Public Governance, Administration and Finances Law Review

in the European Union and Central and Eastern Europe

2.
2016

Wolters Kluwer

10.53116/pgaflr.2016.2.1

ARTICLES

The Next Generation of Capital and County Government Offices Developments in Hungarian Middle-Level State Administration Since 2011*

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** This study has been realized within the framework of the research on the 'New Challenges in the Middle Level State Administration. Trends in the Development of County and Capital Government Offices and District Offices'. The work has been granted by the Hungarian Ministry of Justice.

Abstract: The last financial crisis and the rhapsodic developments of Hungarian public administration resulted in a political aspiration that aimed (and still aims) to revitalize the State of Hungary and increase its administrative competitiveness. The territorial representation of the government has been strengthened by the reorganization of the middle level of public administration and the establishment of the new institution of capital and county government offices. The goal of this study is to summarize and evaluate the major steps of the aforesaid process, and to consider the expected further developments in this field.

Keywords: Hungarian public administration; middle-level state administration; territorial representation of Hungarian Government

1. Introduction

Public administration systems are complex phenomena,[1] that cannot operate independently of the social, economic, and cultural atmosphere in which they exist. At the same time, no public administration system is absolutely isolated: the European national administrative systems were affected by numerous megatrends in the last 25 years. A continuous need of development was generated by, among others, the globalization,[2] the New Public Management, and the idea of the European Administrative Space. However, while these trends are undoubtedly convergent, they did not result in uniform administrative systems. Public administration systems are still predominantly nation-specific, since they are formed primarily within the framework of national politics.[3]

From the onset of the 21st century, but especially since the financial crisis of 2007–09, an increased interest has been observed regarding the classic Weberian bureaucratic traditions in Europe.[4] Understandably, this can change the judgement of most elements of public administration systems, including middle-level state administration. Like the energy crisis of the 1970s, the recent crisis induced notable reforms in the public sector, and resulted in the major readjustment of the relationship between the state, the market, the citizens, and the society they live in.[5]

At the same time, considering that individual countries faced specific challenges, it cannot be stated that the recent international crises (such as threats of terrorism, environmental disasters, illegal immigration) evoked common crisis management. On the contrary, each country practically reacted to the above challenges in their own specific ways. What is certain, however, is that the re-imagination of the state and administrative roles became of utmost importance.[6]

In Hungary, the above process proved to be especially cumbersome, due to the administrative evolution (on-going since the Democratic Transformation) being far from following a clear-cut path: instead, the improvement of Hungarian state administration in the last 25 years is rather a story of burdening reversals and concept changes. Let me point out though, that this tendency generally applies to all countries of the Central- and Eastern European (CEE) region – almost none of them possessed a straightforward concept regarding the roles and responsibilities of the state after Transformation.[7]

In my opinion, the above tendencies altogether resulted in a political aspiration, which aimed (and aims) to revitalize the state and increase its competitiveness. Since the executive branch of the state is its administrative apparatus, and the above aspirations required executive actions, the reformation of Hungarian state administration was inevitable.

The goal of this study is to provide detailed data and information on the recent changes of Hungarian middle-level state administration for researchers, and for anyone interested in the topic. The overview first considers the changes

performed between 2011 and 2014. Then, the executed integration actions of 2015 will be summarized. Finally, the study describes the most recent and upcoming developments in public administration, spearheaded (and to be spearheaded) in 2016 and beyond.

2. First Steps Toward an Integrated Territorial Public Administration (2011–2014)

As an organic part of the evolution described above, the legislative branch established the capital and county-based government offices. In administrative sciences, these offices are also known as the territorial, sub-national, or middle-level elements of Hungarian public administration. Thus, I will use these terms interchangeably in this study.[8] The inception and evolution of these 'government offices' (hereafter GOs in short) were performed in line of the following milestones.

Albeit the period of 1990–2010 already had a deconcentrated state administrative organization in Hungary that ensured the territorial representation of the government, middle-level public administration saw the onset of a new era from 1 January 2011.[9] 15 deconcentrated organizations have been merged into the so-called capital and county government offices. The rationale behind this transformation was the decrease of territorial division experienced within the administrative system.[10]

One of the specialties of the newly-found GOs was the so-called 'distributed structure'. This meant that the offices were divided internally into a Main Office, and to several Specialized Administrative Organs. The Main Office was responsible for the management of joint functions, like IT, procurement, and HR-matters; at the same time, the Specialized Administrative Organs handled specialized administrative duties (as a relic of the roles of the former specialized territorial agencies). The reorganization affected almost 250 institutions in Hungary, which was about half of the entire state administrative organizational circle at that time.

One year after the Fundamental Law of Hungary was enacted, it named the GOs as the general-duty territorial organizations of the government.[11] Since then these offices have practised the administrative supervision of the local self-governments.[12] To improve their effectiveness of influence over the mid-level processes, the leaders of the GOs (the 'governmental commissioners') also received a key role in coordinating the key investments of the national economy.

The middle-level government offices were vertically expanded in 2013: the 20 GOs received 198 additional deconcentrated offices (the so-called 'district offices', or DOs in short).[13] With their introduction, legislation aimed to standardize the rather eclectic image of sub-national state administration functioning between counties and towns.[14]

In 2014 the structure of DOs evolved further. The ever-growing network of integrated customer service offices (also known as 'government windows'), operating as part of the DOs, were complemented by several sub-offices and almost a thousand specialized civil servants.

Considering the fact that most of the pre-2015 steps of this reinforcement have already been studied extensively,[15] the rest of my study focuses on the major transformations of 2015, 2016, and beyond.

3. 2015 – Government Offices Reloaded?

Since 1 April 2015, the model of GOs has been facing yet another transformation. The changes are due to the legislative decision of homogenizing the administrative structure, and merging additional specialized duties into the offices. The course of this transformation is detailed below.

3.1 Mid-Level Government Offices: Version 2.0[16]

The political forces intended to continue the path of changes that would increase state (pro)activity, and in which the GOs appear as the integrative connective points of mid-level public administration. However, the ideological framework of these changes has been designated as the Strategy for the Improvement of Public Administration and Public Services, the mid-term improvement documentation of Hungarian public administration, which obviously builds on the existing county- and district-level apparatus, and considers the structure of integrated administrative offices an element worthy of further improvements.[17] The strategy aims for a completely reformed user-friendly public administration, to be achieved by 2020.

Considering that large-scale complicated systems (like the public administration apparatus, and its subsystems) can rarely be reformed within a single political cycle, I find it justified that a long-term strategy has been prepared.[18] At the

same time, let me point out that while it would be reasonable to align the planning and execution phases to the known EU-level development cycles, the proposed modifications will most probably be scheduled to align the Hungarian election year. Hence, most of the painful changes will be carried out by the government during 2016, or in 2017 the latest.

The reformation of the government offices were executed by an internal and external thread, which are summarized below in more detail.

3.1.1 'The 3-Is': Increasing Internal Integration

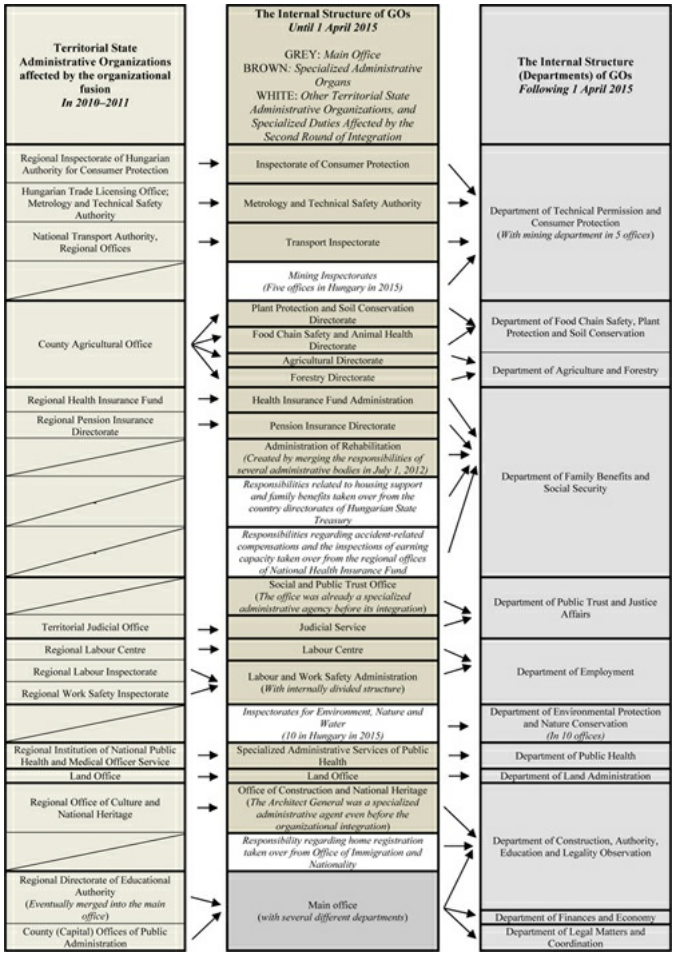
The laws enacted in 2015 (and the underlying strategy on which they are based) clearly indicate that the main aspiration of the decision makers was to enhance cooperation among the elements of GOs that were rapidly forged into a single organization back in 2011. From that moment on, no internal distributed structures were required. Their tasks and authorities were re-assigned and concentrated to the county-level governmental commissioners and district office directors; at the same time, offices started to consist only of divisions and departments (see Table 1 below). Due to the re-definition of organizational and professional control, the management, supervisory and monitoring licences were also clearly determined.19 Compared to the original structure, the current administrative offices of the government boast a seasoned internal structure, a more centralized control scheme, and more dynamic leadership.

3.1.2 The Second Round of External Integration

To simplify territorial state administration, two solutions were implemented. In some cases, integration meant only the assimilation of certain specialized tasks and their related personnel, as happened with the Hungarian State Treasury, National Health Insurance Fund and Office of Immigration and Nationality. In two cases, however, integration was realized by merging complete organizations into the GOs. These were the Inspectorates for Environment, Nature and Water and the Mining Inspectorates. The 'government office corpus' established in 2011 was successful in accepting new organizations and responsibilities during 2015, and this tendency (horizontal expansion of government offices) is likely to continue in the future.

To facilitate the understanding of the core concept behind the internal organizational changes and the external integration, Table 1 has been prepared below. The table showcases the events that occurred 'under the hood' between 2010 and 2015, that is the development of the specialized agencies working as units of the mid-level public administration apparatus.

*Table 1: Organizational changes in mid-level state administration with the progress of the integration process (2011–2015)*20



Source: Table 1 was edited by Attila Barta.

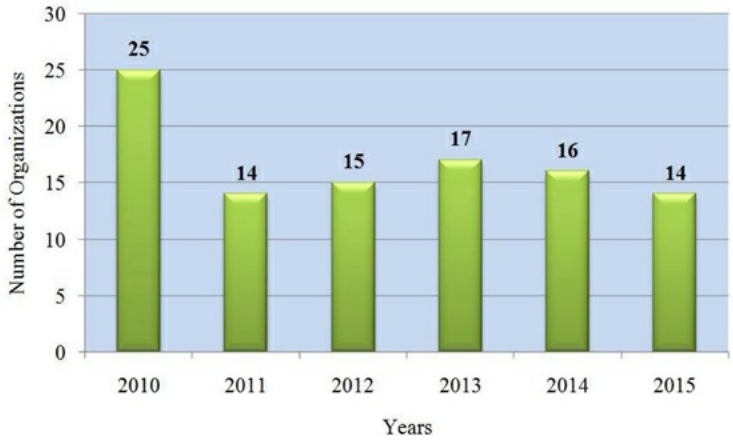
It is therefore not an overstatement that in the past years, the government interventions have been focusing on the territorial level;21 more precisely, on the mid-level government offices and the district government windows. The GOs became the nucleus of the re-defined middle level of public administration: the government aspires to use them in the unification of deconcentrated state administration (shattered back then during the Democratic Transformation). This endeavour – unparalleled even on an international level22 – is truly a large-scale aspiration: just consider that while the 20 GOs employed roughly 20.000 civil servants in 2011, their number was increased to about 33.500 by April 2015 (it is almost 1/4 of the whole civil servants in Hungary). It should therefore come as no surprise, that the scale of identified monetary support (provided from the central budget) was also increased: while in 2011 it accounted for 88.4 billion HUF, it was around 114.7 billion HUF in 2015.

As it is apparent from the above train of thought, the reformation of the county and capital government offices was far from being only a mere organizational change. I suppose it is obvious that the system is facing a new generation of government offices. This of course does not mean that there are no pending issues: for example, even by considering only the daily operation of the organization, we can pinpoint several areas of improvement. For an organization of this scale, even the system of countersigning official documents can be a daunting task to set up, not to mention the geographical challenges: in the current structure, employees working for the same department (or for the same division in case of district offices) may work on different premises, a factor resulting in numerous challenges in communication and work efficiency. For example, the Capital Government Office of Budapest operated more than 130 offices in 2015, which conveyed the suggestion of rationalizing its premises.

3.2 A Quick Look at the Rest of the Deconcentrated Actors

As it is apparent from the summary, the transformation of 2015 was as important as the establishment of the GOs back in 1 January 2011. However besides the notable administrative integration, the recent years have also seen a tendency of latent disintegration. Because of this latter trend, the types of deconcentrated administrative bodies in 2015 were basically equal to the amount that the system had back in 2011 (see Figure 1 below).

Figure 1: Changes in the Annual Number of Specialized Territorial Administrative Organizations (2010–2015)



Source: Figure 1 was edited by Attila Barta

As we can see in the Figure above, in 2010 there were 25 types of deconcentrated organs with specialized tasks. Although this category received a new organization; National Land Trust with operational deconcentrated units, the same year also saw the inception of the National Media and Infocommunications Authority. With its establishment, the regional bodies of the former National Communications Authority have been removed from this category.

One year later, there were a notable decrease, then increase. The causes: the beginning of 2011 saw the merging of 14 specialized deconcentrated administrative authorities, and the unification of the former public administration offices. Therefore, the number of related organizations decreased. At the same time, the regional offices of the Hungarian Investment and Trade Agency were established. On 1 May 2011, the regional directorates of the National Institute for Quality and Organizational Development in Healthcare and Medicines and the regional offices of National Health Insurance Fund were also created as 'hidden' deconcentrated organizations.

In 2012 the number of territorial state administrative organizations increased, because the regional bodies of the National Institute for Environment were created.

In 2013 seventeen types of deconcentrated bodies functioned outside the GOs. The causes behind this number were as follows: the government absorbed several operational tasks that had formerly been delegated to local self-governments, resulting in the creation of a new system of deconcentrated institutions. New organizations included the Educational Districts of the Klebelsberg Institution Maintenance Centre and the County Directorates of Social Affairs and Child Protection.

The number of deconcentrated organs decreased in 2014, because the Hungarian Investment and Trade Agency ceased to be a body of state administration; hence its deconcentrated bodies were no longer considered parts of the public administration system.[23] In 2015 this trend was continued when the Mining Inspectorates and the Inspectorates for Environment, Nature and Water were merged into the county/capital GOs.

Most of the mid-level deconcentrated bodies (5 types) belong to the agricultural and (3 types to the) human capacity portfolios (the latter mostly preoccupied with unemployment-, education-, and public health-related tasks), just as they did earlier.[24] The latter can be explained with the shift of responsibilities: starting from 2010, mid-level human capacity matters formerly handled by county-level self-governments were transformed into a state administration responsibility. At the same time, the maintenance of social, medical, and educational institutions reached such a level and specialties that neither them, nor the deconcentrated bodies of tax and treasury administration (described below) were affected by the integration with territorial government offices.

4. The Way Forward?

The overview of the administrative structure resulting from the process described above is shown in the following link. The figure is about the system of state administration and local self-governments in Hungary in mid-2016. Triangles indicate offices, while circles indicate public bodies (the figure was translated and updated by Attila Barta, on the basis of István Balázs' original illustration):

http://jog.unideb.hu/documents/tanszekek/kozigazgatasi/201617_szi_flv/the_system_of_state_administration_and_loc governments_in_hungary_in_mid-2016.jpg

The following section of my essay considers some plans and tendencies that may pave the way for future improvements in the middle level of Hungarian public administration.

4.1 Who is in Charge?

Following 2010, the number of ministries was radically decreased. Still, in early 2017, a new central organizational reform is planned that would affect around 50 institutions. The goal of this transformation is to achieve a simpler administrational structure by drastically decreasing the number of background institutions supporting the ministries. This will be mostly achieved by merging these institutions into the ministries themselves. The effects of this reorganization are, however, far more expansive: many of the daily tasks will be delegated to the middle level of public administration (that is, to the GOs25). This readily fits the plan which calls for a Hungarian state administration which is operated solely by ministries, GOs, and DOs.

In case the above plans will be fully realized, the number of specialized deconcentrated bodies of state administration is expected to be decreased by three besides the GOs, starting from 2017 and beyond.

In correlation with the above changes, the procedural law of the authorities will also be simplified.26 Considering that the government and DOs allow the handling of increasingly more administrative cases (for example, the capital government office and its districts handled almost two million cases alone), legislation aims to concentrate the first instance licenses of authority to the middle level of public administration. In line with the above changes, second instance tasks and authorities would be assigned to ministries or (if the case was started at district offices) to capital and county GOs. To summarize, official licenses would remain in the sphere of state administration by simplifying their administrative background. At the same time, the jurisdictional system of Hungarian public administration would also transform.27

4.2 Fine-Tuning District Administration

The recent years confirmed that the government considers GOs to be the 'pillars' of Hungarian public administration, and keeps expanding their competences. During the establishment of districts, the underlying goal was to keep those cases with state administrative character (originally assigned to self-governments) at the notary, which fall under local regulations and jurisdiction. At the same time, cases requiring country-level management should be transferred to district level.28 However, when jurisdiction transferred the responsibilities from the notaries to the districts, they inevitably distanced them from clients. To avoid the drastic decrease of administration locations, the government established several local DOs. Where the foundation of local branch offices was unfeasible, specialized clerks were trained and employed.

Due to the above developments, the currently existing 19729 districts will be supported by 270 government windows by the end of 2016. At the same time, the system of approximately 900 municipal specialized clerks (serving approximately 2400 municipalities) will also be kept. By mid-2016, the types of cases handled by government windows reached around 1.500, and legislation still aims to expand this list. At the same time, additional government windows are planned to be opened in department stores and train stations to ease their accessibility.

Thanks to the expansion elaborated above, district-level administration is increasingly becoming the preferred entry point for clients in handling official matters. In other words, the districts and the government windows become the most direct administrative manifestation (or 'face') of the central administration. In my opinion, the fine-tuning of the district system is inevitable; however, in light of the upcoming elections of 2018, I expect no further drastic transformation. That said, I think there is nothing to prevent the assignment of rare tasks requiring specialized knowledge to specific districts. This aspiration already has some examples: starting from 1 January 2017, the central hub of environmental protection will be the Government Office for Pest County, while the family events of Hungarian citizens residing abroad have been registered nation-wide by the Government Office of the Capital City Budapest since 2015.

4.3 'The Young Siblings'

As mentioned in Section 3.2, the middle-level of state administration contained several specialized duties that were 'protected' from reorganization from the start. These included the bodies of tax and treasury management, which 'walked their own path' and evolved in parallel with the system of GOs.

The independence of the tax authority is clearly marked by the fact that its institutional structure has already been reorganized before the establishment of capital and county GOs.[30] The organization (employing approximately 20.000 officials and handling one of the largest amounts of cases and clients in the public administration sector) is separated from mid-level GOs even today. That said, this organization also saw fundamental reforms in 2016. This resulted in the simplified operation of the tax authority: the number of organizational units and senior managers were halved. At the same time, plans were made to enable the management of taxation matters in GOs as well.

Another important and independent organization within the public administration structure is the State Treasury, whose profile began its transformation already in 2015 (see the related changes in Section 3.1.2). In the future, all state payments are expected to be handled by this organization; at the same time, the introduction of the so-called self-government ASP (Advanced Service Provider) is also related to its further developments. The goal of this IT-system (connected to the State Treasury) is to grant users access to applications running on remote servers, allowing self-governments to perform document management, accounting, or taxation matters through a uniform system.[31] While several self-governments welcomed this development with lukewarm enthusiasm at best, it is still expected to be realized by 1 January 2018.

4.4 IT Solutions and GOs

It is a commonly accepted observation nowadays that computerization can make public administration more effective: hence, IT-infrastructure developments quickly gained importance. Enabling the possibility to manage official matters from home is advantageous for citizens and public administration bodies alike: it can reduce the number of clients in the offices, and enables the automatization of management, along with faster communication.

When it comes to in-office solutions, I think that a key aspect in increasing the integration of the mid-level government office system should be the support of its leaders. The GOs and DOs increased both in numbers and in their scope of authorities; hence, every effort must be taken to help their leaders having a clear and up-to-date picture on the processes of the organization. Computerizing the work by setting up and maintaining Management Information Systems (MIS) is a considerable facilitator to that: by using such advanced information technology (IT) solutions, institutional decision-making can become more grounded and swift.

Similar improvements can be achieved by introducing e-Administration, that is using IT solutions for services aimed outside the offices. While the use of IT solutions is undoubtedly the way to go, and related developments were certainly more aimed and coordinated in this area, I still consider these improvements sporadic at best in the system. Therefore, I think that e-Administration should be implemented in multiple stages, along the line of the most frequently handled case types, all the while considering both the matters requiring personal appearance, and also the (generally senior) segment of the Hungarian population who prefer to handle their administrative matters by visiting the office in person.[32]

4.5 Public Servants or State Servants?

However, despite the large-scale ideas and plans, it would be a mistake to forget about the skilled and dedicated civil servants: without them, these offices (and the entire system of public administration) would be worth nothing. Legislation also realized this, and responded by creating the legal status of 'state servants' on 1 July 2016.[33] As a pilot of this change, only officials working for the DOs received this legal status at first.[34] The logic behind this development is outward expansion: the government aims to change the legal status of professionals working in state administration gradually, in multiple stages.[35] By 1 January 2017, all public servants working for the GOs would receive the new legal status; then, from 2018, the new status would be expanded to officials employed by the ministries and other central bodies of public administration. This approach would allow not just the raise of salaries, but could also be a motivational factor in the recruitment of new colleagues as well as keeping the experienced workforce.

Besides the potential advantages, the sustainability of the above process should also be considered. Can the above transformation be finished completely? And if so, then what will be the legal status of the officials employed in non-state administration areas, like self-governments?

5. Conclusions

In my opinion, the large-scale transformation of the Hungarian public administration system was driven not just by the fiscal and economic crisis, but (similarly to some other European countries)36 the need to clearly define the role of the state as well. I firmly believe that the re-centralisation efforts and the reinforcement of deconcentrated state administration within mid-level public administration were the most obvious manifestations of the effort in reinforcing state roles, and improving its integrity in public administration. The tight-scheduled series of changes elaborated above aligns with the intensive duty-based reorganization which characterizes Hungarian public administration since 2011. The latest and forthcoming changes in the GOs and their districts are a direct continuation of the reform which aims to increase the administrative capacity of the Hungarian State and Government.

While mid-level public administration is still organized on a divided structure [territorial state administration and territorial type self governments (like counties, cities with the rights of counties, and the capital city) see the link above], its state administration segment definitely became more integrated (albeit with exceptions, as noted above). This is because the government aims to handle the same (or increasing) amount of responsibilities with a reduced number of state administration organizations. The direct result of this was the establishment of such mega-organizations as the GOs,37 the National Tax and Customs Administration, or the institution maintenance bodies. With the plan of merging central administrative bodies to ministries, the number of such organizations is expected to increase.

The status of the government offices fulfilling the territorial representation of the government has strengthened, and it clearly became the leading actor of the reorganized mid-level, thanks to the constant expansion of its sphere of authorities (by mid-2016, 5 million clients visited the GOs and DOs). In light of these developments, it is no surprise that no further reforms are planned for the system of local self-governments.

With its horizontal expansion, the GOs can facilitate a more efficient maintenance, and can reduce the costs of keeping deconcentrated state administration operational. This can be achieved, among others, by unifying procurement, maintaining a joint car fleet, or centralizing the arrangement of energy efficiency developments.

Considering that public administration is a monopoly, it is hard to decide whether an administrative reform or intervention is successful, efficient, and supportable. However, it is certainly an achievement if it increases client and societal satisfaction, and the transformation in the years behind us aimed to improve this very type of satisfaction. *However, it must be* taken into account that a permanent state of reforms works against consolidation, and opposes the stabilization of the administrative environment and predictable management – after all, constant changes block and upset the regular operation of public administration, even if they do so temporarily.

Personally, I think that the internal consolidation of the offices, and the concentration of the organizational and professional control on the territorial level of administration was a necessary step in 2015. However, I am also convinced that further optimal solutions inevitably require performing model experiments before imposing any further reforms. The 'grassroots' introduction of the 'state servant' legal status could be a sign of this; in any way, it is a certainty that the changes related to administrative personnel, procedures, and organizations can only be a success if they are planned in consideration with each other.

I am sure that the best course of action can only be the balanced and pragmatic development of the administrative system. Each country must choose the direction that keeps the realisation of their specific needs in view, and is defined within the limits of their own possibilities. I hold that the solutions elaborated above can really contribute to the creation of the customer-friendly public administration. After all, let us not forget that 'administratio' also meant assistance and service in Latin.

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4 *Cf.* G. Fodor Gábor, Stumpf István, Neoweberi állam és jókormányzás, 3 *Nemzeti Érdek* 5–26 (2008). Also Wolfgang Drechsler, The Reemergence of 'Weberian' Public Administration after the Fall of New Public Management, The Central and Eastern European Perspective, *6 Halduskultuur* 94–108 (2005). Or from earlier, see Christopher Pollit, Geert Buckaert, *Public Management Reform. A comparative Analysis*, (Oxford University Press, Oxford, 2004).

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8 See Patyi András, Rixer Ádám, *Hungarian Public Administration and Administrative Law,* 304–320 (Schenk Verlag, Passau, 2014). And OECD (2015), Hungary: Reforming the State Territorial Administration, *OECD Public Governance Reviews*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264232921-en (accessed 17 April 2016).

9 While the government had regional representative bodies between 1990 and 2010 as well, their duties and licences were different. Between 1990 and 1994, this task was fulfilled by the 'Köztársasági Megbízott' (government commissioner). Between 1994 and 2006, the assigned offices were called 'Fővárosi Közigazgatási Hivatal' and 'Megyei Közigazgatási Hivatalok' (capital public administration office and county public administration offices, respectively). Between 2006 and 2008, the body was called 'Regionális Közigazgatási Hivatal' (regional public administration office). Finally, from 2009 until September 2010, it was known as 'Regionális Államigazgatási Hivatal' (regional state administration office). Barta Attila, New Trends in The Territorial Representation of Governments, 1 *Curentul Juridic* 75–84 (2012).

10 See the the CXXVIth Act of 2010 on the Capital and County Government Offices, and on the Amendments Related to the Establishment of Government Offices and the Integration of Territorial State Administration.

11 The Fundamental Law of Hungary, Article 17., Paragraph (3)

12 As defined by the Fundamental Law of Hungary and the CLXXXIXth Act of 2011 on the Hungarian Local Self-Governments.

13 175 so-called '*járás*' in the countryside, and 23 so-called '*kerület*' in Budapest.

14 Kéki Zoltán: A kistérségi és a körzeti igazgatás, 233 in Csefkó Ferenc (ed.), *Ünnepi kötet Ivancsics Imre egyetemi docens, decan emeritus 70. születésnapjára* (Pécs, Kódex, 2008).

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17 http://www.kormany.hu/download/8/42/40000/K%C3%B6zigazgat%C3%A1s_feljeszt%C3%A9si_strat%C3%A9gi 41–52, (accessed 30 June 2015).

18 For example, the reconstruction of the citizenship's trust towards public administration is a sociological question that takes at least 8–10 years to research and restore (if not more).

19 For other interesting details on the new regulations, see the work of Papp Dorottya, http://www.arsboni.hu/hatekony_kozigazgatas_de_milyen_aron.html (accessed 26 March 2015).

20 The internal structure of some offices (such as that of the Government Office for Pest County or the Government Office of the Capital City Budapest) may differ from the ones included in the table. The reasons of this can be numerous: on the one hand, responsibilities may vary in the different counties; and on the other hand, it can occur that certain departments and divisions are numbered due to limitations in the number of personnel. The table is aimed to serve as an illustration only, and thus indicates just general solutions.

21 Balázs István, *A közigazgatás változásairól Magyarországon és Európában a rendszerváltástól napjainkig,* 190–193 (Debreceni Egyetemi Kiadó, Debrecen, 2011).

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23 Since the regional directorates of the National Institute for Quality and Organizational Development in Healthcare and Medicines and the regional offices of National Health Insurance Fund rarely based the topics of a thorough analysis, the number of these organizations may be indicated differently in the related professional materials.

24 See Ferrel Heady, *Public Administration, A comparative perspective*, 182 (Taylor & Francis Group, 2001).

25 The specific steps and the schedule of the reorganization are detailed in Government Decree 1312/2016. (VI. 13.) on the Measures Related to the Revision of Central Offices and Ministry Background Institutions Operating as Publicly Financed Institutions.

26 See the CXLth Act of 2004 on the General Regulations of Public Administrative Procedure on Authorities and the Government Decree 1352/2015. (VI. 2) on the Various Tasks Related to the Preparations for the Act on Public Administration Civil Procedure and the Act on General Administrative Procedure.

27 http://www.kormany.hu/download/c/c8/50000/20150514%20Jelent%C3%A9s%20az%20%C3%A1ltal%C3%A1n (accessed 5 September 2016).

28 Patyi, Rixer, *supra n.*1, at 318.

29 In the meantime, a district has been merged into another.

30 See CXXIIth Act of 2010 on the National Tax and Customs Administration.

31 For details, see Government Decree 257/2016. (VIII. 31.) on the ASP System of Self-Governments.

32 See Veszprémi Bernadett, *Az információs társadalom kihívásai és a közigazgatás reakciói* (Debreceni Egyetemi Kiadó, Debrecen, 2015).

33 The polarization of public administration personnel already started when the e 'mployees of the tax authority received their own career benefits.

34 See LIIth Act of 2016 on State Servants.

35 Currently, clerks employed in the public administration sector are uniformly called 'public servants', while officials working in state administration are known as 'government officials'. Since 1 July 2016, the 'state servant' legal status basically exists within the latter group.

36 http://www.eastr-asso.org/content/eastr-0 (accessed 5 September 2016).

37 In mid-2016, 33.702 public servants work at the 20 GOs.

10.53116/pgaflr.2016.2.2

Implications of the New Framework for Market Abuse in the EU*

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* The article is the output of VEGA project No. 1/0907/16 "Legal Protection of Parties of Economic and Legal Relations with Emphasis on Criminal-law Protection of Creditors".

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Abstract: The Market Abuse Regulation (MAR) was adopted in April 2014, and it has been uniformly regulating the issues of insider dealing and market manipulation throughout the EU since 3 July 2016. Unlike the previous legislation, deviation from the regulation's wording will not be possible. This should exclude different applications, which have occurred in the individual EU Member States so far, when investigating unlawful behaviours marked as market abuse. The regulation introduced several substantial changes.

Keywords: market abuse; insider dealing; market manipulation; administrative and criminal offences

1. Introduction

Market abuse is considered to be one of the most dangerous unlawful behaviours on the financial market although it is usually referred to as victimless crime. The root of this is favouring certain group of investors with access to non-public information (insiders) or dissemination of false and misleading information within the investing public. Accordingly, we distinguish two basic forms of market abuse: insider dealing and market manipulation. The European Commission assessed the existing regulatory framework for market abuse under the Market Abuse Directive[1] and related implementing directives as insufficiently effective.[2] After ten years of existence and application of the given directive, a new legislation was adopted in the form of regulation on market abuse.[3] Its wording also takes account of the related new legislation on provision of investment services and technological developments on the financial market.[4] Parallel to this legislation a new directive (MAD II) was adopted, harmonizing criminal penalties in the area of market abuse. Criminal law measures can be considered an element to ensure the effective enforcement of EU policies, as recognized by the Treaty on the Functioning of the EU.[5]

The purpose of the regulation (MAR) is to minimize the national differences in investigation of insider dealing and respective sanction regimes. The regulation entered into force on 3 July 2016, and from this date it repealed MAD and related implementing directives (including the regulation establishing exemptions for buy-back programmes and stabilization of financial instruments). The adoption of the regulation will ensure unification of this issue as well as direct effect of its provisions, and adoption of a national legislation, which may vary across countries, will not be required.

The purpose of the article is to analyze the fundamental changes introduced by MAR compared to the previous European legislation. Several institutes were adopted from the market abuse directive and related implementing directives in the respective regulation, whereas its wording includes also experience from practice or case law of the European Court of Justice.

2. Substantive Changes Included in MAR

The regulation contains several changes,[6] some of them are of only legislative and technical nature, and others assume significant impact on more efficient investigation of unlawful conduct such as insider dealing and manipulative practices on the capital market (market manipulation). In the following paragraphs we will try to analyze and summarize the most important changes through some comments. We believe that identification of the most important changes is beneficial not only for the theoreticians of the financial market, but also for the legal practice of the supervisory authority of the capital market.

1. The regulation formally distinguishes, unlike MAD, three types of unlawful conduct as an administrative offence in the field of market abuse: a) insider dealing, b) unlawful disclosure of inside information, c) market manipulation.[7] Unlawful disclosure of inside information was subordinated to actions under letter a) in MAD.

2. The material scope as well as the personal scope of prohibition related to market abuse was extended, namely by alternative trading platforms and their participants. The MAD was applied only to financial instruments admitted to

trading on a regulated market, or for which a request for admission on such market and its derivatives has been made. On the contrary, the regulation includes also financial instruments traded on multilateral trading facilities (MTFs) which were admitted to trading on MTFs or for which a request for admission to trading on MTFs has been made, and financial instruments which are traded on organised trading facilities (OTFs[8]) and their derivatives[9]. The reason is the increase in trading volume also on the given alternative trading platforms. In this connection, the personal scope was extended by issuers of such financial instruments with regard to the obligations arising from the market abuse regulation.

3. The personal scope covers also those persons who act in collaboration to commit market abuse.[10] In practice it most commonly refers to brokers who devise a trading strategy designed to result in market abuse or persons who encourage a person with inside information to disclose that information unlawfully, or persons who develop software in collaboration with an investment firm for the purpose of facilitating certain forms of market abuse.

4. According to the regulation, the concept of financial instrument will include also emission allowances or auction products based thereon traded on an auction platform with status as a regulated market. The emission allowances were included into the financial instruments already by the adoption of previous Markets in Financial Instruments Directive (MiFID).[11] From practical experience, a behaviour which has effect on benchmarks, subject to fulfillment of conditions set out, is also understood as market manipulation according to the regulation.[12]

5. In addition to the existing administrative offences defined in the Market Abuse Directive (e. g. transaction, order or other conduct related to the financial instrument; a commissive conduct)[13], the regulation covers also omissions and measures to prevent specific transactions (omissive conduct).[14]

6. A rebuttable presumption – so called interpretive rule to assess unlawful conduct [15] – has been formally established which was already formulated by the decision-making practice of the European Court of Justice in the context of the previous directive.[16] It refers to objectivization of the conduct, which means that it is assumed that the conduct of a legal or natural person who is in possession of inside information is forbidden from using inside information, thus an unlawful conduct. However, a rebuttable presumption fully respects the preservation of the rights of defense. The respective recital[17] extends the interpretive rule also to all subsequent changes to orders that were placed before possession of inside information, including the cancellation or amendment of an order, or an attempt to cancel or amend an order. In practice it will mean that within the sanction proceedings the commitment of the offence of insider dealing will be always presumed until proven otherwise by the person against whom the sanction proceedings are conducted (reversed burden of proof).

7. When committing market manipulation, an attempt to engage in market manipulation[18], which was originally covered under the MAD only in relation to the second form of market abuse (insider dealing) shall be also deemed unlawful.

Changes pursuant to item 5, 6 and 7 present a significant and a stricter legislation, extensively defining market abuse. Based on this, it will be possible to sanction an unlawful conduct, the assessment of which was disputed or could not be at all considered as one of the forms of market abuse in the past.

8. Insider dealing in the form of tipping (recommendation, abetting to trading based on a 'good tip' for investment) will be examined in the context of subjective elements – the knowledge that it is an inside information and the conduct is based thereon. Recommendation and abetting will be considered separately as an unlawful conduct, under the definition of unlawful disclosure of inside information.

9. General exceptions to conducts that are otherwise deemed market abuse were directly reflected in the regulation (buy-back programmes and price stabilization, etc.).[19] Moreover, the regulation extended the activities and entities which will not fall under the regulation due to public interest:

– transactions carried out by the European Commission or any other officially designated body acting on its behalf in pursuit of public debt management policy;

– transactions carried out by the European Commission, special purpose vehicle of one or several Member States, European Investment Bank, European Financial Stability Facility, European Stability Mechanism, an international financial institution established by two or more Member States which has the purpose to mobilize funding and provide financial assistance to the benefit of its members (especially the Single Resolution Board managing the supranational Single Resolution Fund)[20];

– activity of the Member States, European Commission or any other officially designated body acting on their behalf, which concerns emission allowances and which is undertaken in pursuit of the climate policy or in pursuit of the common agricultural or fisheries policy[21].

The general exceptions do not apply to employees or external collaborators of the aforementioned entities (e. g. employee of the Agency for Debt and Liquidity Management) under the conditions that the given natural persons carry

out prohibited transactions, directly or indirectly, on their own account, or they engage in prohibited behaviour in form of aiding and abetting. However, national legislations should, in our opinion, implement such organizational measures that would restrict market abuse by the said natural persons.

In addition to the original special exceptions to unlawful conducts (e. g. legitimate conduct of market makers, persons authorised to act as counterparties, persons authorised to execute orders on behalf of third parties, takeover bids, etc.), the regulation distinguishes some new special exceptions (behaviour on the basis of own trading plans and strategies, market soundings22 if the relevant market lacks confidence). Some of the existing special exceptions are directly adopted in the text of the regulation23, not only in the recitals as in MAD.

10. The Market Abuse Directive did not set forth the obligation of a legal entity to implement organisational measures to restrict dissemination of inside information. The implementation thereof deprives the legal entity that is in possession of inside information of the mentioned rebuttable presumption that it used the inside information. The regulation, directly in its text, requires the implementation of the aforementioned measures.

11. For market manipulation the merits of dissemination of false information is complemented by dissemination of misleading information or provision of false inputs in relation to a benchmark, or any other behaviour which manipulates the calculation of a benchmark.24

The regulation's non-exhaustive list of examples of manipulative behaviour includes placing orders, cancellation or modification thereof by any and all available means of trading. Specifically this is an algorithmic and high-frequency trading if it is executed with certain negative effect on the market.25 The algorithmic and high-frequency trading is considered as one of the potential risk carriers, including manipulative practices. The requirement of its regulation refers to the requirement of MiFID II for risk control at investment firms which use this method of trading.26 However, the regulation also underlines the importance of various internet applications and their impact on the investor's behaviour (blogs, social networks like facebook) and points out the necessity of putting them on an equal footing with traditional dissemination of information. The non-exhaustive list of market manipulation indicators was transferred from Directive 2003/124/EC implementing MAD to Annex I of the regulation. MAR, however, emphasises that it is only a non-exhaustive list of indicators relating to false or misleading signals and to price positioning (Part A, Annex I) and a non-exhaustive list of indicators relating to the employment of a fictitious device or any other form of deception or contrivance (Part B, Annex I).

12. In addition to the national supervisory authorities, also a supranational supervisory authority, namely the European Securities and Markets Authority (ESMA), is involved in the process of accepted market practices (AMPs). The national supervisory authority, which is the Národná banka Slovenska (National Bank of Slovakia) in the Slovak Republic, will have to before establishing an accepted market practice notify ESMA of the intention to establish an accepted market practice at least three months before the AMP is intended to take effect. Following this notification, ESMA shall issue an opinion assessing the compatibility of the AMP with the criteria under the regulation, and whether the establishment of the respective AMP would not threaten the market confidence. Where a national supervisory authority establishes an accepted market practice contrary to the opinion of ESMA, it shall publish on its website a notice setting out its reasons for doing so. Such procedure should facilitate market transparency and functioning of small capital markets to which the relevant market practice should not necessarily present a threat as in the case of more developed capital markets. At the same time, it will help avoid arbitrariness of procedures of national authorities according to the principle 'comply and explain'.

13. The regulation assumes establishment of effective precautionary measures, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempts thereof under the threat of administrative sanctions for operators of regulated or non-regulated markets (MTF, OTF). These are requirements for the operators of these markets not for market participants.27 In practice, it will more probably refer to technical software requirements and requirements to carry out orders related to transactions. The details should be laid down in the implementing technical standards of ESMA.

14. A number of changes were made within the obligation of disclosure of inside information (*ad hoc publicity*). One of them is ad hoc publicity of inside information related to financial instruments that are admitted to trading on an SME growth market ('small and medium enterprises'). The respective inside information may be posted on the website of the respective market instead of on the issuer's website where such facility, based on the decision of the market operator, is provided to SME issuers.28 By the effect of embedding this simplified way of information reporting, the administrative burden for the issuers on the markets of small and medium enterprises should be reduced. In order to preserve the stability of the financial system29, the regulation introduced a special reason for delaying the performance of the ad hoc publicity obligation for selected issuers. Specifically, it refers to financial institutions and credit institutions where inside

information is related to their temporary liquidity problems (for example, the need to receive temporary financial assistance from a central bank as lender of last resort). The delay may be executed with a time limit provided that the following conditions are met cumulatively:30

– the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system;
– it is in the public interest to delay the disclosure;
– the confidentiality of that information can be ensured;
– the competent authority has consented to the delay.

Provided that consent to delay the disclosure is not granted by the competent authority, the issuer must disclose the information without delay. The introduction of the special reason is closely related to the second pillar of the EU's Banking Union (crisis management and resolution).31

15. The regulation introduces exemption from the obligation to draw up an insider list for issuers of financial instruments admitted on the SME market. This is an unburdening approach in order to reduce the administrative costs arising from this obligation for SMEs.32 We see this initiative as a psychological effect not to discourage starting small- and medium-sized issuers with various administrative obligations which are connected with issuance and subsequent trading in financial instruments. However, the supervisory authority may request for provision of an insider list. Therefore, small- and medium-sized issuers will have to be able to develop an insider list upon request and provide it. Moreover, the obligation to instruct persons with access to inside information remained for all the issuers. With respect to the archiving obligation of the issuers, the period to retain all inside information on their websites has been prolonged (from one year to at least five years).

16. The notification of managers' transactions (transactions of persons discharging managerial responsibilities at the issuer and transactions of persons closely associated with them) has been significantly extended. The obligation of notification refers not only to transactions relating to shares admitted to a regulated market or their derivatives, but also to transactions relating to debt instruments and/or all financial instruments to which the regulation subject will apply (it means also emission allowances, financial instruments on OTF and MTF). At the same time, the regulation shortened the notification period for the managers' transactions, i. e. from five days to three days. The obligation of notification of managers' transactions was complemented by pledging and lending of financial instruments as the given legal operations can result in a material and potentially destabilizing impact on the issuer.33 The regulation rationalized the aforementioned addition of pledging and lending as follows, 'without disclosure, the market would not know that there was the increased possibility of, for example, a significant future change in share ownership, an increase in the supply of shares to the marketplace or a loss of voting rights in that company'.34

17. The previous European legislation under MAD did not set forth any specific rules for cooperation between the relevant national supervisory authorities and ESMA. Therefore, the regulation explicitly constituted the mutual relations between the aforementioned authorities in the form of cooperation (in exchange of information, investigation of market abuse forms, on-site inspection, and recovery of imposed pecuniary sanctions).35 In terms of the regulation, ESMA is in the position of a coordinator of investigation in cases with cross-border effects if it is requested by one of the involved national supervisory authorities. The cooperation in the form of investigation and on-site inspection may be executed in several ways:

– the requested national authority may carry-out the on-site inspection or investigation itself;
– it may allow the requesting party to participate in an on-site inspection or investigation;
– allow the requesting party to carry out the on-site inspection or investigation itself;
– appoint auditors or experts to carry out the on-site inspection or investigation;
– share specific tasks related to supervisory activities with the other competent authorities.36

Supervisory authorities of third countries (non-EU countries) may also take part in cooperation provided that cooperation arrangements concerning the exchange of information and the enforcement of obligations arising under MAR are concluded with them.

18. Specifically it is necessary to draw attention to the specific legislation of whistleblowing for reporting of market abuse behaviours.37 In this respect, the regulation puts greater emphasis on the protection of persons reporting infringements of the provisions concerning prohibitions and obligations. Reporting should be carried out within a reporting mechanism to a national supervisory authority.38 At the same time, according to the regulation, member states should be allowed to provide for financial incentives for whistleblowers.

3. Conclusion

Most of the MAR provisions came into force on 3 July 2016 (some provisions have been applied since 2 July 2014; provisions related to OTF, SME markets, emission allowances will apply only from 4 January 2017). In compliance with the principle of direct applicability of the European regulation, the national supervisory authorities throughout the entire European Economic Area must, therefore, adopt the relevant provisions of the regulation starting from the mentioned date. The relevant national provisions governing the whole issue of market abuse (insider dealing and market manipulation) were repealed in the Slovak Republic by amending the Act on Securities and Investment Services effective from 1 July 2016.39 In compliance with Article 144, Paragraph 3 of the Act on Securities and Investment Services, the sanctions for market abuse shall be imposed directly in terms of the regulation.40 With respect to the scope and significance of changes introduced by MAR, it appears to be optimal that the national legislation was omitted and not replaced. Adoption of own national legal provisions into the Act on Securities and Investment Services would bring a risk that its wording could be in contradiction with the wording of the regulation. Despite the effort of the legislator, it can be stated that not all areas of the MAR legislation were fully implemented. The regulation related to whistleblowing in relation to market abuse has not been amended in details on national level despite the fact that the implementing directive to the regulation41 that should harmonize the legal regulations in this area determined 3 July 2016 as the date of its transposition. Although the Slovak Republic has a general legislation on reporting of anti-social behaviour (under the Whistleblowing Act) since 1 January 2015, it has chosen an approach of special legislation for whistleblowing in relation to all unlawful behaviours on the entire financial market, not only in relation to market abuse. This approach was reflected in a bill amending the financial market supervision act – a basic procedural regulation for the entire financial market. The reason is the effort to exclude differences in the application practice in relation to various financial market entities. Although, we consider that the aforementioned approach is appropriate, but its legislative process has been significantly falling behind as the transposition of the implementing directive should have taken place already on 3 July 2016 (only in relation to reporting of market abuse). The duration of the legislative process is in this case to the detriment of effective reporting of suspicious transactions of insider dealing or market manipulation. With respect to the fact that these are hardly detectable and provable unlawful conducts, the absence of a detailed whistleblowing process can be deemed negative which makes it impossible to effectively enforce the provisions of the regulation despite the fact that the Slovak Republic had repealed the national legislation in time due to conflict. At the same time, most of the changes introduced by MAR and listed in the text above will not be applicable in the Slovak Republic given the small volume of the Slovak capital market.

References

1 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse); Market Abuse Directive (hereinafter MAD).

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, dated 8 December 2010, on Reinforcing Sanctioning Regime in the Financial Services Sector.

http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2010/com_2010_0716_en.pdf (accessed 7 Feb. 2015)

3 Regulation No. 596/2014, dated 16 April 2014, on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC; Market Abuse Regulation (hereinafter MAR).

4 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments; Markets in Financial Instruments Directive II (hereinafter MiFID II). Its transposition was postponed from the original date of 3 July 2016 to 3 July 2017 due to the complexity of the legislation.

Updated rules for markets in financial instruments: MiFID 2,

http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm (accessed on 14 Aug. 2016).

5 Libor Klimek, Effective Enforcement of Sanctions for Market Abuse in the EU: Introduction of Criminal Sanctions, 114, in Alexander Bělohlávek, Filip Černý & Naděžda Rozehnalová (eds.), *Regulatory Measures and Foreign Trade, Czech Yearbook of International Law* (Juris Publishing, Inc., Huntington, New York, 2013). https://doi.org/10.2139/ssrn.2624110

6 For instance, Husták was engaged in the issue of innovations introduced by MAR. Zdeněk Husták, *The New Market Abuse Regulation – torrent of duties in midsummer*, http://www.epravo.cz/top/clanky/nove-narizeni-o-zneuzivani-trhu-zaplava-povinnosti-v-parnem-lete-101826.html (accessed on 14 Aug. 2016).

7 See titles of articles 8, 10, 12, 14 and 15 of MAR or Recital 7 of MAR.

8 OTF is considered as another alternative trading platform to the regulated market, which will be deemed a new investment service and it will fall under the legal regulation of MiFID II. Refer to definition under Art. 4, para. 1, item 23 of MiFID II.

9 Refer to Art. 2, para. 1 and Recital 8 and 9 of MAR.

10 Refer to Recital 39 of MAR.

11 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

12 A serious case of a multiannual manipulation of benchmarks was the scandal related to the manipulation of LIBOR interbank rate which influenced the US market too.

13 Regardless the fact whether it was conducted on a trading venue or as a non-public trading.

14 Refered to Recital 23 of MAR 'prohibition against insider dealing should apply where a person who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into market transactions in accordance with that information, or by cancelling or amending, or by attempting to cancel or amend an order to acquire or dispose of … '. Cf also Art. 8, para. 1 of MAR.

15 To be found under Recital 23 and 24 of MAR.

16 Preliminary ruling proceedings before the European Court of Justice in Case No. C-45/08 *Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA).* Refer to the ruling of the European Court of Justcie in this case dated 23 December 2009, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0045&qid=1472221177998&from=SK (accessed on 14 Aug. 2016).

17 Recital 25 of MAR.

18 The reasoning of this objective is indicated under Recital 41 of MAR and it assumes that market manipulation was not completed as a result of failed technology, but the seriousness of this conduct is equally important.

19 Refer to Art. 5 and 6 of MAR. For buy-back programmes and price stabilization refer to Ľubomír Čunderlík, *Market Transparency and Capital Market Abuse,* 126–140 (Wolters Kluwer, Bratislava, 2015).

20 For these entities refer to Ľubomír Čunderlík, Financial Implications of Mandatory Contributions of Bank Entities in Times of Financial Crisis in the Context of Banking Union Anticipation, 31–50 in Damian Czudek, Michal Kozieł (eds.), *Legal and Economic Aspects of the Business in V4 Countries, Conference proceedings* (Tribun EU, Centrum Prawa Polskiego, Brno, 2014).

21 Recital 13, 21 and 22 of MAR.

22 Art. 11 of MAR. In practice, it can be a situation known as 'road show', when the issuing manager contacts key investors and provide them the trade conditions. The execution of market sounding will be considered as a lawfully authorised disclosure of inside information in the course of exercise of that person's employment or function, if the person disclosing the information in this way fulfills the requirements under Art. 11, paras 3 and 5 of MAR.

23 For instance, Art. 9 of MAR.

24 Art. 12, para. 1 d) of MAR.

25 Art. 12, para. 2 c), items I to III of MAR.

26 Art. 17 of MiFID II.

27 The requirement is based on the parallel requirements determined under Articles 31 and 54 of MiFID II.

28 Art 17, para. 9 of MAR.

29 Stated under Recital 52 of MAR: '… the wider public and economic interest in delaying disclosure outweighs the interest of the market in receiving the information which is subject to delay.'

30 Pursuant to Art. 17, para. 5 of MAR.

31 Refer to Recital 64 and Art. 39, para. 2 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for recovery and resolution of credit institutions and investment companies; Bank Recovery and Resolution Directive (BRRD).

32 Refer to the reasoning under Recital 56 of MAR.

33 The interpretation of the previous legislation of MAD was not uniform. Despite that, already before the adoption of MAR, there were opinions criticising this imperfection of MAD. Refer to, for example Josef Kotásek, Managers' Transactions, 128 in Josef Bejček (ed.), *Veřejný zájem v obchodním právu, Conference proceedings* (Masarykova Univerzita, Brno, 2008).

34 Recital 58 of MAR.

35 A national supervisory authority may refuse a request to cooperate only under the exhaustively listed conditions. See Art. 25, para. 2 of MAR.

36 These forms of cooperation are broader than those that are indicated under Art. 16, para. 4 of MAD.

37 By the effect of adopting Whistleblowing Act No. 307/2014 Coll. in the Slovak Republic with effect from 1 January 2015, the protection of whistleblowers in relation to defined criminal offences and administrative offences was introduced already before the regulation entered into force. The regulation, however, presents a special legislation for reporting illicit conduct on the capital market.

38 Implementing Directive (EU) 2015/2392 of 17 December 2015 as regards reporting to competent authorities of actual or potential infringements of MAR lays down details on whistleblowing procedures before national supervisory authorities set out in Art. 32 para. 1 of MAR. Its provisions shall apply from 3 July 2016. In the Slovak Republic, the details of this mechanism will be adjusted both by an act amending the act on financial market supervision (with proposed effect from 1 October 2016) and by internal work regulation of the Národná banka Slovenska (National Bank of Slovakia). The bill amending the act on financial market supervision is currently under late interdepartmental review, and its original date of effect was determined for 3 July 2016 (identical to both regulation¢s and implementing directive's date of effect).

39 Act No. 361/2015 Coll. dated 10 November 2015 amending Act on Securities and Investment Services. Its entry into force repealed Art. 131a up to Art. 132n and Art. 144, para. 12.

40 Art. 30, para. 2 and Art. 31 of MAR.

41 Implementing Directive (EU) 2015/2392 of 17 December 2015 on MAR as regards reporting to competent authorities of actual or potential infringements of that Regulation.

10.53116/pgaflr.2016.2.3

The Theoretical Framework of Macroprudential Policy and its Place in the Scheme of Economic Policy

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Abstract: Microprudential regulation and supervision – focused on institutional risks – cannot guarantee the stability of the financial system. Therefore special attention should be paid to macroprudential regulation and supervision to address systemic risks. The purpose of this study is to provide the historical context and a theoretical framework for macroprudential regulation and supervision – a new area of economic policy. To this end, we shall examine the causes for the spread of macroprudential policy, its basic concepts, and thirdly, its place within the scheme of economic policies.

Keywords: economic policy; Glass–Steagall Act; macroprudential policy; regulation and supervision

1. Introduction

The liberalization and deregulation pervading the regulation of financial markets in recent decades would go hand in hand with a significant decrease in states' ability to intervene. Due to regulatory deficiencies, supervisory authorities were incapable of sensing the impending crisis and were also unable to handle aspects of the crisis that had been identified. Providing a new basis for the regulation of financial markets and simultaneously strengthening supervisory competencies have constantly been on the agenda since 2008: on the global level at the Financial Stability Board formed by the G20, on a regional level with the European Union, as well as at the state level. An agreement has been reached between those creating regulatory and supervisory policy, and academic representatives in that microprudential regulation and supervision that focus on institutional risks are insufficient for ensuring the stability of the financial system; therefore significant attention must be paid to macroprudential regulation and supervision that aim to handle systemic risks. This policy area practically did not even exist prior to 2008 and its conceptual definition, the development of its tools as well as its relationship to other areas of economic policy is still evolving. This study aims to present the historical and theoretical basis for macroprudential regulation and supervision as a new field of economic policy. To this end, we shall examine the causes for the spread of macroprudential policy, its basic concepts, and thirdly, its place within the scheme of economic policy.[1]

2. Reasons for the spread of the macroprudential approach

The global economic crisis that emerged in 2008 – specifically an asset price-bubble[2] at the outset – was not the first serious setback in human history. One of the basic characteristics of the economy is that it is in constant change; sometimes it grows, other times it begins to decline[3] and this cyclicality is especially true for the workings of the financial markets. Based on broad empirical research, Leaven and Valencia demonstrated that of the 42 banking crises occurring between 1970 and 2007, 55% were also followed by a currency crisis; in contrast, the number of sovereign debt crises was far lower; over half of bank crises were accompanied by another crisis (currency and banking crises). Furthermore, in almost 11% of cases, a triple crisis occurred (i.e. currency, banking, and sovereign debt crises simultaneously).[4] Distinct risks in particular economic sectors are thus able to have an effect on the stability of the whole sector, which – due to the interconnectedness of actors in the economy – may contaminate other sectors and thus the whole of the economy. Therefore it is worth briefly reviewing the reasons that led to the spread of macroprudential regulation and supervision in the financial markets.

2.1 The Glass–Steagall Act

The supervisory and regulatory side of the 'Great Depression' of 1929–1932 yielded numerous morals and consequences, the causes of which are to be found in the erosion of faith in the financial markets' flexibility and ability to self-regulate – i.e. in the 'invisible hand' of the market according to Adam Smith. The Glass–Steagall Act[5] enacted in 1933 made an

attempt – in order to restore faith in the banking system[6] – to restrict the propensity to speculate, which can be regarded as a basic aspect of financial markets. To this end – effectively erecting a firewall between the activities of financial institutions –, the Glass–Steagall Act separated commercial and investment banking activities. This fundamentally meant that if a bank accepted deposits, it could only use them for providing credit but was prohibited from trading on the stock exchange. The Act also introduced restrictions regarding the speculative use of capital, eliminated interest on deposits repayable on demand, introduced a deposit insurance scheme and the minimum capital requirement.[7] The fundamental aim of the Act was to prevent from hastily risking or at least seriously limit banks concerning the funds of depositors. Consequently, the Act also tried to refrain states – i.e. taxpayers – from having to bail out troubled financial institutions when they are near bankruptcy.

The Glass–Steagall Act placed emphasis on security, soundness, stability and avoidance of abuse amid steady growth rather than quick but risky growth; i.e. it targeted the creation of a system of safeguards providing protection against renewed financial crises. However, the regulations of the Glass–Steagall Act – through taking advantage of its deficiencies – were often worked around by market participants, and constantly eroded during their time in effect.[8] Firstly, the avoidance of the separation of functions appeared in the formation of foreign subsidiaries by financial institutions, since financial markets were significantly more deregulated in numerous jurisdictions – such as in Great Britain – than in the USA. Secondly, commercial banks developed new instruments for investment that behaved almost like securities, while investment banks developed products with the characteristics of loans and deposits,[9] as a result of which they essentially became each other's competitors. A fundamental new technique serving the 'avoidance' of the Glass–Steagall Act became available from the 70s when banks began to sell 'repacked', in other words 'securitized' loans – initially of high quality – to investors in the capital markets.[10] We call this the *originate-to-distribute* model. The essence of this practice lies in that banks are able to transform illiquid instruments into liquid ones having a large market, while the institution originally providing loans spreads its risk among investors.[11]

It must be stressed that – besides market actors – the central bank of the United States of America, the Federal Reserve System (hereinafter referred to as the Fed) itself played a crucial role in the decline of the Glass–Steagall Act's provisions incentivizing stability. Article 20 of the Act contained a general prohibition on banks' forming affiliations with companies whose principal activity is securities underwriting. However, the Fed reinterpreted this prohibition in such a way that initially 5%, then 10%, and after 1997, 25% of the total revenues of commercial banks could originate from investment banking;[12] furthermore, in 1990 it expressly permitted J. P. Morgan & Co. to underwrite securities.[13] Hence the Fed, in the words of Wolfgang Reinicke, de facto overruled the Glass–Steagall Act.[14] This process resulted in the U.S. Congress having no other choice but – after several unsuccessful bills[15] – to formally remove the barriers between commercial and investment banking activity with the Gramm–Leach–Bliley Act of 1999.

2.2 The consequences of the Gramm–Leach–Bliley Act

Uncovering the causes of the global economic crisis of 2008 is not an aim of this study,[16] however, it is necessary to point out that restrictions removed by the Gramm–Leach–Bliley Act in the spirit of – 'cyclical euphoria'[17] – created the basis for the materialization of the macroeconomic risks, the mitigation of which continues to be the primary task of economic policy to this day.

Firstly, the dissolution of the boundary between commercial and investment banking made it possible for financial conglomerates to form enormous corporations that combine the previously separate financial activities (such as the collection of deposits with insurance and listing securities). The risk effect of the merging of activities is connected with financial stability, which is significant for the entirety of the economy.[18] On the one hand, as a consequence of the Gramm–Leach–Bliley Act, such institutions were formed in great numbers that had to be saved by state capital injection in cases of crisis due to their size and role in financial intermediation and their contribution to the national economy. This is the so called 'too big to fail' problem.[19] Achieving the classification of 'too big to fail' comes with significant competitive advantage compared to other financial institutions as it allows for carrying out their activity, building market positions and undertaking exaggerated risks in order to increase their profitability in the secure knowledge that the potential costs of risky businesses and losses will always be paid by tax payers. This is the so-called moral hazard problem that produces significant macroeconomic risks. On the other hand, activities with different aims within one institution necessarily lead to conflicts of interest. As Marján expressed if stock analysts were in the same boat as investment bankers, the temptation would be too big to – as it has indeed happened – endorse to investors without a second thought corporations with known problems. Bankers would easily become accomplices of CEOs running away from problems.[20]

Therefore, instead of solving problems at the micro level, they added up to the macro level due to not having dealt with them.

Secondly – strongly connected to the removal of the barrier from between commercial and investment banking – the originate-to-distribute model formed due to securitization was seriously damaged by the originator's failure to be sufficiently circumspect, and spread more than just good quality mortgages among investors. Due to a relaxation of mortgage lending conditions, increasing numbers of so-called *subprime* borrowers received mortgages that were then also securitized, resulting in complex derivative securities – the risks of which could not even be assessed by the issuers themselves in some cases. They were sold to investors, hence placing the risks off the balance sheet. As a result of this practice, at first everyone was a winner: debtors received loans, banks issued an increasing number of loans that raised their income, those repackaging securities got their premiums and savers realized significant returns without perceiving risk.21 At the same time, the success of such lending formed a bubble, together with which securitization – after reaching a 'critical mass' – no longer meant the spreading of risk but rather the infection of the whole financial system.

Macroeconomic risks produced as a result of the abovementioned practices highlighted the fact that the micro-level approach to the regulation and supervision of the modern financial system, i.e. individual institutional prudence is insufficient. The micro-level stability of the financial system before the economic crisis concealed the accumulated systemic risks, the forecasting and management of which must be made part of the regulatory and supervisory system. Therefore states, economic integration organizations and various international institutions are making significant efforts globally in order to create suitable institutional frameworks and tools for the prevention, discovery and management of systemic risks.22

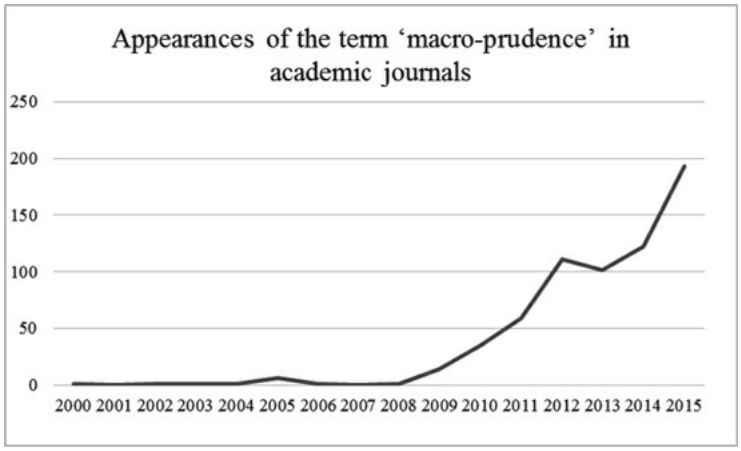
3. Basic definitions of macroprudential policy

After having presented the reasons for the spread of macroprudential regulation and supervision (hereinafter referred altogether to as macroprudential policy), we will attempt to define the basic concepts and aims of macroprudential policy. Firstly, the origin of the term 'macro-prudence' must be mentioned briefly, as in spite of the need for macroprudential approach having been brought to the fore by the present economic crisis, its appearance dates back to much earlier.

3.1 The origin of the term 'macro-prudence'

Uncovering the exact origin of the term macro-prudence is not an easy task, but academic literature relates its inception to the expert work done at the Bank of International Settlements (hereinafter/henceforth referred to as BIS). Piet Clement demonstrated that – according to BIS archives – the first appearance of the term macro-prudence in an international context was in 1979 at a meeting of the Cooke Committee (the forerunner of the present-day Basel Committee on Banking Supervision, the BCBS), where experts discussed the hidden risks of maturity transformation in international interbank lending.23 Because this document was an internal publication, the term was not publicized. The first public document that specifically dealt with macroprudential policy was a report by one of BIS's committees (Committee on the Global Financial System).24 It was not by accident that the question of the necessity of macroprudential policy emerged in connection with risks hidden in the derivative markets and the process of securitization. However, 'cyclical euphoria' overshadowed expert proposals – in parallel with the liberalization and deregulation of the financial markets25 – and up until the beginning of 2000, the notion of macro-prudence was only rarely used.26 The notion's 'rebirth' is traced back to a speech from September 2000 by Andrew Crockett, head of the Financial Stability Forum.27 Crockett summarized the differences between the macro- and microprudential approaches of regulation and supervision, and expressed his concern that in order to reach financial stability, the macroprudential approach would be needed to be reinforced. In spite of the abovementioned, – apart from a few exceptions28 – academic journals remained almost indifferent to macroprudential policy, as *Figure 1* shows.

Figure 1: Appearances of the term 'macro-prudence' in academic journals based on the EBSCO EconLit database (edited by the author)



3.2 The concept and aims of macroprudential policy

Macroprudential policy can be defined as the primary use of prudential tools to limit systemic risks and assure the stability of the financial system. The central element of the notion of macroprudential policy is the concept of systemic risk itself, which encompasses the decline in the provision of financial services due to the weakening of the whole or part of the financial system in a way that this decline has a potentially profound negative effect on real economy.29 In other words, by way of financial institutions' risk-taking and risk-management practices, systemic risks affect the whole of the financial system and thereby the economy as well, since through shifts in economic conditions they become internal risks for particular market actors.30

According to academic literature, the rationale for macroprudential intervention can essentially be found in the occurrence of externalities of the financial system stemming from systemic risks.

Firstly, externalities can arise between particular institutions of the financial system. As credit grows, there can be excessive reliance on short-term wholesale funding provided by banks and non-bank financial institutions that exposes the system to liquidity risk. A build-up of exposure to funding and derivative markets also goes hand in hand with the risk of intermediaries becoming 'too interconnected to fail'. These institutions take larger risks – relying on a state lifeline in case of trouble – through which they gain a competitive advantage, yet they also 'poison' other market actors, weaken market discipline and the incentive to appropriately control risk.31 Besides, they do not take into consideration the effect of their own exposure on the whole system of financial services.32

Secondly, externality can lead to an overexposure of the system to aggregate shocks. A proven correlation exists between credit and asset prices, resulting in widespread leverage and increases the vulnerability of the system against declines in asset prices. Credit booms caused by competitive pressure and capital flow leading to an erosion of lending standards that also increases the financial system's exposure to macro shocks. At the same time, overreliance on short-term wholesale funding exposes the system to crises of confidence.33

Thirdly, externalities can arise when the financial system amplifies adverse shocks to the economy.34 This characteristic is referred to as pro-cyclic behavior. The most well-known form of pro-cyclic behavior is the so-called credit crunch phenomenon, when decreasing profitability, increasing costs of external financing and exchange rate devaluation leads to problems of capital adequacy and liquidity, to which banks react by either cutting or in extreme cases, stopping lending. Reduction of lending leads to cuts in investments and employment that also causes serious problems in the real economy.35 Besides the credit crunch phenomenon, we must also mention the so-called *fire sale effect*, when multiple institutions start selling illiquid securities, thereby depressing prices, further weakening balance sheets and increasing the cost of credit, applying a negative effect on the real economy.36

These externalities give rise to three objectives or 'tasks' for macroprudential policy. Macroprudential policy – as an example of financial stability policy – (1) must handle structural or cross-sectoral risks, (2) must increase the resistance and flexibility of the financial system in the face of aggregate systemic shocks, and (3) must decrease the financial system's pro-cyclicality, i.e. the time dimension of risks. Therefore, firstly, the task of macroprudential policy is the handling of structural or cross-sectoral risks through the regulation of the vulnerability stemming from the interconnections of financial intermediaries in the financial system. Secondly, its task is to increase the resilience of the financial system to aggregate systemic shocks by building buffers that absorb their impact and help maintain the ability

of the financial system to provide credit to the economy. Thirdly, its task is to decrease the inherent pro-cyclicality of the financial system by introducing various capital requirements, provisioning and liquidity regulations, and leverage indicators, i.e. through administrative limits.

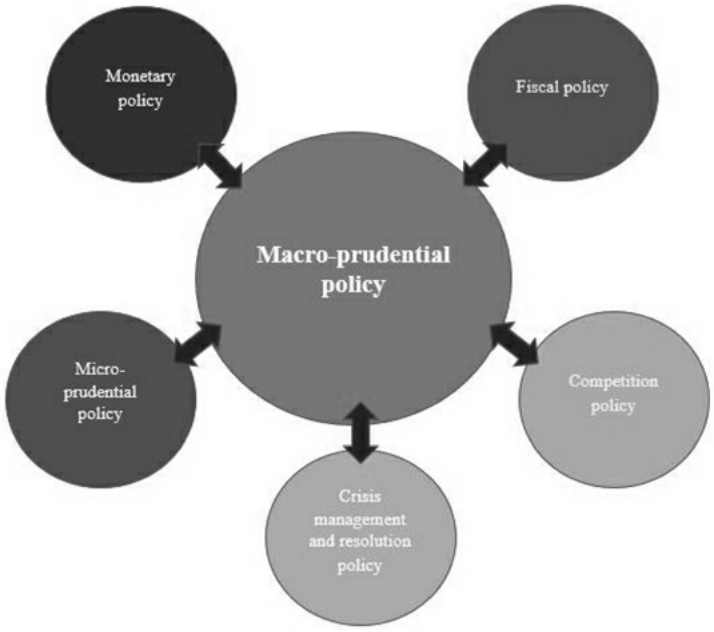
The objectives of macroprudential policy can primarily be realized through macroprudential regulation and supervision. *Macroprudential regulation* means financial regulation that aims to control the social costs associated with excessive balance-sheet shrinkage on the part of multiple financial institutions hit with a common shock.37 The notion of *macroprudential supervision* refers to the entire process of (1) monitoring and analysis of the financial system as a whole in order to chart vulnerabilities; (2) assessing potential threats to financial stability and deciding to take mitigating action, (3) implementing measures to actually mitigate vulnerabilities, and (4) evaluating these actions in order to ascertain to what extent vulnerabilities have indeed been diminished.38

Ensuring the stability of the financial system can also be achieved with approaches other than macroprudential policy, which therefore must closely cooperate with other areas of economic policy, since the stability of the economic system can only be maintained through harmonized coordination.

4. The place of macroprudential policy within the system of economic policies

Hence, macroprudential policy must cooperate with several other economic policy areas in order to reach its goals. *Figure 2* presents the relationship between macroprudential and other policies.

Figure 2: The relationships between macroprudential and other policies (edited by the author)



4.1 The relationship of macroprudential policy and monetary policy

The most recent financial crisis completely undermined the preceding consensus and showed that price stability does not guarantee financial or macroeconomic stability.39 Several countries had to deal with dangerous financial instability besides extremely low inflation levels. In order to ensure macroeconomic stability, monetary policy – among others – has to take financial stability objectives into consideration, and because of the strong connections of the two policy areas, central banks also have to play a leading role in the realization of macroprudential policy.

Macroprudential policy and monetary policy supplement each other in a flexible way, which is especially significant when monetary policy itself hits its limitations – as could be seen in the economic crisis of 2008.

On the one hand, – *ex ante* – well-calibrated and clearly communicated macroprudential policies can limit risks, thereby easing the burden on monetary policy. Macroprudential policy may assist in the controlling of lending and

thereby affects asset prices – thus decreasing risks stemming from the formation of asset price bubbles – and can ease asset price fluctuations originating from pro-cyclical behavior. Moreover, when macroprudential policies – *ex ante* – constrain risk-taking, they reduce the risk of financial disturbances.[40]

On the other hand, macroprudential policy also provides buffers against unexpected shocks, lessening the risk of the monetary policy's running into its own limitation, the 0% interest rate. At times of recession, macroprudential policy can – *ex post* – dampen the effect of shocks on lending and the financing of the economy by releasing these buffers, hence supplementing the devices of monetary policy.[41]

4.2 The relationship between macroprudential and fiscal policies

Adequate fiscal policy plays a significant role in the avoidance of macroeconomic shocks as well as in the handling of existing ones.

Firstly, certain types of tax may contribute to the build-up of systemic risks. Corporate taxes – as several analyses point out[42] – generally increase willingness to development using loans, as opposed to financing from capital. Many countries do not provide tax breaks for those renting property, while providing generous relief for mortgage interest. This can be a source of significant distortion and revenue loss, as households are encouraged to borrow against housing assets, either to invest in non-housing assets or to finance immediate consumption. Such fiscal policy decisions can cause distortions in the financial system that could be avoided through the creation of coordination mechanisms.

Secondly, fiscal policy can have a direct effect on risks in the financial system via taxes, levies and fees. So-called *Pigovian taxes*[43] (such as the bank tax) and so-called financial stability contributions[44] (such as contributions paid into resolution funds) states can influence the behavior of actors in the financial markets and at the same time can create funds – using revenues of market actors – in order to ensure financial stability.

Thirdly, taxes affect asset prices in that a newly introduced tax decreases an asset's price by decreasing the profitability of the asset. Therefore, in periods of prosperity, fiscal policy can be used to prevent the development of asset price bubbles.

4.3 The relationship of macroprudential and microprudential policies

One main lesson of the economic crisis has been that although microprudential regulation is necessary, it is not sufficient for a stable operation of the financial system since the latter is much more than the sum of its financial institutions. In order to defend against losses stemming from systemic risks, the institutional approach in itself is not enough; therefore, the policy areas representing two different perspectives must cooperate closely. The comparison of macro- and microprudential policy can be seen in *Table 1*.

Table 1: **Comparison of macro and microprudential perspectives**[45]

Macro and microprudential perspectives		
	Macroprudential policy	***Microprudential policy***
Immediate objective	Limit financial system-wide distress and systemic risk	Limit individual risks, decreasing threats affecting individual institutions
Ultimate objective	Avoid output costs	Consumer protection
Type of risk	(Partly) Endogenous: result of the common behavior of individual institutions	Exogenous: they can be regarded as a given in relation to individual institutions
Correlations and common exposures across institutions	Important	Irrelevant
Calibration of prudential controls	In terms of system-wide risks: *top-down*	In terms of risks for individual institutions: *bottom-up*

It can be seen from the comparison that while microprudential policy contributes to the stability of the financial market through the prevention and discovery of institutional risks, macroprudential policy does so via the prevention and discovery of systemic risks. Therefore sharing information and the joint analysis of risks, as well as tight communication are necessary to realize the supplementary benefits. Besides close cooperation, there must also be mechanisms in place that are able to resolve conflicts arising from differing perspectives and objectives – mainly occurring at times of economic shock. Regardless of their distinct approaches, macroprudential and microprudential policies both deliver their effects through the same transmission mechanism. During periods of 'good times', the microprudential authority probably agrees with the formation of buffers being a prudent behavior, even if the ratio of credit default is low and profitability is high. However, in 'bad times', tension may increase between the two policy areas, as the macroprudential authority – in order to break pro-cyclicality – would like to ease regulatory conditions in order to avoid a credit crunch and a fire sale, while the micro-prudential authority would tighten requirements to protect depositors and investors.46 In order to resolve conflicts, it needs to be clarified which perspective should have priority at which times.

4.4 The relationship of macroprudential policy, crisis management and resolution policy

Crisis management and resolution policy also supplement macroprudential policy. Macroprudential policy averts risks threatening financial stability as a 'first line of defense' by identifying and managing them. However, in practice all threats cannot be averted, therefore, the macroprudential authority increases resilience of the financial system as a 'second line of defense'. At the inception of a crisis, when the system is not able to neutralize shocks, crisis management and resolution are the final, 'third line of defense' for maintaining financial stability.47 The establishment of crisis management and resolution systems, recognizing the unsustainability of national bailout actions,48 aims at the regulated removal of a failing financial institution from the market in order to maintain financial stability. An effective and credible crisis management and resolution system may support the realization of the objectives of macroprudential policy by reinforcing market discipline.49

4.5 The relationship between macroprudential and competitive policies

The freedom of economic competition originates from the theoretical consensus that competition ensures cost efficiency, the ongoing improvement of the quality and standards of goods and services: all in all, greater efficiency. When carrying out financial activity, intensive competition often incentivizes financial institutions to take excessive risks and grow too fast, and mergers can result in institutions too large in size, carrying in them systemic risks.50 Because of this, tension may arise between the objectives of competition policy and financial stability: the assurance of fair competition may conflict with ensuring financial stability. In order to avoid tension, it is necessary to establish that in relation to the financial sector, the scrutiny of economic competition must be supplemented with a macroprudential perspective. In order to achieve this, certain elements of traditional competition law enforcement (such as authorization, investigation of effective control, merger approval) have been assigned to the macroprudential supervisory authorities in several countries. Other countries implemented strict coordination and consultation mechanisms between the two policy areas and have incorporated financial stability and as a secondary aim into the mission statement of competition authorities.

5. Summary

The global economic crisis has brought into sharp focus the fact that as a result of financial globalization – which primarily manifests itself in the form of the liberalization and deregulation of the financial system – financial institutions are intricately intertwined, leading to the appearance at the global level of instability in the financial system – the so called *poisoning effect*. Even before the symbolic start of the crisis (the bankruptcy of Lehman Brothers), Rajan had already pointed out that the international financial system, the capital and money markets had built up new risks that were not seen by anybody, could not be assessed but still they existed.51 Macroprudential policy specifically aims to forecast, identify and manage these systemic risks pent up in the financial system. Macroprudential policy has to handle structural risks, increase the resilience and flexibility of the financial system against shocks, and decrease the financial system's pro-cyclicality, i.e. the time dimension of risks. Ensuring financial stability – and thereby economic stability – cannot be achieved by macroprudential policy alone; therefore, it is essential that it may operate in close cooperation with other economic policy areas.

References

1 The scope of this study does not include the presentation of the organizational framework of macroprudential regulation and supervision, or the analysis and evaluation of its toolset.

2 It is interesting to note that the first bubble crisis broke out in the Netherlands in 1637 (the so-called *Tulpenwoerde,* meaning tulip mania). Because of speculation, the price of tulip bulbs increased unbelievably over a few years, until the bubble burst and a bulb worth up to the price of a ship one day, regained its original value the next day. Essentially the same happened at the inception of the 2001 dotcom and the 2007 asset price bubbles. See also: Christian C. Day, Paper Conspiracies and the End of all Good Order: Perceptions and Speculation in Early Capital Markets, 1 *Entrepreneurial Business Law Journal* 283, 322 (2006).

3 Rising and declining periods are referred to as cycles. The four most significant types are the Kitchin, Juglar, Kondratyev, and Braudel cycles. The Kitchin cycle, which is also called the inventory cycle, is the shortest one, describing around the fluctuation of the economy over about 3 to 5 years. The Juglar cycle, also known as the fixed-investment cycle, lasts for 7–11 years. The Kondratyev cycle encompasses 50–60 years, consisting of one rising and one declining period. The longest period, 100–200 years, is described by the Braudel cycle. Over this time frame, even practically immobile structures change. We must note that due to the acceleration of the world, the peaks and troughs have moved closer to one another: that is, cycles of 200 years have become shorter, even as much as half the previous length. On the causes of cycles see: András Bródy, A ciklus oka és hatása, 52 *Közgazdasági Szemle* 903, 914 (2007).

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5 Banking Act of 1933, https://ia802702.us.archive.org/7/items/FullTextTheGlass-steagallActA.k.a.TheBankingActOf1933/1933_01248.pdf (accessed 11 December 2015).

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7 See further Howard H. Preston, The Banking Act of 1933, 23 *Am. Econ. Rev.* 585, 607 (1993).

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12 James R. Barth, R. Dan Brumbaugh & James A. Wilcox, Source Policy Watch: The Repeal of Glass–Steagall and the Advent of Broad Banking, 14 *J. Econ. Perspect.,* 191, 204 (2000), 196. 10.1257/jep.14.2.191

13 See also: Zsuzsánna Biedermann, The History of the American Financial Regulation, 57 *Public Financ. Quart.* 313, 331 (2012).

14 Wolfgang H. Reinicke, *Banking, Politics, and Global Finance: American Commercial Banks and Regulatory Change, 1980–1990,* 114. (Edward Elgar, 1995).

15 See also: Jill M. Hendrickson, The Long and Bumpy Road to Glass–Steagall Reform: A Historical and Evolutionary Analysis of Banking Legislation, 60 *A. J. Econ. Sociol.* 849, 879 (2001). 10.1111/1536-7150.00126

16 See also the Hungarian literature regarding this subject: György László Asztalos, The correlation between the financial crisis and the crisis of the financial institutions, 54 *Public Financ. Quart.* 369, 406 (2009); József Móczár, Anatomy and lessons of the global financial crisis, 55 *Public Financ. Quart.* 753, 775 (2010); Miklós Losoncz, The global financial crisis and the European Union, 55 *Public Financ. Quart.* 792, 808 (2010). See also in foreign specialized literature: Joseph E. Stiglitz, The current economic crisis and lessons for economic theory, 35 *Eastern Economic Journal* 281, 296 (2009); Mark Jickling, (2010): *Causes of the financial crisis* (Congressional Research Service, 2010); Jeffrey M. Lipchaw,

The Financial Crisis of 2008–2009: Capitalism Didn't Fail, but the Metaphors Got a 'C', 95 *Minn. Law Rev.* 1532, 1567 (2011). 10.1057/eej.2009.24

17 The expression comes from Raghuram G. Rajan, who uses it to describe how faith in Draconian regulation is strongest at the bottom of the cycle – when there is little need for participants to be regulated. By contrast, the misconception that markets will take care of themselves is most widespread at the top of the cycle – the point of maximum danger for the system. In case of growth, at the highest point of expansion, when the chance of market actors taking exaggerated risks is highest, everyone trusts the self-regulatory mechanism of the market. See Raghuram G. Rajan, The Credit Crisis and Cycle-Proof Regulation, 91 *Fed Reserve Bank St.* 397, 402 (2009), 400.

18 Borbála Szüle, A pénzügyi konglomerátumok létrejöttének kockázati hatásai, 53 *Közgazdasági Szemle* 661, 680 (2006), 662.

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25 *Liberalization* essentially means restoring the conditions of the market economy in areas where state intervention has reached significant levels. *Deregulation* means the removal of regulations on various financial sectors, financial services, interoperability of sectors with one another; generally, it means the reduction of limiting legislation.

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System of Regular Remedial Measures in the Administrative Procedure in the Czech Republic and Other Countries of the So-Called V4*

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* This paper was created as a result of the project 'Postdoc I' (reg. No. CZ.1.07/2.3.00/30.0009). The project is co-financed by the European Social Fund and the state budget of the Czech Republic.

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Abstract: This article focuses on the system of standard (ordinary) remedial measures used in the administrative procedure that can be found in the Administrative Procedure Acts of so called Visegrad Four (Central European) countries. Mentioned is not only the national legislation but also European impact in this sphere and connecting roots. It can be found some problems that are typical for Visegrad Four countries like 'remonstrance'. This paper tries to show possible ways to solve such problems and to emphasize that there is still number of national specifics which can be found. These can be understood as 'inspirational designs', whether positive or negative.

Keywords: administrative procedure; administrative procedure act; appeal; remonstrance; judicial review

1. Introduction

Generally speaking, regular remedial measures are sought by parties to the administrative procedure to protect their (substantive or procedural) rights. These measures are sought to contest (meritorious or procedural) decisions of the first-instance administrative body, which have not yet come into legal force. So the authority over the respective matter is transferred to the superior/higher administrative body.

This contribution stems from the individual description and the subsequent overall comparison of the examined issue in the countries of the so-called Visegrad Four (hereinafter 'V4') and focuses solely on comparing the general legislations contained in the rules of administrative procedure of these states. It deals neither with the specific regular remedial measures that may apply in particular cases, such as the execution, or within the so-called special administrative procedure pursuant to the special law[1] nor with the detailed description of specific legislations and institutes.

This contribution tries to answer a question as to whether the institutes and systems of regular remedial measures in V4 countries, which have similar backgrounds and closely cooperate with one another, are similar or whether they differ in some respects. In relation to this, the contribution also refers to the so-called Europeanisation tendencies given by 'European' requirements that should be reflected on the national legislations concerned.

2. The so-called V4 group

At first, I consider as appropriate to succinctly delineate what the term 'V4 group/states' means and why this article deals with the system of regular remedial measures contained in the rules of administrative procedure of these countries.

The so-called V4 is a political (rather than legal) group of four Central European states, including the today's Czech Republic, Slovak Republic, Republic of Poland, and Hungary. Rather than a (classical) international organization, it is a regional group the beginning of which can be dated back to 15 February 1991 when the Presidents of the stated countries (at the time of the then Czechoslovak Republic) signed a declaration of cooperation towards European integration and building of democratic legal states. Their mutual cooperation stemming from this platform[2] did not let up despite the common accession to the European Union on 1 May 2004. It can even be said that the significance and importance of this group have been strengthened upon the accession to the European Union and the V4-based cooperation still continues in various spheres.

The reason why my contribution is devoted to selected institutes and legislative systems of these countries is their social, historical, geographical, language, cultural and political closeness confirmed, at the institutional level, by the existence of V4 Group. The stated countries declared that they had been and were part of one civilization sharing the same values and that V4 group's objective was to preserve, and, concurrently, contribute to strengthening, their mutual cooperation.

The stated introduction and V4's proclamations may tend to infer relationship amongst the individual legislations. After all, they are members of not only the European Union but also the Council of Europe and are governed by similar principles or requirements (see below). However, it is not that easy. They do show certain similarities, but there are also differences.

The mentioned relationship amongst the legislations is given or even strengthened by their common history (and the same legal order), for Slovakia and Hungary until 1918 and for Slovakia and the Czech Republic from 1918 to 1992. Moreover, in case of the Czech and Slovak Republics, including Poland, a role is also played by the similarity of languages. Hungary is singled out when it comes to the language, but not when it comes to the transition to democracy and its values. All V4 states belong to a group of post-socialist countries, facing similar challenges, tasks and problems. These include, among other things, the establishment of an efficient and generally understandable system of (regular) remedial measures through which individuals could contest administrative bodies' decisions handed down within the administrative procedure.

3. V4 Countries' administrative orders

The contribution focuses on the so-called regular remedial measures sought within the administrative procedure and on the systems of administrative procedure rules of V4 states. For the purposes of this contribution it is crucial, in particular, that all V4 states' administrative procedure rules are reduced to, and have the force of, laws and their contents and focus are similar. This fact facilitates the comparative approach and underlines its sense and purpose.

Regarding the system of regular remedial measures contained in the administrative procedure rules, it is necessary to first briefly state several notes relating to the term 'administrative procedure rules' and, subsequently, to deal with the concept of administrative procedure and regular remedial measures.

Laws usually identified as 'administrative procedure rules' exist not only in central Europe but also in other parts of the European continent.3 Nevertheless, especially Central Europe is typical of the existence of administrative procedure rules.4 In terms of history, the administrative procedure rules have had a relatively long tradition in central Europe.5

The term 'administrative procedure rules' means, (not only) in the V4 countries, the general legal regulation (*lex generalis*) of various procedures applied by public administration through bodies6 called, in theory, as 'administrative bodies'.7 The subject of the legislation contained in the Administrative Procedure Code is then the public administration activity of these bodies.8

Administrative bodies and administrative procedures are regulated, similar to (civil, criminal or administrative) courts, by Codes and Rules.9 For this reason, administrative procedure rules are usually referred to as codes of public administration (activity).10

The oldest administrative procedure codes could be found in Poland (1960), followed by the Slovak Republic (1967). However, in both cases, the existing administrative procedure rules differ from the then legislation. After the substantial changes in 1989 and in relation to their incorporation in the European structures (Council of Europe and European Union), these states have preserved their administrative procedure rules, with more or less significant interventions. On the other imaginary side are the 'new' administrative procedure rules of the Czech Republic and Hungary, both adopted in 2004. In these cases, the legislature decided to adopt a completely new legislation to meet the Europeanization requirements. Poland and Slovakia preserved the original form of legislation, save for certain changes. Moreover, the Polish and Slovak legislations seem to be more stable. The legislation of Polish and Slovak administrative procedure rules is more succinct when it comes to the quantity and, in particular, the length of provisions. The fact that the last Section of the Polish Administrative Procedure Code is 269, while that of the Slovak Administrative Procedure Code is 85 (the actual number of provisions is lower because in both cases, it also includes the cancelled provisions) changes nothing. Conversely, the Czech and Hungarian Administrative Procedure Codes seem to be much more detailed at first sight and are more extensive. The Czech Administrative Procedure Code has 184 Sections that are further broken down into very detailed paragraphs and subparagraphs. This makes the Administrative Procedure Code more extensive although, in fact, it contains fewer provisions than the Polish Administrative Procedure Code. The Hungarian Administrative Procedure Code has 189 Sections that are very detailed and broken down. It may be disputable as to for whom the brevity or, conversely, the extensiveness of legislation constitutes an advantage. In any case, the comparison of the individual Administrative Procedure Codes tends to indicate adoption of the so-called case-by-case approach. The legislation, however general it should be, tries to cover solutions to all possible situations and remember various types of cases.

Thus, all V4 countries have their rules of administrative procedure and understand them within the intentions stated above. For this reason, we can state that the administrative procedure rules of V4 countries are comparable as to their focus. However, the individual administrative procedure rules may differ and, in fact, they do differ, in particular, when it comes to the processes regulated by them. This is given by the different scope of their applicability.

The thing is that public administration is performed by means of various legal measures (forms). In fact, this variety is caused by a wide range and by the specificity of the sphere of administered social relationships. The objectives and tasks of public administration of the 21st century do not allow being fulfilled in a single form, similar to the legislative (where the form of activity is a normative legal act – 'law') or judicial (where the form of activity is the act of applying the law – 'decision') power. The complexity of the domains administered by public administration and the high number of addressees of such activity requires a high number of the applied forms. Furthermore, public administration is typical of combining normative and application activities predetermining the diversity of possible forms. Comparing the administrative procedure rules and the scopes of their applicability, we can arrive at the following general findings further demonstrated by the table below.11

Country	Year of Adoption	Number of Provisions (including cancelled)	Contents/Scope of Applicability
Poland	**1960**	**269**	1. administrative procedure 2. other acts (certificates)
Slovak Republic	**1967**	**85**	1. administrative procedure12
Czech Republic	**2004**	**184**	1. administrative procedure 2. other acts (certificates) 3. public contracts 4. measure of a general nature
Hungary	**2004**	**189**	1. administrative procedure 2. other acts (certificates) 3. administrative contracts

Concurrently, it is crucial that these rules predominantly regulate the so-called administrative procedure. It is a traditional process within which the administrative bodies decide on the rights and legally protected interests and obligations of the parties to such procedure and the result of which is a decision on these rights and obligations, as can be deduced directly from the texts of the legislations (Administrative Procedure Codes) of V4 countries.13

Since the administrative procedure rules of V4 countries are similar in essence, even the issue of regular remedial measures is understood similarly. Therefore, a regular remedial measure is, generally speaking, a means available to the party to administrative procedure (the party to administrative procedure is entitled to it) and contesting, within the given time-limit, a fist-instance administrative decision that has not yet come into legal force. Thus, the authority to pass a decision on the remedial measure and review the whole matter is transferred to the superior administrative body (the so-called effect of devolution).14 The above-stated further shows that the legislations contained in the Polish and Slovak Administrative Procedure Codes are, unlike those of the Czech and Hungarian Administrative Procedure Codes, rather succinct.

However, before describing the individual administrative procedure rules and the system of regular remedial measures contained in them, I consider it useful to deal with the common European roots and requirements leading to the legislations concerned being similar in essence.

4. Administrative procedure and regular remedial measures from European perspective

It would be a mistake to believe that the examined legislations are free of European influences and fall solely within the competence of the national legislature. However, a role is also played by the legal tradition and, to certain extent, by the insistence on the system and legal regulation of regular remedial measures, which may evoke problems and criticism (in particular, in relation to the existence of the remonstrance as stated below). We can understand the mentioned European requirements, in particular, as value-based solutions that should be contained in the legislation. Concurrently, they constitute the minimal procedural standards (*de minimis*) which the national legislation should fulfil and reflect on.

The issue of the right to (regular) remedial measures is dealt with by numerous documents of the so-called European Administrative Law, the creator of which is, in particular, the international organization Council of Europe. The individual documents[15] issued by the bodies of the Council of Europe state that there should be a system of the regular remedial measures of which the addressees of decisions handed down within the administrative procedure should be duly notified. The anchorage of this procedural law is then reflected on other soft-law documents of the Council of Europe.[16] These documents require that the regular remedial measures available within the administrative procedure are first exhausted in vain before the court is involved and court protection is awarded.

The stated facts lead to a partial conclusion that the requirement for existence of regular remedial measures is part of the so-called European Administrative Area, that is, an area of common values and principles that influence soft law of the Council of Europe. The existence or the previous exhaustion of regular remedial measures is considered as the basis for asserting the right to protection from procedures carried out by administrative bodies. Regular remedial measures are understood as the (necessary) pre-level for granting court protection, as required by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Even thanks to this, the issue of regular remedial measures gains new perspective.

At the level of the European Union as such (within the so-called direct Union administration), numerous procedures that could be subordinated to administrative procedures can be found. Their specificity lies in such procedure not being carried out by national administrative bodies, but directly by the Union bodies or institutions[17], which is obvious, particularly, in relation to the direct decision-making activity of the so-called independent agencies.[18]

While a unification mechanism for conducting administrative procedure, represented by the administrative procedure rules, exists at the national level of implementing the Union law, it is absent at the Union level. No matter how Article 41 of the Charter of Fundamental Rights of the EU, including the right to good governance, applies to the direct Union level, it contains no right to seek regular remedial measures although it should contain such right. After all, the right to good governance, as also ensues from the stated documents of the Council of Europe, undoubtedly includes the right to seek regular remedial measures. The European Union tries to compensate for this deficit by adopting EU administrative procedure rules.[19]

The stated documents and requirements under the so-called European Administrative Law are typical of having the so-called Europeanization effect (*top-down approach*) and influence national legislations of the individual European states. For this reason, it can be stated that the existence of a system of regular remedial measures and the requirement for their previous application before court protection is granted as results of the Europeanization. Concurrently, the Europeanization affects the European Union itself since the contemplations about adopting EU administrative procedure rules are reflected on the individual Member States (*bottom-up approach*).

5. Poland and administrative procedure code

The Polish Administrative Procedure Code is the oldest of the V4 countries. It was adopted in 1960 and has been amended more than 20 times since then.[20] Its abbreviation established in the Polish environment is '*KPA*'. In the Central European area (including V4 area), it represents other significant source of inspiration for other Administrative Procedure Codes after the German '*VwVfG*'. Its contents and system, even within the scope of remedial measures, are close to the Czech and Slovak Administrative Procedure Codes. The scope of its applicability has already been briefly delineated above.

The legislation and the system of regular remedial measures in Poland stem from the constitutional principle of a two-instance procedure, within which rights and obligations are determined. Section 78 of the Polish Constitution introduces a constitutional right to seek remedial measures. The principle of a two-instance procedure at the statutory level and in the sphere of public administration is specified in Section 15 of KPA, pursuant to which 'the administrative procedure shall have two tiers'. Exceptions to this rule as stipulated by the laws are admissible.[21]

The stated general provisions are specifically related to Sections 127 and 141 of KPA that define the regular remedial measures available to the parties.[22] These remedial measures are an appeal (Section 127(1) of KPA – *odwolanie*) and a complaint (Section 141(1) of KPA – *zazalenia*). The appeal is further associated with the so-called auto-remedy. The appeal differs from the complaint by being aimed against a decision on the merits, while the complaint is filed against a decision of a procedural nature and only in cases when so specifically stipulated by the Code. Other difference lies in the presence of the effect of suspension, which applies in case of the appeal, but is missing when it comes to the complaint. The filing time-limits differ too. The time-limit for filing an appeal is 14 days and that for filing a complaint is 7 days. Otherwise, Section 144 of KPA refers to appeal-related laws being applicable to the complaint.

Furthermore, the Polish legislation contains a specific remedial measure that is similar to the remonstrance recognized by the Czech and Slovak laws (see below). Pursuant to Section 127(3) of KPA, it concerns an application for renewed procedure (*wniosek o ponowe rozpatrzenie sprawy*) in cases when a minister or a self-governing collegial body has passed a first-instance decision. In these cases, it is not possible to apply the standard regular remedial measure, including its devolution effect, since the stated bodies have no superior authority over themselves that would conduct such procedure. Despite this, the stated institute is subject to the rules pertaining to the appeal and the appellate procedure. This legislation raises numerous questions in Polish theory23 and is sometimes referred to as internal remedy. Its essence lies in the review of an administrative decision by the same authority.24

6. Slovak republic and Act No. 71/1967 Coll., on the Administrative Procedure Code

Regarding the Slovak Administrative Procedure Code, it needs to be mentioned that it concerns the original Czechoslovak (federal) Administrative Procedure Code that was common to the Czech Republic and Slovakia until 31 December 1992. Nevertheless, this Administrative Procedure Code applied, though in its amended form, in both countries even after they had separated. While a completely new legislation was adopted by the Czech Republic in 2004, the Slovak Republic amended the original Administrative Procedure Code of 1967 five times.25 Thus, the latter is the predecessor of the existing Czech Administrative Procedure Code.

In respect of the system of regular remedial measures within the administrative procedure, the Slovak Administrative Procedure Code recognizes two or, as the case may be, three remedial measures.26 The first remedial measure is the appeal (Section 53 – *odvolanie*) and the second is the remonstrance (Section 61 – *rozklad*). Both of these remedial measures are fully vested in the parties to the procedure.

Both cases represent regular remedial measures for which procedure needs to be conducted by the higher-instance administrative body, although this may be considered as disputable when it comes to the remonstrance since remonstrance contains no devolution effect. The time-limit for their filing is 15 days. Unlike the Polish legislation, the Slovak legislation does not differentiate amongst remedial measures based on whether they are aimed against decisions on the merits or decisions of a procedural nature. Decisions of a procedural nature may be contested by the stated remedial measures unless a special law excludes it. Under specific conditions [Section 57(1)], even auto-remedy is admissible in both cases.

While the appeal is 'the most general regular remedial measure against a decision passed within the administrative procedure'27, the remonstrance, conversely, is aimed against decisions passed by an administrative body with no higher-instance (appellate) administrative body, so no appeal is possible. Concurrently, to ensure the administrative review of a decision passed by such administrative body, the legislation has created the specific institute of remonstrance. Remonstrance is determined by the entity governing such administrative body (usually ministries or other central state administration bodies, with the minister or the head of such body passing a decision) on the proposal of an independent remonstrance commission.28 However, such proposal is not binding. As stated by the Slovak theory, 'compared to the appeal, it is a special regular remedial measure sought only against decisions passed by these types of administrative bodies'.29 The procedure for remonstrance is subject to the provisions pertaining to an appeal [Section 61(3)]. However, no appeal against such decision may be filed [Section 61(2)] and the matter is determined finally and conclusively at the level of public administration.

The third remedial measure is a measure that is not determined by the administrative bodies but directly by the courts (Section 70). Unfortunately there is no special term for this legal measure; it is described as an ordinary remedy to (administrative) court. But this conception forgets the main distinction between (administrative) justice and public administration as part of executive power. Administrative justice is no continuing of administrative procedure! The competence over this remedial measure is vested in the courts within administrative justice, but only in the cases expressly stipulated by the laws30. It concerns the procedure for a regular remedial measure in the cases when the superior administrative body is missing, rather than the 'traditional' procedure for an action, through which the final administrative decision is contested. They most frequently concern matters relating to (disability or old age) pension insurance.31 The time-limit for seeking a remedial measure with the court is 30 days.

In this respect, a question arises as to whether the stated solution may be accepted as possible compensation for the highly disputable institute of remonstrance, by which the solution would be similar to the approach applied in the Hungarian Administrative Procedure Code (see below). But as is noted, such approach also produces a lot of problems and questions.

7. Czech Republic and Act No. 500/2004 Coll., on the Administrative Procedure Code

The Czech Administrative Procedure Code has already been briefly introduced above. From the perspective of the legislation concerned, it regulates regular remedial measures, but does not expressly confirm the principle of a two-instance procedure as the Polish legislation in Section 15 of KPA. With regard to the explicit legislative absence of the principle of a two-instance administrative procedure, the conclusions of the judicature of the Constitutional Court and the Supreme Administrative Court are not surprising. This judicature recognizes the existence of such principle[32] and directly refers to it, in particular, in cases when it has been violated, but does not ascribe it the nature of a fundamental principle. As expressly stated by the Constitutional Court[33], 'neither the Charter of Fundamental Rights and Freedoms nor the Convention for the Protection of Human Rights and Fundamental Freedoms guarantee the fundamental right to seek two- or multiple- instance administrative procedure'. In compliance therewith, the Supreme Administrative Court[34] concluded that 'the fundamental principles of determining rights and obligations of natural persons or legal entities by administrative bodies shall not include two-instance decision-making'. Therefore, it can be concluded that the administrative procedure and the administrative bodies' decision-making, where the principle of a two-instance procedure does not apply at all or, possibly, does apply but only in certain modified form, are admissible. Hence, the right to seek regular remedial measures is a matter of common laws and is not constitutionally guaranteed.

The system of regular remedial measures consists of the appeal (Section 81 – *odvolání*) and the remonstrance (Section 152 – *rozklad*).[35] As already stated, the existing Slovak Administrative Procedure Code was the predecessor of the Czech Administrative Procedure Code. The solutions to such regular remedial measures are identical, and even the legislations are similar. The institute of remonstrance was also preserved by the Czech Administrative Procedure Code and, thus, its essence is identical with that applicable in the Slovak Republic (see above).

The time-limit for seeking both remedial measures is 15 days. The auto-remedy is admissible too. Quite a significant shift compared Slovak predecessors concept is so called incomplete appellation in appeal proceedings and related concentrations proceedings at first instance [Section 82(4)]. In appeal and remonstrance procedure can´t be used evidence and facts that could be used in the first instance level.

The legislation pertaining to both regular remedial measures is fragmented since remonstrance is regulated, due to its specific nature, by other (the third) part of the Administrative Procedure Code, dealing with the institutes applied within the administrative procedure less frequently. However, based on the statistical data, the institute of remonstrance is not as exceptional as it seems.[36]

8. Hungary and administrative procedure code

Similar to the Czech Administrative Procedure Code, the Hungarian Administrative Procedure Code was adopted in 2004 (for the sake of completeness it has to be pointed out, that in December 2016 a new regulation was passed under the no. CL: 2016 on the General Administrative Ordinance, which will come into life on 1st January 2018)[37]. For this reason – at current state – the Hungarian regulation belongs, along with the Czech Administrative Procedure Code, to the group of new Administrative Procedure Codes of V4 countries.[38] This legislation is referred to, in compliance with the Hungarian method of identifying laws, as 'CXL: 2004'.

Pursuant to the provisions (Section 71(1) of CXL: 2004), it is necessary to differentiate between decisions on the merits and decisions of a procedural nature. The type of a decision predetermines the system of remedial measures. A decision of a procedural nature may only be contested separately in the cases stipulated by the CXL: 2004.[39]

The system of regular remedial measures contained in the Hungarian Administrative Procedure Code is related to the right to seek regular remedial measures, guaranteed by the Constitution (Article XXVIII paragraph 7).[40] The Hungarian Administrative Procedure Code does not explicitly differentiate between regular and extraordinary remedial measures within their systematics, but divides them based on whether they are vested in the addressee of an administrative act (redress procedure) or not (*ex officio, review procedure*). Generally, the substance of regular remedial measures is the fact that they are vested in the addressee of an administrative decision. Hence, a classical regular remedial measure is the appeal (Section 97(2) and Sections 98 through 108). The time-limit for filing an appeal is 15 days. Alongside this, the Administrative Procedure Code CXL: 2004 counts judicial review (Sections 109 through 111, including the reference to the legislation given by the Hungarian Civil Procedure Code – Act III: 1952) and renewed procedure on the basis of a decision of the Constitutional Court (Section 113 and Act CLI: 2011 on the Constitutional Court) amongst other remedial measures available to the addressee of an administrative act within the renewed procedure (Section 112).

However, these do not concern regular remedial measures since they are, in part, the extraordinary remedial measures (renewed procedure) and, in part, the elements of the follow-up judicial review and the provided court protection.

The legislation pertaining to the appeal does not differ from the appeal-related legislations of the other V4 states. The possibility of filing an appeal is excluded in specific cases as stipulated by Section 100(1) of 1 CXL: 2004. One of the cases of decisions against which no appeal is admissible is the decision of a minister or an independent administrative body.

Unlike Hungary, the Polish, Slovak and Czech legislations have chosen the possibility of remonstrance. The possible Central European 'problem' about the remonstrance is dealt with by the Hungarian Administrative Procedure Code in Section 100(1) d) in favour of the direct judicial review. No matter how the problems associated with the remonstrance are so resolved, the review is delegated directly to the courts, which does not have to be an efficient solution and may lead to the courts being overburdened with these cases.

The construction of Section 97 of CXL: 2004, which regulates all remedial measures, including the possibility of judicial review, is advantageous for the parties to the procedure who so obtain a simple overview of the measures allowing them to exercise their rights. Thus, these parties are notified of what measures may be sought for their rights to be exercised and protected.

9. Comparative notes and summary

The individual V4 countries have their own administrative procedure rules. Although these rules can be divided into 'old' and 'new', the common or different elements do not lie in the age of their legislations.

The administrative procedure is always, either fully, such as in case of the Slovak Administrative Procedure Code, or predominantly, such as in case of the other Administrative Procedure Codes, the core of the V4 states' administrative procedure rules. A certain deficiency of the Slovak legislation lies in the fact that it does not pay attention to other forms of administrative bodies' activity and to the procedural regulation of other processes by which the administrative bodies may exercise their competence and participate in the performance of public administration. The Slovak legislation lacks a legal framework for the other forms of public administration activity. The stated narrower scope of applicability of the Slovak Administrative Procedure Code is definitely influenced by the conditions prevalent at the time of its adoption when many public administration procedures (intentionally) remained unregulated by the laws.

Although it is possible to find both decisions on the merits and procedural decisions, the Administrative Procedure Codes of V4 states allow contesting both forms of the decisions through either the same type of a remedial measure (Czech Republic and Slovakia) or a specific category of remedial measures, such as the Polish KPA.

In terms of the understanding and the system of regular remedial measures applied in the administrative procedure, the Administrative Procedure Codes of V4 countries are considerably similar. Except for the Hungarian Administrative Procedure Code, all of them stem, although it often does not expressly ensues from their texts, from the classical division of remedial measures into regular and extraordinary. The division criterion is based on whether the respective remedial measure is aimed against a decision that has already come into legal force or not. Conversely, the Hungarian Administrative Procedure Code divides remedial measures based on whether they are available to the addressee or not. The advantage of this approach is that the party to the procedure is aware of all remedial measures guaranteed by the Administrative Procedure Code and may choose which of them to use. Concurrently, such party must respect their possible sequence or conditionality, which applies, in particular, to the judicial review.

The basic regular remedial measure in V4 states' Administrative Procedure Codes is an 'appeal'. An appeal may be aimed against a decision that has not yet come into legal force and the competence to determine the matter is delegated to the superior body (devolution effect of an appeal). The time-limits for filing it as stipulated by the Administrative Procedure Code are identical in essence (14 or 15 days).

The appeal in the Czech and Slovak environments is also represented by a specific regular remedial measure, being the 'remonstrance'. At present, the remonstrance raises numerous questions. In my opinion, it is an anachronism of the past since it is not desirable and sustainable that the administrative review is carried out solely by the central public administration body.[41]

Moreover, the remonstrance-related laws contained in the Czech and Slovak Administrative Procedure Codes are considerably minimalistic since they stem from similar application of appeal-related provisions. Is the remonstrance a special type of the appellate procedure of an internal nature or a regular remedial measure as such? Similar questions and problems can be found even in case of the Polish KPA. Conversely, the Hungarian Administrative Procedure Code copes

with the whole issue quite clearly since it does not recognize and regulate any institute of remonstrance and, instead, vests the resolution of such matters in the judicial review. However, a question arises as to whether the stated resolution could be considered as possible compensation for the institute of remonstrance. Regarding the institute of remonstrance, its specificity raises numerous theoretical and practical problems in both the Czech Republic and Slovakia.42 As stated above, even the Polish professional literature shows ambiguities. In my opinion, remonstrance clings to the historical concept, which, however, does not suit the conditions and the environment of a legal state of the 21st century.

The Czech Administrative Procedure Code is deviating when it comes to the system and lucidity of its legislation. The first remedial measure ('appeal') is regulated by Section 81, while the second, relatively specific remedial measure ('remonstrance') is regulated in Section 152, that is, far behind the provisions pertaining to extraordinary remedial measures or administrative execution. For this reason, the orientation in the Czech Administrative Procedure Code requires its perfect knowledge. Conversely, the other Administrative Procedure Codes are exemplary as to their systems. The regular remedial measures are specified in a single place in logical sequence. Regarding natural persons and legal entities, the most instructional Administrative Procedure Code is the Hungarian Administrative Procedure Code that provides a list of possible remedial measures, including the follow-up judicial review, in a single place.

It should be noted, that remedial measures are designed to participants of administrative procedures to protect their rights and freedoms. This is from the external scope of view. But there is also strong scope of internal consequences. The 'appeal' is therefore regarded as an instrument of internal or hierarchical control of Public Administration. Thanks appeal starts the function of superior administrative body. There is a large choice of different results that can be used by superior administrative body. The most typical is the cancellation according to the cassation principle. To this we should add that the use of remedial measure represents also one condition for damages caused by 'wrong and unlawful' administrative decision. It can be concluded that regular remedial measures have several functions.

The legislations on regular remedial measures in V4 states' Administrative Procedure Codes are very similar, also due to the influence of the Europeanization requirements. The admissibility of regular remedial measures is recognized generally and only a special law or a special nature of the decision-making administrative body can stipulate otherwise. In all cases, the access to court protection is conditioned by the previous exhaustion of regular remedial measures. Therefore, the possible differences are given, in particular, by the historical development and tradition.

It should be emphasized that even if in different laws could not be found in all V4 countries the existence of the principle of two instances, all V4 countries have similar roots and all of them admits an 'appeal'. Therefore an appeal represents similar and connecting legal remedy of Central European legal culture. It is 'standard' of the legal regulation that can be found. All exceptions should be interpreted restrictive.

Finally, it is worth mentioning that the higher number of remedial measures on its own does not guarantee a higher standard of protection of the rights. It is important to find the suitable balance between identifying remedial measures for addressees of public administration activity and, concurrently, these remedial measures not paralyzing the public administration activity. In principle, one regular remedial measure fully suffices the administrative procedure purposes if it is conceived broadly and can be sought in a wide range of cases. This basic method of protecting rights is represented in all V4 states' Administrative Procedure Codes by the institute of appeal.

References

1 Compare the institute of objections made in case of selected decisions of the Czech Social Security Administration pursuant to Act No. 88 of Act No. 582/1991 Coll., on the organization and implementation of social security, as amended.

2 As stated on the group's website, the V4 group did not arise as an alternative to the efforts towards pan-European integration and does not try to compete with functional central European structures. In no way shall its activities be aimed against isolating or weakening the relationships with other countries. Instead, the group tries to boost optimal cooperation with all countries, in particular, the neighbouring countries, and is interested in all parts of Europe developing democratically. Compare http://www.visegradgroup.eu/about .

3 Alongside the V4 countries, the administrative procedure rules can be found, for example, in Spain, Croatia, Switzerland, Slovenia, the Netherlands or Iceland. It is definitely not uninteresting that the adoption of such administrative procedure rules is also discussed at the level of the European Union as such (see below). Administrative procedure rules can also be found, for example, in the United States – the federal Administrative Procedure Act (APA) of 1946.

4 Compare in more detail the German Administrative Procedure Code of 1976, known under the abbreviation *VwVfG* and being a major inspiration base for other (central) European administrative procedure rules.

5 The first administrative procedure rules in the Czech Republic (and Slovak Republic) were adopted in 1928 (P. Průcha, *Správní řád s poznámkami a judikaturou* 13 [Administrative Procedure Code with notes and judicature] Leges, Praha, 2012), in Poland in 1928 (Adamiak, B., Borkowski, J., *Postepowanie administracyjne I sadowoadministracyjne,* 7. wydanie, 54 [Administrative Procedure Law and Administrative Justice Procedure Law, 7th] editionLexisNexis Polska, Warszawa, 2009) and in Hungary in 1929 (Horáková, M. et al., *Správní řízení v zemích EU* [Administrative Procedures of EU Countries], Praha: Linde 2012, p. 237).

6 Compare also Adamiak, B., Borkowski, J., *Postepowanie administracyjne I sadowoadministracyjne,* 7. wydanie 82–83 [Administrative Procedure Law and Administrative Justice Procedure Law, 7th edition] (LexisNexis Polska, Warszawa, 2009), L. Klat-Wertelecka, (ed), *Kodeks postepowania administracyjnego* 11 [Code of Administrative Procedure] (ODDK, Gdańsk, 2012), M. Vrabko et al., *Správne právo procesné. Všeobecná časť* 54 [Administrative Procedure Law. General Part] (C. H. Beck, Bratislava, 2013), S. Košičiarová, *Správny proriadok. Komentár,* 7 [Administrative Procedure Code, Commentary] (Heuréka, Šamorín, 2013), or P. Váczi, Procedural Principles of Public Administration in Hungary, in P. Smuk, *The Transformation of the Hungarian Legal System 2010–2013,* 185 (Wolters Kluwer, Budapest, 2013).

7 They are sometimes referred to as administrative bodies directly by the laws since they constitute a legal concept. Section 1(1) of the Czech Administrative Procedure Code contains the general list of bodies considered as 'administrative'. The Slovak Administrative Procedure Code defines 'administrative bodies' in Section 1(2). The Hungarian Administrative Procedure Code contains a more specific definition of administrative bodies in Section 12(3) introducing the term 'authority' or 'administrative authority'. The Polish Procedure Code refers to 'public administration bodies' in Section 5(2).

8 Thus, the provisions that are the subjects of regulation by the Administrative Procedure Codes are very important since they constitute the procedural basis of administrative activity and co-create the contents of administrative law, as these contents are defined by the German speaking theory as *'Recht der Verwaltung'* (compare B. Raschauer, *Allgemeines Verwaltungsrecht.* 2nd updated edition. 4 [Springer, Wien, 2003]). In terms of the administrative procedure rules, it is definitely not uninteresting that a relatively isolated sub-sphere – being the Administrative Procedure Law – is established within the Administrative Law alone as a scientific and pedagogical discipline. This is obvious the most in the Czech and Slovak Republics. The Administrative Procedure Law pays attention to the procedures carried out by administrative bodies and to the administrative procedure rules. The same is confirmed by the professional literature focused on the Administrative Procedure Law. Compare S. Skulová, et al., *Správní právo procesní*, 2. upravené vydání [Administrative Procedure Law], 2nd updated edition. (Aleš Čeněk, Plzeň, 2012), or M. Vrabko et al., *Správne právo procesné. Všeobecná časť* [Administrative Procedure Law. General Part]. (C. H. Beck, Bratislava, 2013).

9 In this respect, it is necessary to mention that compared to civil procedure rules, administrative procedure rules are usually briefer and less complicated. The reason for this is the much higher probability of natural persons and legal entities coming into contact with public administration rather than with the court and the fact that public administration is often performed by officers without legal education. Hence, administrative procedure rules must be understandable.

10 Compare S. Skulová et al., *Správní právo procesní,* 2. upravené vydání, 10 [Administrative Procedure Law, 2nd edition] (Aleš Čeněk, Plzeň, 2012).

11 In case of the Slovak Administrative Procedure Code, it needs to be stated that administrative procedure represents the core of its legislation. It focuses on other procedures usually available within the public administration only marginally and indirectly. Pursuant to Section 3(7) of the same Code, 'provisions pertaining to the basic procedural rules stated in paragraphs 1 through 6 shall reasonably apply also to the issue of certificates, opinions, statements, recommendations and other similar measures'. The Slovak Administrative Procedure Code also regulates the administrative procedure through all its 85 Sections. On the contrary, the Polish Administrative Procedure Code regulates not only the administrative procedure but, as stated in Section 1 thereof, also the issue of certificates (Part Seven, Section 217 et seq.) and the filing and handling of public administration-related complaints (Part Eight, Section 221 et seq.). In terms of the scope of applicability, it is appropriate to add that the Czech Administrative Procedure Code regulates, primarily, the administrative procedure. This legislation forms a crucial part of the Administrative Procedure Code and is included in its Parts Two and Three, that is, in Sections 9 through 153, while Part Four is devoted to

regulating the so-called other acts, such as opinions, statements, certificates or standpoints. Part Five of the same Code regulates public contracts. Part Six regulates a specific institute, being measure of a general nature, and Part Seven deals with the issue of public administration-related complaints. The Hungarian Administrative Procedure Code also focuses on procedures other than administrative as stipulated in Section 12 thereof.

12 With the exception stated in the footnote No. 12

13 Pursuant to Section 9 of the Czech Administrative Code, 'administrative procedure is a procedure which shall be carried out by an administrative body and the purpose of which shall be to pass a decision establishing, changing or cancelling the respective party's rights and obligations and declaring that such party shall or shall not have such rights or obligations'. Section 1(1) of the Slovak Administrative Procedure Code defines the administrative procedure by stipulating that 'this Code shall apply to the procedure within which the administrative bodies decide on the rights, the legally protected interests and the obligations of natural persons and legal entities in the sphere of public administration unless a special law stipulates otherwise'. The Polish Administrative Procedure Code, as well as the Czech and Hungarian Administrative Procedure Codes, does not focus predominantly and solely on the administrative procedure but also on other procedures available within the public administration. Section 1(1) of the Polish Administrative Procedure Code defines the administrative procedure as 'a procedure conducted by, and falling within the competence of, public administration bodies resolving individual matters by way of administrative decision'. The Hungarian Administrative Procedure Code defines the administrative procedure in Section 12(2) a) as 'a procedure within which an administrative body defines client-related rights or obligations… '.

14 For the definition in the Czech theory of administrative (procedural) law compare S. Skulová, et al., *Správní právo procesní,* 2. upravené vydání, 241 [Administrative Procedure Law, 2nd amended edition] (Aleš Čeněk, Plzeň, 2012); for the Slovak concept of regular remedial measures compare M. Vrabko, et al., *Správne právo procesné.* Všeobecná časť, 177 [Administrative Procedure Law. General Part] (C. H. Beck, Bratislava, 2012); the Polish definition of regular remedial measures is contained in B. Adamiak, J. Borkowski, *Postepowanie administracyjne I sadowoadministracyjne,* 7. wydanie, 258 [Administrative Procedure Law and Administrative Justice Procedure Law, 7th edition] (LexisNexis Polska, Warszawa, 2009); and for the Hungarian concept of (regular) remedial measures compare K. Pollák, Achievement of the Right to Legal Remedy in the Hungarian Administrative Procedure, 122 in *Control of the Decision-making Processes in Public Administration as a Means of Economic Efficiency of Public Administration, Compendium of Contributions from the International Scientific Conference 'Bratislava Legal Forum 2013'* Komenský University in Bratislava, Bratislava.

15 Compare, for example, Article V of the Amendment to Resolution 77/31 concerning the protection of individuals in relation to administrative bodies' acts, according to which the decision needs to state what remedial measures can be applied against the respective individual. The possibility of administrative review is stipulated in Article IV paragraph 9 of Recommendation 80/2 on the exercise of administrative discretion. Article VIII of the Amendment to Recommendation 81/19 on access to information held by public authorities also states the requirement for the review of decisions. Article VI of the Amendment to Recommendation 87/16 on administrative procedures relating to a large number of persons stipulates that information on the regular remedial measures should be given. A crucial article is Article 18 paragraph 2 of the Code of Good Public Administration [Amendment to Recommendation 2007/7 on good public administration], pursuant to which a decision must contain a notice of admissibility of regular remedial measures.

16 Article 2 b) of the Principles of Recommendations 2004/20 on the judicial review of administrative acts stipulates that before the court protection and the judicial review of an administrative act is implemented, it is possible to require that all remedial measures available within the procedure conducted by an administrative body are exhausted. This is confirmed by Article 22(2) of the Code of Good Public Administration [Amendment to Recommendation 2007/7 on good public administration], pursuant to which an appeal may be filed within the administrative procedure before the review is carried out by the court; such appeals may even be mandatory in certain cases.

17 For the issue of direct and indirect Union administration further compare, for example, H. C. H. Hofmann, A. H. Türk, *EU Administrative Governance* (Edward Edgar Publishing, 2006).

18 For this issue compare P. Craig, *EU Administrative Law.* 2nd edition. 140 et seq. (Oxford University Press, Oxford, 2012), D. Gerardin, R. Munoy & N. Petit (eds.), *Regulation Through Agencies: A New Paradigm of European Governance* (Edward Elgar, Cheltenham, 2005), M. Pollack, *The Engine of European Integration: Delegation, Agency and Agenda Setting in the EU* (Oxford University Press, Oxford, 2003); T. Zwart, L. Verhey (eds.), *Agencies in European and Comparative Law* (Intersentia, Antwerp, 2003), or W. Weiss, Agencies versus Networks: from division to convergence in

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19 Compare the Resolution of the European Parliament of 15 January 2013, containing a recommendation for the Commission relating to the EU law. The recommendation expressly states that 'Union has no uniform and comprehensive set of codified administrative law rules …' This document then specifically states recommendation 4.10 relating to the issue of remedial measures. According to such document, 'if so stipulated by the EU laws, administrative decisions shall clearly stipulate that an appeal may be filed and shall specify the procedure for filing such appeal …' Thus, the stated provisions show that the European Union counts on the possibility of seeking regular remedial measures against decisions of EU bodies and institutions at the level of the EU administrative governance. However, it is not yet unambiguously resolved whether the right to file an appeal is to be incorporated directly in the EU administrative procedure rules or whether the admissibility of its filing is to be regulated by special EU laws. I believe that it would be more appropriate if the EU administrative procedure rules contained the general possibility of filing an appeal against a decision passed by any of the EU bodies or institutions without excluding that special legislation stipulates otherwise in specific cases and contains an exception to this rule. Compare A. Meuwese, Y. Schuurmans & W. Voemans, Towards a European Administrative Procedure Act. 2 *Review of European Administrative Law* 3–35 (2009).

20 Compare L. Klat-Wertelecka, (ed.), Kodeks postepowania administracyjnego, 13 [Administrative Procedure Code] (ODDK, Gdańsk, 2012).

21 Compare B. Adamiak, J. Borkowski, Postepowanie administracyjne I sadowoadministracyjne, 7. wydanie, 261–262 [Administrative Procedure Law and Administrative Justice Procedure Law, 7th edition] (LexisNexis Polska, Warszawa, 2009), or A. Skoczylas, M. Swora, Administrative Remedies, 337–338 in Polish Administrative Law. in D. C. Dragos, B. Neamtu (eds), Alternative Dispute Resolution in European Administrative Law (Springer, 2014). 10.1007/978-3-642-34946-1_11

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23 Compare in more detail Z. Kmieciak, Wniosek o ponowe rozpatrzenie sprawy w k.p.a. (Odwolanie czy remonstracja?) [Renewed procedure in KPA (Appeal or remonstrance?)] 3 *Państvo i prawo* (2008), 19–35.

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27 M. Vrabko et al., *Správne právo procesné. Všeobecná časť,* 178 [Administrative Procedure Law. General Part]. (C. H. Beck, Bratislava, 2013).

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29 M. Vrabko et al., *Správne právo procesné. Všeobecná časť,* 187 [Administrative Procedure Law. General Part]. (C. H. Beck, Bratislava, 2013).

30 Compare Section 2501(1) of Act No. 99/1963 Coll., the Administrative Procedure Code.

31 The list of cases when a remedial measure may be sought with a court is provided by M. Vrabko et al., *Správne právo procesné. Všeobecná časť,* 189 [Administrative Procedure Law. General Part]. (C. H. Beck, Bratislava, 2013), or J. Sobihrad, *Správny poriadok. Komentár, šieste prepracované vydanie,* 258–261 [Administrative Procedure Rules; Commentary, Sixth amended edition] (Iura Edition, Wolters Kluwer, Bratislava, 2013).

32 Compare, for example, the judgment of the Supreme Administrative Court of 20 July 2004, file number 5 A 69/2001-80, published under number 746/2006 Coll. NSS.

33 See the award of the Constitutional Court of 19 October 2004, file number II US 623/02.

34 Compare the judgment of 27 October 2005, reference number 2 As 47/2004-61, published under number 1409/2007 Coll. NSS.

35 Compare in more detail S. Kadečka, et al., Dispositional Instruments of Protection against Administrative Acts (not in legal force) and Their Effectiveness, 2–3 *International Public Administration Review* (2014) 99–122. 10.17573/ipar.2014.2-3.a06

36 The statistical data, though not fully complete, is available in the contribution by S. Skulová, et al., Remonstrance against Decision made by Central Administrative Bodies in the Czech Republic, 2–3 *International Public Administration Review* (2014) 123–142. It ensues from such data that in the period between 2007 and 2012, remonstrance was the subject of determination in at least 1,200 cases. 10.17573/ipar.2014.2-3.a07

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38 That the Hungarian Administrative Procedure Code is conceived in the spirit of the principle of good governance and client-oriented approach is obvious with reference to the addressee of administrative activity being identified as 'client'.

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41 The remonstrance pursuant to the Czech and Slovak legislations comes into play even in the situations when directly a minister or the person leading the central administrative body has passed the first-instance decision and the remonstrance is determined by the same leader again, but on the proposal of the remonstrance commission. Unfortunately, the leader is not bound by the remonstrance commission's proposal and appoints the remonstrance commission. The details regarding the problematic nature of the remonstrance are stated in the contribution by S. Skulová et al., Remonstrance against Decision Made by Central Administrative Bodies in the Czech Republic, 2–3 *International Public Administration Review* (2014) 123–142.

42 Compare J. Vačok*, Možno vždy považovať rozklad za prostriedok nápravy?* [Is it always possible to consider remonstrance as a means of remedy?] in Dny práva – 2008 – Days of Laws; the second year of the international conference held by Masaryk University, Faculty of Law, available on <http://www.law.muni.cz/sborniky/dp08/files/pdf/sprava/vacok.pdf>. In terms of the Czech legislation compare S. Skulová et al., Remonstrance against Decisions Made by Central Administrative Bodies in the Czech Republic, 2–3 *International Public Administration Review* (2014) 123–142.

10.53116/pgaflr.2016.2.5

Case studies

Subject of waste management fee in Poland

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Abstract: The study is dealing with selected matters of waste management regulation, especially with the applicational issues and praxis of municipalities in Poland and makes an effort to present the most neuralgic points of the normative regulation and practical experiences as well.

Keywords: local self governments; waste management; waste management fee

A new regulation on the collection of municipal solid waste in Poland came into force on 1st July 2013. The purpose of its implementation was Directive 2008/98/EC of the European Parliament and of the Council of 19th November 2008 on waste and repealing certain Directives[1]. According to the new wording of the Law on Preserving Cleanliness and Order in Municipalities (from 3rd September 1996[2]) municipalities are obliged to collect waste instead of the previous practice of commercial relations between real estate owners and recycling companies. A very important element of the new system is the waste management fee (literally: a fee for the management of municipal waste) which is a public burden collected by the municipal tax administration. Fee revenues should cover the costs of collection and recycling of waste by the municipality, its special units or outsourced subjects.

The legal construction of waste management fee includes, of course, many elements and details. Among them, the subject of the fee seems to be the most controversial thus many disputes and legal proceedings have arisen with regard to this subject.

The law from 3rd September 1996 (art. 6h) states that the owners of properties should carry the burden of the fee. 'Owners' also means organizational units and persons possessing such immovable property in management or usufruct (art. 2 sec. 1 p. 4 of the same Act). Moreover, when single apartments in the building are notarially certified as separate real estate, such a role comes to persons (units) managing the common property (art. 2 sec. 3 of the Law).

This last case is mostly doubtful because of the different meanings of 'management' in Polish regulations concerning immovable properties. Another act, the Law on the Ownership of Apartments (from 24th September 1994[3]) in art. 20 orders the managing board to be called when the number of apartments in the building exceeds 7 (it is optional in smaller houses). The next possibility, one of the most frequent and important in Poland, is the functioning of traditional, special structures called housing cooperatives. They are owners or managers of thousands of houses with dwelling and commercial spaces accessible in different legal ways. According to art. 27, sec. 2 of the Law on Housing Cooperatives (from 15th December 2000[4]), management of common properties is held by the cooperative 'like' entrusted management ordered in the Law from 24th September 1994.

The question is whether it is the managers or the owners who are the subjects obliged to pay the waste fee in these cases. It is obvious that the economic charge of the fee must be the burden of the owners, however, this can be realized directly by owners or by managers paying or transferring collected quotes. It causes legal responsibility (for delayed or ignored payment) held by one of these subjects.

The situation in bigger houses (exceeding 7 apartments) is most characteristic. The owners of flats may manage the common property in two ways: they can elect a manager or management board among themselves (which may be called a 'non-professional manager') or employ an external person or company as a professional manager and representative. Another possibility, very common for the management board of the owners, is to negotiate the role of management (as maintenance of the common space, in a technical sense only) with such external subjects.

Professional management companies were the first to explain their legal position in reference to the fee. It was made by suing acts of the municipality law which obliged managers to submit tax (fee) returns with a calculation of the fee. This effectively means that managers are responsible subjects of the fee. Another way was initiating procedures of advance rulings with the suggestion that managers cannot be treated as such subjects. Applicants argued that they have no possibility either calculating preciselyor levying the exact amount of fee duties. Their activity concerns common space such as staircases and courtyards and they have neither access to apartments nor information about them. When the quote of the fee depends on the apartment's size, the number of persons living in the flat and the capacity of garbage from commercial activity, they cannot verify all these data and have no legal instruments to force the owners to give such

information. When paying, due to legal responsibility, the manager may encounter financial problems if it is not feasible to collect payment from the owners. Similar reasons were submitted by housing cooperatives in their cases.

The final solutions were disadvantageous for all of them. Administrative courts of voivodships[5], as well as the Supreme Administrative Court[6] confirmed direct wording of laws and stressed that all managing subjects have ample opportunities to get back quotes of fee from the owners. Only once did the court decide to link the manager's obligations and responsibility only with common property and not apartments[7], however, this view wasn't approved by the Supreme Court.

As an aside, in Wrocław, where controversies and cases between managers and the city administration were extremely frequent, another authority suggested practical compromise. According to the verdict of the self-governing Appeal Judging Board in Wrocław (the second instance for judgment of self-governing decisions[8]), the subject of the fee should only be managers elected by owners to represent their community (instead of the management board of the owners). This excludes managers hired only for maintaining common spaces – which happens in the distinct majority of managing relationships – from the circle of responsibility.

In the intervening period, the law of 24th September 1994 was changed in January 2015. Nowadays, the regulation referring to multi-apartment buildings (art. 2, sec. 3) indicates, as the payers of the fee, only the owners' communities and housing cooperatives. They may all request necessary information from owners of apartments (art. 6m, sec. 1c); this competence is fairly new in the law. This way all kinds of managers are exempt from the charge.

The amendment of the law evidently seems to be a consequence of previous disputes. The present situation is relatively clear. The only doubt can be the possible responsibility of some owners – members of the owners' community – for the fee not paid by others.

Of course, proceedings concerning the period between July 2013 and January 2015 still persist and there are some questions to be answered ultimately.

Also there are no examples of claiming a refund for the fee paid by managers. Though the waste management fee is certainly a public burden, treated in Polish law like taxes, clearing of the accounts between the fee subjects and owners will be settled through civil proceedings.

Additional troubles may arise from inconsequent practice. For example, in Wrocław tax returns with a declared waste management fee were always accepted from the owners of apartments in all houses (also managed by professional companies) therefore their payments were undoubtedly accepted as well. The position of owners of flats in city buildings managed by the organizational units of the municipality is unclear.

However, it is only a short and incomplete report of the most evident controversies, some remarks and conclusions can be drawn (still mostly referring to the legal status before January 2015).

The main paradox is that almost all arguments presented by all sides of the dispute (first of all managers and municipal tax authorities) are generally right. There are serious reasons to accept the opinions of both the fee subjects (about calculation and collection problems) and of the tax authorities and courts (about the direct interpretation and meaning of the text of the law).

The final ground of all these problems is the low quality of legislation. Regulations concerning the waste management fee were introduced hurriedly, without sufficient care with regard to their context and consequences. In the sphere of the subject of the fee, the main mistake is defining it through various legal expressions between different provisions of the same, or even alternative acts. This must not happen in tax law, especially in the regulation of such a universal burden.

References

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3 Ustawa z 24 września 1994 r. o własności lokali (Dz. U. z 2015 r., poz. 1892).

44 Ustawa z dnia 15 grudnia 2000 r. o spółdzielniach mieszkaniowych (Dz. U. z 2013 r., poz. 1222).

5 See for example judgments: from 2nd February, 2013 (I SA/Bd 72/13, from 21st November 2013 (I SA/Ol 586/13), from 7th February 2014 (I SA/Bk 526/13), from 15th May 2014 (I SA/Ol 285/14), from 5th December 2014 (IV SA/Po 868/13); all verdicts of administrative courts are available at http://orzeczenia.nsa.gov.pl/cbo/query.

6 See for example judgment from 26th April 2016 (II FSK 1621/15).

7 Judgment from 31st March 2014 (I SA/Wr 67/14).

8 From 17th December 2015 (SKO 4138/43/15).

10.53116/pgaflr.2016.2.6

Legislative Changes in the Environmental Impact Assessment act in the Slovak Republic

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Abstract: The study is dealing with the implementation of the EIA Directive in the Slovak Republic, primarily focused on the participation of public in environmental proceedings. The case law presented a special approach on this field – partially which – leaded to new ways of interpretation of normative rules.

Keywords: environmental law; right to a favorable environment; right to a judicial protection; public interest; public participation

The Government of the Slovak Republic with its resolution no. 330/2014 of July 2nd 2014 approved a draft law amending and supplementing the Act no. 24/2006 Coll. on the environmental impact assessment. The Prime Minister of the Slovak Republic submitted the draft law to the National Council of the Slovak Republic on July 16th 2014. This proposition was adopted on October 14th 2014.

The mentioned governmental proposition brought changes and amendments made within the applicable Act no. 24/2006 Coll. This amendment represents the reaction of the Slovak Republic responding to the allegations of the European Commission in the framework of the so-called 'infringement proceeding' according to the Article 258 of the Treaty on the Functioning of the European Union. The breach of the obligation to apply the European Law was formally notified to the Slovak Republic by the European Commission on March 21st 2013 through the Letter no. 'C (2013)1558'.

According to the opinion of the European Commission, the main shortcoming of the previously valid Act no. 24/2006 Coll. was the insufficient connection of the process of the environmental impact assessment of the proposed activities with the subsequent proceedings of permission.

The European Commission criticized the Slovak Republic for the lack of implementation of Articles 6, 7 and 9 of the Environmental Impact Assessment Directive. The abovementioned Directive provides in Article 6 the obligation of the member States to take the necessary measures to ensure that the institutions to which powers in the environmental field the project can relate, shall express their statement on the information supplied by the developer and the application for permission. This article of EIA Directive also established the obligation to inform the public early in the environmental decision-making and at the latest as soon as it can reasonably provide information either by public notices or other appropriate means such as electronic media where available, on the decision-making matters defined by this provision of the EIA Directive. At the same time, this provision requires from the Member States to ensure the access of the public concerned to the mentioned group of information in due time. Article 7 of the EIA Directive governs the cases in which the assessed project could most likely have significant impact on the environment of another Member State. Article 9 of the EIA Directive lays down the conditions and extent of providing the information to public about the granting or refusal of permission.

The EIA Directive is an important tool that enables to enforce the requirements of environmental protection into the design of construction projects. The meaning of the process of environmental impacts assessment lies in the fact that this procedure ensures that the consequences on the environment of the construction projects shall be assessed and taken into account before a competent authority of a Member State shall issue a decision permitting the project. The purpose of the EIA Directive includes the effort to ensure that projects likely to have significant impact on the environment shall be properly assessed prior to the permission.

The Slovak case law has presented a special approach to the right to a favorable environment and to the right to a judicial protection in the field of environmental impact assessment before.

The civic association 'G. S.' has filed an action against the unlawful intervention to the right to a favorable environment under the Article 44 of the Constitution of the Slovak Republic and under the Article 27 of the Act no. 24/2006 Coll. to the Supreme Court of the Slovak Republic.[1] In the opinion of the mentioned civic association the essence of this intervention should lie in the fact that the Ministry of Environment of the Slovak Republic nominated people with biased professional qualification to prepare the expertise of the proposed activities in accordance with the Article 36 of the Act no. 24/2006 Coll.[2]

The Ministry of Environment of the Slovak Republic argued that the Article 27 of the Act no. 24/2006 Coll. does not create an independent right to a favorable environment of the non-governmental organization promoting the environmental protection. This article establishes the state that allows real exercise of the procedural rights of the party of the administrative proceeding, respectively the public concerned in the process according to the Act no. 24/2006 Coll. The Supreme Court of the Slovak Republic considered the relation between the designated qualified person and the intervention to the right to a favorable environment.

The purpose of the proceeding on the protection against the unlawful intervention caused by the public authority is to provide the judicial protection to the natural or legal person who claims to be disadvantaged in their rights and legitimate interests through the unlawful intervention of the public administration, which is not a decision, and at the same time this action was aimed against this natural or legal person or it was enforced as a result against this person.

The Supreme Court of the Slovak Republic focused on the fact, whether the civic association was entitled to bring an action against the unlawful intervention to the Supreme Court of the Slovak Republic. It concluded, that the civic association has demanded protection of individual rights against unlawful intervention by the public administration in proceedings according to Act no. 24/2006 Coll.

The dispute of the case was the assessment of the operation of a nuclear power plan. That is why the Supreme Court of the Slovak Republic did not automatically exclude the fact that its operation may have had an impact on the individual rights of the public concerned. Such fundamental rights of natural persons as their right to life or the right to property may have been affected. These rights may have a connection to the right to a favorable environment under Article 44 of the Constitution of the Slovak Republic as well. The object of the activities of the mentioned civic association was the environmental protection. The civic association brought together the individuals whose premise was the protection of public subjective right – the right to a favorable environment and the protection of other fundamental rights guaranteed by the Constitution – the right to life and the right to property. In this case the civic association met the conditions of the Article 27 of the Act no. 24/2006 Coll.3 The case law in this case stated that the civic association helped the individuals to perform their right to a favorable environment. Therefore it has concluded that the civic association was entitled to bring an action for the protection against the unlawful intervention by the public authority. However, the key issue was to assess whether the designation of the objected qualified person filled up the characteristics of the unlawful intervention. The case law considers the intervention to be unlawful, if it directly intervenes in the subjective public rights – e. g. violation of the right to life, violation of the personal liberty, violation of the right to property, violation of the right to inviolability of the home and such. Either the civic association did not show a causal link between the claimed partiality of the expertise and the environmental impact assessment process.

Since January 1st 2015 the participation of the public concerned in the proceedings regulate the Articles 24 and 25 of the Act no. 24/2006 Coll. Section 1 of the Article 24 of this Act defines the obligation of the competent authority to inform the public about the facts established by law.

Subsequently, section 2 of the Article 24 of Act no. 24/2006 Coll. regulates the position of the participant of the public concerned in the proceedings established in the third part of Act no. 24/2006 Coll.

According to this provision, 'The public concerned has the status of a party in the proceedings referred to in the Third Part and subsequently the status of the participant in the proceeding on the permission of the proposed activity or its change if it applies the procedure under sections 3 or 4 if its participation in the proceedings does not already arise from the special regulations. Right of the public to a favorable environment, which has shown the interest in the proposed activity or its change through the procedure under sections 3 or 4, may be directly affected by the permission of the proposed activity or its change or by the subsequent performance of the proposed activity or its change.'

The public may show the interest in the proposed activity through the procedure under the Article 24 (3) of the Act no. 24/2006 Coll. If it does so, it automatically gains the position of the participant to the proceeding.

According to the Article 24 (3) of the Act no. 24/2006 Coll. 'The public shows the interest in the proposed activity or its amendment and in the proceeding of permission, when filing

a) a reasoned written opinion on the plan in accordance with the Article 23 (4)
b) a reasoned comment on the scope of the assessment of the proposed activity or its amendment according to the Article 30 (6)
c) a reasoned written opinion on the assessment report according to the Article 35 (2)
d) a reasoned written opinion on the notification of the amendment according to the Article 29 (9).'

The legal position of the participant to the proceedings guarantees several special procedural rights to the public under the Article 24 (4) of the Act no. 24/2006 Coll. effective from January 1st 2015. According to this provision 'The public has a right to appeal against the decision on whether the proposed activity or its amendment shall be assessed under this

Act (hereinafter referred to as 'the decision issued in the screening proceeding'), or appeal against the final statement even if it was not a participant to screening proceeding or to the proceedings on the issuance of the final statement or amendments to it. The date of receipt of the decision when making such an appeal shall be the fifteenth day of the publication of the decision issued in the screening proceeding according to the Article 29 (15) or the fifteenth day of the publication of a final statement by the competent authority according to the Article 37 (7). The public by filing the appeal shall also show the interest on the proposed activity and on proceeding permitting it.'

Since January 1st 2015 the legislator has included the legal position of the participant to the public concerned in the proceedings referred to in the Third Part of the Act no. 24/2006 Coll. to the Article 24 (2) of the Act no. 24/2006 Coll. According to this provision, Right of the public to a favorable environment, which has shown the interest in the proposed activity or its change through the procedure under sections 3 or 4, may be directly affected by the permission of the proposed activity or its change or by the subsequent performance of the proposed activity or its change.'

In my opinion, this expression brings positive changes in the sense that it allows the public to step up against decisions issued under the provisions of the Act no. 24/2006 Coll. effective of January 1st 2015. Thus the Slovak legislator has ensured the transposition of the conditions of the Article 46 (2) 2 of the Constitution of the Slovak Republic, according to which 'who claims to have been deprived of his rights by the decisions of the public authority, may apply to the court to examine the legality of such a decision, unless the law stipulates otherwise. From the jurisdiction of the court the examination of decisions concerning fundamental rights and freedoms may not be excluded.' It can be said that in such case, the right to a favorable environment under the Article 44 of the Constitution of the Slovak Republic has in some way 'greened' the right to judicial protection under the Article 46 (2) of the Constitution of the Slovak Republic. The public concerned is in this way put in position, in which it is actively entitled to protect the right to a favorable environment. If the legislator presumes the direct connection between the intentions and proposed activities on one hand and the right to a favorable environment on the another hand, then it has also established the entitlement of the public concerned to file a constitutional complaint to the Constitutional Court of the Slovak Republic.

References

1 See: The judgment of the Supreme Court of the Slovak Republic of January 1st 2011, no. 8 Sžz 1/2010.

2 According to Article 36 (1) of Act no. 24/2006 Coll. effective in the year 2010, "Expertise on the proposed activity may be prepared only by a natural or a legal person who is professionally qualified according to Article 61 and designated competent authorities. A person who has participated in the preparation of the plan or in the assessment report on the activity cannot take part in the process of the preparation of the expertise. Other professionally qualified persons registered under special regulations may also participate in the process of the preparation of the expertise, if it arises from the nature of the impact of the proposed activity on the environment."

3 According to the Article 27 of the Act no. 24/2006 Coll. effective in 2010, "The non-governmental organization promoting the environmental protection, which submits a written statement to the intention of the proposed activity listed in Annex no. 8 according to Article 23 (4) has the status of a party within the integrated licensing, proceedings under the Road Act, Building Act, Aviation Act, Water Act, Railway Act, the Forests Act, the Nature and Landscape Protection Act and the authorization of Mining Activity Act. Such non-governmental organization is considered to be a subject whose right to a favorable environment may be affected by the decision. Non-governmental organization promoting environmental protection shall submit proof of registration to the competent authority and to the permitting authority together with submission of written observations on the proposed action plan."

10.53116/pgaflr.2016.2.7

Book reviews

Tax Codes Concepts in the Countries of Central and Eastern Europe[1]

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A thematic monograph entitled *Tax Codes Concepts in the Countries of Central and Eastern Europe* has been resulted from an international cooperation of members of the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe, Białystok, Poland (hereafter referred to as Centre). Editors of the volume, Leonard Etel and Mariusz Popławski, oversaw a group of authors that are mostly closely related to the organization. The authors made a selection of topics – their first interest was aimed at providing an overview of tax codes (history, structure, evaluation and development), secondly, they focused on substantive and procedural tax law aspects from the tax codification perspective).

It is not merely a coincidence that the editors and hence the team leadership for this publication have been Polish, as there were several reasons substantiating the choice. Polish Tax laws are in a process of crucial recodification as the Polish General Taxation Law Codification Committee is elaborating a new Tax Ordinance. There has been a number of professional workshops and specialists conferences organised by and in the Faculty of Law in Bialystok.

The volume under review, however, is not exclusively concerned with Polish legal codifications. Its aim, as mentioned above, was to create a broad and detailed collection of studies on professional approaches to tax law codifications in eight different Central and Eastern European countries, those of Belarus, Czech Republic, Hungary, Lithuania, Poland, Russia, Slovenia and Ukraine.

The choice of working language itself – English – is also reflecting an ambition to provide information on a regional as well as an international level. Its reviewer was a Czech specialist, associate Professor Petr Mrkývka.

The volume indeed provides a substantial contribution to a special area of law – best seen in its first part – introduced by a review chapter entitled Tax Code Models by Mariusz Popławski. Roles and impacts of tax law and tax codes are analysed not only in the context of the EU law codification but also in context of wider international legal systems and entities – the International Monetary Fund Code Model in particular, that offers a draft of a model of a hypothetical tax law in 2000 (IMF Tax Code) and the CIAT Tax Code Model compiled by the Inter-American Center of Tax Administrations with subsequent versions dated to 1997, 2006 and 2015.

At this point I would like to emphasize that the first part of the monograph offers a concise summary of information on fundamental questions of law codification in the states concerned, including their different historical perspectives. Since the volume does not offer a succinct comparative perspective, its informative and well-organised contents enable the reader to formulate conclusions.

The second part of the volume consists of individually very interesting, but rather selective elements concerning current aspects of substantive and procedural tax law. These aspects are indeed related to a sum of shared underlying issues in a tax codification perspective. The states participating in activities of the Centre are usually represented by several authors, and additionally another essay reflecting on the French system has also been added. The character of this part of the monograph is undoubtedly related to the 15th International Scientific Conference, which bears the title of *Concepts of Tax Codes. 15 Years of the Centre's Operation*. Presentations revealing the results of the research teams from the individual member states particularly on the current state and the direction of changes of their tax law codification procedures are composing it. However, we are not dealing with a typical structure of conference proceedings here – a selection was made on-demand for this volume and with a clear objective of publishing studies pertinent to the volume's overall topic, whilst unrelated studies have been or will be published elsewhere.

Conclusively, it may be said that the publication *Tax Codes Concepts in the Countries of Central and Eastern Europe* resulted in a specialized and thematized monograph, offering a complex and comprehensive knowledge concerning a large European region and an important area of law systematisations. Especially thanks to its first part, it becomes a recommended reading on legal theory and practice in the field of tax laws and their existing and proposed codifications.

References

1 Leonard Etel, Mariusz Popławski (eds.), *Tax Codes Concepts in the Countries of Central and Eastern Europe* (Temida 2, Białystok, 2016) ISBN 978-83-62813-88-9.