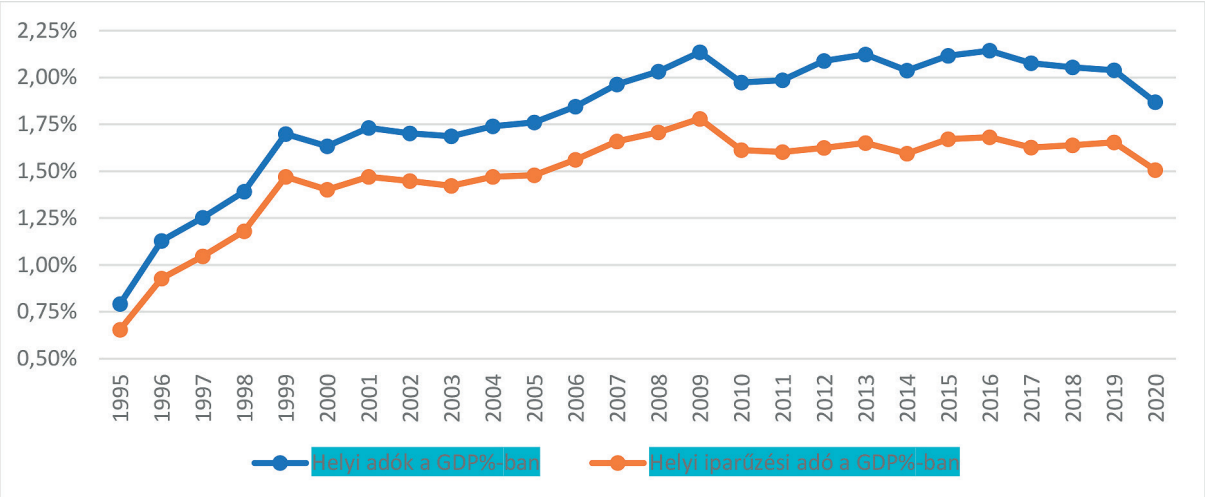
In the examined period, the role of the local business tax in the composition of taxes further decreased, to an average of 80 percent in the examined period, while the proportion of the construction tax increased to 15 percent in parallel; however in the last three years the share was already below the average value. The share of land tax increased to 2.7 percent, the share of tourism tax increased slightly. The role of local taxes remained marginal in the local tax system. If we look at the change, it can be concluded that the local business tax and the tourism tax had the highest growth rate until 2019. In terms of property taxes, the growth rate of the land tax was higher than that of the construction tax; both types of taxes showed a stable but increasing trajectory. Although it increased compared to the beginning of the examined period, the income from the communal tax stagnated in relation to the examined years.

The economic sensitivity of the tourism tax, but especially of the business tax, can still be detected, since it increased significantly during the period of prosperity, but in the first Covid year, 2020, it decreased considerably, partly due to economic policy measures.

The tables also include some shared taxes, the importance of which has steadily declined over the three periods. Table 3 clearly shows the considerable decline resulting from the termination of the division of the vehicle tax. It can be seen from the data series that the decrease in the sharing ratio was already felt after 2013.

*1. Figure: Local tax revenues and local business tax in percent of the GDP*

Local taxes as % of the GDP (blue) and Local business taxes as % of the GDP (orange)




own editing based on the KSH[13]

The first figure shows how local tax revenues have changed in proportion to GDP, and the local business tax, which has the most impact on it. The figure shows that, from 1995 to 1999, local tax revenues as a proportion of the gross domestic product were characterized by a very

[13] Online: https://www.ksh.hu/stadat_files/gdp/hu/gdp0026.html

dynamic expansion; from 2000 the rate of growth decreased slightly, and after the crisis it did not return to the 2009 value. It can be seen from the figure that the role of the local business tax decreased slightly from 1999 within the total GDP-proportional tax revenue, but it still had a decisive role.

## 4 The effects of the COVID-19 pandemic crisis on the local tax system

In relation to the legal dynamic examination, we identified the following main legal areas:

- Tax administration,
- Building tax, land tax,
- Local business tax,
- Tourist tax,
- Municipal budget.

### 4.1 Tax administration

In terms of tax administration, Government Decree 135/2020 (IV. 17.) on the establishment of special economic zones was decisive. The tax administration aspects of this are that it assigns tax matters in special economic zones from local governments to the state tax authority. The primary reason for this is that the right of taxation and ownership has been transferred to the territorially authorized county self-government.

The 2020 autumn tax package also significantly affected the local tax system. Act CXVIII of 2020[14] abolished the temporary business activity in relation to the local business tax. As a direct consequence, if there is construction industry activity in the settlement for more than 180 days, a site must be established in the given settlement. This measure is a means of facilitating administration.

Due to the COVID19 pandemic, pursuant to Act LX of 2020, the motor vehicle tax became a central budget revenue in its entirety, thus tax authority competence was transferred from the local authorities to the state tax authority. This measure is an adaptation related to the change in regulation. With it, the institution of shared central taxes has almost been abolished, as the remaining items are marginal compared to the former PIT, or motor vehicle tax. The Act XC of 2020, and the 2021 budget will make the full deduction of vehicle tax continuous, so only fines, surcharges and enforcement costs will be paid to local governments.

In relation to 2021 and 2022, a ban on tax increases came into effect for local governments, as a result of which they could levy property and communal taxes on the valorised value of itemized taxes, with the maximum tax amount due in 2020, in accordance with the local tax law

*4. Table: Tax maximums from January 1, 2020*

| | | |
|---|---|---|
| Building tax | 1,951.65 | HUF/m$^2$ |
| Land tax | 354.8459 | HUF/m$^2$ |
| Communal tax of an individual | 30,161,907 | HUF/tax item |
| Tourist tax after length of stay | 532.2 | HUF/guest night |

Source: PM/23098/2019. Information no. _ **51/P. Pursuant to Section (1),** they are also effective in 2022

[14] Act amending certain tax laws.

Although serious development has taken place in the self-governing system (ASP), the elaboration of forms used at the local level has also begun at the state tax authority. As a result, in addition to the business tax, it is possible for taxpayers to use the central form for construction tax, land tax, and municipal tax. This factor can be a relief mainly for minor local governments. It is also a relief that visitors from third countries can register electronically in the tourist tax.

### 4.2 Building tax, land tax

Pursuant to Act LXXVI of 2020,[15] property rights related to state property are exempt from building and land tax. Subsequently, Act VII of 2022[16] was also supplemented by the law for state-owned companies performing public tasks. The previously effective regulation also sought to exempt public organizations from paying construction tax and land tax. The system of settlement taxes follows this logic, so the measure mainly serves adaptation related to the economic environment.

### 4.3 The local business taxes

Government Decree 140/2020 (IV. 21.)[17] enabled the subjects of the local business tax to fulfil the local tax declaration and tax payment obligation due on May 31 by September 30. This measure is in line with the deadline for the preparation of the accounting report, as well as with the postponement of the corporate tax return, as these obligations are consistent with each other.

Pursuant to Government Decree 639/2020[18] (XII. 22.), in the 2021 tax year the local business tax will be reduced to one percent for companies classified as small and medium-sized enterprises up to a HUF four billion threshold, if the local government has levied a higher tax rate. The tax advance will also be automatically reduced by 50 percent if a statement is made to the local government by February 25, 2021. To take the value limit into account, the report of the last closed year was used as a basis for enterprises subject to the accounting Act. It qualifies as *de minimis* aid under the EU regulations. This measure was implemented in Act CXXXI of 2021, which was extended to 2022 under the same conditions.

### 4.4 The budget's direct effects on the local governments

Government Decree 140/2020 (IV. 21.) ordered the suspension of the tourist tax payment that can be charged by local governments until December 31, 2020, as a result of which the taxpayers and those obliged to collect taxes did not have to pay the tax, but they had to fulfil the declaration obligation. In connection with this, the central budget does not disburse central budget support to local governments on unpaid tax.

---

[15] Law on the foundation of the 2021 central budget of Hungary.

[16] Act VII of 2020 amending Act CLXXXIX of 2011 on Local Governments in Hungary.

[17] Government Decree on the tax relief measures necessary to mitigate the economic impact of the coronavirus epidemic in the framework of the Economic Protection Action Plan.

[18] Government Decree on certain measures necessary to mitigate the impact of the coronavirus pandemic on the national economy.

Based on Government Decree 603/2020 (XII. 18.),[19] local government fees have been fixed until December 31, 2021, according to which local governments, budgetary bodies and local government companies cannot increase prices. They cannot introduce new fees or modify existing ones. An exception to this is if the amount of the fee increase has been determined in advance.

Pursuant to Government Decree 61/2022 (II. 28.),[20] local authorities will receive compensation due to the 2022 business tax discount.

*5. Table: Amount of compensation in connection with the local business tax*

| Settlement size | Amount of compensation |
|---|---|
| Under 25 thousand people | An amount equal to the lost tax |
| *Over 25,000 people* | lost tax revenue is 100% if the tax capacity is below 70% of the average. |
| | lost tax revenue is 75%, if the tax capacity is above 70% of the average. |
| Not supported | If the business tax capacity exceeds the average |
| | Capital and district municipalities with a population of more than twenty-five thousand people |

Source: 61/2022 (II. 28.) Own editing based on the government decree

### 4.5 Tourist tax

Based on Government Decree 140/2020 (IV. 21), until December 31, 2020, taxpayers are exempt from the tourist tax paid for guest nights, but at the same time, the person obliged to collect it does not have to collect it and pay it, but the declaration obligation remains. The provision of the Government Decree 498/2020 (XI. 13.) on certain economic rules applicable during the state of emergency, extends the exemption from the tourist tax until the end of the emergency on January 1, 2021. Government Decree 319/2021 (VI. 9.)[21] specifies the period of suspension of the tourist tax as until June 30,2021. Government Decree 87/2022 (III. 7.)[22] exempts citizens of Ukraine from the tourist tax in view of the state of emergency.

## 5 Conclusion

During the creation of the local tax system, it was modern and consistent with the regulations of the European Charter of Local Governments, and essentially enabled the legislator and the local governments to adapt flexibly to economic challenges, and on the other hand to create a tax-mix that considers the economic and social characteristics of the settlement. In addition, it created the basis for the performance of local public duties, and the role of local taxes in financing

[19] Government Decree on the economic measures necessary to mitigate the impact of the coronavirus pandemic on the national economy.

[20] Government Decree on the 2022 business tax for micro, small and medium-sized enterprises on municipal aid in connection with the 2022 tax relief for small and medium-sized enterprises.

[21] Government Decree amending Government Decree No 498/2020 (XI. 13.) on certain economic rules applicable during an emergency.

[22] Government Decree on the different application of the rules of Act C of 1990 on Local Taxes on Tourism during a state of emergency.

increased significantly. In the three decades before the pandemic, the local tax system was characterized by relative predictability; the changes mainly included the valorization of tax rates and changes in the range of exemptions and discounts. The most variable type of tax was the local business tax. More significant changes were mainly implemented starting in 2010, when there was the appropriate political mandate to implement the necessary changes. The changes meant the elimination of some types of taxes, at which time the communal tax for businesses and the tourist tax paid for holiday homes were abolished. These changes did not represent a radical change in the system; the principle of the economy of tax collection was mainly kept in mind. From 2015, the concept of local taxes appeared, which introduced open-list taxation in the local tax system. It did not directly affect the system of local taxes, but, from 2013, the personal income tax division was eliminated, and the vehicle tax division was reduced to 40%, however, these types of taxes were divided central taxes.[23]

After the pandemic, the legislative process accelerated significantly, considering that many new measures were introduced to the legal order. According to Hoffman (2021), the centralization process strengthened in the Hungarian local government system after the COVID19 pandemic. After the COVID19 period, special economic zones were created, which created the right of county governments to levy taxes. The rate of the local business tax was maximized at 1 percent and was also suspended during certain periods of the pandemic. The room for manoeuvre of local governments has also been narrowed by fixing itemized taxes at the 2020 tax maximum. These factors significantly influenced the financial scope of the local governments, since, during a period of temporary economic downturn, their own revenue capacities were severely limited, which adversely affected the freedom of management and the quality parameters of the tasks to be performed. The economic policy justified taking these measures by the need for local governments to play their part in the crisis management as well.

The Hungarian local tax system fulfilled its role, as it ensured the revenue independence of local governments, and their role became stronger after the system change. This indicates that adaptation to economic conditions has been achieved. The Hungarian system is made up of tax types that are also used in international practice, but are applied differently, adapted to the domestic environment. However, the problems of external origin that have appeared since 2020, and the government's responses to them, raise the need for a general transformation of local tax regulation, and with it, the enhancement (restoration) of the autonomy of local government management.

## References

Bailey, S. J. (1999). *Local Government Economics. Principles and Practice.* Macmillan. https://doi.org/10.1007/978-1-349-27415-4

Balázs, I. (2022). A helyi önkormányzatok és a központi állami szervek kapcsolata. In Balázs I. (Ed.), *Közigazgatási jogi alaptanok* (pp. 196–217). Debreceni Egyetem Állam- és Jogtudományi Kar.

Bird, R. M., & Slack, E. (2002). *Land and Property Taxation: A Review.* Online: http://bit.ly/3i0oLO9

[23] On the relationship between state bodies and local authorities [Az állami szervek és helyhatóságok kapcsolatáról], see Balázs (2022).

Csipkés, M., & Veres, B. (2018). A helyi önkormányzatok létjogosultsága ma Magyarországon. *Controller Info*, 6(1), 13–20. https://doi.org/10.24387/CI.2018.1.4

Dafflon, B. (2006). The assignment of functions to decentralized government: from theory to practice. In E. Ahmad, & G. Brosio (Eds.), *Handbook of Fiscal Federalism* (pp. 271–305). Edward Elgar. https://doi.org/10.4337/9781847201515.00020

Fábián, A. (2017). Local self-government in Hungary: The impact of crisis. In C. Nunes Silva, & J. Buček (Eds.), *Local government and urban governance in Europe* (pp. 71–87). Springer, Cham. https://doi.org/10.1007/978-3-319-43979-2_4

Fábián, A. (2020a). *A helyi jogalkotási autonómia és választási rendszer*. Dialog Campus.

Fábián, A. (2020b). On the Legal Basis of the Lawmaking by Local Self-Governments – an International Overview. *Lex Localis*, 18(4), 955–975. https://doi.org/10.4335/18.3.955-975(2020)

Hoffman, I. (2021). Opportunities for central (regional) government to intervene in decisions and operations of local governments in Hungary. *Institutiones Administrationis - Journal of Administrative Sciences*, 1(1), 30–39. https://doi.org/10.54201/iajas.v1i1.6

Holm-Hadulla, F. (2020). Fiscal equalization and the tax structure. *Regional Science and Urban Economics*, 81, 103519. https://doi.org/10.1016/j.regsciurbeco.2020.103519

Horváth, M. T., Péteri, G., & Vécsei, P. (2014). *A helyi forrásszabályozási rendszer magyarországi példája, 1990-2012*. Közgazdasági Szemle, 61(2), 121–147.

Hutkai, Zs., Jobbágy, Z., Kis, N., Mészáros, B., & Téglási, A. (2019). Biztonság és bizalom a kormányzatban. In Kaiser T. (Ed.), *A jó* állam *mérhetősége III.* (pp. 9–29). Dialóg Campus.

Kecső, G., & Tombor, Cs. (2020). *A helyi adók szabályozása és joggyakorlata Magyarországon külföldi kitekintéssel – különös figyelemmel az iparűzési adóra és a helyi vagyonadók arányosságára*. University of Public Service.

Kis, N. (2018). The Role and Impact of Trust on the Operation and Sustainability of the States. *Public Finance Quarterly*, 63(3), 289–302.

Kitchen, H. (2004). *Local Taxation in Selected Countries: a Comparative Examination* [Working Paper 2004(5)]. IIGR, Queen's University. Online: http://bit.ly/3EVTvc6

Lane, J-E. (1995). *The Public Sector: Concepts, Models and Approaches*. Sage. https://doi.org/10.4135/9781446220085

Musgrave, R. A. (1959). *The Theory of Public Finance*. McGraw-Hill.

Musgrave, R. A., & Musgrave, P. B. (1989). *Public Finance in Theory and Practice*. McGraw-Hill.

Oates, W. E. (1972). *Fiscal Federalism.* Harcourt Brace Jovanovich.

Parragh, B., & Kis N. (Eds.) (2020). *Az* ösztönző állam *válságkezelése I. A koronavírus-válság kezelésének első eredményei.* Ludovika Egyetemi Kiadó.

Plósz, D. J. (2019). Local governments and convergence from European perspective. *Köz-Gazdaság – Review of Economic Theory and Policy*, 14(3), 83–98. https://doi.org/10.14267/retp2019.03.05

Qiao, M., Ding, S., & Liu, Y. (2019). Fiscal decentralization and government size: The role of democracy. *European Journal of Political Economy*, 59, 316–330. https://doi.org/10.1016/j.ejpoleco.2019.04.002

Szabó, T., & Kovács, E. (2018). Közszolgáltatások és térbeli koncentráció [Public services and spatial concentration]. *Polgári Szemle*, 14(1–3), 361–382. https://doi.org/10.24307/psz.2018.0829

Tiebout, C. M. (1961). An Economic Theory of Fiscal Decentralization. In Universities-National Bureau Committee for Economic Research (Ed.), *Public Finances: Needs, Sources, and Utilization* (pp. 79–96). Princeton University Press. Online: http://www.nber.org/chapters/c2273

**Legal sources**

Act C of 1990
Act XC of 2010
Act LXXIV of 2014
Act LIX of 2020
Act LX of 2020
Act LXXVI of 2020
Act CXVIII of 2020
Act VII of 2022
Government Decree 135/2020 (IV. 17.)
Government Decree 140/2020 (IV. 21.)
Government Decree 498/2020 (XI. 13.)
Government Decree 603/2020 (XII. 18.)
Government Decree 639/2020 (XII. 22.)
Government Decree 319/2021 (VI. 9.)
Government Decree 61/2022 (II. 28.)
Government Decree 87/2022 (III. 7.)
European Charter of Local Governments

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 61–77
DOI: 10.54201/iajas.v2i2.29

# A comparison of the development and common objectives of the legislation of the capital markets of the USA and the EU from the beginning of the 20th century

**Pavel Datinský***

* Ph.D student at Masaryk University, Faculty of Law, Department of Financial Law and Economics. E-mail: datinsky.pavel@gmail.com

## Abstract

This paper deals with the historical development of the legislation of the capital markets of the USA and the EU. It is divided into two parts: the general part contains a brief history of the development of the capital market in this context and I identify several milestones that had a significant impact on the development of the capital markets. The special part, first dealing with the development of the legislation of the capital market in the USA from the Great Depression to date and further by the development of the EU capital market from the foundation of the European Economic Community in 1957 to the implement of the MIFID 2 Directive and MIFIR Regulation, concludes with a comparison of both legislative systems and their common objectives and the interests pursued by individual regulations. The main sources for this paper are in particular the relevant laws regulating the area in question, Czech and foreign scientific papers on the given topic and online economic platforms.

## Keywords

capital market, European Union, investment services, investor protection, prudential requirements.

## 1 Introduction

The financial market of each individual state within the market economy is a crucial and indispensable factor, influencing the functioning of its entirety, as it enables the allocation and redistribution of free financial resources, from the segments of the market with a surplus to those with a deficit. The financial market may be characterised as a sum of relations, entities, instruments, and institutions, which enable the transfer of temporarily free capital on the basis of demand and supply, which leads to the financing of predominantly private economic activities by the private sector itself, which has a positive impact on society as a whole.

Demand on the financial market is represented by a segment with a deficit of capital, which needs it and, as a rule, offers a certain form of consideration for its provision. Entities found in the deficit segment are, as a rule, entrepreneurs who need the capital in order to undertake certain economic or business activities but lack sufficient capital for it. They shall be referred

to herein as issuers. Entities found in the surplus segment are, as a rule, households or other entrepreneurs who are not able to spend all their free capital on their own needs and are eager to provide it temporarily to the deficit entities for a pre-agreed consideration, which is to motivate the investors to provide their capital to the issuers (de Haan et al., 2012, 14–16). Such consideration most often takes the form of an interest-bearing investment, shares in the issuer or a combination of both. The bonding arrangement between the issuer and the creditor is later included in the so-called Investment instrument (Veselá, 2019, 22–28; Pearce & Barnes, 2006, 4–6).

The higher the motivation of the investor, the more capital he will provide to the issuer, as the investor's reward will be higher and more attractive. Conversely, the issuer is interested in providing the lowest reward in order to receive the investor's capital for the lowest price. As far as the interests of the two parties, i.e. those of the issuer and the investor, are different, they however still provide mutual performance to one another, so it is beneficial to the healthy functioning of the whole transaction to ensure it is properly regulated, which will set the boundaries and rules for its implementation and the means of protecting both parties from any undesirable behaviour by the other party.

Alongside the different interests of the investor and the issuer, it is essential to take into account the typical investment risks connected to every investment and posing a threat to the investor, who should diligently consider such risks before making an investment (Rejnuš, 2014, 201–206). According to the extent of the potential risk and the promised future reward, the investor then makes decisions as to how much capital to provide to the issuer, if at all. In practice, this means that the riskier the investment for the investor, the more attractive the promised reward and vice versa.

For the investor to make a rational decision, it is nevertheless indispensable for him to be informed of all relevant facts in a clear, genuine, and non-misleading way to make his investment decision on the basis of high-quality information, otherwise, the investor runs a risk of making the wrong decision and expecting their investment to have features and risk levels that the given instrument in fact does not have[1]. If the investor incurs a loss he could not predict, he may also lose his trust in that financial market and, in an extreme case, may even lose any interest in investing his capital in the market ever again. Such a scenario on a larger scale has far-reaching implications, as if the segment with surplus capital loses their trust, it may further lead to the restricted functioning of the capital market as a whole or even to its complete halt (Bodie et al., 2014, 5–8).

Various negative situations in the capital markets have been occurring ever since they emerged[2] and it would not be much of an overstatement to say that it is these negative events that have positively influenced the development of capital markets. Even in the Middle Ages, when trade in capital or short-term securities, notes of hand, or commodities knew almost no regulation, in times of crisis a sovereign authority figure stepped into this segment of the internal market and mitigated the consequences of the crisis on society by adopting appropriate rules of conduct (laws) (Allen & Gale, 2007, 1–24). It is quite apparent, even in modern history, that as a rule, innovative and ground-breaking regulations only came after significant crises in capital markets that revealed their existing shortcomings (Pavlát et al., 2003, 57–112; de Haan et al., 2012, 22–23).

The given work provides an analysis and presentation of selected historical events that shaped the trade in capital in leading states of the western world, from the Middle Ages to date and demonstrates crucial historical moments that led to the adoption of ground-breaking and

[1] More at: de Haan et al. (2014, 16–22).

[2] F.e. the Tulips Crisis in 16th century in Netherlands or the South sea "bubble" in 17th century in England.

innovative legislation, the aim of which was to improve the functioning of the capital market. In the chapters on the development of legislation on modern capital markets, there will first be an analysis of the legislation of the market in the United States of America, as the world leader in this sphere, followed by an analysis of European legislation from the foundation of the European Economic Community to date. I shall later compare and define the two different systems in relation to the common primary interests and spheres that are regulated.

## 2 A brief history of capital markets

The origins of the capital market go back to the Middle Ages. Many port towns, were important trade centres, with markets selling domestic and foreign goods. Traders conducted financial transactions in different currencies and ensured their commitments with notes of hand that resemble present-day promissory notes. They were used as a means of payment since many traders did not bring much money to the markets for security reasons, as they were afraid of being robbed. Those notes of hand were then informally and spontaneously traded and exchanged between individual traders. The first records of such trade encounters for the purpose of these transactions come from 12th century Italy.

The gradual expansion of trade in notes of hand given by traders led to the growing institutionalisation of markets and, around the 15th century, there appeared stock exchange societies that united registered traders who, in a more or less organised fashion, traded from brick and mortar buildings, which gave rise to the first European stock exchanges where, in addition to securities (notes of hand) there was trade in goods and foreign currencies. In 1409, a stock exchange was founded in Bruges in what was then Flanders, later in French Lyon, German Hamburg, and later the still standing if several times rebuilt Royal Exchange in London (de Haan, 2012, 51–57).

An important milestone in the trade in securities was the foundation of the Amsterdam stock exchange in 1608, known today as EURONEXT AMSTERDAM,[3] which for the first time began trading in participating securities, namely those that entitle their holders to participate in the company that issues them; in other words, shares. The first joint-stock companies were founded, though not only in Holland, in order to develop international trade with India. Colonisation developed the trade in goods from overseas, in particular in colonising countries, England, France, and Spain, which grew significantly rich thanks to such imports. The first stock exchange in the Austrian Empire was founded by the patent of Maria Theresia as of 14 July 1771 and securities in the form of government bonds in particular were traded there (Veselá, 2011, 47–52).

The history of the financial market in Germany was significantly influenced by Mayer Amschel Rothschild, who, as a gifted trader in clothes and coins, wisely diversified his investment portfolio and founded the Rothschild banking house in Germany. The three Rothschild sons later left Germany and founded banking houses in Paris, London and Vienna, and the name of Rothschild is linked to investment banking to this day (Bouvier, 2022). More significant trade in the German capital market began in the second half of the 19th century after the unification of Germany (Musílek, 2011, 13–15).

With the development of industrial production and capitalism by the end of the 18th century, there appeared the first stock exchanges that resemble those of the present day – in 1792 the New York Stock Exchange was founded, which initially traded in bonds of the federal govern-

[3] Online: https://www.euronext.com

ment that used them to finance their debts from the American War of Independence. With the passage of time, there was more and more trade in corporate shares, understandably supported by the dynamic development of industry, in particular in the USA, but also all around the world.

Stock exchange trade was not regulated until the end of the 19th century except for autonomous, non-governmental rules of conduct set by stock exchange corporations and applicable to their members. Public regulation was limited to the authorisation of stock exchange activities as such; it had nothing to do with setting relations established by participating in the stock exchange. The first attempts to regulate them appear at the end of the 19th century (Veselá, 2011, 61–77).

During the First World War, capital markets stagnated and industry focused on armaments, and European states were heavily in debt due to the high costs of warfare. Post-war development was characterised by the renewed functioning of the capital market, stabilisation of the value of individual states' currencies and the restart of industrial development and private financing of entrepreneurs via the stock exchange. New York and London became the main global financial centres. Economic growth, supported by private financing in securities exchange, lasted until 1929, when a major economic crisis occurred and the New York Stock Exchange crashed, which negatively affected capital market activities up until the Second World War (Hsu, 2017, 17–38). Investors lost a great deal of their assets, many national economies collapsed and great numbers of people, including disappointed investors, blamed the capitalist and democratic model of government for it, which also led to the growing power and influence of communism and fascism (Pavlát et al., 2003, 68–72).

The Second World War copied the First World War when it comes to its impact on the capital markets; industrial development stagnated except for the development of armaments that states financed through international loans from the USA in particular, not at all from the private sector, by means of selling securities in the securities exchange. After the Second World War, capital markets stabilised again and the economies of several states began to function in their traditional way. However, with the post-war rise of communism in Eastern European states and the transition to the centrally planned economy, the capital market in those countries practically ceased to exist. Such states were Czechoslovakia, East Germany, Hungary, Poland, Romania, Bulgaria, Yugoslavia and Albania, and, of course, the Soviet Union. The capital markets of these states were thus frozen until the end of the communist regime and their regular functioning was renewed after the transition to the market economy, which took place at the beginning of the 90s, after an almost 50-year pause (Veselá, 2011, 47–52).

During this pause in the Eastern bloc, the western world still functioned according to the market model of the economy and capital markets were developing, in particular in the USA, where there was a continuous growth of the national economy during the fifties and sixties and alongside with it grew corporations financed by the private sector, which brought profit to investors and increased the trust of investors in the capital market as a whole (Hsu, 2017, 39–56). Alongside the development of the capital market and the increase in investors' trust, there was increased interest from investors from all classes of society, who had not participated in the capital market until that time, in particular small investors who invested capital on a small scale.

It was not just the arrival of the new type of investors that caused the significant growth of investment funds that connected the assets of many small investors and its collective investing in the capital markets. These funds gradually appeared in the whole western world. In the fifties, there appeared open-ended mutual funds in France, the so-called SICAVs (Sociétés d'investissement à capital variable) followed by Scotland and the whole Great Britain. It is worth noticing, though, that first funds in Great Britain appeared significantly earlier, when the

Foreign and Colonial Government Trust was founded in 1868, followed by the Massachusetts Investors Trust of Boston in the USA in 1924, which was the first so-called open-ended mutual fund in history and which operates to this day as one of the biggest funds in the world. From the end of the Second World War to 1990, the number of investment funds around the world multiplied more than thirty-fold, from the initial 73 funds in 1945 to 2,362 funds in 1990 and their managed assets reached 570 billion dollars by 1990. This number only includes stock and bond funds though, not money-market funds (Liška & Gazda, 2004, 321–325).

Up to the 1980s, stock exchanges all over the world operated as bricks and mortar buildings where traders physically came to buy securities, which entailed a number of restrictions. What significantly reformed the stock exchange trade all over the world was the spread of the internet and the development of IT and communication technologies. This connected all the world's stock exchanges, gave rise to online trade and mainly remote trade without any territorial limitations. This factor had a significant impact on the further increase in money invested in the capital market and the development of the global capital market. Alongside this came the dematerialisation of securities, which changed their paper form to electronic data (Pavlát et al., 2003, 90–104).

### 2.1 Partial summary

The origins of trade in securities go back to the 12th century, when it was an informal and uncodified activity. With the development of foreign trade and the use of various forms of credit, there appeared the first organised stock exchanges with internal organisation and internal private rules of conduct among the participants. Regulation as known today came in the 19th century. The actual development of modern capital markets began in the 20th century when, despite the two world wars and the division of the world into the market and centrally planned economies, there was great expansion and globalisation.

## 3 The development of the capital market legislation

The capital market in its early stage, as stated in the preceding chapter, was in no way regulated. In this respect, it seems a legitimate question to ask how the basic interests of society connected to this sphere were protected if at all, namely interest in the proper functioning of the capital market, the relocation of free financial resources from the spheres of surplus to those of deficit and the trust of investors in the capital market as a whole to which they were all inextricably linked.

The given article shall focus on the analysis of the development of the relevant legislation of the capital market in the USA and Europe. The USA is currently the country with the most developed capital market in the world and is regarded as a financial superpower.

I have chosen Europe as the other research area. For the purpose of the given article, Europe means the European Union, the area of common market founded by the Rome treaty on the European Economic Community that was later transformed into the European Community and finally into the present-day European Union. The legislation of the capital market in Europe was chosen for examination due to the uniqueness of its common and later single market and the current relatively thorough and detailed regulation of the capital market at the national as well as the EU level.

### 3.1 Capital market development in the USA

The development of legislation covering the capital market in the USA clearly indicates that practice was one step ahead of its regulation. In other words, the rules always came only after a negative experience that showed that further regulation was indispensable. All fundamental laws regulating the capital market in the USA at the federal level were passed in response to a systemic and intrinsic problem that revealed the shortcomings of the system and its legislation and demonstrated the need to regulate the given sphere better and more deeply. In the ensuing paragraphs, I thus outline the chronological development of the regulation of the capital market in the USA at the federal level.

The Securities Act of 1933 (sometimes called "*Truth in securities Act*") was the first federal act regulating trade in securities on the primary market and was passed in response to the great economic crisis of 1929 (Mishkin & Eakins, 2016, 169–170). The act aimed to renew the trust of the public in the capital market and the stabilisation of the market. In order to achieve these objectives, issuers were required to register newly issued securities and to inform their investors. Based on the published information on the traded securities, investors could thus make more circumspect and informed judgements as to whether to buy them. They were also informed of the risks associated with this investment. This information was published in a document reminiscent of today's securities prospectus. In addition to that, the act criminalised a number of prohibited activities when trading securities (fraud, manipulation of information, etc.).[4]

Unlike the above-mentioned act, the Securities Exchange Act of 1934 did not regulate the primary market with securities on their first issue, but the secondary market. Its significant contribution was the formation of the supervisory authority called the Securities and Exchange Commission (further referred to as the "SEC") which ensures compliance with the federal laws on securities, namely the Securities Act. The act further defines entities participating in the capital market and offering investment services and stipulates the primary requirements linked to their function, the requirement to register with the SEC among them. Alongside the establishment of the SEC, the act also established self-regulatory organisations in the capital market (further referred to as "SROs") that, on a voluntary basis, unite individual entities participating in the capital market and create rules of conduct for its members. Typical SROs are specialised stock exchanges, including the NYSE, NASDAQ and CBO.[5]

In 1939 the Trust Indenture Act was passed; this established several definitions and duties of issuers of debt securities in their public distribution and increased the protection of investors.

As financial investment had been developing in the 1920's, thus enabling small investors to enter the capital market, it was necessary after the great crisis to bring this segment of investors back to the capital market. Hence, after extensive research into the problem by the SEC, the Investment Company Act (further referred to as the "ICA") was passed in 1940. The act sets minimum requirements for management companies and mitigates the conflict of interest between the management company and investors. At the same time, management companies are required to inform their investors as to their financial situation and investment policy before the purchase of their securities and regularly after their purchase. Information on the management company and the fund managed by it is published in a way that is reminiscent of the present

[4] The US Securities and Exchange Commission. *The Laws That Govern the Securities Industry*. Online: https://bit.ly/3UDc35H

[5] Cornell Law School. *Securities Exchange Act from 1934*. Online: https://www.law.cornell.edu/wex/securities_exchange_act_of_1934

day's statutes of collective investment funds. Together with (that is, immediately after) the ICA, the Investment Advisers Act was passed, which set the registration requirements for persons who provide investment advice and recommendations to investors and at the same time obliges brokers to comply with the laws intended to protect the investors.

During the end of the sixties and the beginning of the seventies, another crisis erupted in the USA that was linked to the growth of inflation and a recession in the capital market that had had no precedent in the USA ever since the major economic crisis. The trust of investors in the capital market therefore deteriorated and the reduced amount of capital in the market called for the passage of the Securities Investor Protection Act in 1970. This act had one significant contribution, which was the establishment of the Securities Investor Protection Corporation (further referred to as the "SIPC") which compulsorily united all traders registered with the SEC and required them to contribute to the fund intended to pay damages to investors as the result of the insolvency of traders and breaches of their obligations towards the investors. Currently, any eventual damage to investors is covered by this fund up to 500,000 USD. The SIPC is the precursor of today's securities traders' guarantee fund operating on the territory of the EU member states.[6]

At the turn of the millennium, an enormous scandal, associated with the Enron, Global Crossing and Tyco companies, broke. These companies (and many others that were not covered in the media), on the basis of an artificial overstatement of the financial results, seemed more lucrative to investors, which increased the share price of these companies while their true value was far from their market price (Veselá, 2019, 621–622). On publishing this information, Enron, an energy giant with more than 20.000 employees, crashed and the value of its shares plummeted. As a response to this event, the Sarbanes-Oxley Act was passed in 2002, which significantly increased the liability of corporate management, established strict rules for corporate accounting and reporting to provide supervision and oversight together with setting relatively strict punishments for non-compliance. The act is often called "*the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt*" (Bumiller, 2002). The act established the Public Company Accounting Oversight Board (further referred to as the "PCAOB"), which specifies standards for audits of corporations and supervises their implementation in corporations with shares listed on stock exchanges.

After the mortgage or the so-called speculative crisis of 2008, caused by irresponsible lending and insufficiently collateralised mortgages, led to the global recession that affected the global capital market (Veselá, 2019, 623–629; Bodie et al., 2014, 15–23; Mishkin & Eakins, 2016, 171–178), the Dodd-Frank Wall Street Reform and Consumer Protection Act was passed in response to this negative event in 2010. Its objective was to increase the protection of investors, restrict some commercial practices linked to offering investment services, increase the transparency of companies listed on stock exchanges, and in particular to consolidate and tighten the criteria for ranking these companies. For this purpose, the act established several federal bodies, including the Financial Stability Oversight Council, which monitors the economic and financial stability of major financial corporations, the insolvency of which may have a negative impact on the economy of the USA as a whole (just like the crash of Lehman Brothers bank during the mortgage crisis), and the Consumer Financial Protection Bureau that supervises the loan market and responsible lending not only to consumers and, within the SEC, the act establishes a special commission to monitor rating agencies (Mishkin & Eakins, 2016, 448–450).[7]

---

[6] Online: https://www.sipc.org

[7] Online: https://www.cftc.gov

Based on the facts listed above, it can be said that the legislation in the sphere of capital market is a kind of ex-post legislation that later responds to unwanted situations in order for them not to happen again. All the passed acts have sought to increase the protection of investors and their awareness of investments offered to them. It is from the first half of the 20th century that we can trace standards that were later adopted by European legislation, to be mentioned further in the article, such as information requirements for issuers, banning conflicts of interest in management companies and guarantee funds, and the rules of conduct of brokers.[8]

### 3.2 Development in Europe

The regulation of the capital market on the territory of the European Union does not have such a long history as the USA for good reason, since before the Rome Treaty was signed in 1957 there was no common market that could be regulated jointly. Even after the signature of the Rome Treaty, this common market was still in its infancy; the free movement of capital was quite limited, and its main regulation was in the national legal systems of individual member states. The significant development was caused by the arrival of the internet and the cross-border trade that led to the globalisation of markets in the eighties and then in particular by the signature of the Single European Act in 1986, which created a new European Community (Valiante, 2018, 79–80).

On reforming the common market into the single market and further economic integration of the European Communities, as well as significant intensification and expansion of the four basic freedoms of the single market, the basis for the common currency was formed and the European Union was founded by the Maastricht Treaty on the European Union in 1993, which existed alongside the European Community until its unification and connection by the Treaty of Amsterdam, the Treaty of Nice and finally by the Treaty of Lisbon. The last-mentioned treaty gave the EU international legal personality and a supranational character (Týč, 2010, 19–25).

In the following paragraphs I trace the chronological development of the EU legislation of the relevant sphere of the capital market from the beginning (i.e. the signature of the Treaty of Rome and the foundation of the EEC) until now. Since, during this period, the given sphere was regulated by a plethora of directives and regulations, research into which would go beyond the scope of this article, I focus solely on the regulations that I deem important for the purpose of this paper and ground-breaking in the historic overview.

#### 3.2.1 Freedom of establishment

As mentioned in the introduction to this paper, the basis of the capital market is the capital flow from the spheres of surplus to the spheres of deficit and, as the capital market has an international character as it had in the EEC, it is indispensable for spheres of surplus in individual states to be able to invest capital in other states and for entities with a deficit to seek capital in other states in the Common Market. The first step enabling cross-border capital flows was the harmonisation of rules on the cross-border establishment of entities with a deficit (corporations) on the territory of other member states, where such legal persons could acquire capital by means of share subscription and, if needed, listing them on national stock exchanges. Freedom of establishment was stipulated in the original Treaty on the European Economic Community in arti-

[8] More at: Bodie et al. (2014, 83–91).

cles 52–58 and of particular importance was article 54, paragraph 3g, which stipulated that "by co-ordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by the Member States of companies or firms within the meaning of the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the Community." Building on this provision, the EEC adopted several important directives that harmonised the given sphere and at the same time ensured adequate protection of special entities, namely members and creditors (third parties) of established corporations. Below I give a basic overview of the above-mentioned directives influencing the given sphere.

Directive 68/151/EEC of 9 March 1968 introduced the common standard for the protection of members of an established company and introduced primary standards for unified information that such companies must publish in their financial statements to provide a genuine and complete picture of the state of the company. Compulsory audits of these companies by auditors who were further regulated by the EEC legislation were established alongside it. Even at the onset, we can see the attempts of the EEC legislators to improve the quality of information provided to investors and not only by issuers.

Directive 77/91/EEC of 13 December 1976 further developed the preceding directive and consolidated the principles of protection of members during the establishment and in particular a change in the share capital of a joint-stock company with foreign founders.

The next one was Directive 78/855/EEC of 9 October 1978, which extended the protection of shareholders and creditors in accordance with the preceding directives, not only in the cross-border establishment of corporations, but also in cases of mergers of public limited liability companies. It was soon followed by Directive 78/660/EEC of 25 July 1978, which extended common minimum standards for financial statements for some companies (in particular joint-stock companies), these being the key indicator of the financial and economic situation of a corporation. It is on the basis of this information that investors make judgements about whether the corporation is attractive enough to invest in it and, if this information is not misleading, genuine and complete, the investor can make a qualified judgement on whether or not to invest in the company.

Subsequently, there was a need to harmonise the same conditions for shares of foreign companies being listed on EU stock exchanges in another state, thus Directive 79/279/EEC of 5 March 1979 was adopted, which set minimum standards for securities to be listed on the stock exchange, and shortly followed by Directive 80/390/EEC of 17 March 1980 on the securities prospectus to be listed on a stock exchange. Since then, the prospectus has been another source of information for investors, as it provides them with relevant information about the company and its investment intentions, as well as information as to the risk level of the given investment without having to scrutinise financial or other statements of this corporation.

These directives were followed by the extension of protection of members and creditors of established and listed companies, as well as the adoption of Directive 82/891/EEC of 17 December 1982, which was a response to the insufficient regulation of the above-mentioned Directive 78/855/EEC and also extended the standards of protection of persons to cases of the division of public limited liability companies. Directive 83/349/EEC of 13 June 1983 in its turn established the requirement for groups of enterprises under common management or otherwise related to publish their financial statements on a consolidated basis; in other words, to provide information not only on one company, but on the group as a whole, which extended and improved the awareness of investors and third parties as to the economic and financial situation of all the corporations in a given group.

To harmonise the types and quality of the information provided, as well as the means of their publication and compilation, there came the unification of the same requirements for the

professional competencies of persons who check the information published or directly compile it, namely auditors and accounting advisors. Directive 84/253/EEC of 10 April 1984 introduced the requirement for member states to subject these persons to an approval process, in which member states were obliged to examine their professional competencies for the performance of their activities.

Following the adoption of the latter directive, the area of freedom of establishment for several types of corporations might be deemed relatively harmonised, and investors from individual states of the community might, with a relative degree of qualification, invest in companies established abroad or, if needed, into domestic companies based on the same standards of awareness and protection as in other states. Simultaneously, corporations could be established and could list their securities on individual national stock exchanges under similar conditions as elsewhere in the common market. All of this led to the development of suppliers of investment services, the so-called brokers, connecting investors and issuers.

### 3.2.2 Free movement of services

Free movement of services, including the investment services outlined above, was stipulated in articles 59–66 of the Treaty on European Economic Community and several relevant directives were adopted to harmonise the free movement of investment services. Collective investment was the first area to raise great interest, since collective investment involves a high amount of money from a wide base of investors, the protection of whom is always paramount. For this reason, Directive 85/611/EEC of 20 December 1985 was adopted, which was the first to harmonise investment via collective investment funds. However, it applied solely to funds investing in transferable securities, which, upon the request of investors, repurchased participation certificates from investors for their fair value according to the underlying assets of these participation certificates, the so-called UCITS[9] funds, hence another name of the directive – the UCITS Directive. It set standards for the licensing of such funds, their management companies, and depositaries, established the common standard for the management of the assets of the funds, their structure and investment options; that is, a definite list of assets to be invested into including the share of such investment relative to the total value of the fund. It also set the requirement for publishing information provided to members by funds or their managers. This directive was later slightly amended by Directive 88/220/EEC of 22 March 1988, which responded to the special feature of Denmark's capital market, with a high level of investment in state bonds or other bonds with a high rating, so the directive increased the possible proportion of such bonds in the assets of UCITS funds.

At the very moment when the sphere of collective investment was harmonised, interest was focused on the harmonisation of investment services provided to individuals, thanks to which the relatively important Directive 93/22/EEC of 10 May 1993 was adopted. This aimed to regulate the standards for the protection of individual investors, fair competition between investment companies, the provision of investment services across the borders of individual states and monitoring the solvency of investment companies and the prudence of their business activities. The directive had two main objectives (i) protecting the assets of investors and (ii) ensuring the proper functioning of securities markets. In order to reach these objectives, the directive harmonised the rules of licensing investment companies, national monitoring of enterprises,

[9] "Undertakings for the collective investment in transferable securities".

the requirement to inform investors, and the requirement for member states to monitor investment companies' compliance with the rules of prudent business activities. In this connection, it is necessary to mention that the given directive did not expressly apply to the provision of investment services of collective nature, which were still harmonised by the above-mentioned Directive 85/611/EEC.

Collective and individual investment services were later further harmonised by the game-changing Directive 95/26/EC of 29 June 1995, which responded to the experiences of improper use of relations between investment companies and third parties and in particular disclosure of confidential information on the position and investment of companies and it therefore increased the number of compulsorily shared facts between auditors and supervisory authorities and restricted the possibility of investment managers sharing information that third parties could abuse to the detriment of the enterprises or other investors.

The UCITS Directive was later substantially changed by Directive 2001/107/EC of 21 January 2002, which defined some new investment services that might be provided by some management companies (individual portfolio management for individual investors if still within Directive 93/22/EEC), introduced the requirement to publish both the securities prospectus and the simplified securities prospectus, which significantly improved the awareness of investors as to the substance of the investment strategy of the fund, harmonised new standards for internal business control for the protection of investors and some other requirements and possibilities for management companies and depositaries of funds of collective investments. Immediately afterwards, Directive 2001/108/EC of 21 January 2002, was adopted, which enabled UCITS managers to add new investment instruments in the form of participation certificates of other UCITS or even derivative instruments to their portfolios, regarding which the fund manager must duly inform investors in the prospectus and other documents.

A completely ground-breaking initiative to harmonise the provision of investment services was to become Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (Markets in Financial Instruments Directive), commonly known by the acronym MIFID. It was unprecedented in its scope as well as the quality and details of the harmonisation itself. This was achieved due to the so-called Lamfalussy process (Sergakis, 2018, 5–8) being used in the process of its creation.

The main objectives of MIFID were (i) to respond sufficiently to new technologies when providing investment services, (ii) to increase the protection of investors, and (iii) to improve competition in the single capital market. I deem the adoption of new rules of conduct of investment companies towards investors and the division of investors into three main groups – eligible counterparties (big financial or other institutions), professionals (standard or bigger companies), and retails, as well as the introduction of specific requirements for conduct and provision of services for each individual type of investors to have been essential steps. The directive also introduced the requirement to examine the appropriateness of an investment instrument and service for the given investor before providing a particular service and for the execution of orders from the investor according to their best interest (best execution), in the sense of their fastest, east expensive and most effective fulfilment.

Another important instrument was the unification of organisational requirements for investment companies in the form, *inter alia,* of compliance requirements, obligatory risk management, the audit of companies independent of executive authorities of the company and the system of searching for and managing conflicts of interest between executives. MIFID also introduced plenty of new rules ensuring the transparency of trade, the extension of the requirement to inform in connection with both investors and supervisory authorities and also increased

the number of investment instruments by adding financial and commodity derivatives, and increased the number of investment services by adding investment counselling. Last but not least, it enumerated new methods of trade and trading platforms via which such investment services can be provided (Multilateral Trading Facilities) (Casey & Lannoo, 2009, 33–38). The period for transposition of the directive by the member states was by 30.4.2006 and it continued to apply until its successor, Directive 2014/65/EU of 15 May 2014 so-called MIFID 2, was adopted. The directive is still in force alongside the associated Regulation 600/2014, known as the MIFIR, of 15 May 2014. Both of them further develop the investor protection and stability of the market in particular as a response to the previously-mentioned US mortgage crisis.

In this connection, is it worth mentioning that MIFID harmonised the provision of investment services to individual investors, while collective investments (originally harmonised by Directive 85/611/EEC) were harmonised separately from this segment of investment services. The rules on collective investment were amended no sooner than 2009, when Directive 2009/65/EC of 13 July 2009 was adopted. Following the line of MIFID, it extended investor protection, simplified the cross-border provision of collective investment services and made the given segment more transparent and stable.

By way of recapitulation, it is worth mentioning that, in terms of ensuring the freedom of establishment of corporations in EU as well as the listing of their shares on national stock exchanges, the effort of the EU legislators focused on the regulation of the provision of investment services. These services are indispensable for stimulating the basic functions of the capital market and perfectly matching demand and supply; nevertheless, their inappropriate provision jeopardises the trust of investors in the capital market, which is one of the main pillars on which the proper functioning of the capital market is based.

It was only after the basic harmonisation of collective investment services that the interest of EU legislators focused on individual investment services provided to individual investors, whose assets were managed services independently and individually by the providers of investment. This dualism in the provision of investment services is still visible both at the level of the European Union and the level of the majority of national legislation systems, where collective investment is regulated separately from investment for individual investors.[10]

### 3.2.3 Prudent provision of investment services

Alongside the harmonisation of the provision of investment services as described in the preceding chapter, the EU's interests, were focused on the quality of such services. Good quality investment services have a positive impact on investors trust in the capital market and hence the very functioning and stability of the capital market. It is yet not easy to say what a good quality investment service looks like. The market risk of the investor may be minimised if the service provider thoroughly, fairly and completely informs and examines his or her knowledge and experience in the sphere of investment protect against non-qualified judgements before providing investment services.

The credit risk may be reduced further by ensuring that the investment company provides its services with prudence, by which it should ideally limit the risk of its failure. Prudential rules for the provision of investment services may be defined as a set of rules to ensure the essential

[10] F.e. regulation in Czech Republic in Act Nr. 256/2004 Sb., of undertaking on capital markets (individual) and Act Nr. 240/2013 Sb., of investment companies and investment funds (collective).

organisational and eligibility provisions for the functioning of the investment company, its by-laws, the system of internal control, and the basics of monitoring the financial and operational stability of the investment company.[11]

Although the prudential rules are directed at the internal processes inside investment companies, some of them de facto set rules of conduct with regard to investors, so it cannot be said that such rules can be strictly divided from the external rules of conduct of investment companies. These rules are usually adopted gradually and, with the development of investment services, they are gradually extended and improved.

Prudential rules have to a certain degree always been specified in individual directives regulating investment services as described in the preceding chapter; however, the first important directive to focus comprehensively on the adoption of prudential rules for all investment (and loan) companies was Directive 93/6/EEC of 15 March 2009. This followed on from the above-mentioned Directive 93/22/EEC, which, however, only harmonised the fundamental framework of cross-border recognition of companies without prescribing common requirements for the capital of such companies or for controlling the risks to which these companies are exposed. The directive thus divided investment companies into several categories according to the services provided, then specified the minimum amount of share capital for each type of company, later introducing the requirement for companies to have the prescribed amount of free capital to cover the financial risks of the company at all times. It further introduced the requirement to monitor and manage their credit exposure and, on a daily basis, to check and assess the positions in its trading portfolio and also required the supervisory authorities to review companies on a so-called consolidated basis. Compliance with the requirements stipulated by the directive was to be checked by national supervisory authorities which, as the directive stipulated, were to be informed by the companies.

This directive was further amended by Directive 98/31/EC of 22 June 1998, which responded to numerous frauds by investment companies in the capital market during the futures exchange and the abuse in futures exchange as well as for the sake of the trading portfolio include the positions in commodities and commodity derivates previously not required to be monitored and in some cases reported to the supervision authorities. The directive also introduced stricter methods for assessing companies' trading risks.

Directive 93/6/EEC was later replaced by Directive 2006/49/EC of 14 June 2006 which was a follow-up to MIFID. Although including some framework and marginal prudential rules, MIFID lacked norms for harmonising capital requirements and the system of risk surveillance for investment companies. The main objectives of the new directive were (i) the adoption of minimum requirements for the capital adequacy of investment companies, (ii) setting surveillance rules on the prudent provision of investment services inside the investment company, and (iii) increased cooperation between the supervisory authorities of the member states. This directive quite thoroughly specified and extended the requirements harmonised by previous directives with similar goals.

As a result of the global crisis, which erupted in the USA in 2007 and which has been mentioned in the preceding chapters, a group of financial experts met at European Union level. It was presided by Jacques de Larosière, the former governor of the central bank of France. The objective of this meeting was to find a solution for eliminating the impact of similar global crises on the financial market of the EU. Its outcome was the publication of the so-called Larosière

[11] See more at: Husták & Smutný (2016, 173–186).

Report as an attempt to explain what caused the crisis and simultaneously suggest several measures to prevent future crises in the single market. One of its crucial suggestions t was the introduction of consistent single unified regulatory rules for the capital market in the EU and the substitution of the so-called harmonisation system of regulation by direct regulation, binding on the member states.[12]

A response to the Larosière Report was the replacement of Directive 2006/49/ with the new Regulation 575/2013 of 26 June 2013, which directly administers the sphere of prudential laws in all the member states and is still in effect. In the new regulatory regime after the report, Regulation 600/2014 was also adopted as a successor to the above-mentioned Directive 2014/65/EC, and stipulated binding prudential requirements for investment companies licensed within MIFID 2.

The development of the legislation shows that these rules have been changed numerous times in their essence, and the sphere they harmonised has been increasingly regulated in order to ensure the most effective functioning of the capital market. A closer study of the EU legislation outlined reveals that all legislation that was either amended or newly adopted among other objectives was intended to improve the functioning and transparency of the capital market and the investor protection, which is the main prerequisite for the allocation of sufficient capital in the market and its duly and healthy functioning.

### 3.3 Comparison

Comparing the development of the legislation of the capital market in the USA and the common and later single market of the EU, we can trace several differences and also some important common points and principles. The fundamental difference in the legislation of the two markets stems from their different systems of government. The capital market in the USA is regulated at the federal level while the EU market was, for a long time, regulated only by harmonising directives while the European Economic Community, later European Community, and finally the European Union tried to bring the relevant regulations of member states closer to each other.

During the long history of the development of the capital market in the USA, it has undergone several noticeable crises and relevant legislation usually came ex post, i.e. after a negative experience and as a response to this crisis.

The European capital market as a whole did not experience a noticeable crisis during the whole period of its existence until the USA crisis reached it in 2007, so the adopted legislation was first of a technical character with the objective of propelling cross-border investment and practically "launch" the functioning of the common capital market. The legislation adopted later was rather a response to deficiencies in the functioning of the market in individual cases and had no fundamental EU impact. The change came after the crisis of 2007 and the Larosière Report, which resulted in the EU capital market being regulated directly via directly applied regulations.

What the two legislations have in common is the objective that the legislation set as time passed. As it can be seen in both cases, the original objective was to set basic rules for the functioning of the capital market itself, to enable corporations to have their shares listed on securities stock exchanges, where they could later be offered to investors, and establish the fundamental requirement to inform investors; in other words, to regulate the primary market.

[12] See more about Larosièr report at: Sergakis (2018, 8–11).

After securing this starting point, the legislation aimed at the secondary market and the suppliers of investment services. The priority in both these spheres was collective investment (the Investment Companies Act in the USA, Directive 85/611/EEC in the EEC) rather than individual investment (the Investment Advisors Act in the USA, directive 93/22/EEC in the EEC).

After the basic regulation of the suppliers of investment services, the legislation attempted to increase investor protection and their trust in the capital market by adopting laws that first regulated the conduct of issuers and brokers with the investors and information provided to them in order to minimise the capital risk to investors and increase their qualification and awareness. This legislation was later accompanied by regulating the prudent supply of investment services, the objective of which was to reduce the credit risk to investors even further.

Both legal systems show that with, the passage of time, there is a growing tendency to improve investor protection. This leads us to conclude that it is the trust of investors in the capital market that is in reality the essential prerequisite for the proper and healthy functioning of the market as a whole.

## 4 Conclusion

This paper compared how the common objectives and interests in passing laws regulating the capital market were implemented in the USA and in the EU from the creation of the European Economic Community to implement of the MIFID 2 Directive and MIFIR Regulation. By exploring the history of capital markets, I studied individual legislative acts that are important in regulating the given sphere, first in the USA and then in the EU, together with outlining important historical events.

It is evident in both spheres that, despite the differences in circumstances and historical backgrounds, their gradual development showed similar interests and developed in a similar manner as time passed. At the start of the legislative journey, regulating the very establishment of the capital market and its functioning in the form of listing the securities of major corporations on respective securities stock exchanges, i.e. the regulation of the primary market, was a prerequisite. The second step was to regulate the so-called secondary market, where there were third parties alongside issuers and investors, i.e. suppliers of investment services that help the proper functioning of the capital market and in matching the demand for capital with its supply.

At the moment when the basic rules for the supply of such services were established, legislators attempted to improve the functioning of the capital market gradually and to impose stricter requirements on the entities providing investment services in the market. This attempt can above all be explained by their interest in ensuring the maximum protection of investors who invest the surplus of their capital, since investors' trust in the capital market determines its proper and healthy functioning. Although the two studied spheres have experienced different historical events and the mode of regulating the capital market has been different, their main objectives and interests are the same.

## References

Allen, F., & Gale, D. (2007). *Understanding financial crises*. Oxford University Press.

Bodie, Z., Kane, A., & Marcus, A. J. (2014). *Investments* (10th global edition). McGraw-Hill Education.

Bouvier, J. (2022, August 13). *Rothschild family*. Encyclopedia Britannica. Online: https://www.britannica.com/topic/Rothschild-family

Bumiller, E. (2002, July 31). *Corporate Conduct: The President. Bush Signs Bill Aimed at Fraud In Corporations*. The New York Times. Online: http://bit.ly/3TYFRt8

Casey, J-P., & Lannoo, K. (2009). Origins and structure of MiFID. In *The MiFID revolution* (pp. 26–44). Cambridge University Press. https://doi.org/10.1017/cbo9780511770470.004

de Haan, J., Oosterloo, S., & Schoenmaker, D. (2012). *Financial Markets and Institutions. A European Perspective* (2 ed.). Cambridge University Press. https://doi.org/10.1017/cbo9781139198943

Hsu, S. (2017). *Financial Crises, 1929 to the Present* (2nd. ed.). Edward Elgar. https://doi.org/10.4337/9781785365171

Husták, Z., & Smutný, A. (2016). *Investiční služby a nástroje po rekodifikaci*. C.H. Beck.

Liška, V., & Gazda, J. (2004). *Kapitálové trhy a kolektivní investování*. Professional Publishing.

Mishkin, S. F., & Eakins, G. S. (2016). *Financial Markets and Institutions* (8 ed.). Pearson Education Limited.

Musílek, P. (2011). *Trhy cenných papírů*. Ekopress.

Pavlát, V. et al. (2003). *Kapitálové trhy*. Professional Publishing.

Pearce, R., & Barnes, S. (2006). *Raising venture capital.* John Wiley & Sons Ltd. https://doi.org/10.1002/9781118673416

Rejnuš, O. (2014). *Finanční trhy* (4. aktualizované a rozšířené vydání). Grada Publishing.

Sergakis, K. (2018). *The Law of Capital Markets in the EU. Disclosure and enforcement*. Red Globe Press.

Týč, V. (2010). *Základy práva Evropské unie pro ekonomy* (6. vydání.). Leges.

Valiante, D. (2018). CMU and The Deepening of Financial Integration. In D. Busch, E. Acgouleas, & G. Ferrarini (Eds.), *Capital Markets Union in Europe* (1 ed.) (pp. 2.01 – 2.43) Oxford University Press. https://doi.org/10.1093/oso/9780198813392.001.0001

Veselá, J. (2019). *Investování na kapitálových trzích* (3. Rozšířené a ktualizované vydání). Wolters Kluwer.

**Legal sources**

First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC)

Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alternation of their capital, with a view to making such safeguards equivalent (77/91/EEC)

Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC)

Fourth Council Directive of 25 July based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC)

Council Directive of 5 March 1979 coordinating the conditions for the admissions of securities to official stock exchange listing (79/279/EEC)

Council Directive of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (80/390/EEC)

Sixth Council Directive of 17 December 1982 based on article 54 (3) (g) of the treaty, concerning the division of public limited liability companies (82/891/EEC)

Seventh Council Directive of 13 June 1983 based on the article 54 (3) (g) of the Treaty on consolidated accounts (83/349/EEC)

Eighth Council Directive of 10 April 1984 based on article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (84/253/EEC)

Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC)

Council Directive of 22 March 1988 amending, as regards the investment policies of certain UCITS, Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investments in transferable securities (UCITS) (88/220/EEC)

Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field

European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (UCITS)

Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses

Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 78–87
DOI: 10.54201/iajas.v2i2.39

# The legal framework for countering the affordability of traditional cigarettes in Poland - a review of selected issues

**Krzysztof Michalak*, Mariusz Popławski****

* Assistant Professor, University of Bialystok, Faculity of Law, Institute of Medical Law and Private International Law. E-mail: k.michalak@uwb.edu.pl ORCID: https://orcid.org/0000-0003-1502-3275

** Dean, Full Professor, University of Bialystok, Faculity of Law, Department of Tax Law. E-mail: m.poplawski@uwb.edu.pl ORCID: https://orcid.org/0000-0003-1403-3033

## Abstract

The aim of this study is to describe the conditions of citizens' security in connection with the elimination of the economic affordability of traditional cigarettes as they are harmful products. The most important aim of this text is to show the relationship between the content of the term "elimination of traditional cigarettes" and the concept of "citizens' security," as laid down in Article 5 of the Polish Constitution. In the field of program norms, special emphasis should be placed on the category of the "means to achieve" systemic aims. It can therefore be assumed that excise duty on certain tobacco products will be considered in this context as such means. It should be emphasized that objective circumstances, such as the harmfulness of traditional cigarettes in the context of the state's care for the security of citizens, should affect the final shape of the law in this matter.

## Keywords

healthcare, security, tobacco products, interpretation of constitution.

## 1 Introduction

The purpose of this paper is to examine the determinants of citizens' security in connection with the implementation of gradual elimination of the economic affordability of traditional cigarettes as harmful products (Ministry of Finance, 2021). Following the data provided by the World Health Organization, taking into account the "international aspect," (Etel, Perkowski et al., 2017) which is valuable for academic research, it should be assumed that the use of stimulants can be effectively suppressed by limiting their economic affordability, which is achieved, for example, by increasing the excise tax rates (WHO, 2021, 86). The constitutional aspect rele vant to this paper arises from Article 5 of the Polish Constitution.[1] The specific objective of the

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, no. 78, item 483, as amended), hereinafter referred to as Constitution or Polish Constitution.

paper is to provide a description of the relationship between the content of "citizens' security," formulated *in extenso* in that article and the government's responsibility to regulate the market for tobacco products, particularly so-called traditional cigarettes. A parallel issue is related to the question of whether the context of the state's objectives, as set forth in Article 5 of the Constitution, also includes the tasks that jointly concern matters of excise tax policy and health protection (Charkiewicz, 2021). An analysis of the issue specified in the title of this paper requires a preliminary clarification of some general matters. First, it is important to exercise caution in the course of the research, if only because of the constitutional context adopted in this paper. Under certain conditions, it may be considered as a novel "pattern of constitutional control" in a working or even utilitarian sense of the term. Second, the collection of comments contained in this paper treats the elimination of traditional cigarettes as a course of action officially adopted by the state. The hypothetical value of the present paper is therefore its presentation of the relationship between the content of the "elimination of traditional cigarettes" and "citizens' security" set forth in Article 5 of the Polish Constitution and its drawing a number of conclusions from that relationship.

## 2 Short insights into the reasons for the elimination of traditional cigarettes

It should be noted that eliminating certain types of stimulants, especially so-called traditional cigarettes, is becoming an increasingly urgent objective of the legislator. While this objective is supported primarily by current objective medical knowledge, what is also important is the clear constitutional preference set forth in Article 5 of the Polish Constitution, which literally establishes "citizens' security" as a goal to be pursued by the state. Third, the ongoing COVID-19 pandemic and its effects on individuals' health, public health, and the economics of the healthcare system also seem to determine the need to eliminate of specific stimulants that are considered to be hazards to safety and health.

It seems, that there are also other vital reasons for eliminating traditional cigarettes. Whenever legal sciences deal with important social issues, such as human life or health, serious dilemmas arise, and not only of a legal nature. This is because large concepts, relevant to legal science and the functioning of society, are contrasted here: freedom, of the paradigmatic kind, associated, for example, with voluntary deterioration of one's health, self-determination, autonomy (which in its pure formulation does not tolerate any, even if reasonably justified, limitations), healthcare costs, taxes, and legislation. The latter should be consistent; that is, it should adhere to a certain principle, such as paternalism, which allows interference in human freedom on the grounds of a higher value (health, life, duration of life).

An important prerequisite seems to be the very fact that, as confirmed by almost universal existing medical acknowledgement, the use of so-called traditional cigarettes, which involves burning a mixture of dried leaves, is a habit that is harmful, both socially and individually. The negative health effects of compulsive smoking and tobacco use, as described above, are well understood according to current medical knowledge. However, society is often unaware of the costs of smoking as a certain phenomenon among the population. These costs are enormous and associated not only with the treatment of so-called tobacco-related diseases, but also, for example, the costs of lower employee productivity and other burdens of an economic nature. Not only is the medical knowledge in this area well established, but the societal beliefs on this subject seem to be similarly formed.

Meanwhile, according to available public data and journalistic debates, cigarette sales and consequently cigarette use, are increasing in Poland. The data for the Polish economy, especial-

ly from January and February 2022, is clear and its macroeconomic assessment leaves no doubt about the scale of the problem. Cigarette sales, despite last year's 5% increase in the minimum excise tax rate, were already up in January compared to the same period last year. In the first two months of this year alone, consumers-smokers consumed more than 720 million more cigarettes than in the same period a year ago. Part of the reason for this is that, despite the excise tax hike, cigarette prices have hardly gone up in real terms, due to rising inflation.

Although the root cause of the problem discussed in this paper is limited to the Polish domestic situation, there is no doubt that the problem and its scale are global. One form of international control over the availability of tobacco products are called framework conventions. The Framework Convention on Tobacco Control (WHO FCTC) is an example of such a convention. It was the first treaty negotiated under the auspices of the World Health Organization that relies on medical information about the harmfulness of smoking, as well as the right of all people to the highest standard of health. As stated in its preamble: "[...] scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases." Against this backdrop, it should be said that the WHO FCTC represents a paradigm shift in the development of a regulatory strategy for addictive substances. Unlike previous treaties on the control of these substances, the convention emphasizes the importance of a balanced demand reduction and supply control strategy.

The convention was intended to be a response to the globalization of the "tobacco epidemic." Tobacco use has been, and to some extent still is today, promoted by a variety of factors with cross-border reach and effects. The basic provisions of the WHO FCTC concerning reducing demand are contained in Articles 6 to 14, with Article 6 (Price and tax measures to reduce the demand for tobacco) being of key importance. These provisions regulate price measures, primarily of a fiscal nature, intended to reduce the demand for tobacco, as well as the so-called "non-price" measures to reduce the demand for tobacco. The latter are first and foremost provided for in Article 7 (Non-price measures to reduce the demand for tobacco), as well as in other articles including Article 8 (Protection from exposure to tobacco smoke), Article 9 (Regulation of the contents of tobacco products, Article 10 (Regulation of tobacco product disclosures, Article 11 (Packaging and labelling of tobacco products, Article 12 (Education, communication, training and public awareness), and Article 13 (Tobacco advertising, promotion and sponsorship).

Under these conditions, it must be concluded that the need for a fresher scholarly look at the intersection of law and the availability of traditional cigarettes requires examination, and that the theses of legal scholarship related to the issue at hand require re-reading. Older normative solutions, especially in the light of more recent statistical data and the aforementioned tobacco epidemic, lead to the conclusion that the current fight against cigarettes is ineffective. This fight is lost, for sure. Against this backdrop, there is little doubt that the self-existent and autotelic goal of a rational legislator should include either gradual or abrupt, but in any event comprehensive, elimination of so-called traditional cigarettes. Following the aforementioned data and the quasi-legislative activity of the World Health Organization, it is reasonable to assume that measures aimed to eliminate traditional cigarettes are complex and multi-faceted. At the same time, it is assumed in the literature that an effective, and thus also popular, method of combating these stimulants is to limit their economic availability. This is often achieved through a progression of excise tax rates. However, this is not the only, and is sometimes an insufficient, legislative measure that can be applied in the area of this legal analysis. It is worth noting that addressing

the problems associated with the tobacco epidemic requires solutions that go far beyond the current ad hoc measures and necessitates a new approach.

Considerations of thorough research, however, dictate mentioning already at this stage that the problem tolerates neither apodictic judgments nor clear-cut solutions. Analogous social and legal research, carried out mainly in connection with alcohol products, clearly shows that the balance of so-called "hard prohibitionist policies" is negative. These policies are ineffective, do not achieve their intended objectives, and are very costly. Wherever prohibitionist actions are taken, there are also repercussions and social problems, including, first of all, various forms of criminality. Against this background, it is puzzling why the policy of prohibition (studied using the example of the prohibition of production, trade, and export of alcoholic products, which was in force from 1920 to 1932 in the United States) became the dominant global method with regard to, for example, narcotics and similar substances, while at the same time it was not used, even to a fragmentary extent, with regard to cigarettes.

At the same time, it must be stated that there will always be a social group that demonstrates the need to use substances with adverse health effects. If this assumption is accepted, it is appropriate to make a kind of a double statement that, to the extent that it is justified, the elimination of traditional cigarettes should be definitive, while, in the remaining scope, combating the epidemic of addictive smoking should take the form of promoting the use of novel products that are objectively less harmful to health.

The justification for a more decisive action by the government in this matter can be found in the legislation already in force, and also – and very importantly – in its constitutional context. The constitutional aspect, arising among others from Article 5 of the Constitution of the Republic of Poland, which is initially significant for the analyses of the project, already intuitively seems to provide a systemic and legal foundation for legislative and organizational changes in the matter in question. The *in extenso* requirement to ensure the safety of the public, which is formulated in that provision, appears to correlate directly with the government's responsibilities related to shaping the tobacco products market. It also seems important that, in the context of state objectives, included fragmentarily for example in Article 5 of the Constitution, but also in other provisions related to social rights (Article 68 of the Constitution), there are also those tasks that jointly concern excise tax policy and health protection.

A few initial hypotheses can be found against this backdrop. First, a preliminary analysis of the constitutional provisions leads to the conclusion that the elimination of traditional cigarettes as harmful products, already in the current state of the law, is a means to achieve the objective of protecting the safety of citizens and their health enshrined in the aforementioned constitutional provisions. The programmatic nature of those constitutional norms dictates that the rules of correct legislation should be applied in such a way as to secure the important social objectives enshrined in the Constitution. Second, the legislator, acting on the basis of the model of rational law-making shaped in the paradigm of knowledge and perfect competencies, has certain obligations related to the appropriate creation of the statutory system, namely that it should not allow the objectively harmful products to be marketed. This should not be tolerated, especially when medical knowledge in the relevant area clearly shows the negative consequences of their use. Consequently, it will need to be decided whether the current legislator has the legitimacy to counteract the threat in question only through forms of a rather indecisive nature. Third, despite the fact that, hypothetically, the most decisive method of counteracting the problem would be a prohibition (irrespective of its legal nature), it should be stated that currently a much more socially viable option seems to be the use of so-called novelty products (e.g. liquids, pouches, etc.). Thus, in the current legislative perspective, the goal of the legislator should be to, in a

way, "promote" the use of these alternatives, such as electronic cigarettes. Such a hypothetical legislative goal is an intention that requires further objective and in-depth analysis; therefore, the need for research on legal solutions to this issue must be emphasized. Initiatives concerning novelty products may take the form, in particular, of excise tax mechanisms that charge certain categories of less harmful products proportionately less than tobacco products, which are much more harmful to health.

## 3 Elimination of traditional cigarettes and the security of citizens. Comments on Article 5 of the Polish Constitution

It is emphasized that "one needs not be persuaded that the wording of the Constitution, like any legal text, requires interpretation" (Wronkowska, 2016, 17). The choice of verbal and lexical expressions in the Polish Constitution is very rich and, to a large extent, it is a result of the fact that the legislator emphasizes certain aspects as particularly important. Moreover, the constitutional provisions are characterized by a noticeable conciseness, often taking quite extreme forms.

As mentioned earlier, pursuant to Article 5 of the Constitution, "The Republic of Poland shall safeguard the independence and inviolability of its territory, ensure and human and civil freedoms and rights and the security of its citizens, protect the national heritage, and ensure environmental protection in accordance with the principle of sustainable development." Article 5 of the Constitution thus defines the fundamental goals of the state (Tuleja, 2021). This provision comprises the functions of the state and the fundamental directions and objectives of its action, with ensuring security as a fundamental value (Skrzydło, 2013, 19–20). The goals of the state take the form of programmatic principles and, therefore, comprise public actions, but without explicitly defining the means for, and ways of, achieving them. This kind of "open textuality" warrants a search for measures that will serve the implementation of specific tasks, including current ones. As has been emphasized, it is not possible to determine the content of individual obligations based solely on the content of Article 5 of the Constitution, and reference, among other things, to other constitutional provisions, as well as the rules of their interpretation are required. Thus, when looking for other similar normative contexts, it is worth noting that the concept of security is quite widespread in the Constitution and is the rationale for restricting rights and freedoms pursuant to Article 31(3), for imposing the prescription to care for the environment pursuant to Article 74(3), and for introducing consumer protection regulations pursuant to Article 76 of the Polish Constitution (Miłkowski, 2020, 34–35).

Of note is the characteristic way in which the provision in question is formulated, which is quite intuitively distant from the typical formulation of a general or fundamental norm, or another "norm-forming statement" (Gizbert-Studnicki & Grabowski, 1997, 104). This unique way is the result of the functions that this provision fulfils. This is because the function of a programmatic norm, a programmatic rule, and in part also purposive norms themselves, is to formulate the preferred states of affairs and the prescribed objectives. Article 5 of the Constitution, framed as a programmatic provision, does not as such directly give rise to marked claims that are suitable for enforcement (Garlicki & Zubik, 2016, margin ref. 4.), but it initiates a broad normative context for interpreting what has been framed as the state's objective. It is worth noting that the criterion applied for dividing norms into purposive and fundamental consists of "the method of determination of the prescribed behaviour of the addressee of the norm." Thus, a basic legal suggestion as to the nature of programmatic norms results from their very name. Consequently, it should be emphasized that the above circumstances affect the interpretation of

the legal text of the Polish Constitution, insofar as such regulations are contained therein. As a side note, it should be mentioned that a legal analysis of a purposive norm applicable to conduct requires a number of more complicated interpretative operations, which also involve going beyond the legal text. More abstract categories, such as axiological consistency, are then taken into account instead of the mere content of the provision. The starting point for such procedures, however, is the interpretative (Ziembiński, 2007, 196) or inferential rule, which is a component of the concept of sources of law. It lies in the trivial view that, since it is prescribed to achieve objective O, it is prescribed to take actions A that are the means of archiving objective O. Thus, it can be said that "it is prescribed to take (all) such actions A as are means to achieve objective O." In this way, it can be seen that, in the case of programmatic norms, the conclusiveness of the inference made on their basis consists of broader interpretative procedures that are intended to serve the objectives formulated by the relevant regulation. From the standpoint of justification, it is important to show the existence of non-legal premises; for example, to show what kind of behaviour or what kind of means will in fact lead to the achievement of the constitutionally "programmed" objective – in other words, whether there is a teleological relationship between behaviour B and objective O. In view of the above, appealing to even the instrumental rationality of the legislator appears to bring beneficial results. It is not possible to determine the desired directions in legislation without taking the indications of non-legal knowledge into account. In the context of the problem under examination, the knowledge in question is medical knowledge which concerns healthcare, preventing addictions, health security, and other matters. It is knowledge that equips the legislator with the necessary substantive competence for the correct formation of legislation in a given area.

In conclusion, programmatic norms are legally binding norms, with the difference that they do not impose definite obligations, but rather *prima facie* obligations, on their addressees (Gizbert-Studnicki & Grabowski, 1997, 112). It is therefore reasonable to review the selected opinions of legal writers on the defined obligations of the state that result from Article 5 of the Polish Constitution. It is makes sense to adopt a perspective that combines the aspects of civil security, health protection, and prevention of the use of stimulants, especially traditional cigarettes.

As has been emphasized, in order to grasp the nature of the objectives contained in the provision in question, the very structure of the Polish Constitution is important. Indeed, Article 5 sets out the most important political and social objectives, as is evident even from its placement. Thus, based on the *a rubrica* argument, it should be noted that this norm is located together with regulations that shape the set of principles of the system of government and the basic characteristics of the state and its tasks. It is mainly for this reason that "citizen's security" should be understood in this context relatively broadly, as a unique sense of stability and protection. On the other hand, "ensuring the security of citizens" requires a narrow interpretation, especially understanding this structure to mean the "right to respond to" and prevent threats. It has also been noted that this provision is vague and, consequently, its modal and operative interpretation is allowed (Haczkowska, 2014, margin ref. 1.). It has been emphasized that the state has two primary objectives, to ensure the security of its citizens and to pursue the concept of the common good, which is associated with environmental protection and security. It is worth noting that although "citizens' security" itself is present in legal language, its definition is not contained in any legal act. Thus, given the fact that this formulation itself co-organizes legal structures that are of immense importance to the system of government, its correct interpretation, consistent with legislative considerations, poses a serious challenge. To some extent, a suggestion concerning the meaning is the quite synonymous term "public security," defined as the totality of conditions and institutions protecting, among other things, the life and health of

citizens. Other terms with a similar meaning are "internal security *sensu stricto*," such as universal and systemic security, and "internal security *sensu largo*," which additionally includes, among other things, the protection of life and health. It then follows that the state has an obligation to take action to ensure citizens' security in the broadest sense, which, however, does not abrogate the legal and, to some extent, factual question regarding the methods required to do so. Therefore, the framework and functions shaped by Article 5 of the Polish Constitution are particularly relevant to law-making.

It has thus been established that the term "security" is most likely ambiguous and has been used in various ways in the Polish Constitution. As such, the contextual and polysemantic nature of the term makes it necessary to consider it within the regulations and issues it co-defines. In addition, the textual argumentation regarding the provision of Article 5 of the Constitution allows certain conclusions to be drawn, which affect, among other things, the scope of its application. A somewhat simplified statement can be made that *citizens' security* can be treated as a binary name (terminological focus). From the linguistic perspective, *citizens' security* is an example of a customary combination of words (collocation). Structures of this kind appear all too often in common language; however, unlike idioms, they do not have any specific, reserved meaning. Indeed, the linguistic function of such structures is revealed in the possibility of contextual clarification of their meaning, mainly through the mechanisms of interpretation. From the formal-linguistic standpoint, it seems that (*quod*) *lege non distinguente nec nostrum est distinguere*. If the order of a normative phrase has not been clarified or divided by an additional qualification (feature) contained in the text, e.g. one that makes the content of the phrase associated with security, be it military, public, energy, or of some other specific type, then the concept should be applied to all areas of state activity aimed at ensuring citizens' security. Since the objective of "citizens' security" has been formulated, decoding the means of achieving this objective should, under the conditions identified in the title, take the form as followings:

- since the fundamental objective $O_1$ – *protection of the security of citizens* – has been established and its component objective is $O_2$ – *protection of the health of citizens*, then whenever the $M_x$ means implemented pursue the constitutional objectives *Ox*, they comply with its content;
- then the means $M_1$ – *elimination of traditional cigarettes*, as a way to achieve the constitutional objectives $O_1$ and $O_2$, is consistent with the content of the constitutional norm expressed in Article 5 *in medio* of the Polish Constitution.
  Therefore, it should be concluded that allowing the trade in a particular type of harmful stimulants or not actively counteracting them is incompatible with the axiological premises concerning the security of citizens as an intrinsic constitutional goal of the Republic of Poland. Therefore, also in the matter under examination, the current activity of the legislator, in particular the correct choice of legislative means, should be aimed at implementing the objectives arising from the constitutional directives that determine the security of citizens. It thus appears that the initial statement regarding the function of excise tax as a means to eliminate the economic affordability of traditional cigarettes progressively is constitutionally sound.

## 4 A few comments on the optimal regulation of traditional cigarettes

Having established that the objective of eliminating traditional cigarettes is supported by Article 5 *in medio* of the Polish Constitution, it is now necessary to address briefly the hypothetical

directions for amendments in the law. The important determinants of the optimality of legal provisions are their justification (the so-called justification perspective) and the critical-postulative argumentation (Opałek, 1974, 190). Justification, criticism, and postulates include legal arguments, which are often very different in nature and content and range from "trivial" (Smolak, 2012, 15), through functional and advisability-oriented ones, to those characteristic of the institutional approach (Gizbert-Studnicki, 2001, 123). It is emphasized that even trivial explanations of socially important matters have some relevance to law-making and the shape of its institutions. Moreover, argumentation concerning a specific legal norm that refers to the most serious supernatural, external sources or some primordial "meta-justification" and rationalization has many objective pitfalls. The nature of the postulates *de lege ferenda* is also important. These are special statements that do not have a normative strength in the strict sense (consequently, they are not norms in the basic sense of the word), but instead are "directives of a weaker type" and most often take the form of recommendations and guidelines. Such an approach to the postulated law, as well as to the directives concerning the directions of the law's development, makes it possible to discuss future and hypothetical legal provisions, leaving aside to some extent the complex problem of validation (Grabowski, 2009, 227), in the same way as discussing law – the postulated law.

Thus, given the relevance of simple argumentation and the complex ontological nature of the legal postulates that the present paper does not purport to formulate, it is only appropriate to collect a few remarks on the optimal regulation of the issue of traditional cigarettes, leaving aside deeper, particularly systemic aspects of the problem that follow from a more comprehensive study of this topic. Therefore, it should first be noted that the issues analysed herein that are related to the subject matter of the paper are complex. On the one hand, they seem to be quite simple, while being studied in a more recent perspective. On the other hand, the cultural phenomenon of stimulants is invariably undeniable. Even knowledge based on facts and observations that confirms the harmfulness of a certain substance, as well as the form of its administration, or a belief in the harmfulness of a certain habit, do not necessarily translate into rational conduct. This condition is a serious counterweight to a fully rational framing of the law governing stimulants (e.g. legal prohibition of their use). The aforementioned cultural phenomenon seems to make it difficult to create a rational behaviour or a custom based on similar motives that would eliminate – by creating in this regard a civilizational taboo – the use of such substances (Elias, 1980, 226). Such social conditions mean that the epistemological objectivity of certain phenomena does not definitively influence the directions of law-making. It would seem, however, that the factual and non-abstract nature of such circumstances as the harmfulness of traditional cigarettes (1), their axiological unambiguity in the context of the state's concern for the security of its citizens (2), as well as the *prima facie* availability of less harmful alternatives to traditional cigarettes (3), in the legally acceptable form of assertions, *ergo* hypotheses, and guidelines, should influence the final form of the law governing this matter. When considered as the foundation of "strong directives" for the legislator, these circumstances should have a decisive influence on the fundamental issue, on the objective of the legal text and the purpose of the law, being certain facts that affect the directions of the development of law as such.

## 5 Conclusions

The conclusions drawn should be recalled or, for the sake of a proper order, reiterated. First, an analysis of Article. 5 of the Polish Constitution appears to prove that eliminating traditional cigarettes as harmful products is a means to achieve the objective of protecting the security

of citizens and safeguarding their health. Second, in view of the above, it must be considered whether a rational legislator should allow objectively harmful products to be traded when medical knowledge in this regard clearly demonstrates the negative consequences of their use. Consequently, it will need to be decided whether the actual legislator has the legitimacy to counteract the threat in question merely through forms of a rather indecisive nature. Third, the emphasized flexibility of some constitutional provisions, given the irrational nature of some social practices or the variability of the conditions concerning public health, should be seen as the right to reinterpret them. Fourth, despite the fact that, hypothetically, the most decisive method of counteracting the problem would be full prohibition (irrespective of its legal nature and social effectiveness), it should be stated that currently a much more socially viable option seems to be the use of the so-called noveltyother nicotine-content products. Thus, in the current legislative perspective, the goal of the legislator should be to, in a way, "promote" the use of these alternatives, such as electronic cigarettes. Such a hypothetical legislative goal is an intention that requires further objective and in-depth analysis; therefore, the need for research on legal solutions to this issue must be emphasized. Innovative solutions concerning novelty products may take the form, in particular, of excise tax mechanisms that charge certain categories of less harmful products proportionately less than much more hazardous tobacco products. Fifth, the findings contained in the paper take the form of mostly theoretical conclusions that are far from definitive and outline some prospects for research on the issue of eliminating traditional cigarettes.

## References

Charkiewicz, M. (2021). Taxation of novel tobacco products with excise duty. *Institutiones Administrationis – Journal of Administrative Sciences*, 1(1), 18–22. https://doi.org/10.54201/iajas.v1i1.4

Elias, N. (1980). *Przemiany obyczajów w cywilizacji Zachodu*. Państwowy Instytut Wydawniczy.

Etel, L., Perkowski, M., & Kierznowski, Ł. (2017). The Border University Network as a Response to Academic Challenges in the Field of Internationalization. *Eastern European Journal of Transnational Relations*, 1(1), 11–18. https://doi.org/10.15290/eejtr.2017.01.01.01

Garlicki, L., & Zubik, M. (Eds.). (2016). *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I.* Wydawnictwo Sejmowe. Online: http://bit.ly/3VfYdqL

Gizbert-Studnicki, T. (2001). Ujęcie instytucjonalne w teorii prawa. In J. Stelmach (Ed.), *Studia z filozofii prawa* (pp. 123–128). Wydawnictwo Uniwersytetu Jagiellońskiego.

Gizbert-Studnicki, T., & Grabowski, A. (1997). Normy programowe w konstytucji. In J. Trzciński (Ed.), *Charakter i struktura norm Konstytucji* (pp. 104–108). Wolters Kluwer.

Grabowski, A. (2009). Prawnicze pojęcie obowiązywania prawa stanowionego. Krytyka niepozytywistycznej koncepcji prawa. Księgarnia Akademicka.

Haczkowska, M. (Ed.). (2014). *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. A commentary]*. Wolters Kluwer. Online: http://bit.ly/3V9V0ZE

Miłkowski, T. M. (2020). *Czynności operacyjno-rozpoznawcze a prawa i wolności jednostki*. Wolters Kluwer.

Ministry of Finance. (2021). *Wspieramy prozdrowotne wybory Polaków*. Online: http://bit.ly/3C63zwK

Opałek, K. (1974). *Z teorii dyrektyw i norm*. PWN.

Skrzydło, W. (2013). *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Article 5). Wolters Kluwer.

Smolak, M. (2012). *Wykładnia celowościowa z perspektywy pragmatycznej*. Wolters Kluwer.

Tuleja, P. (Ed.). (2021). *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Article 5). Wolters Kluwer. Online: http://bit.ly/3hSZ5TH

World Health Organization. (2021). *WHO report on the global tobacco epidemic 2021: addressing new and emerging products*. Online: https://www.who.int/publications/i/item/9789240032095

Wronkowska, S. (2016). O niektórych osobliwościach konstytucji i jej interpretacji. In M. Smolak (Ed.), *Wykładnia konstytucji. Aktualne problemy i tendencje* (p. 17). Wolters Kluwer.

Ziembiński, Z. (2007). O źródłach prawa – reguły egzegezy jako składnik normatywnej koncepcji źródeł prawa. In S. Wronkowska (Ed.), *Z teorii i filozofii prawa Zygmunta Ziembińskiego* (p. 196). Wolters Kluwer.

**Legal sources**

Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, no. 78, item 483, as amended).

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 88–98
DOI: 10.54201/iajas.v2i2.32

# Intergovernmental relations during the COVID-19 crisis in Poland

**Robert Gawłowski***

* Associate Professor, WSB University in Toruń (Poland) Finance and Management Faculty in Bydgoszcz. E-mail: robert.gawlowski@wsb.bydgoszcz.pl

## Abstract

The article studies the Polish response to COVID-19 from an intergovernmental relations (IGR) perspective. The main focus is on how the Central and Local Government Common Commission worked during this period. The author uses the analytical taxonomy of three types of contrasting IGR processes: (1) a predominantly multi-layer policy process, involving limited conflict, (2) a centralised policy process as the central government attempts to suppress conflict and (3) a conflicted policy process, where such attempts are contested and tend to contribute to poor policy outcomes. In conclusion, it is shown that the Polish government preferred to choose a centralised policy and implement a one-size fits all approach during the first phase of COVID-19.

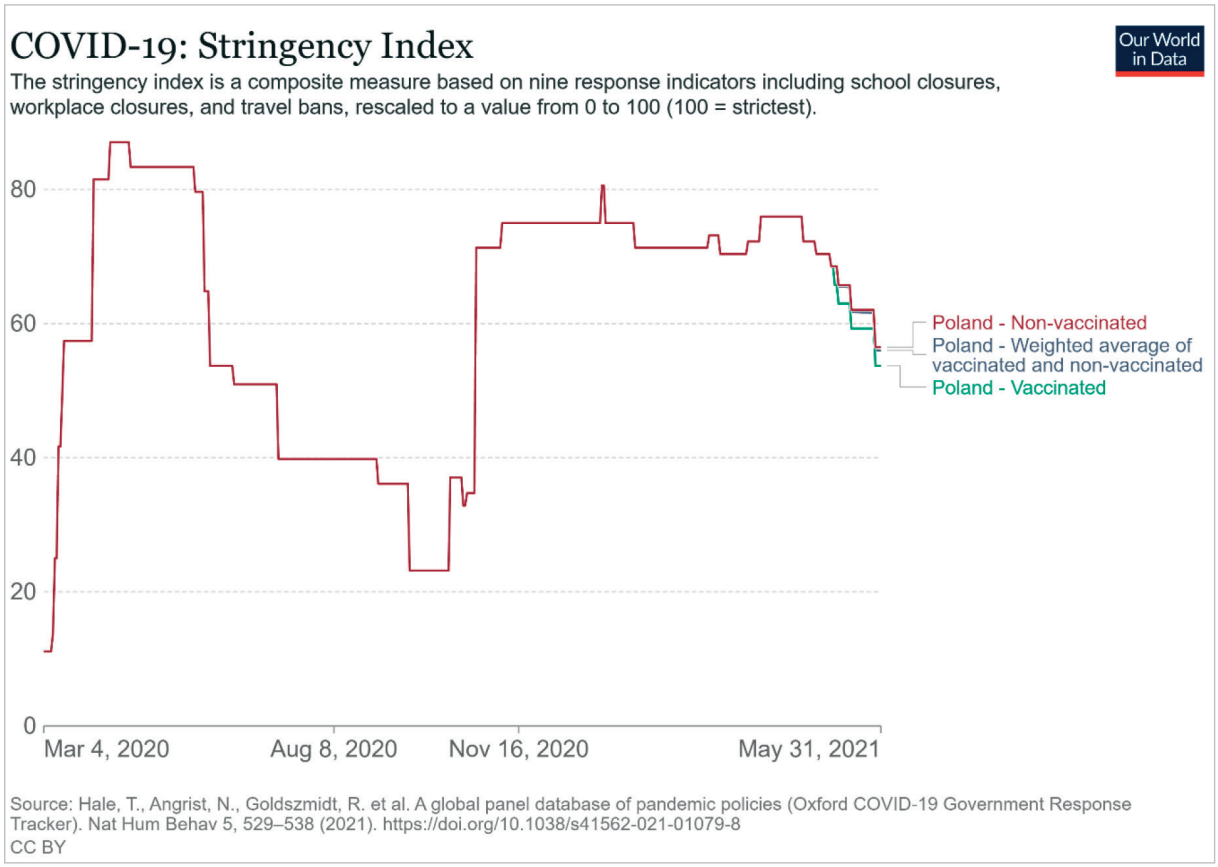
## Keywords

local government, intergovernmental relations, pandemic, public policy.

## Introduction

Crises and ideas are core subjects of study in public policy and administration. There are an increasing number of crises that the public sector has had to face during the last decades, such as managing economic and environmental crises, natural disasters, public health events and terrorist attacks (Hannah et al., 2022). The outbreak of COVID-19 was not only a huge challenge for public health, including many early deaths, but also for public administration (Dunlop et al., 2020). For some researchers, the pandemic reveals that the public sector was not only facing simple and complex problems, but also turbulent challenges, characterised by the surprising emergence of inconsistent, unpredictable and uncertain events (Ansell et al., 2021). For others, there are still many questions that we have to put to public managers and governments in order to prepare ourselves better for the next turbulent challenges that may occur and need more prompt answers (Nemec et al., 2020). Taking this into consideration, it is suggested that the Covid-19 pandemic was a game-changer for public administration and, more importantly, for the leadership competencies required during and post times of crises (Dirani et al, 2020; O'Flynn, 2020; Fay & Ghadimi, 2020). However, crisis management during such events as Covid-19 is not only a matter for leaders in the public sector. After a few waves of the pandemic, it is more than certain that a crucial part of resilience is based on essential workers, who had to face enormous challenges and this is why there is a huge need to identify and resolve bottle-

necks (Schuster et al., 2020). It seems to be obvious that Covid-19 has accelerated digital transformation, among institutions of public administration included (Gabryelczyk, 2020). During COVID-19, each European country's government had to face difficult decisions regarding how to deal with this threat. To make things worse, it was a highly unexpected event for all managers in public administration and, as a result, there were no procedures and measures in place to fight against it. Furthermore, after a few weeks, it was obvious that international cooperation mechanisms (such as the European Union and United Nations) were unable to provide decisive leadership and each country had to stand alone to prevent the virus from spreading further. This is why European governments' responses were characterised by "coronationalism" (Bouckaert et al., 2020). On the top of that, COVID-19 very quickly became a very complicated issue, as it was necessary to consider its health, economics, and territorial policy aspects. It is fair to say that the decision-making process clearly became a balancing act that was hard to achieve. In this context, intergovernmental relations between central and local governments seemed to be one of the most important ways that could possibly allow cooperation and coordination to be implemented successfully inside public administration. Chart 1 is a good summary of the composite measure implemented in Poland during the Covid-19 pandemic.




According to the research conducted, it is fair to say that several strategies were implemented across European countries. In Germany, the coordination of pandemic management shifted between a multi-level system – with the sub-national and local authorities as key actors – to the more functional orientation with increased vertical coordination (Kuhlman & Franzke, 2022). In the Czech Republic and Slovakia, the policy of handling Covid-19 was based on self-referential organisational decisions, rather than on strictly coordinated joint inter-organisational decision-making (Jptner & Klimovskỳ, 2022). In France, three phases have been identified, in which two antagonistic types of IGR opposed each other – swinging between presidential hyper-centralism

and more horizontal and informal action at the local level (du Boys et al., 2022). When it comes to Spain, strong centralization was seen as a way of dealing with the crisis (Navarro & Velasco, 2022). In Italy, the policy response has been based on temporary, fast-track procedures. The later have been regularly applied when Italian governments confront natural disasters and prompt action is ensured by a repertoire of extraordinary measures running in parallel to burdensome ordinary procedures (di Mascio et al., 2020). Moreover, this time was full of conflict and variation within the policy-making and policy-delivery processes, and it is fair to say that the Italian case was a mix of inadequate institutional coordination and insufficient and unclear central guidelines, which ultimately produced uncertainty (Malandrino & Demichelis, 2020). Last but not least, in Belgium and the Netherlands, there was a strong similarity from a functional perspective, which could be characterised as a clear top-down crisis structure, accompanied with power dominance that severely affected mayors' influence in both countries during the first wave of the Covid-19 pandemic (Wayenberg et al., 2022). Looking for exceptional examples of countries' policies during the Covid-19, it is worth mentioning Sweden, because the country chose to take a relatively liberal crisis response to the onset of the pandemic compared to the rest of Europe. As E. Petridou pointed out, the Swedish case showed the intersection of dualism in the model of public administration response and the devolved governance system that bestows operational autonomy on public agencies and local public authorities. The duality that characterises the relationship between politics, policy, and administration in Sweden resulted in a response that was necessarily decentralised. This response, in conjunction with high political trust among the citizenry necessitated, and was conducive to, broad guidelines (Petridou, 2020). However, the reason(s) for countries' different responses in the face of the Covid-19 pandemic is still under consideration (Yan et al., 2020) and needs more case study research.

The aim of this article is to explore how the processes and structures of IGR were exploited during 2020 and 2021 in Poland and how it changed during the first and second wave of the pandemic. Thus, it is not only a static description but also a dynamic analysis of evolution. The main area of interest is the functioning of the Central and Local Government Common Commission, which is a longstanding mechanism thorough which IGR have been operating. Poland is one of the few countries in Europe where such a coordination and cooperation mechanism has been running over the last two decades. It is not an exaggeration to state that it is a proven and well-known structure that is at the disposal of the central public administration. The lack of analysis of the Polish case is the main reason for the author deciding to conduct this research. As a research tool, the author uses an analytical taxonomy of three types of contrasting IGR process proposed by Bergström, et al. who distinguish such types as the following: (1) a predominantly multi-layered policy process involving limited conflict and in which both central and subnational governments play a significant and coordinated role and exert influence on policy within the centre; (2) a centralised policy process as the central government attempts to suppress conflict and allows subnational governments little discretion and influence at the central level and (3) a conflicted policy process, where such attempts are contested and tend to contribute to policy failures, because of strongly contested rules of the game and serious communication problems between the central and subnational governments (Bergström et al., 2022). It is worth mentioning that the fertile ground that helps to build this taxonomy is a series of papers presented in Local Government Studies.

The paper proceeds as follows: first, it discusses the context of the Polish intergovernmental system; second, the research design is presented; and third, the focus is put on the Covid-19 pandemic in the context of the Central and Local Government Common Commission. The conclusions summarise the research findings.

## Context of the Polish intergovernmental system

Despite the huge popularity of the governance paradigm in public administration, IGR is still a rather narrow field of work for researchers covering local and regional governance, so there is still much more of a country-specific approach to analyse IGR rather than a cross-country comparison. The outbreak of the Covid-19 pandemic might be seen as a focal point that draws much more attention to this issue. It is fair to say that the only way to fight successfully against the Covid-19 pandemic was by implementing territorial politics. Flexible policies that took into account regional or county-specific situations demanded robust IGR for several reasons. Some of these could be the need for information exchange, or quick and successful responses on the grand scale.

One of the crucial parts of democratic transformation in Poland after 1989 was the creation of self-government. Local government was introduced in March 1990 and, during the legislative process, one of the most controversial issues was how to organise IGR, as the founding fathers of this reform were aware that this is a key aspect of coordination processes in public administration. Despite the fact that no coordination mechanism at all was introduced, cabinet ministers set up the Central and Local Government Common Commission. In the beginning, it was an informal way of orchestrating mutual relations (Gawłowski, 2015), exchanging information and, in principle, collecting knowledge for the next steps of public administration reform. The tangible outcomes of this cooperation were so useful that, in the following years, the Central and Local Government Commission slowly and consistently became an institution regulated by a legal act (CLGCC Act, 2005). The final act of institutionalisation was that the CLGCC was intertwined with the Polish accession to the EU.

Members of the Central and Local Government Common Commission are appointed from both cabinet ministers and national self-government associations in equal numbers. Twelve of them represent government departments[1] that cover public services delivered by local and regional administration and the same number of representatives are delegated from six associations.[2] Needless to say, such diverse representation from self-government associations causes legitimate questions regarding organisation and mobilisation in their relationship with the central government. Problems associated with collective action are seen by many scholars as a key obstacle to effective IGR (Cigler, 2012; Callanan, 2012; de Widt & Laffin, 2018).

There is no chair of this Commission, in order to avoid a situation in which one of the sides might get a more distinctive position. However, the CLGCC Act allows the appointment of two co-chairs, one each from the central and self-government side. The main goals of the Commission are as follows: (1) developing a common position of the cabinet and local government regarding the scope for addressing economic and social issues; (2) reviewing and assessing the legal and financial conditions for the functioning of local government, including services delivered by counties as well as institutions with supervision and control over self-government; (3) assessment of the self-government position in relation to European integration, including how self-government aligns financial resources with regional policy; (4) analysing information

[1] Ministry of Public Administration and Interior; Ministry of Health; Ministry of Regional Development; Ministry of Finance; Ministry of Culture and National Heritage; Ministry of Infrastructure; Ministry of Education and Science; Ministry of Sport and Tourism; Ministry of Foreign Affairs.

[2] Association of Rural Governments in Republic of Poland; Union of Towns; Association of Polish Cities; Union of Polish Metropolis; Association of Polish Counties; Association of Region of the Republic of Poland.

related to prepared draft legal acts, government documents and programmes concerning issues of self-government, in particular the financial regulatory assessment; (5) presenting opinions on draft legal acts, programmes and other government documents concerning the issues of self-government, including those defining the relationship between local government and other public administration institutions. In most cases, the goals presented in points 4 and 5 are those most often discussed during the plenary sessions. Given that the CLGCC is an advisory body to the cabinet, representatives from local and regional national associations are allowed to present only their opinion on the draft legislative acts, programmes and other documents mentioned above. In each case, their opinion could be positive or negative. In the event of rejecting the cabinet's legislative intentions presented by self-government representatives, there is however no legal possibility to prevent the cabinet from submitting their proposals to the parliament. Nevertheless, members of the parliament are aware that the draft documents presented to them for further action received a negative opinion in the previous stage.

It is worth mentioning that the mechanism of mutual relations between central and self-governments provided by the CLGCC works on a daily basis. It means that plenary sessions take place each month and between them, several working groups provide a first preliminary assessment. At this level, civil servants from government and self-government administration discuss the merits of the draft acts and documents that are important in practice side. The key issues are financing and the legal requirements for transfer to local and/or regional level, as well as such aspects as assessment and control. If reaching an agreement is not possible, the draft acts or documents, along with identified discrepancies, are moved to the political level at the plenary session. At this time there are 11 working groups that cover such issues as education policy, health policy, public finances, international cooperation and, last but not least, public administration and internal security.

The CLGCC has a stable and important position in the Polish public administration. It ensures a systematic process for mutual relations, as well as for exchanging opinions on draft legal acts and documents so that many potential pitfalls are avoided. However, there is still some room for improvements, such as an extension of the scope of the issues raised during the plenary sessions by additional points regarding the structural position of self-government in public administration, or even a further extension of the consultation mechanism to the regional level, where central government and self-government co-exist (Gawłowski, 2016).

National self-government associations are important actors in IGR in Poland. They play a crucial role in three dimensions, namely (1) exerting influence on central government; (2) collecting and disseminating knowledge on delivering public services among members of the association and, last but not least, (3) building a network inside public administration as well as with external partners (Issac-Henry, 1980; Entwistle & Laffin, 2003). Their importance in both IGR and self-government on a national level has been growing for a long time (Laffin & Entwistle, 2000) and, during Covid-19, it became even bigger. In the Polish case, there are six national self-government associations that play vital roles in terms of IGR.

## Methodology

In order to determine what kind of relations dominated during the first wave of COVID-19 in Poland, the author focused his attention on the formal documents of the CLGCC. The special points of interest were the verbal notations and minutes of plenary sessions that presented the merits and outcomes of these meetings. This study analysed the Covid-19 pandemic from the 4th of March 2020, when the first case was registered in Poland, to May 2021, when the last

measures were lifted. However, in order to make comparison possible, 2019 is added as a reference point to illustrate better the change in IGR before and during the Covid-19 pandemic.

Two questions were raised during this research:

*RQ1) How many plenary sessions were there and what was the scope of the agenda during the first wave of COVID?*

*RQ2) What kind of policies were discussed during the plenary sessions?*

In order to find reference points that allow the author to compare and contrast how the CLGCC was working during the first wave of COVID-19, the previous research outcomes in terms of the CLGCC were used (Gawłowski, 2016; Gawłowski, 2020). Methodologically, this research represents a two-case desk research study. In the first step, the author employed an analysis of minutes and verbal notations that presented the merits of plenary sessions. In the second step, the author included an analysis of the adopted legislative acts that were proposed by cabinet ministers.

*Table 1. Timetable of the Covid-19 pandemic*

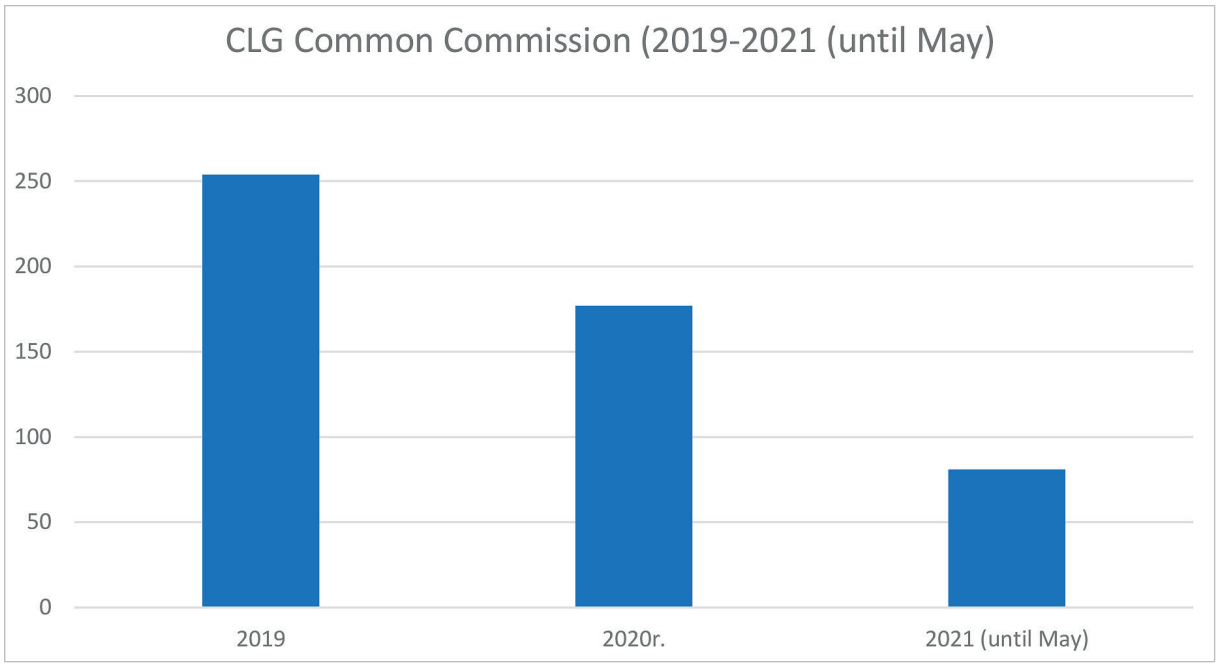
| | |
|---|---|
| **First wave of Covid-19 pandemic (March – August 2020)** | |
| 2 March | Polish Sejm (lower chamber) voted on the Covid-19 Act (ustawa o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem Covid-19) |
| 4 March | First registered Covid-19 case in Poland |
| 6 March | Polish Senate (second chamber) voted on the Covid-19 Act |
| 9 March | Sanitary control at the Polish-German and Polish-Czech border |
| 10 March | Mass events banned |
| 12 March | Polish government introduced the first wave of restrictions |
| 15 March | Polish border is closed |
| 18 March | Furlough programme announced by the Polish government |
| 31 March | Second wave of restrictions introduced |
| 6 April | Postal Voting Act introduced by the Polish government |
| 16 April | Obligation to cover nose and mouth in public spaces introduced |
| 4 May | Some restrictions lifted |
| 6 May | Nursery and primary schools opened |
| 10 May | Presidential elections postponed |
| 18 May | Second part of restrictions lifted |
| 27 May | Third part of restrictions lifted |
| 30 May | Obligation to cover nose and mouth in public space lifted |
| **Second wave of Covid-19 pandemic (mid-August 2020 – March 2021)** | |
| 8 August | New wave of restrictions introduced. The country is divided into three zones: red, yellow, and free from restrictions. |
| 10 August | The whole country is in the yellow zone |
| 23 October | The whole country is in the red zone |
| 4 November | New wave of restrictions |
| 26 November | Government introduced the second edition of the furlough scheme |
| 27 November | Government announced that Christmas Eve events could be attended by small numbers of participants |
| 14 December | New wave of restrictions introduced. Quarantine in the whole country |
| 15 January | School teaching returns |
| 1 February | Galleries, cinemas and theatres opened |
| 12 February | Ski slopes and hotels, with some restrictions, opened |

Source: own research

## The intergovernmental response in Poland

COVID-19 was a good chance to check if intergovernmental relations were seen by central policymakers as a tool to coordinate and implement policies that could help to fight the pandemic better or as a formal procedure that is a part of the legislative process. In order to identify which attitude was more frequently recognised during this time, it is worth looking at the statistical summary of the number of plenary sessions during the first wave. Based on that, it seems to be clear that the longer COVID-19 was present, the less frequently plenary sessions of the CLGCC were held and, as a result, fewer drafts of legal acts and documents were presented to self-government representatives. In the year before COVID-19, there were 254 acts and documents altogether; however at the end of 2020 there were 177, and 81 until May 2021. For this reason, it is fair to say that the government decided not to use intergovernmental mechanisms in order to fight against COVID-19.

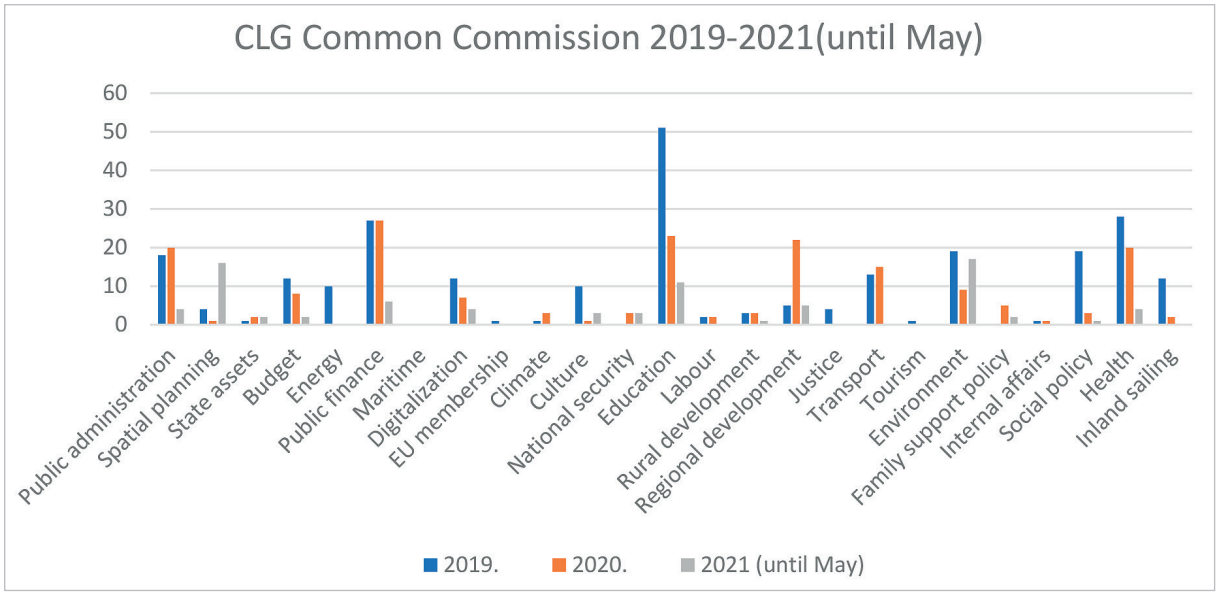
*Chart 1. The number of draft legal acts and documents presented by the government during the plenary sessions at CLGCC.*




Source: Own study.

The next chart presents a statistical summary of the public policies to which draft legal acts and documents presented by the cabinet relate. Draft papers have been grouped into the subjects that relate to the legal division of work introduced by the Division of Governmental Administration Act 2020. Each of the cabinet ministers covers at least one division of governmental administration; however, it is usually a couple of them. Based on that, it is possible to see which governmental division of administration was most exposed to legal amendments, or to be more precise, what kind of legal draft acts and documents were discussed at the plenary session of the CLGCC during the first wave of COVID-19.

*Chart 2. Areas of public policy to which draft legal acts and documents relate.*




Source: Own study.

According to chart 2, we can say that, in 2020, draft legal acts and documents prepared by the government came from public finance in the first place. It means that the initial cabinet response to COVID-19 was focused on financial support. Interestingly, it was exactly the same number of draft legal acts and documents as it had been a year before. In second position were draft legal acts and documents devoted to education and regional development. Health policy was only in third place, was which could be surprising, given the scale of threat caused by COVID-19.

The best exemplification of growing centralization during the Covid-19 pandemic was the fact that the most important regulation introducing anti-pandemic measures was not presented at the plenary session CLGCC. The Polish government decided to send the bill directly to the Parliament (Sejm) and asked MPs to act immediately.

However, it is worth underlining that the situation changed in the next year. In the first five months of 2021, the biggest number of draft legal acts and documents were prepared by the cabinet with regard to such policies as spatial planning, environment and, in third place, education. As such, health issues were out of the discussion between central and local government administrations through CLGCC mechanisms. Obviously, cabinet ministers prepared and introduced new measures that allowed many governmental institutions and arms-length bodies to fight against COVID-19, but these were not subject to consultation with self-government representatives.

## Conclusions

This conclusion returns to the analytical taxonomy of the three types of contrasting IGR processes described at the beginning of this paper. It is fair to say that the Polish case shows a centralised policy and implementation of a one-size fit all approach during the first phase of COVID-19. The reason supporting this conclusion is that CLGCC were excluded from the decision-making processes during this time. The number of plenary sessions decreased along with drafts of legal acts and documents presented to the self-government representatives. The decision-making process was fully centralised by cabinet ministers who focused mostly on the hierarchical approach of public management rather than cooperation and coordination with different actors across public administration.

The next wave of the Covid-19 pandemic seems to be quite different in terms of intergovernmental relations. The government found it useful to open channels of communication and increase the role of CLGCC, which could be found in the agenda of the Commission. More opportunities for contacts between central and local/ regional administration gave a window of opportunity to prepare the next round of policy actions in a spirit of mutual cooperation. A new approach was needed because the government decided to implement a territorially focused policy, making it impossible to work in a mode of one-size fits all. For this reason, there was a noticeable change in the government's attitude to the government that allows us to say that it was predominantly a multi-layer policy process involving limited conflict. Having said that, it does not mean that intergovernmental relations worked perfectly. Some conflicts still existed during this time.

The multi-layered approach was exercised by national self-government associations, which focused on the dissemination of best practices and practical knowledge of how members of these organisations dealt with COVID-19. These kinds of actions are very vividly described in the annual reports presented by each association. However, it is not the main area of interest in this paper and can be seen as a research agenda for the next steps.

There is no doubt that this kind of centralised policy reduces the possible outcome of access to local perspectives and the quick feedback that representatives from self-government associations might give. It is hard to say why this way of managing public policies was chosen. Whether it was the time of response that outweighed possible advantages gained from consultation and coordination, or maybe it was the previous experience of strained relations between central and local government' that exerted an influence on those who made decisions on these matters. Despite the possible explanation of this, it is fair to say that, during the first wave of COVID-19, network and multi-level governance were prevented from further development. However, the question of whether it is the best way to tackle such turbulent issues as a pandemic still remains. The importance of this question seems to be very topical when we take into consideration further unprecedented and unexpected challenges that public administration has to face. In the Polish case, the next good example of this could be the occurrence of a huge immigration flow of people from Ukraine, which reached more than 3 million people in the first 10 weeks of fighting. The speed of this event showed that it was a task with which local governments had to face in the first place rather than central government.

## References

Ansell, Ch., Sørensen, E., & Torfing, J. (2021). The COVID-19 pandemic as a game changer for public administration and leadership? The need for robust governance responses to turbulent problems. *Public Management Review*, 23(7), 949–960. https://doi.org/10.1080/14719037.2020.1820272

Bergström, T., Kuhlmann, S., Laffin, M., & Wayenberg, E. (2022). Special issue on comparative intergovernmental relations and the pandemic: how European devolved governments responded to a public health crisis. *Local Government Studies*, 48(2), 179–190. https://doi.org/10.1080/03003930.2022.2039636

Bouckaert, G., Galli, D., Kuhlmann, S., Reiter, R., & van Hecke, S. (2020). European Coronationalism? A Hot Spot Governing a Pandemic Crisis. *Public Administration Review*, 80(5), 765–773. https://doi.org/10.1111/puar.13242

du Boys, C., Betrolucci, M., & Fouchet, R. (2022). French inter-governmental relations during the Covid-19 crisis: between hyper-centralism and local horizontal cooperation. *Local Government Studies*, 48(2), 251–270. https://doi.org/10.1080/03003930.2021.1958786

Callanan, M. (2012). Subnational collective action: The varied patters of mobilisation of local government associations. *Local Government Studies*, 38(6), 753–775. https://doi.org/10.1080/03003930.2012.683863

Cigler, B. (2012). Not just another special interest. In A. Cigler, & B. Loomis (Eds.), Interest group politics (pp. 264–296). CQ Press.

Dirani, M. K., Abadi, M., Alizadeh, A., Barhate, B., Garza, C. R., Gunasekara, N., Ibrahim, G., & Majzun, Z. (2020). Leadership competencies and the essential role of human resource development in times of crisis: a response to the Covid-19 pandemic. *Human Resource Development International*, 23(4), 380–394. https://doi.org/10.1080/13678868.2020.1780078

Dunlop, C. A., Ongaro, E., & Baker, K. (2020). Researching COVID-19: A research agenda for public policy and administration scholars. *Public Policy and Administration*, 35(4), 365–383. https://doi.org/10.1177/09520767209396

Entwistle, T., & Laffin, M. (2003). The multiple strategies of the Local Government Association: partner, player and think-tank? *Policy & Politics*, 31(1), 37–50. https://doi.org/10.1332/030557303321095798

Fay, D. L., & Ghadimi, A. (2020). Collective Bargaining during Times of Crisis: Recommendations from the COVID-19 Pandemic. *Public Administration Review*, 80(5), 815–819. https://doi.org/10.1111/puar.13233

Gabryelczyk, R. (2020). Has Covid-19 Accelerated Digital Transformation? Initial Lessons Learned for Public Administration. *Information Systems Management*, 37(4), 303–309. https://doi.org/10.1080/10580530.2020.1820633

Gawłowski, R. (2015). Komisja Wspólna Rządu i Samorządu Terytorialnego – od konsultacji do współudziału w rządowym procesie decyzyjnym. *Samorząd Terytorialny*, 12/2015, 5–15.

Gawłowski, R. (2020). *Między współpracą a przetargiem i rywalizacją. Relacje rządowo-samorządowe w systemie administracji publicznej*. Wyd. ASPRA JR.

Gawłowski, R. (2016). Relacje rząd-samorząd terytorialny na przykładzie Komisji Wspólnej Rządu i Samorządu Terytorialnego. In T. Astramowicz-Leyk, & A. Żukowski (Eds.), *Samorząd terytorialny we współczesnej Europie. Teoria i praktyka funkcjonowania* (pp. 187–201). Instytut Nauk Politycznych Uniwersytetu Warmińsko-Mazurskiego w Olsztynie.

Hale, T., Angrist, N., Goldszmidt, R., Kira, B., Petherick, A., Phillips, T., Webster, S., Cameron-Blake, E., Hallas, L., Majumdar, S., & Tatlow, H. (2021). A global panel database of pandemic policies (Oxford COVID-19 Government Response Tracker). *Nature Human Behaviour*, 5(4), 529–538. https://doi.org/10.1038/s41562-021-01079-8

Hannah, A., Baekkeskov, E., & Tubakovic, T. (2022). Ideas and crisis in policy and administration: Existing links and research frontiers. *Public Administration*, 100(3), 571–584. https://doi.org/10.1111/padm.12862

Isaac-Henry, K. (1980). The English Local Authority Associations. In G. W. Jones (Ed.), *New Approaches to the Study of Central –Local Government Relationships* (pp. 1–12). Gower.

Jptner, P., & Klimovskỳ, D. (2022). Vertical and horizontal intergovernmental relations during the first wave of the COVID-19 crisis: experience from the extremely fragmented CEE countries. *Local Government Studies*, 48(2), 232–250. https://doi.org/10.1080/03003930.2021.1944858

Kuhlman, S., & Franzke, J. (2022). Multi-level responses to COVID-19: crisis coordination in Germany from an intergovernmental perspective. *Local Government Studies*, 48(2), 312–334. https://doi.org/10.1080/03003930.2021.1904398

Laffin, M., & Entwistle, T. (2000). New problems, old professions? The changing national world of the local government professions. *Policy & Politics*, 28(2), 207–220. https://doi.org/10.1332/0305573002500929

Maladrino, A., & Dmichelis, E. (2020). Conflict in decision-making and variation in public administration outcomes in Italy during the COVID-19 crisis. *European Policy Analysis*, 6(2), 138–146. https://doi.org/10.1002/epa2.1093

di Mascio, F., Natalini, A., & Cacciatore, F. (2020). Public Administration and Creeping Crises: Insights From COVID-19 Pandemic in Italy. *The American Review of Public Administration*, 50(6-7), 621–627, https://doi.org/10.1177/0275074020941735

Navarro, C., & Velasco, F. (2022). From centralization to new ways of multi-level coordination: Spain's intergovernmental response to the COVID-19 pandemic. *Local Government Studies*, 48(2), 191–210. https://doi.org/10.1080/03003930.2022.2042683

Nemec, J., Drechsler, W., & Hajnal, G. (2020). Public Policy during COVID-19: Challenges for Public Administration and Policy Research in Central and Eastern Europe. *NISPAcee Journal of Public Administration and Policy*, 13(2), 11–22. https://doi.org/10.2478/nispa-2020-0011

O'Flynn, J. (2020). Confronting the big challenges of our time: making a difference during and after COVID-19. *Public Management Review*, 23(7), 961–980. https://doi.org/10.1080/14719037.2020.1820273

Petridou, E. (2020). Politics and administration in times of crisis: Explaining the Swedish response to the COVID-19 crisis. *European Policy Analysis*, 6(2), 147–158. https://doi.org/10.1002/epa2.1095

Schuster, C., Wetzman, L., Mikkelsen, K. S., Meyer-Sahling, J., Bersch, K., Fukuyama, F., Paskov, P., Rogger, D., Mistree, D., & Kay, K. (2020). Responding to COVID-19 through Surveys of Public Servants. *Public Administration Review*, 80(5), 792–796. https://doi.org/10.1111/puar.13246

Wayenberg, E., Resodihardjo, L., Voets, J., van Genugten, M., van Haelter, B., & Torfs, I. (2002). The Belgian and Dutch response to COVID-19: change and stability in the mayors' position. *Local Government Studies*, 48(2), 271–290. https://doi.org/10.1080/03003930.2021.1958787

de Widt, D., & Laffin, M. (2018). Representing territorial diversity: the role of local government associations. *Regional Studies*, 52(11), 1585–1594. https://doi.org/10.1080/00343404.2018.1462488

Yan, B., Zhang, X., Wu, L., Zhu, H., & Chen, B. (2020). Why Do Countries Respond Differently to Covid-19? A Comparative Study of Sweden, China, France, and Japan. *The American Review of Public Administration*, 50(6-7), 762–769. https://doi.org/10.1177/0275074020942445

**Legal sources**

Central and Local Government Common Commission Act 2005 (Dz. U. 2005, nr 90, poz. 759).
Division of Governmental Administration Act 2020 (Dz.U. 2020, poz. 1220).

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 1, 99–111
DOI: 10.54201/iajas.v2i2.55

# A conceptual and theoretical framework for deep mediatisation

**Mónika Andok***

* Associate Professor, Pázmány Péter Catholic University, Institute of Communication and Media Studies, Department of Communication Studies. E-mail: andok.monika@btk.ppke.hu,

**Abstract**

Among the processes related to network communication, the study presents the concept of deep mediatisation resulting from digitisation. In the theories related to traditional mass communication (printed press, radio, television), the nature of the process of mediation has been problematic since the 1980s, and some researchers have focused on researching the process of mediatisation instead of the media phenomenon. In this study, I explore the research traditions of mediatisation in terms of both media sociology and cultural theories. While the concept of mediatisation is used to describe traditional mass communication technologies and processes that operate in a classical, analogue way, deep mediatisation is the key word for network communication on a digital infrastructure. After highlighting the differences between traditional mediatisation and deep mediatisation, I present the theory of Couldry and Hepp, which underpins a new kind of social construction theory based on deep mediatisation in the social world.

**Keywords**

datafication, deep mediatisation, digitalisation, mediatisation, social construction.

## 1 Research traditions of mediatisation

The history of media research can look back about a hundred years: it was brought to life by the "new" media of the 1920s: the mass communication possibilities offered by radio and cinema. Up until the 1950s and 1960s, the research approach was dominated by the effect paradigm, which was replaced by the reception theory. In the first case, the effect on consumers was studied by focusing on media content, be it news, movies, radio ads or even soap operas. This approach assumed that media consumers were mostly a homogeneous, passive mass (Andok, 2015b). The emergence and dominance of reception theory from the 1960s coincided with the spread of television, and not by chance: the construction and creation of meaning by the recipient in relation to media content was problematised in this approach. Scholars committed to critical cultural studies, primarily British and American ones, have identified the demographic, social and situational factors that play a role in the meaning-making practices of recipients in relation to media content (Hall, 2007; Ang, 1995; Császi, 2008).

Since the 1990s, there has been a perceivable desire among researchers to revisit questions on the functioning of the media in order to draw attention to the consequences of their use.

They did not define their ideas as effect studies, but they did declare that the presence of the media would have "consequences" in everyday life (Silverstone, 2008; Silverstone, 2010). At the same time, one can see a shift in the focus of analysis and approach in the 1990s, from a static, systemic concept of the media to an analysis of the process of mediatisation. This also means a shift in the concept of the medium, from the position of factum to the position of agent. As British media researcher Roger Silverstone, a prominent figure in the mediatisation approach, put it: "We should think of the media as a process of mediation. Mediation means the movement of meaning from one text to another, from one event to another. The circulation of meaning goes beyond Katz and Lazarsfeld's two-step flow of communication theory. Namely, mediated meanings circulate in a much wider range, in an infinite intertextuality." (Silverstone, 2008, 28).

Silverstone's theory, however, does not aim to describe a different conception of meaning-making from that of reception theory, but to show how the meanings offered by the media and their creation become everyday, mediatised, shared practices and experiences. It is exactly this shared experience that allows us to view the media as a permanent source of existence in community: "The essence of a community lies in the fact that its members interpret things in general, or certain specific and significant things in a similar way, or at least they believe so, and also believe that this interpretation is different from interpretations provided by others. The reality of a community, in people's perception, is thus the result of attachment and commitment to a common set of symbols." (Silverstone, 2008, 117).

All in all, the media or the process of mediatisation plays an important role in defining the ways of everyday being and acting (Silverstone, 2010, 125). Although Silverstone also stresses that mediatisation is a social and a technological process at the same time, his theory focuses on the former. The technological aspect of mediatisation is more clearly developed in Jay David Bolter's and Richard Grusin's remediation theory, inextricably linked to socio-cultural projection, without one aspect being subordinated to the other (Bolter & Grusin, 2011). The American authors argue that a communication technology tool is not a medium in itself – it is the social and cultural practices and functions associated with it that turn it to one: "a medium is what remediates. It takes possession of the techniques and forms of other media, and their social significance, and attempts to compete with them or transform them in the name of the real. The medium in our culture can never function in isolation, because it is in constant contact with other media through respect and rivalry (Bolter & Grusin, 2011, 2). At the same time, in addition to the symbolic, meaning-building function of the media, we cannot forget their material, objective character, since remediation often means social practices that are associated with the (media) means themselves.

Nick Couldry and Andreas Hepp, who have developed a theory of deep mediatisation (Couldry & Hepp, 2017), take four key points from the approaches outlined above and incorporate them into their own concept:

- an emphasis on media as a process, which is essential for understanding the digital software-based, fast-changing, adaptive nature of digital media (Couldry, 2004; Couldry, 2012; Hepp, 2019);
- the extreme embeddedness of the media in everyday life, both in their content-experiential and in their use-object dimensions (Couldry, 2004; Couldry, 2012; Hepp, 2019);
- stressing that the media do not operate in isolation, that it is not the operations and changes of a single medium that are significant, but the interdependence and interconnectedness of the media (Hepp, 2019, 84);
- the objective and material aspects of media tools are as important as their content or the way they are used; the emphasis on the material side is also important in the case of social construction practices.

In the scientific characterization of mediatisation, it is important to note that, since it creates links between different geographical areas, it must be assumed to be trans-local and, in certain cases, transcultural.

## 2 The social constructionist research tradition

To better understand the theoretical roots of deep mediatisation, Couldry and Hepp contextualise their conceptualization in terms of media sociology. They identify the presence of two media research trends in the 2000s, institutional and social constructivist approaches. In the institutional tradition, the media is only one of the social institutions, but it has the capacity to impose its "media logic" on other social institutions. In other words, it does not subjugate other institutions, it does not completely penetrate their functioning; it "merely" forces or encourages them to adopt its own logic in order to be effective and efficient in the sphere of social communication and publicity.

Media logic, in their view, refers to the fact that the forms, genres, organizational rules and technology of the media have an impact on other segments of society (Hepp, 2019, 60–61). In other words, if these social institutions wish to gain social attention through their media presence, they can do so more effectively by adopting the formal elements of media genres and adapting to the requirements of production and technology. For example, to be included in news programmes, they must take into account the logic of news value; the length of the speech and the content elements should be adapted to the formal criteria of the media genre, while the timing of a press conference should follow the daily routine of content creators. It can be seen, therefore, that this approach is rooted in the tradition of mass communication and journalism studies, and, in Hepp's view, originally reflects the thinking of David Altheide and Robert Snow, as well as Stig Hjalvard (Hepp, 2021, 207). The theory of deep mediatisation does not draw on this school of thought, but on the social constructivist approach, although it is repeatedly mentioned that the two schools of thought are not sharply separated (Hepp, 2019, 9).

The social constructivist tradition highlights the role of the media in creating our social reality, our culturally and meaningfully saturated reality. Two researchers who followed in the footsteps of phenomenological sociology, Peter Berger and Thomas Luckmann, published their epochal work, The Social Construction of Reality, in 1966 (Berger & Luckmann, 1998). Their view is that reality is a social product and that the sociology of knowledge studies the process in which this reality is produced. They repeatedly stress their phenomenological starting-point, that the social world is not reducible to material foundations: "no existing social order can be derived from biological endowments; social order itself necessarily follows from the biological constitution of man" (Berger & Luckmann, 1998, 80). Although they acknowledge the presence of ideas and thoughts in societies, they consider them to be only a minor part of social knowledge, because what an ordinary person *knows* about reality is not theoretical but *everyday, commonplace knowledge*. And the media have been the dominant source of this commonplace knowledge since the second half of the 20th century.

The everyday world in and through which social reality is constructed is ordered in space and time. Intersubjectivity is also an important element of constructivist theories. Zoltán Hidas describes the phenomenon from the sociological perspective in this way: "The human world is made human by its meaningfulness, i.e. by its interpreted being, and it is made social by its being interpreted together with others." (Hidas, 2018, 12). The concept of institutionalization plays an important role in the theory of Peter Berger and Thomas Luckmann, and they also describe its process. Any action that is repeated many times is hardened into a model that can be later repro-

duced automatically. We save energy by not having to think through the situation step by step on every single occasion. Institutions are created when actions are typified by actors interacting. (In a purchase situation, the actions of the seller and the buyer are typified. In everyday life, this action becomes also habitualised.) This institutional world is no longer experienced as subjectively created but as an objective world - the fact that we "experience" these institutions as objective reality constitutes a guarantee that we can pass it on to the next generation.

The Berger-Luckmann volume was undoubtedly the most important base for Couldry and Hepp in the development of deep mediatisation, so much so that they even referred to it in the title of their book: *The mediatized construction of reality* (Couldry & Hepp, 2017, 6). By incorporating mediatisation, they emphasise that the media are these days an inescapable element in the construction and maintenance of social reality. This requires an examination of how people use media in everyday life for the most mundane actions, from waking up through counting steps to predicting the weather. From this perspective, the influence of the media has both an institutionalization and a materialization side (Hepp, 2019, 8). Institutionalization means that certain communication patterns become stable; people start to communicate according to the technological capabilities offered by that medium and expect others to do the same. This was the case, for example, with the spread of emojis in the early days of network communication (Wallace, 2015, 32), and Messenger is cited as an example of materialization, which accustomed people to a special form of dialogue.

Through observing these new practices, we can witness that medium-specific forms would emerge in the communicative shaping of the social world. To sum up, one can say that most of our social practices today are medium-bound, from family photo albums through program design to document- sharing. Earlier, these were linked to non-mediatised forms of interpersonal or group communication, whereas today they exist on digital media platforms. We can however even mention school administration, which now replicates the institutional structure in a digital system. This is also to point out that we are witnessing a process of (digital) re-creation in new, media-specific social constructivist practices.

Couldry and Hepp adopt a materialist phenomenological position, which they parallel with Raymond Williams' cultural materialism (Hepp, 2019, 9). According to this view, media and communication research should explore both the material and the symbolic levels of a phenomenon. In other words, it is not only the context materialised in the data that is important, but also the way in which meaning is attributed to it by its users. An example of it from the economy is that the data series for financial products do not mean anything in themselves; they also require people's practices of meaning-creation and meaning-attribution. It is also important to note that, in a period of deep mediatisation, social practices that were not previously associated with media have also become mediatised.

In the period of traditional mass media, in the 1980s and 1990s, we distinguished between social actions and practices that were specifically related to the media world, for example reading newspapers and watching television, and practices that were not in any way related to the media world, such as going on a trip, cooking or playing sports. Nowadays, these also have a media connection through various apps (performance tracking, calorie counting, educational videos). In addition, any social action that requires coordination is (also) medium-linked, and organised through network communication interfaces. In other words, the boundary is blurred between physical and mediated communicative action in areas such as home, communities, work, education, health, economy, public administration, entertainment etc. This is why Couldry and Hepp believe that a renewed practice theory is needed, with sociological foundations reaching back to Anthony Giddens, and in which the process character is highlighted.

In the social constructivist tradition, the technological medium is not an isolated institution (system) within society; it is rather part of the others, integrated into them. Therefore, the medium becomes a powerful agent of the construction of social reality, a shaper of communicative and social practices, and at the same time it institutionalises and objectifies these social practices. The authors incorporate four important elements from social constructivist theory, rooted in phenomenology, into their theory of deep mediatisation:

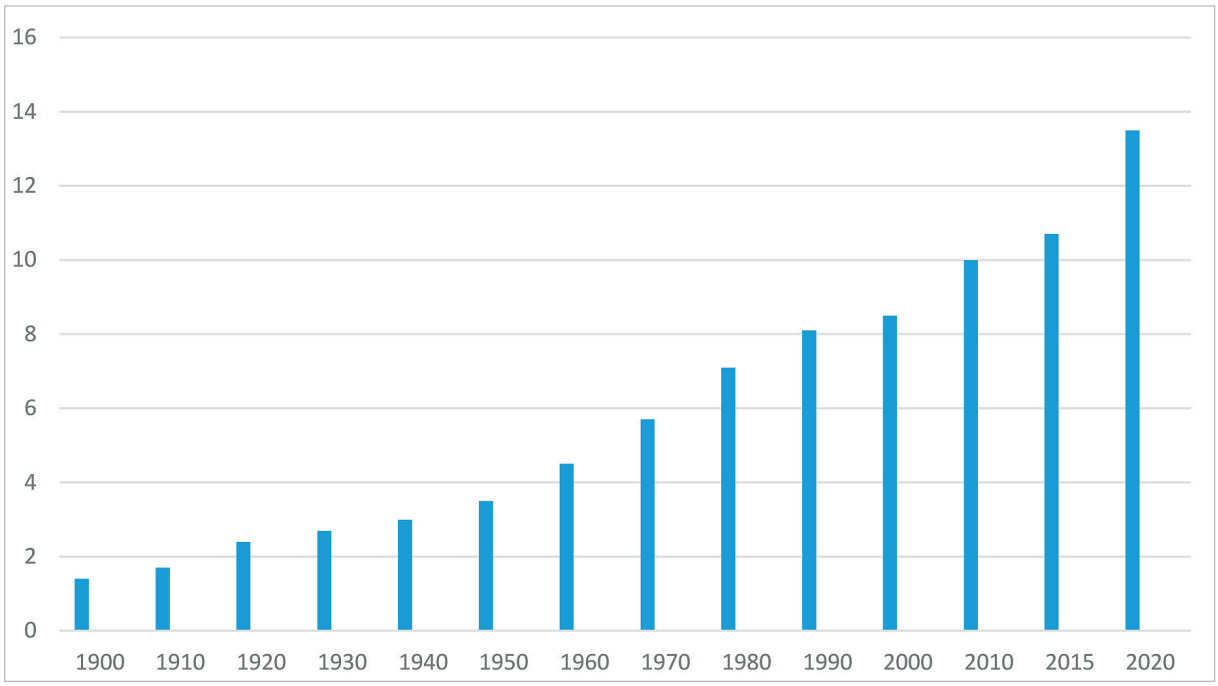
- the reality of the social world and of everyday life is ordered in space and time (Couldry & Hepp, 2017, 81–122), but a third element is added: the concept of data and orderliness according to the data;
- the primacy of everyday knowledge over academic knowledge Couldry & Hepp, 2017, 19);
- intersubjectivity (Couldry & Hepp, 2017, 18);
- the process of institutionalization, and more specifically the involvement of the media in the process of institutionalization (Couldry & Hepp, 2017, 21–24).

In their view, mediatisation (rather than technological determinism or critical technology studies) is the concept within which the relationship between the change in the media and communication and the change in society and culture becomes critically analysable. This phenomenon has qualitative and also quantitative dimensions. The qualitative dimension refers to the role of certain media in socio-cultural changes and explores this both in its theoretical aspects and in the course of empirical research. The quantitative dimension refers to the spatial, temporal and social expansion of mediatised communication. Today, in a world of networked communication, social media, we use digital media for work, learning, playing, shopping and keeping in touch with our family, friends and colleagues.

The COVID-19 epidemic has further reinforced this trend. Previously, media consumption was not available every day, only for a few days a week for a few hours, whereas today it is available 24 hours a day. To achieve deep mediatisation also required people to spend more and more time in front of screens in their everyday lives. This screen time includes not only content consumption, but also time for socialising, working, learning, doing business or shopping. In other words, the tools of media are used for more than one thing and for much longer periods of time each day. In the last 120 years, the time spent consuming media content has seen a tenfold increase. While in 1900, the adult population spent around 1.4 hours a day reading the newspaper; screen time reached 13 and a half hours during the 2020 coronavirus quarantine. The data concerns primarily US adults, but illustrates well the international trend.[1] In 1900 it was 1.4 hours, in 1910 1.7 hours, in 1920 2.4 hours, in 1930 2.7 hours, in 1940 3 hours, in 1950 3.5 hours, in 1960 4.5 hours, in 1970 5.7 hours, in 1980 7.1 hours, in 1990 8.1 hours, in 2000 8.5 hours, in 2010 10 hours, in 2015 10.7 hours; and in 2020, during the quarantine, 13.5 hours were spent in front of screens (see Figure 1). Add to this the change in the frequency of consumption. While at the beginning of the 20th century people read a newspaper once a day, i.e. every 24 hours, in 2020 the number of times people look at their smartphones and check their screen is in a chain, on average, they look at a screen or display every three minutes (Zalani, 2022).

[1] Sources of the data used: The Brand Builder Marketing (2012); Eyesafe Inc. (2020).

*Figure 1: Time allocated for media content consumption and media use, measured in hours per day*




The quantitative dimension in spatial terms refers to the phenomenon that whereas media used to be available in a fixed location (predominantly in the home), today, with the presence of mobile internet they are available from virtually anywhere. And the social practices associated with it are widely observable, both in social spaces and in private spaces.

Theories of mediatisation and social construction are also linked to James Carey's approach to communication, i.e. to the ritual model. According to him, media and communication technology are also culturally embedded, as the human mind has created technological tools to solve various problems and to assist human work. Of course, technology leaves its imprint on socio-cultural organizations, but far from being in a deterministic way or following a causal connection. According to Carey, modern communication has radically changed perception, awareness, interest, and the way we perceive life and the everyday existence of social relations. Deep mediatisation will also influence these areas. One of the tenets of Carey's work is consistent with the ideas of deep mediatisation: the media of communication are not means in terms of will or ends, rather forms belonging to human life, which reproduce our thoughts, actions and social relations (Carey, 2008, 24).

In sum, according to Carey's theory, the study of communication equals the study of genuine social processes that create, give meaning to and make available for social use the symbolic cultural forms that are important to the community. This idea is very close to the idea of mediatised social constructions. The social world, in Hepps' conception, is an intersubjective sphere of human (mediated) experience and social relations, which people not only "encounter" but also participate in maintaining and shaping it through their ongoing interactions. Although the world of everyday life is intersubjectively a social world, this does not mean that it is also homogeneous (Couldry & Hepp, 2017, 19–20).

## 3 The difference between mediatisation and deep mediatisation

The nature of mediatisation has changed fundamentally over the last decade and a half or so, not because of the emergence of a new medium but because of the transformation of the overall media environment. The change in the media environment may be characterised by five trends; these being: (1) differentiation; despite media convergence, we are confronted with an increasing number of media; (2) interconnectedness; (3) ubiquity; (4) innovation and (5) datafication (Hepp, 2019, 41–51). When the British media researcher and his German co-author reviewed the history of technologically mediated communication, they identified four major waves of mediatisation:[2] mechanization, followed by the change brought about by electricity, digitization and finally, datafication (Couldry & Hepp, 2017, 34–57; Hepp, 2019, 5–6).[3]

Of these, mechanization appears in the practice of creating and sharing media content, with the first example being printing books, from 1450. However, the process did not stop there, of course; all the phases of printing presses and telecommunications can be mentioned: the spark-gap transmitter as well as the typewriter. The advent of electronic media gave rise to the second wave of mediatisation, including the spread of radio and television. Thanks to electronics, broadcast content became instantaneous in the media sense, i.e. the time of content distribution and reception coincided. Digitization is the third wave of mediatisation, in which classical media have been transformed in such a way that they no longer resemble the previous devices in terms of their appearance, but have retained their autonomy in terms of content and their image, even if adapted to the digital environment. Digitization and the emergence of datafication, a process of interconnectedness and networking, have given rise to the fourth wave, which also resulted in the emergence of deep mediatisation. Datafication is the conversion of expressions, places and social interactions into real-time and online measurable data, not only to describe social behaviour and its context, but also to anticipate it. In effect, it provides a new way of accessing and understanding human behaviour. This not only means monitoring behaviour, but also enabling planning on this basis (Mayer-Schönberg & Cukier, 2013, 79; van Dijck et al., 2018, 198). Datafication is an automated process, which can be done for purposes going beyond the actual purposes, manifest or latent, of social actors. This challenges classical phenomenology because it only considers people using these means for their own purposes. Along this, the results of the process of datafication will generate certain elements of our social knowledge, knowledge about ourselves, about our communities. Couldry compares this to the science of statistics that emerged at the end of the 19th century, because in that case, too, a new source of knowledge of our communities was added. Nevertheless, the authors consider data as a kind of black box, a tool whose mechanism we do not need to know in order to use it. We have many of these tools, indeed most of them are like this: cars, home lighting, etc., but devices using datafication collect data about their users is a different manner.

The decisive element in the process described above is the emergence of digitization, which has also resulted in the broadening of the media concept. Digital media have not only changed technologically mediated communication, but also many other segments of social reality. We

[2] Coludry and Hepp do not follow the theory of technological determinism, but their definition of eras is identical to McLuhan's division on two points: they separate the era of the printed press (mechanization) and the era of electronics.

[3] These waves are also highligted in the lectures presenting the volume, see The Berkman Klein Center for Internet & Society (2017, 9:22).

can approach this phenomenon in such a way that media are no longer just a medium for communication, but also for social action. The idea of the medium as a vehicle of action makes the procedural character of the media even more obvious (Pólya, 2011; Andok, 2015a). In the everyday use of digital media, use patterns are automatically recorded and stored in data, commonly called digital footprints: the automated nature of the data collection, storage and use process cannot be overemphasised.

Deep mediatisation is a new stage in the process of connecting every aspect of our world to digital media and the infrastructures that power them. As a researcher, it is worth focusing not only on how everyday social practices have been transformed, but also on the role of the big technology companies, such as the big five, i.e. Alphabet, Amazon, Apple, Meta and Microsoft. Couldry and Hepp distinguish three types of actors involved in deep mediatisation: individual, collective (communities, social movements) and organizational ones. The latter include large technology firms, but also public or supranational agencies (Hepp, 2019, 10). Deep mediatisation is not only a phenomenon produced by large companies: ordinary people also contribute to its maintenance through their daily use of media.

Hepp also positions the question of deep mediatisation within German media studies. He suggests that media sociology needs to be broadened and rethought in three key categories: alongside the issues of (1) agency, (2) social order and (3) social relations. In the case of agency, the emphasis is on practice theory (Hepp, 2021, 207). Social order refers to relatively stable patterns of interconnection of individuals, groups and institutions. Hepp mentions two of the theories for describing this new type of social order: one is Shoshana Zuboff's theory of surveillance capitalism (Hepp, 2019, 125), and the other is the framework of data colonialism developed by Couldry and Ulises Mejias (Couldry & Mejias, 2019; Hepp, 2022a). They deal in more detail with the transformation of the world of social relations, attempting to find an adequate form from three directions and incorporate it into the theory of deep mediatisation, which eventually became Elias's concept of figure/figuration.[4]

## 4 The role of figure/figuration in deep mediatisation theory

The authors show three possible frameworks for rethinking social relations: (1) the notion of the network as a theoretical framework (Lee Rainie, Barry Wellmann, Maunel Castells), (2) assemblage theory (Gilles Deleuze, Félix Guattari) and (3) the notion of figuration (Norbert Elias) (Couldry & Hepp, 2017, 57–78; Hepp, 2021, 217–219). They end up with the concept of figuration, because they consider it the most appropriate to describe the new type of complexity that characterises deep mediatisation. It is also possible to include the notion and process of meaning and meaning-making, whereas the network and assemblage are not suitable for this (Couldry & Hepp, 2017, 67).

In Elias's conception, figuration is a model of the processes of interconnectedness, the more or less stable interactions of individuals, in which social meaning is created (Couldry & Hepp, 2017, 63). The Hepps adapt the concept to communicative situations and talk about communicative figurations, which can be grasped along four characteristics:

– Each communicative figuration can be described by a specific constellation of actors; this provides its structural basis;

[4] There is no complete consensus among Hungarian sociologists on the translation of "figuration": some translate it as "figure (alak)", while others opt for "figuration". See Hadas (2014, 108).

- each communicative figuration has a thematic framework that helps and serves to guide its action;
- it is associated with a specific communicative form and a specific communicative practice, indicating whether it is characterised by, for example, reciprocity, virtuality, etc;
- it can also be characterised by a specific set of media used by the actors to operationalise the figuration (Couldry & Hepp, 2017, 66–67).

Communicative figurations are patterns of communicative processes, and as such are rarely linked to a single medium. For example, the public sphere is a communicative figuration, and social organizations also have communicative figurations (the family, the community, etc.) by which they reorganise the social sphere, bringing a new order into it (Hepp, 2013, 623). The figuration of figurations as a communicative pattern emerges through the interaction of three dimensions: the frames of relevance, the media technologies and the pattern of actors and their communicative practices.

During the third and fourth waves of mediatisation, i.e. the period of digitization and datafication, the former social communicative figurations are being partially transformed, i.e. they are undergoing a process of refiguration. The essential difference, however, compared to the previous figurations, is that the new ones also have a data imprint, thus continuously linking the social and the economic process: the social space becomes an economic space at the same time. This means both new types of tensions and increasing interdependence. Existing figurations are being transformed, such as the reorganization of newsrooms, and new figurations, such as platforms, are emerging. Reconfiguration is a structural change, a linking of the figuration (internal perspective) and its interconnections (external perspective). It even appears as a meta-flow, creating a figuration of figurations. Couldry's point here is that the figuration of figurations is both a media infrastructure and a site of meaning-making.

Overall, this change in the media environment, built on new figurations, is identified as a meta-process, in addition to other meta-processes such as individualization, globalization or commodification. In their thinking, deep mediatisation, the continuous contact with media technology, also means the state of being observed. On the one hand, deep mediatisation is a medium created by large technology companies and settled in by users. Technology-based media communication permeates societies, communities and relationships in a manner that also dramatically transforms them. In other words, mediatisation is both a reflection of the changes in the communication system and the social and cultural changes that are taking place as a consequence. Deep mediatisation is a long-term, non-linear, often recursive process (Hepp, 2019, 109).

## 5 Deep mediatisation empirical research

In the last five years, empirical studies of deep mediatisation have also emerged. These have focused on three levels:

- Individual level - changes in habits and coping with everyday life in the new media environment;
- social relations level - analysis of local and social movements, identity, constructions, communication networks;
- social domains - the world of economy, religion, politics, education.

For example, they looked at the number of apps that helped us in our daily lives during the coronavirus epidemic. Not only did they help us to understand the virus and the course of the infection, but also how we should deal with it, how we should try to overcome the situation. Many of the solutions were also media-related (distance learning and work, online shopping) (Hepp, 2022b).

It raises the question of how one can govern effectively and legitimately in an age of deep mediatisation, and how a society can remain governable when, in a world of new communicative figurations, decision-making about our social world is delegated to the level of technology, whether intentionally, unintentionally or willingly. What kind of public sphere can we talk about in a technological arena where, for example, 15 percent of online political conversations in the 2016 US presidential election campaign were related to chatbots (Hepp, 2019, 130)? Empirical research has also pointed to the potential for discrimination by the way data categorise us, as the dominant purposes of data use are linked to economics, marketing and surveillance (Couldry & Hepp, 2017, 131, 206–212).

The deep mediatisation can be seen in the online event spaces. In their research on the squares of Leipzig and Bremen, Andreas Hepp, Piet Simon and Monika Sowinska have analysed what mediatisation means for young people in their everyday urban environment, in terms of their perception and construction of community. The sixty in-depth interviews with young people aged 16–30 revealed practices such as how the city becomes a context for collective action through organizing action on social media sites, how events are continuously "monitored" and then real-time actions adapted to it, how continuous group communication can be characterised, or how virtual communication space is linked to real space as a place of encounter (Hepp et al., 2018, 51–80).

## 6 Summary

Couldry and Hepp set out to describe the process and theoretical framework of the data-based new deep mediatisation enabled by digitization. In deep mediatisation, we construct our social reality in everyday life, relying on digital media, and its elements are institutionalised. Deep mediatisation is a process that is technologically based on digitization and datafication - they ensure that, for the social reality we construct together, with digital media as its support, interface and source, not only construction process is completed but it is also to be imprinted in data. This datafication is then also a source for the creation of new or renewed social figures/figurations. Communicative figurations can be rewritten and can also appear at the meta-level, making deep mediatisation a highly complex, non-linear process.

Out of research tradition, they draw from mediatisation and social constructivist theories. From the former, the emphasis on the process nature of media, the embeddedness of media in everyday life, the interaction and interconnectedness of media and the objective and material aspects of media tools have been highlighted, while, from the theory of social constructionism, based on phenomenology, the spatial, temporal and data ordering of everyday life, the primacy of everyday knowledge, intersubjectivity and the process of institutionalization have been highlighted. In addition, their main resource is Elias's concept of figuration. However, in addition to media sociology, some names from the field of culturalist media studies are mentioned, such as Daniel Dayan and Elihu Katz whose work on media events is referred to, and they think it would be worth updating their insights on television to the world of network communication

(Dayan & Katz, 1992).[5] It is worth pointing out that what the notion of figuration has meant from the point of view of media sociology is very close to that of imagination, introduced in cultural studies by Charles Taylor, which he links to the question of modernity. The Canadian philosopher emphasises that modernity has general structural features (market economy, suffrage) that are ubiquitous and pervade modernising societies. On the other hand, the experience of modernity makes different cultural and social practices possible, i.e. modernity is not synonymous with social structures, economic structures, political institutions or technical and technological modernization, but also includes culturally patterned ideas and social imaginaries, related to everyday social life. On this basis, modernity is a cultural system, i.e. cultural meanings, concepts, local models of everyday life, knowledge and practice (Taylor, 2007).

To mention a criticism of the theory of deep mediatisation: it does not (so far) address the question of legitimation, although, in Berger-Luckmann's theory, questions of institutionalization and legitimation are closely linked. The institutional world needs continuous legitimation, possibilities to explain and justify the existence of an institution. The function of legitimations is to make already institutionalised, primary objectifications objectively accessible and subjectively foreseeable. In this way, legitimation becomes in effect a secondary objectification. In their theory, the Bergers also anticipate that, in most societies, alternative symbolic worlds may emerge, which are competing definitions of reality. In the clashes between these worlds, the question of power always arises: it is always the power rather than the genius of the legitimators that determines which of them wins. Their competition is decided by interests beyond theory. In modern pluralistic societies, this means in everyday life that "they contain certain basic elements of a common intellectual world that prevail with the nature of certainty, but beyond this there are further partial worlds of meaning, which coexist in a state of mutual agreement" (Berger & Luckmann, 1998, 174). Add to this the fact that, in the 21st century, these legitimation processes and clashes are not only reflected and mediated by the media, but also shaped by the media in the deep mediatisation processes.

## References

Andok, M. (2015a). Média mint gyakorlat. In Aczél, P. (Ed.), *Műveljük a médiát!* (pp. 33–38). Wolters Kluwer. Online: https://bit.ly/3Hvtfas

Andok, M. (2015b). Médiahatások. In Aczél, P. (Ed.), *Műveljük a médiát!* (pp. 97–132). Wolters Kluwer. Online: https://bit.ly/3Hvtfas

Andok, M. (2017). *A kommunikáció rituális elmélete.* Gondolat.

Ang, I. (1995). A Dallas és a tömegkultúra ideológiája. *Replika*, 6(17–18), 201–214.

Berger, P. L., & Luckmann, T. (1998). *A valóság társadalmi felépítése. Tudásszociológiai* értekezés. Jószöveg Műhely.

Bolter, J. D., & Grusin, R. (2011). A remedializáció hálózatai. *Apertúra,* 6(3). Online: https://bit.ly/3Yg7wZQ

Carey, J. W. (2008). *Communication as Culture, Revised Edition. Essays on Media and Society (2nd ed.)*. Routledge. https://doi.org/10.4324/9780203928912

Couldry, N. (2003). *Media Rituals: A Critical Approach.* Routledge.

Couldry, N. (2004). Theorising media as practice. *Social Semiotics*, 14(2), 115–132. https://doi.org/10.1080/1035033042000238295

[5] The idea has already been partially updated, see Couldry (2003), Couldry et al. (2009), Andok (2017).

Couldry, N. (2012). *Media, Society, World.* Polity.
Couldry, N., & Hepp, A. (2017). *The Mediated Construction of Reality*. Polity.
Couldry, N., Hepp, A., & Krotz, F. (Eds.) (2009). *Media Events in a Global Age*. Routledge. https://doi.org/10.4324/9780203872604
Couldry, N., & Mejias, U. (2019). *The Costs of Connection. How Data Is Colonizing Human Life and Appropriating It for Capitalism.* Stanford University Press. https://doi.org/10.1515/9781503609754
Császi, L. (2008). Médiakutatás a kulturális fordulat után. *Médiakutató*, 9(3), 93–108. Online: https://bit.ly/3PkIqF7
Dayan, D., & Katz, E. (1992). *Media Events: The Live Broadcasting of History*. Harvard University Press. https://doi.org/10.4159/9780674030305
van Dijck, J., Poell, T., & de Waal, M. (2018). *The Platform Society. Public Values in a Connective World.* Oxford University Press. https://doi.org/10.1093/oso/9780190889760.001.0001
Eyesafe Inc. (2020, March 28). *COVID-19: Screen Time spikes to over 13 hours per day according to Eyesafe Nielsen estimates.* Online: https://bit.ly/3BtVGlc
Hadas, M. (2014). Erőszakkontroll és intimitás. Kritikai adalékok Norbert Elias civilizációelméletéhez. *Erdélyi társadalom*, 12(2), 97–122. https://doi.org/10.17177/77171.151
Hall, S. (2007). Kódolás – dekódolás. In Angelusz, R., Tardos, R., & Terestyéni, T. (Eds.), *Média, nyilvánosság, közvélemény* (pp. 131–143). Gondolat. Online: https://bit.ly/3Pidjdz
Hepp, A. (2013). The communicative figurations of mediatized worlds: mediatization research in times of the 'mediation of everything'. *European Journal of Communication*, 28(6), 615–629. https://doi.org/10.1177/0267323113501148
Hepp, A. (2019). *Deep Mediatization*. Routledge. https://doi.org/10.4324/9781351064903
Hepp, A. (2021). Media and communication. In B. Hollstein, R. Greshoff, U. Schimank, & A. Weiß (Eds.), *Soziologie — Sociology in the German-Speaking World.* Special Issue Soziologische Revue 2020 (pp. 211–226). De Gruyter Oldenbourg. https://doi.org/10.1515/9783110627275-015
Hepp, A. (2022a). Agency, social relations, and order: Media sociology's shift into the digital. *Communications*, 47(3), 470–493. https://doi.org/10.1515/commun-2020-0079
Hepp, A. (2022b). Digital media, data infrastructures, and space. The refiguration of society in times of deep mediatization. In G. B. Christmann, H. Knoblauch, & M. Löw (Eds.), *Communicative Constructions and the Refiguration of Spaces. Theoretical Approaches and Empirical Studies* (pp. 57–75). Routledge. https://doi.org/10.4324/9780367817183-6
Hepp, A., Simon, P., & Sowinska, M. (2018). Living together in the mediatized city: The figurations of young people's urban communities. In A. Hepp, A. Breiter, & U. Hasebrink (Eds.), *Communicative Figurations. Transforming Communications in Times of Deep Mediatization* (pp. 51–80). Springer. https://doi.org/10.1007/978-3-319-65584-0_3
Hidas, Z. (2018). *Törékeny* értelemvilágaink. *A világalakítás rendje és szabadsága.* Gondolat.
Mayer-Schönberg, V., & Cukier, K. (2013). *Big Data. A Revolution That will Transform How We Live, Work and Think.* Houghton Mifflin Harcourt.
Pólya, T. (2011). A médium mint cselekvési közeg. Médiumelméleti nézőpontváltás a technológiai determinizmus után. *Replika*, 76, 51–74.
Silverstone, R. (2008). *Miért van szükség a média tanulmányozására?* Akadémiai Kiadó.
Silverstone, R. (2010). *Médiaerkölcs. A médiapolisz felemelkedése.* Napvilág.
Taylor, C. (2007). *A Secular Age*. Belknap. https://doi.org/10.4159/9780674044289
The Berkman Klein Center for Internet & Society. (2017, October 23). *Deep Mediatization: Social Order in the Age of Datafication* [Video]. YouTube. Online: https://bit.ly/3UZQ9Kg

The Brand Builder Marketing. (2012, March 12). Strategy Reminder: Shifts in Global Media Consumption. Online: https://bit.ly/3Bty1kY

Wallace, P. (2015). *The Psychology of the Internet.* Cambridge University Press. https://doi.org/10.1017/cbo9781139940962

Zalani, R. (2022). *Screen Time Statistics 2021: Your Smartphone is Hurting You*. Online: https://bit.ly/3FJlvjO

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 112–131
DOI: 10.54201/iajas.v2i2.51

# Judicial Review of COVID-19 Restrictive Measures in the Czech Republic

**Šimon Chvojka*, Michal Kovalčík****

* PhD student at Masaryk University, Faculty of Law. E-mail: simon.chvojka@mail.muni.cz
** Master's student at Masaryk University, Faculty of Law. E-mail: michalkovalcik@mail.muni.cz

## Abstract

The courts ought to be active players during the pandemic crisis to prevent the abuse of power, enhance the quality of the measures taken and their communication and contribute to increasing their legitimacy. The paper focuses on the Czech Constitutional Court and the Supreme Administrative Court (together with regional administrative courts) and assesses whether they lived up to this role. We found that the Constitutional Court was a passive player, which resulted from insufficient procedural legal norms and a formalistic approach by the court itself. On the other hand, the Supreme Administrative Court was – mainly due to a special procedural framework – an active player. Its case law has a real impact and prevents the executive power from making some faults, such as an obvious lack of legal basis or clearly insufficient reasoning.

## Keywords

judicial review, COVID-19, restrictive measures, Constitutional Court, Supreme Administrative Court, Czech Republic.

## Introduction

The COVID-19 pandemic has been a challenge for many state institutions. Even though the executive has stood in the spotlight, the courts have not stayed out. This paper focuses on the judicial branch in the Czech Republic and its activities from the beginning of the pandemic until the end of 2021. The task laid on judicial shoulders was not easy. Relevant legal regulation either lacks any provision at all for judicial oversight or it provides them in a sub-optimal matter. Based on the analysis of the legal framework, case law, and normative ideals, this article answers the question of how the judiciary in the Czech Republic lived up to its role.

The article is divided into four main parts. The first provides a brief overview of applicable legal regulations in the Czech Republic for imposing restrictions. The second part is more theoretical and discusses the ideal approach of courts in times of pandemic. We argue that courts should not stand behind the scenes but should play an active role.

The following two parts focus on two courts, which played a key role at some stage of the pandemic in the Czech Republic – the Constitutional Court (hereinafter: CC) and the Supreme Administrative Court (hereinafter: SAC) together with the lower administrative courts. We describe their actual stand and actions stemming from their judgments and, consequently, com-

pare them with the ideal theoretical approach presented in second part. Finally, we conclude that the CC has been a passive player, which results from insufficient procedural legal norms and a formalistic approach by the court itself. On the other hand, we deem the SAC – mainly due to special procedural framework and its pro-active interpretation – to be an active player.

## 1 The Czech legal regulation of the pandemic management

The legal regulation on which the restrictions can be based is divisible into three categories. The first one is a framework triggered by a declaration of a "general" state of emergency and authorising the government (and some other authorities) to issue crisis measures pursuant to the Crisis Management Act.[1] The second is a common legal framework (regardless of a state of emergency), enabling the Ministry of Health to adopt measures to combat an epidemic. Finally, the third is a state of pandemic alert, which is governed by a special act and was adopted specifically because of the COVID-19 pandemic. We now introduce these regimes in greater detail.

From the beginning of the pandemic until February 2021, the government could rely only on the state of emergency regulated by the Security Act,[2] Crisis Management Act, and on the general legal framework represented by the Public Health Act.[3]

The state of emergency can be declared "if the Czech Republic's sovereignty, territorial integrity or democratic foundations are directly threatened, or if its internal order and security, lives, health or property are to a significant extent directly threatened, or if such is necessary to meet its international obligations on collective self-defence"[4] for a maximum of 30 days. A possible extension is subject to prior approval by the Chamber of Deputies. The Chamber may also annul the declaration. While in the state of emergency, the government may, upon its resolution (a crisis measure), for the necessary time and to the strictly required extent, restrict fundamental rights and freedoms specified in Article 5 of the Crisis Management Act. These include freedom of movement, the right to assemble and the right to strike.

Together with these crisis measures, or while not in a state of emergency, the Ministry of Health may issue, according to the Sec. 69 of the Public Health Act, an emergency measure. That enables the ministry to, for instance, prohibit or restrict contact between individuals suspected of being infected and other individuals, cultural or sports events, and hotels and restaurants. It also grants a power to "prohibit or order certain other activities to eradicate an epidemic or the risk of an epidemic."

In February 2021, the Pandemic Act[5] was passed. The main reason for the adoption of the specific act for the pandemic was political pressure from the opposition to abandon the state of emergency and to provide the government with sufficient legal basis for the necessary restrictions outside of the state of emergency. This act empowers the Ministry of Health to issue emergency measures with prohibitions and orders specified in § 2 (2) therein. That specifically includes restricting public transport or businesses, the prohibition of organising public or private events, restriction of universities, ordering the use of protective gear, etc. The Pandemic

[1] Zákon č. 240/2000 Sb., krizový zákon. English version is available at https://bit.ly/33G2vlE.

[2] Ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky. English version is available at https://bit.ly/3fxbyI7.

[3] Zákon č. 258/2000 Sb., o ochraně veřejného zdraví.

[4] Article 2 (1) of the Security Act.

[5] Zákon č. 94/2021 Sb., o mimořádných opatřeních při epidemii onemocnění COVID-19. This act was amended by zákon č. 39/2022 Sb. In this paper, we refer to the unamended version, unless stated otherwise.

Act also provides for judicial oversight by administrative courts, which will be described in detail further on in this paper. These authorisations should have been valid until February 2022; however, they were extended until November 2022.[6]

## 2 The role of courts during the pandemic from a theoretical perspective

States exist to advance the well-being of their members; it is their main purpose (N. Barber, 2012, 56). To specify this aim regarding the pandemic situation, the well-being of all citizens in this case can be materialised as stopping the spread of a contagious disease while having the least possible impact on the economy as well as on fundamental rights. A modern democratic state with the rule of law is thus expected to fulfil its negative and positive obligations to individuals. It must refrain from infringing their fundamental rights and shall also conduct itself actively in such a way that these rights (particularly the right to protection of life and health) are not endangered by someone or some other event or phenomenon and that these rights can be fulfilled as much as possible. In other words, the state must pay attention not only to "freedom from" but also to "freedom to" (Berlin, 1969, 130–135). Therefore, the view asserting the ideal of state action during the pandemic as the non-issuance of any restrictive measures goes very against these principles of a modern democratic state. If the state did not issue any restrictive measures, it would fulfil its negative obligations but would completely fail in the area of positive obligations (Eichler & Sonkar, 2021).

If state power is exercised through the bodies of the legislative, executive and judicial branches, the well-being of all citizens must be the common aim of all of them, and these obligations must be fulfilled together by all three powers. The purpose of the division of power is not only to protect negative freedom – to protect against the concentration of power in the hands of one tyrant – but also to increase the effectiveness of governance in the broadest sense, by dividing individual competencies according to which branch seems most appropriate to exercise such competence (N. W. Barber, 2018, 56; see also Waldron, 2012, 24). While the legislature provides space for the input of amateurs (in the sense of opposition to experts) with a wide variety of opinions and it sets the direction of individual policies (N. W. Barber, 2018, 59), executive bodies have a wide range of expertise in specific policy areas and are expected to take concrete steps based on the direction set by the legislature, including the identification of various techniques. The executive is the only one with the power to enforce the outputs of legislation and the judiciary. The judiciary complements the entire triad – it exists to resolve legal disputes between the two parties and to interpret the law (N. W. Barber, 2018, 60; Shapiro, 1986, Chapter 1). Its main advantage over other branches is the impartiality and independence required by their social function (Shapiro, 1986, Chapter 1). In short, from Parliament, we expect an amateur discussion in conflicts of interest, expertise and managerial skills from the executive, and legal skills based on legal knowledge, methodology and argumentation from the courts.

We argue that, during the pandemic, the courts should grasp their role in managing it and be active players in the system of the separation of powers. The court's active approach means, generally speaking, that they employ their powers as much as they are able to do so according to the respective legal framework. Either an active or passive approach manifests itself especially in the interpretation of vague, indefinite legal terms as will be described in the following

[6] Point 49 of the zákon č. 39/2022 Sb.

chapters. The active court does not look for an opportunity to dismiss the case, but on the contrary, seeks ways in which it can live up to its constitutional role in the system of the separation of powers. The active court does not avoid answering questions and solving legal (i.e. neither medical, nor epidemiological, nor sociological) problems. Where there is a legal way, there must be a will.

That being said, we argue that courts should be active but not too activist. They must take into account the specifics of the exceptional situation, and the adequacy of individual measures should be assessed according to what the competent authorities could and should have known at the time the measure was adopted (Ondřejek, 2020, 624). Federico Fabbrini presented the concept of a *dynamic model* of the role of courts in emergencies based on empirical examples (Fabbrini, 2010). The onset of a crisis is usually characterised by a lack of information and very short interferences with rights, hence courts should be more reluctant to review the status quo. If the crisis lasts longer, there will be more information, including scientific knowledge and encroachment of fundamental rights is likely to become more serious as a result of lengthening time. With this, the role of the courts is gradually changing, from a more restrained one to being an active actor (Fabbrini, 2010, 693–696). We consider this model to be applicable to the role of courts in the COVID-19 pandemic.

Too activist approach – that disregards the specifics of a pandemic and interfere with the expertise of the other branches – exceeds the role of courts in the separation of powers. Courts do not have the expertise in the field of pandemics to review the suitability or necessity of declaring a state of emergency – and it can also bring unintended side effects. Jenkins observes, based on the decisions of the US and Canadian Supreme Courts and the British House of Lords, that overly activist pro-human rights judgments have provoked other branches of power and led to an extension of executive powers or reduced the impact of court decisions (Jenkins, 2014, 91). The road to hell is paved with good intentions.

Accordingly, courts should employ their instruments to fulfil their role in the system of the separation of powers and try to resolve very and only legal questions – not medical, epidemiological, sociological or similar issues. Three principal grounds lead us to this claim. The active approach is able to (1) prevent the abuse of power; (2) enhance the quality of the measures and their communication; and (3) contribute to increasing the legitimacy of measures. Now we elaborate on these three reasons in more detail.

(1) *Prevention of power abuse*. Justice Jackson, in his famous dissenting opinion on the US Supreme Court ruling in the Korematsu case against the United States, approving the internment of Americans of Japanese descent during World War II, stated – regarding the crisis legal framework – it was "a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need".[7] A pandemic crisis has become (not only) such a loaded weapon for populist governments acting as an excellent pretext for them to consolidate power and, according to some authors, potentially leading to massive violations and redrafting of the local and global political order (Eichler & Sonkar, 2021). It is an opportunity through technocratic tools (transfer of responsibility to politically unaccountable experts – virologists or epidemiologists), populist tools (polarising and national rhetoric, neglecting minorities) and anti-democratic (weakening the role of parliaments, strengthening the executive, silencing the opposition and civil society) to misuse their power (Guasti, 2020, 48). Maerz et al. empirically show these inclinations in their research into 143 countries – democratic standards have fallen

[7] Dissenting Opinion of Justice Jackson, Korematsu v. United States, 323 U.S. 214 (1944).

in 83 of them during the pandemic (Maerz et al., 2020). In this regard, courts ought to use their power to ensure that governments do not use the often vague wording of crisis laws and do not rule with their decrees – in the words of the European Court of Human Rights (hereinafter: ECtHR) – "beyond the extent strictly required by the exigencies of the crisis".[8] If this is not the case, arbitrary rule, which threatens not only democracy but – maybe more importantly – the individual rights of citizens, will emerge. Although there is a new government in the Czech Republic which is not deemed populist as was the previous (see e. g. Havlík, 2019), that changed nothing regarding the necessity of an active courts' approach. Therefore, the courts should prevent such a government from receiving a *carte blanche*, leading in the worst case scenario to a long-term violation of fundamental rights.

(2) *Enhancing the quality of the measures and their communication*. The unprecedented pandemic forced governments to react quickly. Individual steps are usually taken not only within time constraints but also under pressure from various interests. It is therefore not surprising that, euphemistically speaking, they are not usually legislatively and technically perfect, nor adequate in their justification. The measure is often the result of a debate between epidemiologists or virologists, not legislative experts. Here, however, comes the role for courts with skills and expertise in the legal field. Judges are not experts on epidemiological issues, but they are experts on legal issues. Legality represents their daily bread. The judicial role in a pandemic thus lies in helping the government to improve these measures so that they will respect the principles of the rule of law and cannot violate fundamental rights. Courts can also help to interpret disputed measures, fill in their gaps and so on. They can contribute to a "clearer situation".

Although court rulings are by their nature related to a case from the past, the effects and implications of these verdicts are primarily aimed at the future (N. W. Barber, 2018, 62). The case law can be beneficial for the government to set future measures – if it recognises that some measures will not pass due to specific shortcomings, it will naturally help the government to define the limits of future measures (Wiley & Vladeck, 2020, 195), and not only the limits but also the way in which government actions communicate. As Wiley and Vladeck observe, the judiciary would force the government to "do its homework" – that is, to communicate not only the purposes of its regulations but also how exactly these regulations relate to those purposes (Wiley & Vladeck, 2020, 195). In other words, it is not only about noble goals but also noble (or at least justifiable) means to achieve them. This is all the more true in the Czech Republic, where the justification of the measures and the way they have been communicated are among the largest deficits in our pandemic management (see Vikarská, 2020; Vikarská, 2021; Wintr, 2020, 295).

(3) *Increasing the legitimacy of measures*. The legitimacy of government actions is closely related to their justification and legislative-technical measures. Trust in government and in its actions embodies an essential determinant of citizens' compliance with the measures (Bargain & Aminjonov, 2020, 12).[9] This is crucial given the nature of this crisis situation. Maerz et al. point to the lack of the oft-cited correlation between "firm hand rule" and pandemic management (Maerz et al., 2020). Bargain and Aminjonov, on the other hand, find this correlation among governments with greater public confidence (Bargain & Aminjonov, 2020, 13). The role of the courts in respect of the legitimacy of measures lies in improving their quality and justification, as explained in the previous point, but also in their specific societal role as independent and

[8] Ireland v. United Kingdom, app. no. 5310/71, § 207; Sakik and others v. Turkey, app. no. 23878-23883/94, § 44.

[9] See also judgment of the CC from 9. 2. 2021, no. Pl. ÚS 106/20, para. 94. All judgment of the CC are available in Czech from www.nalus.usoud.cz.

impartial arbitrators (Shapiro, 1986, Chapter 1). If a particular disputed measure is reviewed by independent and impartial arbitrators – moreover enjoying the greatest public trust in the Czech Republic in the long term within the political system[10] – such a measure will naturally gain greater legitimacy in the event of positive court approval (Petrov, 2020, 80). Overcoming any other institutional obstacle can only increase the legitimacy of certain acts (Petrov, 2020, 80).

To sum up, only the joint action of all three powers for a common goal – which we define as stopping the spread of a contagious disease with the smallest possible impact on the economy as well as on fundamental human rights – can lead to the most effective measures in a democratic state under the rule of law. Courts should not stand behind the scenes but should play an active role. In the next parts, we assess whether the Czech courts have been met these requirements. The next chapter starts with the CC.

## 3 The Constitutional Court

According to the Article 83 of the Constitution, the CC is "the judicial body responsible for the protection of constitutionality". Apart from an abstract review of laws, every person may submit a constitutional complaint to the court. The complaint is an extraordinary remedy and can be filed "against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms".[11]

Decisions of the CC were crucial during the first year of the pandemic, as the Czech Republic was in a state of emergency for most of it. Their importance stemmed from the vagueness of the applicable norms, the absence of norms for judicial oversight and the exceptional nature of the situation. It was the first time that a nationwide state of emergency had been declared in the Czech Republic. Previously, such state had involved only some regions for a short period of time as a response to natural catastrophes. As a result of this, those affected did not seek judicial protection directly against the measures. However, the pandemic is an entirely different scenario. As a response, some people demanded a review of the constitutionality of the declaration of the state of emergency and of the adopted crisis measures affecting their human rights.

There were two significant issues that needed to be clarified at the level of constitutional law, since the applicable laws did not provide any answer: (1) whether the courts (and if so, which) had the jurisdiction to review the constitutionality of the state of emergency declaration; and (2) whether the courts (and if so, which) had the jurisdiction to review the crisis measures.

The CC concluded that both are reviewable by the courts. However, the CC's approach was not consistent with our definition of the court's role in the pandemic.

### 3.1 Declaration of the state of emergency

As far as the declaration of the state of emergency is concerned, the CC exhibited great self-restraint and called it an "act of governance", which is not reviewable in abstract by courts in general.[12] The main supervision is provided by the Chamber of Deputies, which may – at any time – annul the declaration according to the Article 5 (4) of the Safety Act.

---

[10] Among all state's principal institutions (i.e., apart from municipalities and regions), only army and police are holding greater public trust (CVVM, 2020; CVVM 2021a; CVVM 2021b; CVVM 2021c).

[11] Article 87 (1) (d) of the Constitution.

[12] CC, dated 22 April 2020, ref. no. Pl. ÚS 8/20, para. 26.

The CC ruled that it is not competent to hear such a motion, because it lacks jurisdiction. That is because the declaration is an "act of governance", staying out of judicial review (but within parliamentary control), and the Constitution does not foresee any procedure for such an act.[13] Nevertheless, the judgment concurrently mentions that the absence of competence is not absolute, and the CC could intervene if the declaration "was contrary to the fundamental principles of the democratic rule of law and would entail a change in the essential elements of the democratic rule of law."[14] In other words, the CC generally lacks jurisdiction except in cases of a flagrant breach of the rule of law or the state's international commitments. The majority opinion does not list any examples of such situations. According to dissenting judges, the CC should review the declaration if the state of emergency was declared for different reasons than the laws allow,[15] if it was declared arbitrarily or if it was just an excuse for seeking other goals (removal of the obligation of public procurement law, intimidation of opposition etc.).[16]

One of the dissenting judges, Milada Tomková, noted that only a competent court can hear cases and by stating its lack of jurisdiction, the CC surrendered its competence altogether in all cases.[17] We agree with her critique, as this approach is inconsistent and also brings some practical problems (e. g. the necessity to assess the legality of the state of emergency as a preliminary question by the ordinary courts when hearing cases about the legality of following measures) (for more detail see Kovalčík, 2021, 654; Vikarská, 2020). Some authors, however, commend this approach (Horák et al., 2021).

It could be concluded that the CC did grant the executive (and legislative) power considerably large space in this issue. As one of the concurring opinions aptly notes: "it is not a task of the judicial power in this situation to assess the relevance of infected persons, possibilities of spread of the virus, the impact on lives, health, property, etc."[18] However, according to us, this space is too large and does not go hand in hand with its role in the system of the separation of powers. The CC should have retained the power to review the procedural aspects of the declaration (regardless of the manifest breach of the rule of law during the process) as well as a gross misuse of discretion during the declaration (amounting to the breach of the rule of law) – of the dissents hint.

The proposed approach could be equated to the ECtHR while scrutinising derogations under Article 15 of the ECHR. The ECtHR reviews not only the procedural part of derogation, but also the existence of "war or other public emergency threatening the life of the nation" (Jovičić, 2021). However, as the court itself states, the assessment of whether such a situation has arisen is a matter for the national authorities, and states enjoy a wide margin of appreciation (Schabas, 2015, 596).

The possibility to review the procedural aspects became crucial during the spring of 2021. The Chamber of Deputies did not approve the government's proposal to prolong the state of

---

[13] Ibid., para. 32; the same conclusion is also in subsequent decisions, see e. g. CC, dated 12 May 2020, ref. no. Pl. ÚS 11/20, para. 21.

[14] CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 27.

[15] Dissenting opinion of Radovan Suchánek to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 6.

[16] Dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 6.

[17] Dissenting opinion of Milada Tomková to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 9.

[18] Dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 2.

emergency, which should have therefore ended on 14th February 2021. The government however decided to declare a "new" state of emergency, which directly followed the previous one. It argued that the county governors asked it to do so, and that establishes the new legal reason for the declaration.

A group of senators challenged this declaration in front of the CC. In its judgment, the court declined to review the declaration following its previous jurisprudence. In its opinion, it did not fulfil the necessary threshold for review,[19] and therefore it dismissed the application as one over which it had no jurisdiction. But on the other hand, as *obiter dictum*, the CC concluded that the government's approach was in fact unconstitutional. It specifically noted that "unless the facts under which the state of emergency was declared have changed, it cannot be 'redeclared' by the government from the moment the 'authorised' state of emergency has ended, and the Chamber of Deputies has not agreed to its extension".[20] In other words, even though the CC, in the reasoning found the merit unconstitutional, it dismissed the case because its unconstitutionality was not enough.

### 3.2 Crisis measures

The restrictions of basic rights themselves during the state of emergency were imposed via crisis measures (for details, see chapter II). Even though the declaration itself should include restricted rights and their scope,[21] the CC held that they could be set out in subsequent crisis measures.[22]

As far as the legal nature of the crisis measure is concerned, the CC found that it is not a "statute", but it has the nature of "some other enactment".[23] This conclusion has far-reaching consequences – it can only be annulled with *erga omnes* effect by the CC in special proceedings, which only privileged applicants may initiate. As a result, that entailed the *de facto* impossibility of abstract judicial review by the CC due to the cumulative effect of the following:

(1) the crisis measures were frequently updated (the average validity of crisis measure adopted from 30th November 2020 until 13th February 2021 was 25.7 days) (Chvojka, 2021, 20);
(2) the process set out by the CC Act[24] for abstract legal review is not constructed for quick intervention by the CC [it has to give the government 30 days to reply[25] and the crisis measure must be valid at the time of application (or the application is inadmissible[26])];

[19] CC, dated 16 March 2021, ref. no. Pl. ÚS 12/21, para. 20.

[20] Ibid., para. 22.

[21] See Article 6 (1) of the Security Act, which stipulates that "*Concurrently with its declaration of the state of emergency, the government must specify which rights* […] *shall* […] *be restricted*".

[22] CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 28 and 29.

[23] Article 87 (1) of the Constitution. CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 45. Newest case law considers this conclusion as stemming from "settled case law" – see CC, dated 11 May 2021, ref. no. Pl. ÚS 23/21, para. 10. However, it is necessary to assess the nature of crisis measures in each case. Some measures were found to be "an act of a purely internal nature" – see CC, dated 26 January 2021, ref. no. Pl. ÚS 113/20, para. 9.

[24] Zákon č. 182/1993 Sb., o Ústavním soudě [Constitutional Court Act]. English version is available at https://bit.ly/3XSfxUV

[25] § 69 (1) of the CC Act.

[26] § 66 (1) of the CC Act.

(3) the CC Act does not provide for a possibility to declare the crisis measure unconstitutional without annulment in case it was abolished during CC's proceedings (in such case, the proceedings are dismissed[27]) as does Pandemic Act (see below);
(4) there is a limited number of applicants who may apply for a review of legal norms (the application can be submitted by the government, group of 25 deputies or 10 senators, the CC itself while deciding a constitutional complaint, the Ombudsman, or by an individual together with a constitutional complaint).[28]

As a result, many applications were dismissed since ineligible applicants applied for review. Other proceedings initiated by senators were dismissed because the reviewed crisis measure was replaced by a new one.[29] From spring 2020 until the time of submission of the paper, only one crisis measure was actually reviewed by the CC.

In that case, the senators submitted for review a crisis measure restricting retail shops. The CC found that the government acted arbitrarily, as the crisis measure generally forbid all retail shops from providing their services, and then it provided for 36 exemptions without any reasoning for doing so.[30] In this respect, it should be noted that this (and all other crisis measures issued) lacked any official reasoning.

This shows that abstract judicial review of adopted crisis measures during the state of emergency is virtually impossible. The fundamental issue is the applicable procedural legislation, which never counted on such a situation as the current one. However, the subsequent formalistic and restricting interpretation of the procedural rules by the CC led further into a dead end. That was mainly reflected in the refusal to continue the proceedings after the amendment or repeal of a reviewed measure where it had been initiated by privileged applicants.

### 3.3 Emergency measures issued according to the Public Health Act

From time to time, especially at the beginning of the pandemic, the government also issued measures according to the rather general provisions of the Public Health Act. Some citizens also petitioned the CC, demanding review. The CC affirmed that these measures are "specific measures of a general nature"[31] (*opatření obecné povahy*) which are reviewable by administrative courts in special proceedings. Therefore, applicants have to use this procedure before applying to the CC. However, the court shall not reject the complaint if "the significance of the complaint extends substantially beyond the personal interest of the complainant".[32] This is the case if the issue at stake concerns hundreds or thousands of cases and its resolution would eliminate more litigation, if there is an urge to figure out the constitutionality of the particular interpretation, or if it concerns the basic principles of democratic rule of law (Filip et al., 2007, 280–281). These must be argued and adequately proved by the applicants.

---

[27] § 67 (1) of the CC Act.

[28] § 64 (2) of the CC Act.

[29] CC, dated 16 June 2020, ref. no. Pl. ÚS 20/20; and CC, dated 8 December 2020, ref. no. Pl. ÚS 102/20.

[30] CC, dated 9 February 2021, ref. no. Pl. ÚS 106/20, para. 70.

[31] E.g., CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 54; or more recently CC, dated 27 April 2021, ref. no. Pl. ÚS 19/21, para. 9.

[32] § 75 (1) and § 75 (2) (a) of the CC Act.

Even though the CC itself has the power to annul a specific measure of general nature,[33] the court did not satisfy any complaint. In all relevant cases, their dismissal was justified in the eyes of the CC by not extending the personal interest of the complainant. The "mere subjective feeling by the applicant" that the issue at stake concerns more people was not enough.[34]

But when else will this provision be fulfilled, if not in case of such widespread measures, which affect the fundamental rights of all the inhabitants of the state?[35] We cannot think of a better situation in which the complainant's interest is shared than this one, but apparently the CC can. On the other hand, the self-limitation is understandable since remedy before the administrative courts was available.

We do not consider the role of the CC in relation to emergency measures issued according to the Pandemic Act, since they are primarily reviewed by the SAC and the case law does not deal with their direct review by the CC. However, the CC widened the possibility to lodge an action. Under previous case law, the applicant had to be directly affected by the measure.[36] However, the CC held that such a restriction is unconstitutional.[37] We elaborate on this decision's impact in part IV.3 below.

### 3.4 The Constitutional Court as a passive player

In the light of the theoretical outlet accounted for in the previous chapter, we deem the CC's role during the pandemic as that of a passive player. It means that the CC is neither a "passive bystander" nor an active player. Generally speaking, the CC has failed to play its part. While the substantial self-restraint regarding the declaration is consistent with the separation of powers during an emergency, it is the only thing on the good practice list.

First, to be an active player and to live up to its role, the CC should retain the power to scrutinise procedural aspects of the declaration of the state of emergency as well as "ordinary" (i.e. not only flagrant) misuse of the declaration. The declaration of the state of emergency as such (solely) is able to interfere with individual rights (for more detail see Kovalčík, 2021, 667). That is why judicial review is necessary.

Given that the government is legitimised through the confidence of the Chamber of Deputies and the interconnectedness is thus obvious, the control by the Chamber cannot be considered sufficiently effective. Therefore, the government does not have the problem – in the normal circumstances – of ensuring that the state of emergency will not be cancelled. In addition, the government can in fact declare the state of emergency in spite of the reluctance of the Chamber of Deputies, as it also happened during spring 2021, although it will probably be an unconstitutional procedure.

Also, in respect of scrutinising particular measures, the consequences of the active approach could be far-reaching. The requirement to state reasons in the crisis measure should have been established earlier than a year after the first state of emergency. The conclusion of the CC puts into question the constitutionality of all adopted measures, which could have a serious impact,

[33] CC, dated 5 May 2020, ref. no. Pl. ÚS 12/20, para. 20.

[34] CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 62; CC, dated 5 May 2020, ref. no. Pl. ÚS 13/20, para. 28; CC, dated 9 June 2020, ref. no. Pl. ÚS 19/20, para. 39.

[35] See dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20.

[36] For greater detail see part IV.3 of this paper.

[37] CC, dated 19 July 2022, ref. no. IV. ÚS 2431/21, paras. 25–27.

among other things, on a state liability for damages. Nevertheless, it was good that at least some playground for the government was drafted.

The actual approach to review presented in February 2021 was regrettable, as the CC did not invalidate the unconstitutional state of emergency declaration. This was followed by the impossibility of reviewing the crisis measures, caused both by insufficient legal norms and a formalistic approach by the CC. As dissenting opinions, as well as scholars pointed out,[38] other – pro-review – interpretations were also possible. Where there is a will, there is a way.

The picture of the CC as a passive player is exemplified by its reluctance to review the emergency measures issued according to the Public Health Act, although the applicable law allows for such review and conditions for not exhausting the available remedies before submitting the constitutional complaint.

The situation in which the abstract judicial review of the declaration and the crisis measures is impossible had not been solved to this today. The public and academic focus shifted with the adoption of the Pandemic Act. However, the reality remains, that in any following state of emergency (as the one declared in November 2021 and lasting until Boxing Day), we will be back in this unsolvable situation. The only rational solution, in our opinion, is to provide for special proceedings, either before the CC or the SAC, in which abstract judicial review would be possible. If the legislator is unable to pass the corresponding acts, the courts will have no other choice than to amend their current findings and allow the review themselves.

It should be noted that this part focused solely on abstract judicial review in front of the CC. *In concreto* review of the declaration and crisis measures by administrative courts was and is still possible in some cases. However, the only possible way for citizens and others to obtain review was and is to violate some restrictions first and to be fined. In such a case, the administrative courts could review the constitutionality of the declaration or measure (regardless of its abolition). The approach by the SAC and lower administrative courts will be presented in the following chapter.

## 4 The Supreme Administrative Court and lower administrative courts

The second important player in the field of the judicial review of adopted measures is the SAC. This court is the highest judicial body within the administrative judiciary. Lower courts are the regional courts and they usually act as courts of the first instance. A cassation complaint to the SAC is permitted against their decision. By its decision, the SAC ensures the unity and legality of administrative courts' case law. In addition, the SAC is the first instance court for review of the emergency measures adopted under the Pandemic Act.

This court has had a much harder position during the pandemic and especially after the Pandemic Act was adopted. Unlike the CC, which got rid of applications on the basis of procedural reasons, the SAC had to make substantive review of a majority of applications. This chapter therefore investigates how much the SAC fulfilled its role as a court during a pandemic – together with the regional courts.

[38] See Chvojka (2021); Horák et al. (2021); Kovalčík (2021); Vikarská (2021); and also dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 6.

### 4.1 Declaration of the state of the emergency and crisis measures

The SAC case law followed the opinions of the CC regarding the nature of the state of emergency declaration and crisis measures.[39] Therefore, the administrative courts cannot provide for an abstract review as well.

As far as incidental review is concerned, there are a few relevant cases available. One of the most notable cases is from the Municipal Court in Prague. The applicant filed a motion demanding a declaration of unlawful intervention into her rights by a crisis measure (i.e. she wanted to declare the effects of normative act unconstitutional), which prevented her from going to her workplace abroad. The court, with the help of the ECtHR case law, stated that there is a close connection between the crisis measure and the applicant, and therefore dismissing the notion would be a denial of justice and violation of the right to an effective remedy. It then went on and concluded that the interference with the applicant's right was proportionate, and the motion was unfounded.[40] The possibility of a sort of "concrete review" was subsequently refused by the SAC's enlarged senate[41] and even the CC, which labelled the decision as excessive and stated that the Municipal Court's "approach probably stemmed from excessive inspiration from the [ECtHR]. However, the [ECtHR] is an international body whose powers are enshrined in an international treaty and do not directly affect the powers of the national courts of the contracting parties."[42] According to both, it is not possible to seek a declaration of the unlawfulness of effect stemming from the generally applicable act.

Another case concerns a review of the declaration of the state of emergency from February 2021, which we described above. The Municipal Court in Prague stated that the declaration was unconstitutional and, therefore, schools must resume teaching since there was no legal basis for their suspension.[43] The same court also reviewed the legality of crisis measures restricting retail stores when assessing the legality of banning people from the store by police and concluded that the crisis measure was unconstitutional.[44] The last one concerns the right to assemble. The police denied the applicant access to a square where the protest was taking place since too many people were already there. The Municipal Court in Prague reviewed the legality of the declaration of the state of emergency and concluded that material and procedural requirements were fulfilled and hence it was not unlawful or unconstitutional.[45]

To summarise, the activity in review by the administrative courts was precluded by the opinions of the CC on the nature of the declaration and crisis measures. In contrast to this, it

[39] In regard of the declaration see e.g., SAC, dated 21 May 2020, ref. no. 5 As 138/2020 - 80, paras. 37 and 39. As far as the crisis measures are concerned, see para. 42 of the cited judgment. All judgments of the administrative courts are available in Czech at www.nssoud.cz.

[40] Municipal Court in Prague, dated 11 November 2020, ref. no. 14 A 45/2020 - 141, mainly paras. 15, 33, 34–39, 51, and 107.

[41] Enlarged senate of the SAC, dated 30 June 2021, ref. no. 9 As 264/2020 - 51, para 72.

[42] CC, dated 4 January 2022, ref. no. Pl. ÚS 34/21, para. 30.

[43] Municipal Court in Prague, dated 23 February 2021, ref. no. 17 A 126/2020 - 84, para. 38. This judgment was annulled, and the action dismissed by the SAC, dated 20 July 2021, ref. no. 6 As 73/2021 - 67, but for different reasons than that the courts cannot review the declaration in incidental review.

[44] Municipal Court in Prague, dated 31 May 2021, ref. no. 6 A 141/2020 - 90, para. 66. The SAC approved the decision by SAC, dated 14. October 2021, ref. no. 7 As 205/2021 - 45.

[45] Municipal Court in Prague, dated 21 September 2021, ref. no. 8 A 26/2021 - 42, para. 56.

seems that the administrative courts are counting on incidental review. However, that means that citizens must first expose themselves to some kind of sanction for breaching the measures and only then argue its unlawfulness in front of the administrative court.

### 4.2 Emergency measures under the Public Health Act

At the beginning of the pandemic, the Ministry of Health used the emergency measures issued according to the Sec. 69 of the Public Health Act to supplement the crisis measures. The content of the measures included, among others, the obligation to wear a mask, the prohibition and restriction of social events, mandatory antigen testing in healthcare facilities, or restriction of retail stores and freedom of movement in public places.

As we mentioned earlier, these measures are reviewable in abstract as "specific measures of general nature" by the administrative courts in special proceedings. Nevertheless, their reviewability has run up against some limits of the legislation – stemming particularly from its short validity (a feature shared with crisis measures). That led to a similar problem, because the previous case law mandated the dismissal of action for missing subject matter if the challenged specific measure of a general nature was abolished while proceedings took place.[46] However, the SAC concluded that when the emergency measure is quickly replaced by one with similar content, the court should allow an amendment of action to reflect this change instead of dismissing it and even instruct the applicant to do so.[47]

Another important addition of the SAC was the "restriction" of the Ministry's powers. The Sec. 69 (1) (i) of the Public Health Act allows the Ministry to "prohibit or order certain other activities to eradicate an epidemic or the risk of an epidemic". The Ministry used this provision to impose numerous different obligations as mentioned above. The SAC rejected the endlessness of such power, arguing that an *eiusdem generis* interpretation is essential.[48] Therefore, the Ministry cannot use this power to, for instance, shut down restaurants and casinos because this does not relate to other powers in the enumeration at all.[49] Furthermore, the measures according to the Public Health Act can only target "persons suspected of being infected". As such, this act does not allow the behaviour of all persons on the territory to be regulated unless the entire country is declared "the focus of infection" and everybody can be suspected as being infected.[50]

The courts also repeatedly reproached the Ministry of Health for insufficient reasoning of its emergency measures. The Municipal Court in Prague even stated that it "repeats a number of deficiencies previously criticised by the court, despite the instructions given to the [Ministry] in earlier decisions of the court, or rather it cumulates and further deepens these deficiencies."[51]

It is obvious that the SAC, and subsequently the regional courts, cared about effective judicial protection and tried to avoid denial of justice. The effectiveness of the review stems from the limitation of the Ministry's powers extended in an arbitrary and unlawful way and in requiring adequate reasons for the measures to be imposed. The only reproachable issue can be seen

[46] See cited case law in SAC, dated 26 February 2021, ref. no. 6 As 114/2020 - 63, para. 85.

[47] Ibid., paras. 97 and 106; or SAC, dated 16 March 2021, ref. no. 5 As 160/2020 - 66, paras. 18 and 20.

[48] SAC, dated 26 February 2021, ref. no. 6 As 114/2020 - 63, para. 143.

[49] SAC, dated 21 May 2021, ref. no. 6 Ao 22/2021 - 44, paras. 47 and 49.

[50] Enlarged senate of the SAC, dated 11 November 2021, ref. no. 4 Ao 3/2021 - 117, para. 54.

[51] Municipal Court in Prague, dated 13 November 2020, ref. no. 18 A 59/2020 - 226, para. 144.

in the length of the SAC's proceeding with regard to one of the leading decisions. It took almost nine months, but the conclusions there were crucial for further actions.

### 4.3 Emergency measures under the Pandemic Act

The Pandemic Act contains specific provisions for judicial review, aiming to overcome obstacles noted above in relation to the review of crisis measures by the CC and emergency measures issued under the Public Health Act. The most important change in this regard is the possibility to review even abolished measures and eventually declare them invalid.[52] The second important step was affirming the emergency measures as "specific measures of general nature" for which the general procedural rules apply.

This legal framework enabled the SAC to force the executive power to adhere to the basic democratic and rule of law standards, such as that interference with the rights of citizens and imposing obligations is only possible when it is in accordance with the law and has a proper justification. This is surely a welcome change after the first period with almost no judicial review. On the other hand, the current version of the Pandemic Act puts a heavy burden on the already swamped SAC. Since the pandemic apparently will not end in the nearest future, changes should be introduced.

The motion to invalidate an emergency measure can be submitted by "one who claims to have been deprived of his rights by a measure of a general nature issued by an administrative authority."[53] The previous case law then requires the applicant to claim the possibility of hir or her legal sphere being affected consistently and conceivably by the measure.[54] As a result, only the person to whom the measure was addressed could lodge an action. Therefore, there was difference if the wording was, for example, "the restaurants shall be closed" or "customers may not enter restaurants' premises". This was changed by the above-mentioned decision of the CC and, under current interpretation, both sides (restaurants and guests) may lodge an action, regardless of the wording.

This could have a grave impact on number of motions and workload of the SAC. From February 2021 until the end of the state of pandemic readiness in spring 2022, the SAC obtained 317 motions. 60 of which were found at least in part justified, and therefore the court either annulled the emergency measure (or its part) or declared it unlawful. 30 motions were rejected as unfounded. 189 were dismissed for various procedural reasons [the lack of legal standing (also linked to previous narrow interpretation of legitimation to lodge action), late motion, unpaid court fee or motion's withdrawal, etc.] or because they were manifestly unfounded.[55] There were 22 pending cases at the time of submission of the paper.[56] The high number of dismissals is mainly due to previously restrictively applied legal standing. Therefore, in the potential upcoming COVID-19 autumn/winter wave, the SAC could face high number of motions, which it would have to deal with on the merits instead of dismissal for procedural reasons.

---

[52] § 13 (4) of the Pandemic Act stipulates that "*If the emergency measure was abolished during proceedings, it does not prevent further proceedings*".

[53] § 101a (1) zákona č. 150/2002 Sb., soudního řádu správního.

[54] SAC, dated 22 December 2021, ref. no. 8 Ao 28/2021 - 83, para. 14.

[55] § 13 (3) of the Pandemic Act allowed this simpler way.

[56] Data were obtained from the SAC.

The approach of the SAC to review has developed over time. The SAC was stricter and more prompt at the beginning. The measures were annulled as a whole (not only specific provisions) with a slight postponement so a new one could be issued and in relatively quick proceedings.[57] For instance, in June 2021, the SAC struck down the measures of the Ministry of Health allowing entrance to cultural and similar indoor events only to people with a vaccination, negative test or recovery certificate. According to this judgment, the Ministry had not put forward justifiable reasons for not including antibody tests among the entry conditions.[58]

One of the most serious issues was measures restricting and prohibiting restaurants and bars. The problem is that the Pandemic Act does not allow the Ministry of Health to restrict or forbid the operation of restaurants or bars. This led to the annulment of the measure by the SAC; however, the Ministry of Health issued new measures with the same content ignoring the previous legal opinion of the SAC in the annulling decision. In the decision reviewing the same restriction in a subsequent measure, the SAC pointed this out and stated that the Ministry of Health must "be aware that it is issuing measures that are manifestly unlawful and are likely to cause harm and prejudice to the fundamental rights of its addressees," and that "the possibilities of judicial protection provided by the [SAC] have already reached its limits" since the proceedings only took four days.[59]

Apart from the lack of legal basis, another grave issue was the reasoning of the measures, which was often found insufficient. As the SAC pointed out, the Ministry of Health "(despite the fact that it has gradually tightened the obligations) still mechanically copies the justifications for the more stringent measures and does not adapt them in any way, not only to these new obligations but also to the requirements of the legislation."[60] This led to an annulment or declaration of unlawfulness in many cases.[61] In cases of justification of measures requiring respirators to be worn, the SAC reproached the ministry for not taking into account the findings of the court made in the review and annulment of similar previous measures and made the same mistakes. While reviewing the third measure in this respect, the SAC noted that it "cannot stand idly by while its decisions are systematically ignored by the [Ministry of Health] and must therefore do its utmost to prevent the consequences of such a practice by the respondent".[62]

Now fast forward in time after the "first wave" of judgments, where the SAC adopted a different approach. The court started annulling or declaring unlawful only specific articles of the emergency measures and dismissing the rest of the motions.[63] Moreover, some proceedings are taking much longer since some judges no longer consider the review of emergency measures a priority over the normal cassation agenda.[64]

---

[57] See e. g. SAC, dated 14 April 2021, ref. no. 8 Ao 1/2021 - 133; SAC, dated 22 April 2021, ref. no. 6 Ao 11/2021 - 48; or SAC, dated 11 May 2021, ref. no. 3 Ao 3/2021 - 27.

[58] SAC, dated 30 June 2021, ref. no. 6 Ao 21/2021 - 23, para. 21.

[59] SAC, dated 21 May 2021, ref. no. 6 Ao 22/2021 - 44, paras. 65 to 67.

[60] SAC, dated 27 May 2021, ref. no. 7 Ao 6/2021 - 112, para. 78.

[61] See e. g. SAC, dated 14 April 2021, ref. no. 8 Ao 1/2021 - 133, paras. 105 to 107; SAC dated 11 May 2021, ref. no. 3 Ao 3/2021 - 27, paras. 38 and 40; SAC, dated 9 June 2021, ref. no. 8 Ao 15/2021 - 65, paras. 59, 60 and 63; or SAC, dated 16 June 2021, ref. no. 9 Ao 7/2021 - 27, para. 27.

[62] SAC, dated 27 July 2021, ref. no. 8 Ao 17/2021 - 63, para. 43.

[63] See e. g. SAC, dated 28 July 2021, ref. no. 6 Ao 6/2021 - 91; SAC, dated 29 June 2021, ref. no. 8 Ao 7/2021 - 44; or SAC, dated 18 November 2021, ref. no. 9 Ao 21/2021 - 111.

[64] SAC, dated 23 November 2021, ref. no. Aprn 4/2021 - 107, para. 3. This ruling and the de-prioritizing of some

This takes us to the last important note. Having the SAC review the emergency measures as the court of first (and only) instance[65] had an impact on other proceedings as well, due to the complexity and difficulty of the review. It was one of causes of the proceedings taking longer – the median of a length of cassation proceedings, which are resolved on the merits, rose from 240 days in 2020 to 296 days in 2021.[66] Other causes, such as a growing backlog[67] and elections to the Chamber of Deputies in autumn 2021,[68] are not related to COVID-19.

### 4.4 The Supreme Administrative Court as an active player

As the onset of the pandemic in the Czech Republic was (unsurprisingly) confusing and even highly emotive, the administrative judicial review, to some extent, mirrored this chaos. In the beginning, we could observe both – activist courts and those with the "passive bystander approach".

As we elaborated on above, the dynamic situation of the new contagious disease required a more restrained approach by the courts. They should focus on procedural review and manifest unlawfulness, whilst, in respect of the suitability and proportionality of the particular measures, courts should be more reluctant to intervene. However, that was not always the case at the SAC. Although the community of scientists does not have a clear, strong and almost unanimous opinion on the usability of antibody tests for COVID-19, the SAC abolished measures because of the absence of reasoning for antibody tests not qualifying as the fourth option allowing entry to cultural events.[69] This judgment was even bolder in the light of the EU Covid Passports, which brought an agreement between the EU member states on three "safety options" – vaccination, negative test and recovery certificate.

Nevertheless, one swallow does not make a summer – several early "Pandemic Act judgments" by administrative courts, which could be deemed activist, were exceptional, and the case law has stabilised over time. The SAC has neither conclusively stood behind the scenes nor played a consistently active role, but put a stop to extreme activist proposals such as "creation of a sort of concrete review competence" without any legal basis, at the right time.[70] In short, the SAC grasped its role in the system for managing the pandemic and delineated a quite unambiguous playground for executive actions. The grounds of this lie, among other factors, in the clearer procedural framework for reviewing pandemic measures provided by the Pandemic Act, designed specifically for this situation.

This active – but not activist – approach by the SAC has a real impact. Plenty of judgments induced political pressure from the opposition in the Parliament as well, as from Czech

---

emergency measures was approved by the CC – see CC, dated 4 January 2022, ref. no. I. ÚS 3265/21. Subsequently, this was included in § 13 (5) of the amended Pandemic Act.

[65] § 13 (6) of the Pandemic Act forbids cassation complaint, only constitutional complaint to the CC is permissible.

[66] Source data were obtained from SAC. The number of days was calculated as median of length of proceedings from date of complaint's arrival at the SAC until the day of judgment on merits.

[67] Precise statistics can be found on the website of the SAC at http://nssoud.cz/main2Col.aspx?cls=Statistika&menu=190.

[68] The SAC had to deal with largest number of election complaints in history (most of them were however dismissed on procedural reasons). See Final information on election complaints. Online: https://bit.ly/3OZC51U

[69] SAC, dated 30 June 2021, ref. no. 6 Ao 21/2021.

[70] Enlarged senate of the SAC, dated 30 June 2021, ref. no. 9 As 264/2020 - 51, described in more detail above.

society as a whole, since the SAC's pandemic judgments were given significant space in the media. That leads to Ministry of Health and the government caring more about the wording of measures as well as their proper justification. However, the regulation of pandemic measures is still far from the ideal, but what is ideal? To summarize, it looks like that the judicial body has helped other branches of the state power to – at least – improve the measures.

The last reflection of this approach by the administrative courts is the novelisation of the Pandemic Act. It mostly reacts to the case law finding a lack of effective measures and therefore it now allows the Ministry to restrict any businesses where two persons directly meet and provides for a detailed list of places (specifically including zoos, rehabilitation centres, planetariums and discos), the operation of which can be restricted. The validity of the Act has been extended until 30 November 2022. At the time of submission of the paper, the Chamber of Deputies also cancelled the state's pandemic readiness, thereby terminating the Ministry of Health's power to issue emergency measures.[71] Also, there is no legislative proposal to prolongate the validity of the Pandemic Act.

## Conclusion

This paper rendered an overview of the judicial review of pandemic measures in the Czech Republic and addressed some of the problems, mostly from the perspective of the CC and the SAC. In the theoretical part, we argued that only joint action by all three state powers for a common goal – stopping the spread of a contagious disease with the smallest possible impact on the economy as well as to fundamental human rights – can lead to the most effective measures in a democratic state under the rule of law. This "joint action" also needs courts as active players in managing the pandemic. An active approach by the judiciary is able to prevent the abuse of power; enhance the quality of the measures and their communication and contribute to increasing the legitimacy of measures. Following up on this ideal approach, we assessed whether the courts in the Czech Republic live up to this role.

The findings are diverse. Firstly, the CC did not fulfil its role during the pandemic. The main obstacle was the insufficient legal framework for review of the declaration of the state of emergency and crisis measures adopted within it. However, the CC, by its interpretation, prevented its review even in the rest of the cases. That resulted in almost a year in which the CC was precluded from any abstract review. Accordingly, current crisis legislation cannot avoid amendments. The new Czech government stated has promised to revive the legal framework for crisis management. However, its programme statement does not contain anything on courts in this regard (Government Programme Statement, 2022).

On the other hand, we commend the SAC as an active player. The SAC and lower administrative courts managed to overcome the procedural obstacles in their abstract reviews of emergency measures, which led to the annulment of many of them. That revealed the necessity of effective judicial protection in such exceptional circumstances, since the SAC had to annul measures for basic errors by the executive power, such as an obvious lack of legal basis or clearly insufficient reasoning.

[71] Resolution of the Chamber of Deputies from 4 May 2022, ref. no. 113/2022 Coll.

**References**


Barber, N. (2012). *The Constitutional State* (Reprint edition). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199585014.001.0001

Barber, N. W. (2018). *The Principles of Constitutionalism*. Oxford University Press. https://doi.org/10.1093/oso/9780198808145.001.0001

Bargain, O., & Aminjonov, U. (2020). Trust and Compliance to Public Health Policies in Times of COVID-19. *Journal of Public Economics*, 192, 104316. https://doi.org/10.1016/j.jpubeco.2020.104316

Berlin, I. (1969). *Four Essays on Liberty*. Oxford University Press.

Chvojka, Š. (2021). Role Ústavního soudu v koronakrizi. *Jurisprudence*, 30(2), 14–27.

CVVM (Centrum pro výzkum veřejného mínění). (2020, October 5). *Tisková zpráva. Důvěra vybraným institucím – červenec 2020.* Online: https://bit.ly/3hb3Fw5

CVVM (Centrum pro výzkum veřejného mínění). (2021a, August 2). *Tisková zpráva. Důvěra ústavním institucím v červenci 2021.* Online: https://bit.ly/3Tdg402

CVVM (Centrum pro výzkum veřejného mínění). (2021b, August 27). *Tisková zpráva. Důvěra vybraným institucím – červenec 2021.* Online: https://bit.ly/3t4YGjj

CVVM (Centrum pro výzkum veřejného mínění). (2021c, December 21). *Tisková zpráva. Důvěra k vybraným institucím veřejného života – srpen/září 2021.* Online: https://bit.ly/3t21BcG

Eichler, J., & Sonkar, S. (2021). Challenging absolute executive powers in times of corona: Re-examining constitutional courts and the collective right to public contestation as instruments of institutional control. *Review of Economics and Political Science*, 6(1), 3–23. https://doi.org/10.1108/REPS-08-2020-0132

Fabbrini, F. (2010). The role of the judiciaries in times of emergency: Judicial review of counter-terrorism measures in the US Supreme Court and the European Court of Justice. *Yearbook of European Law*, 28(1), 664–697. https://doi.org/10.1093/yel/28.1.664

Filip, J., Holländer, P., & Šimíček, V. (2007). *Zákon o Ústavním soudu: Komentář.* C. H. Beck.

Government of the Czech Republic. (2022, January 7). *Government Programme Statement*. vlada.cz. Online: http://bit.ly/3h5a3oX

Guasti, P. (2020). The Impact of the COVID-19 Pandemic in Central and Eastern Europe: The Rise of Autocracy and Democratic Resilience. *Democratic Theory*, 7(2), 47–60. https://doi.org/10.3167/dt.2020.070207

Havlík, V. (2019). Technocratic Populism and Political Illiberalism in Central Europe. *Problems of Post-Communism*, 66(6), 369–384. https://doi.org/10.1080/10758216.2019.1580590

Horák, F., Dienstbier, J., & Derka, V. (2021). Právní úprava mimořádného vládnutí v kontextu pandemie covid-19. Rozhodnutí o vyhlášení nouzového stavu. *Právník*, 160(6), 431–450.

Jovičić, S. (2021). COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights. *ERA Forum*, 21(4), 545–560. https://doi.org/10.1007/s12027-020-00630-w

Jenkins, D. (2014). When Good Cases Go Bad: Unintended Consequences of Rights-Friendly Judgments. In F. Davis, & F. de Londras (Eds.), *Critical Debates on Counter-Terrorism Judicial Review* (pp. 75–96). Cambridge University Press. https://doi.org/10.1017/cbo9781107282124.005

Kovalčík, M. (2021). Role Ústavního soudu za pandemie v nouzovém stavu: Aktivní hráč, nebo pasivní přihlížející? *Časopis pro právní vědu a praxi*, 29(3), 649–668. https://doi.org/10.5817/CPVP2021-3-9

Maerz, S. F., Lührmann, A., Lachapelle, J., & Edgell, A. B. (2020). Worth the Sacrifice? Illiberal and Authoritarian Practices during Covid-19. *V-Dem Working Paper 110*. https://doi.org/10.2139/ssrn.3701720

Ondřejek, P. (2020). Proporcionalita opatření přijímaných ve výjimečných stavech. *Časopis pro právní vědu a praxi*, 28(4), 613–629. https://doi.org/10.5817/CPVP2020-4-4

Petrov, J. (2020). The COVID-19 Emergency in the Age of executive Aggrandizement: What Role for Legislative and Judicial Checks? *The Theory and Practice of Legislation*, 8(1–2), 71–92. https://doi.org/10.1080/20508840.2020.1788232

Schabas, W. (2015). *The European Convention on Human Rights: A Commentary* (First edition). Oxford University Press. https://doi.org/10.1093/law/9780199594061.001.0001

Shapiro, M. M. (1986). *Courts: A comparative and political analysis* (Paperback ed). University of Chicago Press. https://doi.org/10.7208/chicago/9780226161341.001.0001

Vikarská, Z. (2020, May 20). Czechs and Balances – If the Epidemiological Situation Allows…. *Verfassungsblog*. Online: https://bit.ly/3UtCV8y

Vikarská, Z. (2021, March 30). Czechs and Balances – One Year Later. *Verfassungsblog*. Online: https://bit.ly/3Td20Un

Waldron, J. (2012). Constitutionalism: A Skeptical View. *NYU School of Law, Public Law Research Paper No. 10-87*. https://doi.org/10.1002/9781444310399.ch15

Wiley, L. F., & Vladeck, S. I. (2020). Coronavirus, Civil Liberties, and the Courts: The Case Against 'Suspending' Judicial Review. *Harvard Law Review Forum*, 133(9), 179–199. https://doi.org/10.2139/ssrn.3585629

Wintr, J. (2020). K ústavnosti a zákonnosti protiepidemických opatření na jaře 2020. *Správní Právo*, 53(5–6).

**Legal sources**

Constitution of the Czech Republic.

Zákon č. 182/1993 Sb., o Ústavním soudě [Constitutional Court Act].

Ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky [Security Act].

Zákon č. 240/2000 Sb., krizový zákon [Crisis Management Act].

Zákon č. 258/2000 Sb., o ochraně veřejného zdraví [Public Health Act].

Zákona č. 150/2002 Sb., soudní řád správní [Code of Administrative Justice].

Zákon č. 94/2021 Sb., o mimořádných opatřeních při epidemii onemocnění COVID-19 [Pandemic Act].

Zákon č. 39/2022 Sb., kterým se mění zákon č. 94/2021 Sb., o mimořádných opatřeních při epidemii onemocnění COVID-19 a o změně některých souvisejících zákonů, ve znění nálezu Ústavního soudu, vyhlášeného pod č. 4/2022 Sb., a zákon č. 520/2021 Sb., o dalších úpravách poskytování ošetřovného v souvislosti s mimořádnými opatřeními při epidemii onemocnění COVID-19 [Amending Act].

Resolution of the Chamber of Deputies no. 113/2022 Coll.

ECtHR – Ireland v. United Kingdom, app. no. 5310/71.

ECtHR – Sakik and others v. Turkey, app. no. 23878-23883/94.

CC decision no. Pl. ÚS 8/20.

CC decision no. Pl. ÚS 11/20.

CC decision no. Pl. ÚS 12/20.

CC decision no. Pl. ÚS 13/20.

CC decision no. Pl. ÚS 19/20.

CC decision no. Pl. ÚS 20/20.
CC decision no. Pl. ÚS 106/20.
CC decision no. Pl. ÚS 113/20.
CC decision no. Pl. ÚS 102/20.
CC decision no. Pl. ÚS 106/20.
CC decision no. Pl. ÚS 12/21.
CC decision no. Pl. ÚS 19/21.
CC decision no. Pl. ÚS 23/21.
CC decision no. Pl. ÚS 34/21.
CC decision no. IV. ÚS 2431/21.
CC decision no. I. ÚS 3265/21.
Municipal Court in Prague judgment no. 14 A 45/2020 – 141.
Municipal Court in Prague judgment no. 18 A 59/2020 – 226.
Municipal Court in Prague judgment no. 17 A 126/2020 – 84.
Municipal Court in Prague judgment no. 6 A 141/2020 – 90.
Municipal Court in Prague judgment no. 8 A 26/2021 – 42.
U.S. Supreme Court – Korematsu v. United States, 323 U.S. 214 (1944).
SAC judgment no. 6 As 114/2020 – 63.
SAC judgment no. 5 As 138/2020 – 80.
SAC judgment no. 5 As 160/2020 – 66.
SAC judgment no. 9 As 264/2020 – 51.
SAC judgment no. 8 Ao 1/2021 – 133.
SAC judgment no. 3 Ao 3/2021 – 27.
SAC judgment no. 4 Ao 3/2021 – 117.
SAC judgment no. Aprn 4/2021 – 107.
SAC judgment no. 6 Ao 6/2021 – 91.
SAC judgment no. 7 Ao 6/2021 – 112.
SAC judgment no. 8 Ao 7/2021 – 44.
SAC judgment no. 9 Ao 7/2021 – 27.
SAC judgment no. 6 Ao 11/2021 – 48.
SAC judgment no. 8 Ao 15/2021 – 65.
SAC judgment no. 8 Ao 17/2021 – 63.
SAC judgment no. 6 Ao 21/2021 – 23.
SAC judgment no. 9 Ao 21/2021 – 111.
SAC judgment no. 6 Ao 22/2021 – 44.
SAC judgment no. 8 Ao 28/2021 – 83.
SAC judgment no. 6 As 73/2021 – 67.
SAC judgment no. 7 As 205/2021 – 45.

# Book Review

Institutiones Administrationis – Journal of Administrative Sciences Vol. 2 (2022) No. 2, 133–134
DOI: 10.54201/iajas.v2i2.54

# Jozef Sábo, *Hodnotenie dôkazov v daňovom práve* (Pavol Jozef Šafárik in Košice, 2020)

**Michael Feldek***

* PhD student at the Department of Financial Law and Economics, Faculty of Law, Masaryk University. E-mail: 257064@mail.muni.cz

At the end of 2020, the University of Pavol Jozef *Šafárik* in Košice published a monograph by Jozef Sábo entitled *Hodnotenie dôkazov v daňovom práve* (Evaluation of Evidence in the Tax Law). It is a scientific monograph which, in accordance with its title, deals with theoretical and practical problems of evidence in tax proceedings.

Although the author is originally from the Slovak Republic and in his interpretation occasionally uses examples from Slovak legislation, the book cannot be seen as an excursion into Slovak tax law. On the contrary, the book under review emphasizes general principles of evidence evaluation, which can be considered common at least at the level of European law. If the author uses examples from tax law, he focuses almost exclusively on the issue of value added tax, especially on the issues of proving tax frauds and fulfilling the conditions for obtaining a tax deduction. In my opinion, this can also be seen as a positive feature of the reviewed publication, given the existence of a common European value added tax system. Since the individual institutes and the problems associated with them are based on European Union law and the case law of the Court of Justice of the European Union, the examples given by the author should also be understandable to readers from other Member States.

The author sees the potential contribution of the book on two levels. The first is a contribution to making the process of evaluation of evidence by tax administrators more efficient and streamlined. The author is convinced that the correct understanding and application of the evaluation of evidence in tax proceedings ultimately also protects the fiscal interests of the state, especially in cases of tax evasion. The author then sees a second potential benefit in strengthening the respectability of tax law as a separate branch of law in society. I am convinced that the reviewed publication can contribute to the achievement of both objectives.

As for the content of the reviewed publication, it is divided into two approximately equal parts. In the first part, aptly titled "The Concept of Truth in Tax Law", the author deals primarily with the definition of the basic premises of the issue under consideration, i.e. the possibility of knowing the facts, the standard of proof, the distribution of the burden of proof and the process of evaluating evidence individually and in relation to each other. The author approaches the issue with, in my opinion, the correct assumption that the nature of a factual event that took place in the past (i.e. the truth in simple terms) can rarely be known with absolute certainty. He therefore works with the notion of a practical standard of truth as a rationally justified belief about a certain fact. The evaluation of evidence is therefore intended to induce a belief in the correctness of factual inferences in a model rational observer who is endowed with expert common knowledge, critical thinking, and logical reasoning. In my opinion, the above helps the clarity of the publication and enables it to transcend the author's country of origin, since the matter described has in this context universal validity.

I find the discussion of the standard of proof in tax proceedings very interesting. The author refers to it as clear and convincing evidence and sees it as a kind of compromise between the standard of proof in criminal proceedings, where guilt must be proven beyond reasonable doubt, and in civil litigation, where the preponderance of evidence of one of the parties is decisive. In this respect, it is, in my view, a bit unfortunate that the author perhaps too often illustrates his interpretation with examples from criminal law, where the standard of proof, the allocation of the burden of proof and the facts relevant to the decision in the case are significantly different from proceedings in tax cases. From a practical point of view, on the other hand, one can appreciate that the author also addresses in this part the issue of tactics in presenting factual claims, proposing evidence, and challenging the relevance of particular means of evidence. This approach can be illustrated by the example of expert evidence, where the author points out, for example, the possibility of questioning the basis on which the expert relies, the impartiality of the expert himself or whether the question under consideration falls within his expertise.

In my opinion, the second part of the reviewed publication, entitled "Standards of Evidence Evaluation", can be considered as a methodological aid for the organization and subsequent evaluation of evidence, both separately and in their mutual context. The main focus of the author's attention is on the methodology of evidence evaluation, dividing the standards of evidence evaluation into structural ones, based on their visual arrangement and the use of mathematical and logical methods, and psychological ones, which emphasize in particular the role of stories in the evaluation of evidence. From a practical point of view, what is particularly valuable about this section is that the author highlights the most common mistakes that can be made when using these methods.

In view of the above, the reviewed publication can be considered logically structured. While the first part is mainly devoted to the problem of the goal of the evidence evaluation process, the second part is focused on the methods to achieve this goal. The only minor problem with the book under review is that the author often takes detours in his commentary, explaining certain minor aspects of the subject matter in unnecessary detail. This can be illustrated by the author's discussion of the importance of DNA in the process of proof, which can be considered marginal at best in tax administration. Thus, one can understand that the author uses the problem of matching certain numbers of DNA markers to explain certain shortcomings of the probabilistic model of evaluating evidence, but the detailed explanation of how to challenge this evidence feels redundant. However, the minor deficiency complained of in no way diminishes the overall value of the reviewed publication. Thus, it can certainly be recommended to anyone interested in the issue of evaluation of evidence in tax law. The publication may be beneficial for those who are actively involved in the course of tax proceedings or subsequent litigation, as well as for those whose interest in the subject matter is more academic. An important bonus of the reviewed publication is the fact that it is available to readers free of charge in electronic form. Those who are interested in the subject matter but do not speak Slovak can thus get acquainted with the content of the publication with some effort, for example, with the help of machine translation.

## References

Sábo, J. (2020). *Hodnotenie dôkazov v daňovom práve*. Univerzita Pavla Jozefa Šafárika v Košiciach, Vydavateľstvo Šafárik Press. Online: https://zenodo.org/record/4817641

# CONTENTS

## ARTICLES



## BOOK REVIEW