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Good Governance and Good Public Administration

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Abstract: The following article will examine the main principles of good governance and good public administration. It will outline the structure of reforms which have been accomplished in Hungary since the change in government in 2010, with special attention paid to the provisions of the new Constitution of Hungary that entered into force in 2012, and the Magyary Zoltán Public Administration Development Program, which will elaborate on the characteristics of what is considered the 'good state.'

Keywords: good governance; good public administration; good state

1. 'Comprehensive' thoughts

There have been significant reforms in Hungary since 2010,1 and these increased efforts toward policy-making are a stark contrast to the relatively silent two-decade-long period immediately after the regime change, from approximately 1989/1990 to 2010.2 Yet, it also reflects Hungary's shift towards an action-driven and fast-paced environment where rapid legislative3 and government (as well as constitutional4) decisions can occur.5

2. Good governance6

In the 1990s, the term 'good governance' began emerging fairly often as a demand on behalf of international financial institutions toward recipient countries concerning the structure and operation of their political institutions.[7] Namely, that neither concrete objectives of development policies nor general macroeconomic ideas can be realized without having an operational system of governance, regulation, and implementation in a country's political and economic units.[8] Over the years, there has been an evolution in the understanding of 'good governance.' Currently, this term defines characteristics of a desirable regulating and governing system, and represents a general reference framework for the evaluation of political governance.[9]

Good governance is an global phenomenon, and as such it is and should be considered at the international level. A legally binding norm is either the part of a national legal system, or somehow belongs to the international law (treaty law, customary international law).[10] Legal systems themselves are of course not free from the influence of globalization, as interchange of legal institutions and interactions between legal orders are everyday phenomena in our world today.[11]

In international treaty law (conventions of human rights) three fundamental rights, the freedom of opinion and freedom of expression,[12] the right to peaceful assembly[13] and the freedom of association[14] are crucial preconditions to good governance.[15] Additionally, a non-discrimination clause can be considered as a basic prerequisite for all the principles of good governance.[16]

Equality as the principle of good governance is guaranteed in the non-discrimination clauses of the International Bill of Human Rights.[17] Article 2 of the International Covenant on Civil and Political Rights (ICCPR) contains a non-discrimination clause that is amplified by Article 3, which contains an undertaking to respect the principle of equality of men and women in enjoyment of rights secured:[18] Good governance is not only understood at national or state levels, it is also a set of principles for good urban government, and better local governments. The main principles of good (urban) governance are: equity, civic engagement, transparency, and accountability, which all incorporate aspects of human rights law. Other principles like sustainability, subsidiarity, efficiency, and security do not have any existence in human rights laws. In this regard, it can be stated, that the five core principles of good

governance are: equity, efficiency or effectiveness, accountability, participation and security. UN-HABITAT's[19] proposed list of seven norms[20] can be subsumed under these abovementioned five principles.

The United Nations Millennium Declaration[21] clearly states that good governance is a key tool for the elimination of poverty. This Declaration is not legally binding, but it is a document of intent in which the Member States of the UN commit themselves to promote good governance within their countries. This applies to all level of governance, including at the state, regional, and urban governance levels.

Although the term 'good governance' has no generally accepted definition, its elements – the characteristics of a desirable governance – re-emerge in different descriptions: participative, equitable and inclusive, it is in line with the rule of law and is transparent, responsive, effective and efficient, and consensus-oriented and accountable.[22] These principles are general enough to say that their validity is not limited to present governance; they can be found – although not always explicitly – in the political thought of the past as well.[23]

Upon closer examination of the main legal elements of good governance, equity can be defined as equal access to decision-making processes, and the basic necessities of local and community life.[24] Practically, this means the inclusion and creation of fair and predictable regulatory frameworks, according to relevant international documents.

Efficiency[25] refers to the ratio between the outputs (products, services) and inputs (resources used).[26] Efficiency or effectiveness requires that institutions and processes achieve their goals while making the best use of resources.[27] Effective governing is when policy goals are achieved at the lowest possible cost and in due time.[28] Effective governing is concerned with the effective coordination of key policy actors: state institutions and social actors.[29]

Civic engagement implies that living together is not a passive exercise; it pertains to people's right to participation and those mechanisms supporting people's participation. Civic engagement is well guaranteed in Article 25 of the ICCPR.[30] Practical means of realizing these norms include inter alia, establishing the legal authority for civil society to participate effectively in such mechanisms as development councils. Therefore participation is also often considered a cornerstone of good governance.[31]

The key element of participation is that the interests of almost every citizen, every class of society – including people with the lowest ability to promote

their concerns – should be taken into account in the course of political decision making.[32] This requirement can be fulfilled with direct participation of the people[33] and by the representative organizations as well.[34] According to Frivaldszky (2012), the popularity of presently emerging ideas of 'good governance,' as well as their increased legitimacy is, "not only due to governmental effectiveness, but also to the closely related participatory governance."[35] And citizen participation is a key element in promoting transparency and accountability.

Transparency and accountability are of key importance if we want to increase the quality of governance.[36] Transparency is an invaluable element and precondition to any government reforms.[37] This is easy to comprehend: if the citizen possesses more knowledge, he has acces to more possibilities.[38]

However, in countries where government upholds and distorts information about the economy and economic policy, the independent media can become weak, or the parliament cannot control the government, and the quality of governance decreases.[39]

The accountability of local, regional and national authorities to their citizens is a fundamental tenet of good governance. Similarly, there should be no place for corruption in any state organization, because it can undermine government credibility[40] and deepen poverty.[41] Transparency and accountability are essential to a stakeholder's understanding of government, and to who is benefiting from decisions and actions. Access to information is therefore fundamental to this understanding and to good governance. Furthermore, laws and public policies should be practised in a transparent and predictable manner. Elected and appointed officials and other civil servant leaders must set an example of high standards of professional and personal integrity.

Among practical means of realizing these norms we can observe, inter alia:

– transparent tendering and procurement procedures and the use of integrity pacts and monitoring mechanisms in the process;

– regular, independently executed programmes to test public officials' integrity response;

– promoting an ethic of service to the public among officials while putting into place adequate remuneration for public servants; and

– establishing codes of conduct and provision for regular disclosure of assets of public officials and elected representatives.

Transparency requires decision-making processes which follow clear regulations.[42] Information concerning that process should be freely available for affected citizens.[43] Further, not only must the decision-making be transparent, the enforcement of the decision is also subject to open procedural rules.[44]

Transparency is a key feature of not just the government, but of the private sector as well,[45] and there is a correlation between the need for transparency in the public and private sectors.[46] Unfortunately, where transparency and accountability of the public sphere is low, the probability of 'state capture' and other kinds of illegal business influences on the governance is higher.[47]

3. Good administration

Good public administration is a prerequisite for good governance.[48] The expression 'good administration' has become somewhat fashionable and appears in various instruments both in European and in national level, but authors provide varying definitions.[49] It is therefore necessary first to acknowledge that there are differing concepts of good governance at the international and European levels.

The European Union Charter of Fundamental rights and freedoms includes[50] the right to good administration.[51] This Article 41 is based on the existence of the Union as subject to the rule of law, the characteristics of which were developed in the case law enshrining inter alia good administration as a general principle of law. According to the Charter, every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions, bodies, and agencies of the Union. The right to good administration is only applicable in legal relations with EU institutions, irrespective of national authorities, although there are scholars who argue the need to extend it to them, at least when applying EU law.[52]

This right includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and

– the obligation of the administration to give reasons for its decision(s).

This right is understood more widely by the Recommendation of the Council of Europe.[53] The basic principles, introduced by the Recommendation on good public administration, establish the goodness of public administration by the basic values of the rule of law: legality, equality, impartiality, proportionality, legal certainty, proceeding within reasonable time, involvement, respect for privacy, and transparency.[54] According to the Recommendation, public authorities shall act in accordance with the law. Public authorities shall further act in accordance with rules defining their powers and procedures laid down in their governing rules and exercise their powers only if the established facts and the applicable law entitle them to do so, and solely for the purpose for which they have been conferred.[55] This Recommendation also includes several suggestions to Member States in promoting good governance.[56] Among them, one is of the adoption of standards established in a model code which is attached as an appendix to the Recommendation itself.[57] However, this Recommendation is directed to the exercise of public power at the national (not the international) level, but with the increasing powers of international organizations, the principles listed are also becoming of growing relevance at the international level.[58]

The requirements of a right to good administration stem from the fundamental principles of the rule of law,[59] such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy, and transparency. While the rule of law is clearly a constitutional idea, its concretization in specific standards should be regarded as being of a more administrative nature.[60] These principles provide procedures to protect the rights and interests of private persons, inform them and enable them to participate in the adoption of administrative decisions.

Jurisprudence distinguishes three aspects of the rule of law. Firstly, the principle expresses a, 'preference for law and order within a community rather than anarchy', which is the philosophical view of society linked with basic democratic notions. Secondly, the rule of law, 'expresses a legal doctrine of fundamental importance, namely that government must be conducted according to law, and that in disputed cases what the law requires is declared by judicial decision'. Thirdly, 'the rule of law refers to a body of political opinion about what the detailed rules of law should provide' in matters both of substance and of procedure.[61]

Under the Council of Europe, understanding good administration is an aspect of good governance. It is not just concerned with legal arrangements, but depends on the quality of organization and management, and it must meet the requirements of effectiveness, efficiency, and relevance as determined by the needs of society. Good administration must maintain, uphold, and safeguard public property and other public interests. It must comply with budgetary requirements, and (similarly to the UN requirements) it must preclude all forms of corruption. Any form of good administration is also dependent on adequate human resources available to the public authorities, and on the qualities and appropriate training of public officials.

The European legislator now focuses 'not just on specific administrative acts, but also on the administrative procedures themselves. In other words, there has been a shift in emphasis from the outcome of administrative action (result) to the administrative behaviour (functioning).'[62]

4. Measures of the Hungarian State for the vindication of the good governance's principles

The following is to consider what Hungary has done for the vindication of the principles of good governance.

4.1 Provisions of the Hungarian Constitution

On 1 January 2012 the new Constitution of Hungary entered into force, and is referred to as 'Fundamental Law' or 'Basic Law'.[63] Fundamental Law incorporates many provisions that are in close connection, and therefore contributing, to the enforcement of the principles of good governance. When compared to the former Constitution, some of these provisions are new, [64] but some were also previously present.[65]

The National Avowal[66] of the Fundamental Law states that:

– We believe that we have a general duty to help the vulnerable and the poor. As it was previously mentioned, the United Nations Millennium Declaration clearly states that good governance is a key tool for the elimination of poverty.

– We believe that the common goal of the citizens and the State is to achieve a good quality of life, safety, order, justice, and liberty. Referring back to philosophical views of good governance, happiness and the 'good life' for people can prove the worthiness and efficiency of government actions.[67]

– We hold that democracy is only possible where the State serves its citizens and administers their affairs in an equitable manner, without prejudice or abuse.

Additionally:

– Article B states: Hungary is a state under the rule of law.[68]

– Article N declares the principle of balanced, transparent and sustainable budget management, and in the course of performing their duties, all state organs (public administrative authorities, local governments, etc.) shall be obliged to respect this principle.

– Article XXIV declares the key element of the right to good administration, that is: Every person shall have the right to have his or her affairs administered by the authorities in an impartial, fair and reasonably timely manner. This right shall include the obligation of the authorities to justify their decisions as determined by law.[69]

The impact of the Charter is rather obvious on this provision because the last phrase of Article 41 para. 1 and 2 item C are textually present here (administration in an impartial, fair and reasonably timely manner, and the obligation to justify decisions).[70] Equal contents can be found in para. 2 of the Fundamental Law and Article 41 para. 3 of the Charter, both regulating compensation of the damages from unlawful conduct.[71]

4.2 Magyary Zoltán Public Administration Development Program

The Magyary Zoltán Public Administration Development Program (the Magyary Program), which was expanded in 2011, contains the reforms and principles of the public administration system which was introduced by the conservative government that formed in 2010. The Magyary Program[72] is rooted the concept of the good state, which itself is closely linked to concepts of good governance, and good administration.[73]

The Magyary Program became one of the frameworks, and the continuously renewing and 'rephrased' base – beyond public administration – of the Hungarian government's ideas regarding the good state after 2010.[74]

The 'good state' concept, which is closely related to the idea of good governance and good administration underpins the ethical norms of both the common good and good public service. [75] If one had to define the core idea of the 'good state' one could say that it is the ability to reflect on real social problems.[76] And, that it emerged as a solution for an impending crisis further underlines the significance of legal requirements towards a good state and stresses that necessity.[77]

The Magyary Program on the one hand set down the legitimacy and results of the reform that began in 2010, but also appointed the public administration reform's main tasks. The Magyary Program also elaborates on the characteristics of the good state.[78] According to the Magyary Program (and to the opinion of the Ministry for Public Administration and Justice) this concept is able to mark the main direction for the state management model. The concept of the Good State as a definition could be understood as follows:

A state may be regarded as good if it serves the needs of individuals, communities and businesses in the interest and within the boundaries of the common good, in the best possible way. The concept of common good is that:

– the State creates a lawful and equitable balance between a number of interests and needs, allowing the enforcement of claims in this way and provides protection;

– the State proceeds with due responsibility in the interest of the protection and preservation of the nation's natural and cultural heritage;[79] and

– the only self-interest of the State is that it should be able to enforce the above two elements of the common good (under any circumstances and of course effectively); in other words, the State should create an effective rule of law, therefore should provide the functioning of its institutions, and should provide the honouring and accountability of individual and collective rights.[80]

A smart state is defined as: good state, simpler state, better public services, better procedures, better civil, and public servants.[81]

5. Summary

Good governance is a global phenomenon and should be understood at the international level. Norms, requirements, and the supporting practical means previously addressed are based on the international law of human rights, and are binding to all member states of the UN. The UN General Assembly's Millennium Declaration (while not legally binding under international law)

stresses the following: success in meeting the objectives of conducive development and elimination of poverty in the world depends, inter alia, on good governance in each country. It also depends – according to the UN Declaration – on good governance at the international level and on transparency in financial, monetary, and trading systems.[82]

Good public administration is a prerequisite for good governance. The European Union Charter of Fundamental rights and freedoms include the right to good administration. The Fundamental Law of Hungary (the Constitution which entered into force in 2012) incorporates many provisions that are in close connection, and therefore contributing to, the enforcement of the principles of good governance. The impact of the Charter is obvious on these provisions of Fundamental Law. The Hungarian Government set the formation of a good state as its objective. The Magyary Program established the legitimacy and results of the reform that began in 2010, and also appointed the public administration reform's additional main tasks. The Magyary Program elaborates on the characteristics of the good state.

References

1. The Government that stepped into power in 2010 had a two-thirds majority in Parliament. Even with such unprecedented support, it had to face the economic crisis while dealing with the systemic controversies of the transitional period. As part of this double effort, the Government launched a vast reform agenda for the entire public administration system. In general terms, the reform can be summarized as the centralization of institutions (fewer ministries), centralization of competencies from municipal (local government) level to territorially distributed central public administration organs. Márton Gellén, Governance in Administrative Reforms: Hungary and the Current Trends in Europe, 68, in Krisztián Kádár (ed.), Good governance: international dimensions (Budapest, National University of Public Service, 2015).

2. For a long time, Hungary has been known as the 'preeminent student' of Westernstyle democracy and capitalism in the post-communist bloc. Democratic transition was marked by enormous development in the rule of law, public institutional development, rapid economic liberalization, as well

as the momentous and profound democratization of the entire society. With the perspective of the more than two decades that have passed since the regime change, the trends in the Western model societies during the same historic period in appear to also be a decisive factor in the long-term characteristics of local transitions. The exceptionally long, steady growth period and dynamics of the 'roaring nineties' used to provide a supportive external atmosphere for transitional reforms in the state institutions. On the other hand, however, this period veiled the substantial issues of whether the models taken as guidelines for the transition were truly the optimal one for the long run. Transition countries – including Hungary – were not prepared for any of the systemic problems of the Western model. Nevertheless, times changed, and when the economic crisis erupted in 2008, Hungary found itself in a situation in which the internal challenges of the still ongoing transition and the sudden and enormous external challenges merged and created a truly 'wicked', multi-faceted crisis. Gellén, supra n. 1, at 67.

3. Between the summers of 2010 and 2011 legislation was extremely 'revolutionary' in Hungary, as the 266 approved acts (from which 95 were brand-new, while 171 were modifications of previous acts) and 172 decisions of the Parliament significantly exceed the annual statistics of the first years of previous governmental cycles (before and after the change of the political system in 1990). Between 2006 and 2010 these numbers in total are 263 (new) and 328 (modification). Almost one-third of the acts enacted in 2011 were modified in the same year: in December 63 of the 213 acts approved in 2011 – which was a new record – were modified. Ádám Rixer, Attempts of the good state in Hungary: New contents of norms created and maintained by the state, IX. Iustum Aequum Salutare, 129, 130 (2013).

4. In the years 2010 and 2011 the Constitution of Hungary was amended more than ten times, before the new constitution entered into force in 2012.

5. The establishment of the National University of Public Service by the Act of Parliament in 2011 is a perfect example for that; the interval between the very idea emerged and the operations of the new University started were only 1,5 years. And it is worth underlying that the university was not a direct or immediate answer to any global phenomenon or global need. It has rather

developed as a cornerstone of the comprehensive Hungarian state reforms: the restructuring and reconstruction of the state in Hungary.

6. Literature on good governance is incredibly extensive and comprehensive, and for these reasons it would be impossible to provide a concise summary in this article. Zsolt Boda, Some Notes on Fairness, Trust and Good Governance, IX. Iustum Aequum Salutare, 9, 17 (2013). For a recent analysis of conceptions of governance and good governance in the Hungarian and international academic discourse see György Hajnal, Gábor Pál, Some reflections on the Hungarian discourse on (good) governance. IX. Iustum Aequum Salutare, 95–106 (2013). Hajnal and Pál indicate that in a significant part of domestic literature – contrary to the trends in international literature – the homogeneous conglomerate of good governance and New Public Management ideas are put into contrast with a raw, simplified way with good government ideas and the neo-Weberian approaches identified with them. See Ádám Rixer, Introduction, in András Patyi, Ádám Rixer (eds.), Hungarian public administration and administrative law, 69 (Passau, Schenk Verlag, 2014). Rixer also explicates that the contents of the expression 'Good Governance' is almost fully identified with the New Public Management approach and its contents in the domestic literature. See Rixer, Ibid.

7. László Komáromi, Good Governance and Direct Democracy. Examples and Lessons from Past and Present, IX. Iustum Aequum Salutare, 107 (2013).

8. Uwe Holtz, Entwicklungspolitisches Glossar, 71–72 (Complete revision and extension of the version of 2006, University of Bonn, 2009), http://www.uni-bonn.de/~uholtz/virt_apparat/EP_Glossar.pdf (accessed: 17 December 2012). For the evolution of the term 'Good Governance' see further Rudolf Dolzer, Good Governance: Genese des Begriffs, konzeptionelle Grundüberlegungen und Stand der Forschung, in Rudolf Dolzer, Matthias Herdegen & Bernhard Vogel (eds.), Good Governance: Gute Regierungsführung im 21. Jahrhundert, 13–23 (Freiburg, Konrad-Adenauer-Stiftung e.V. – Herder Verlag, 2007), http://www.kas.de/upload/dokumente/verlagspublikationen/Governance/gov

ernance_Dolzer.pdf (accessed 19 December 2015). Cited by Komáromi, supra n. 7, at 107.

9. Komáromi, Ibid. 107.

10. Under the term 'international law' I mean those laws governing the legal relations between nations, rules and principles of general application dealing with the conduct of nations and of international organizations and with their relation inter se, as well as with some of their relations with persons, whether natural or juridical. See Henry Campbell Black, Black's Law Dictionary, 565 (St. Paul, West Group, 1998).

11. For the globalisation of constitutional law see e.g. Mark Tushnet, The Inevitable Globalization of Constitutional Law (Paper No. 09-06, Harvard Law School, Public Law & Legal Theory Working Paper Series); David S. Law, Mila Versteeg, The Evolution and Ideology of Global Constitutionalism (Paper No. 10-10-01, Washington University in St. Louis, School of Law, Faculty Research Paper Series, 2010); for the globalisation of administrative law see e.g. Edoardo Chiti, Bernardo Giorgio Mattarella, Global Administrative Law and EU Administrative Law: Relationships, Legal issues, and Comparison (Berlin–Heidelberg, Springer, 2011).

12. At a national level, freedom of expression is necessary for good government and therefore for economic and social progress. Freedom of expression and freedom of information contribute to the quality of government in various ways: e.g. they promote good governance by enabling citizens to raise their concerns with the authorities. If people can speak their minds without fear, and the media are allowed to report what is being said, the government can become aware of any concerns and address them. https://www.article19.org/pages/en/freedom-of-expression.html (accessed 5 January 2016) Freedom of expression is an essential pillar of governance more broadly, because this right enables as many citizens as possible to contribute to, as well as monitor and implement, public decisions on development. The importance of press freedom in promoting good governance is underlined by the increasing numbers of people who have access to an expanded realm of media platforms. http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/2014-

themes/free-media-contribute-to-good-governance-empowerment-and-eradicating-poverty/ (accessed 5 January 2016) For the role of free press in promoting good governance see Pippa Norris, The Role of the Free Press in Promoting Democratization, Good Governance and Human Development, 66–75, in Section 2 of Mark Harvey (ed.), Media Matters: Perspectives on Advancing Governance and Development (Global Forum for Media Development, Internews Europe, 2008).

13. In October 2012, the Human Rights Council renewed its commitment to promote and protect the rights to freedom of peaceful assembly and of association, by adopting resolution 21/16 (October 2012) and resolution 24/5 (October 2013), in which it inter alia reiterated the important role of new information and communications technologies in enabling and facilitating the enjoyment of the rights to freedom of peaceful assembly and of association, and the importance for all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries; furthermore recognized the importance of the freedoms of peaceful assembly and of association, as well as the importance of civil society, to good governance, including through transparency and accountability, which is indispensible for building peaceful, prosperous and democratic societies; declared itself aware of the crucial importance of active involvement of civil society in processes of governance that affect the life of people. See the website of the Office of the United Nations High Commissioner for Human Rights http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx (accessed 19 December 2015).

14. Freedom of association is more than a fundamental right, it is also a means of supporting democracy. For further details about the freedom of association and good governance see B. C. Smith, Good Governance and Development, 128 (London, Palgrave Macmillan, 2007).

15. For some key principles of good governance and an explanation of how each is linked with a particular type of human right see John Graham, Bruce Amos & Tim Plumptre, Principles for Good Governance in the 21st Century, 15 (Policy Brief 4), http://iog.ca/wp-

content/uploads/2012/12/2003_August_policybrief151.pdf (accessed 5 January 2016); Adel M. Abdellatif, Good governance and Its Relationship to Democracy and Economic Development. Global Forum III on Fighting Corruption and Safeguarding Integrity, 26 (Seoul 20–31 May 2003, Workshop IV Democracy, Economic Development, and CultureAnnex III). http://web.iaincirebon.ac.id/ebook/moon/bureaucracy-governance/goodgov.pdf (accessed 5 January 2016) While Good Governance doctrines reflect political and civil rights, it is less clear to what extend in the practice of institutions they also reflect social, economic and cultural rights. Frederick M. Abbott, Christine Breining-Kaufmann & Thomas Cottier (eds), International Trade and Human Rights: Foundations and Conceptual Issues, 101 (Ann Arbor, University of Michigan Press, 2006).

16. All form a part of the International Covenant of Civil and Political Rights – ICCPR

17. Art. 7 of the Universal Declaration of Human Rights declares the principle of equal protection before the law.

18. Art. 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

19. United Nations Human Settlements Programme, www.unhabitat.org

20. The seven norms of good urban governance as defined by the UN-HABITAT are sustainability, subsidiarity, equity, efficiency, transparency and accountability, civic engagement and citizenship and security. The Challenge of Slums: Global Report on Human Settlements, 182 (United Nations Human Settlements Programme, 2003).

21. One of the most important aims of the United Nations' programme of Reinventing Government is to promote good governance towards the realization of the United Nations' Millennium Development Goals (MDGs). The MDGs are a set of targets on certain human development variables adopted by the Millennium Declaration of the UN General Assembly in 2000. http://www.un.org/millennium/declaration/ares552e.htm (accessed 5 January 2016); for further details see Governance for the Millennium Development Goals: Core Issues and Good Practices, 7th Global Forum on

Reinventing Government Building Trust in Government 26–29 June 2007, Vienna, Austria (A United Nations Publication, Printed in the United States of America 2006), http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025110.pdf (accessed 5 January 2016). This book constitutes the first attempt to link the MDGs to the important concept of governance. As such, it delineates the theoretical and empirical links between policy making and sound governance while at the same time contributing to the debate on democratic governance.

22. Kioe Sheng Yap, What is Good Governance? United Nations Economic and Social Commission for Asia and the Pacific (s. a.), http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf (accessed 17 December 2012), cited by Komáromi, supra n. 7, at 107–108.

23. Komáromi, supra n. 7, at 108.

24. Regarding equity Kiss indicates that an important aspect of public services is how the benefits are distributed among the various groups of the society (groups can be formed based on, for example, socio-demographic or geographical factors). In a narrower sense, equity may refer to equality in access to services (for example, the chance for students in smaller villages to access high quality education). This narrower approach, however, ignores that several factors other than access to services also have an influence over outcome and impact indicators. Norbert Kiss, Public Policy Making and Organization of Public Services, in Krisztián Kádár (ed.), Good governance: international dimensions, 165 (Budapest, National University of Public Service, 2015).

25. The term 'productivity' is also often used instead of 'efficiency'. Most often, 'efficiency' refers to an input/output ratio (for example, total unit cost of products produced or serviced delivered), while productivity is a measurement of output/input (for example, units produced per employee). Kiss, Ibid. 171–172, endnote 4.

26. An organization is more efficient than another if it is able to produce the same level of output by using fewer input resources, or is able to produce

more outputs from the same amount of inputs. Outputs contribute to the achievement of shorter term outcomes and longer term impacts (which address social needs), effectiveness refers to how much outputs contribute to expected outcomes. Actual measured impacts are often dependent on environmental factors as well. Kiss, Ibid. 165. Kiss indicates that the performance of public service is generally described by the 4E model, referring to economy, efficiency, effectiveness, and equity as building blocks of public service performance. Kiss, Ibid. 157.

27. Yap, supra n. 22, at 3, cited by Komáromi, supra n. 7, at 114. footnote 25.

28. Boda, supra n. 6, at 9.

29. Boda, Ibid. 9.

30. Art. 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Art. 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

31. Komáromi, supra n. 7, at 108.

32. Komáromi, Ibid. 108.

33. The majority of scholars are of the opinion that direct democratic processes may reduce the efficiency of a political system in the short run. Popular rights can restrict the government's scope of action. The more participants have a share in decision-making, the more information, opinion-forming, co-ordination, conflict-regulation, mobilisation etc. are required. However, these additional costs may be recovered in the long run. Komáromi, supra n. 7, at 114.

34. Komáromi, Ibid. 108.

35. János Frivaldszky, A jó kormányzás és a helyes közpolitika formálásának aktuális összefüggéseiről [On the present context of good governance and

shaping proper public politics], 61, in Szabolcs Szigeti (ed.), A jó kormányzásról: Elmélet és kihívások [On good governance: Theory and challenges] (JTMR Faludi Ferenc Akadémia – Jezsuita Európa Iroda-OCIPE Magyarország – L'Harmattan, 2012), cited by Ádám Rixer, The relationship between civil organisations and public administration in Hungary, with special regard to their participation in legislation, 253, in András Patyi, Ádám Rixer (eds.), Hungarian public administration and administrative law (Passau, Schenk Verlag, 2014).

36. Boda, supra n. 6, at 18.

37. Norbert Kis, The Quality of Governance and its Assessment, in Krisztián Kádár (ed.), Good governance: international dimensions, 71 (Budapest, National University of Public Service, 2015).

38. Kis, supra n. 37, at 71.

39. Boda, supra n. 6, at 18.

40. Gerald E. Caiden, Undermining good governance: corruption and democracy, 5 Asian Journal of Political Science, 1–22 (1997). 10.1080/02185379708434101

41. However poverty may also lead to corruption. Jonada Tafa, Examining the relationship of Corruption with Economic Growth, Poverty and Gender Inequality Albanian Case, 192–193, 1 European Journal of Social Sciences Education and Research (2014).

42. Komáromi, supra n. 7, at 112.

43. Komáromi, Ibid. 112.

44. Komáromi, Ibid. 112. According to Komáromi direct democratic decision-making processes can enhance transparency from many aspects. Compared to representative decision-making, where a significant part of the process runs behind the scenes – in hidden debates of party boards, members of the coalition, experts, interest groups and commissions – the steps of direct democratic actions are much more transparent. Peter Müller, Elemente direkter Beteiligung auf Bundesebene: Ein Plädoyer für mehr Demokratie in der aktiven Bürgergesellschaft, 736, 733–744, in Stefan Brink, Heinrich Amadeus Wolff (eds.), Gemeinwohl und Verantwortung: Festschrift für

Hans Herbert von Arnim zum 65. Geburtstag (Berlin, Duncker & Humblot, 2004), cited by Komáromi, supra n. 7, at 112. footnote 20.

45. Boda, supra n. 6, at 18.

46. Boda, Ibid. 17.

47. Boda, Ibid. 17.

48. Kis, supra n. 37, at 45.

49. See some of these definitions: Péter Váczi, The institution of good administration in the Council of Europe, 1–2. https://www.law.muni.cz/sborniky/cofola2008/files/pdf/sprava/vaczi_peter.pdf (accessed 5 January 2016).

50. European Union Charter of Fundamental rights, Art. 41. It is also important that the effects of the principles of 'good governance' on administration appear in a legally relevant form in the Charter of Fundamental Rights of the European Union (Art. 41), but are detailed only in the 'European Code of Good Governance'. The Code basically covers the bodies of the European Union but through the European Administrative Area it has also 'sneaked into' the public administration of member states. Rixer, supra n. 6, at 121, footnote 360.

51. This is an evidence of the existence of a common European background in relation to administrative procedure and good administration. Chiti, Mattarella, supra n. 11, at 139.

52. Eva Nieto-Garrido, Isaac Martín Delgado, European administrative law in the constitutional treaty, 86 (Oxford, Hart, 2007), cited by Chiti, Mattarella, Ibid. 139, footnote 14. However, it is unavoidable, that the concept of good administration keeps seeping into national law through the work of domestic court.

53. Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. The Council of Europe has been active in the field of good administration, and started its work in the sphere of administrative law already in 1977 when its first resolution on the Protection of individuals with regard to actions of administrative authorities was issued. (Adopted by the Committee of Ministers on 28 September 1977

at the 275th meeting of the Ministers' Deputies). Although in its text there is no specific reference to the term 'good administration' either, but there are a number of principles designed to achieve this end. Chiti, Mattarella, supra n. 11, at 138.

54. Kis, supra n. 37, at 45. For the recent development of transparency regulations in Hungary see Kis, Ibid. 73–74.

55. These requirements of the formal rule of law have been interpreted by the Hungarian Constitutional Court in many decisions [56/1991. (XI. 8.) Constitutional Court Decision, ABH 1991, 454, 456; 8/2011. (II. 18.) Constitutional Court Decision, ABH 2011, 49, 79]. See András Patyi, András Téglási, The constitutional basis of Hungarian public administration, 205, in András Patyi, Ádám Rixer (eds.), Hungarian public administration and administrative law (Passau, Schenk Verlag, 2014).

56. Chiti, Mattarella, supra n. 11, at 138.

57. Chiti, Mattarella, Ibid. 138.

58. Jan Klabbers, Anne Peters & Geir Ulfstein, The Constitutionalization of International Law, 63 (Oxford University Press, 2009). **10.1093/acprof:oso/9780199543427.001.0001**

59. Although the whole practice of state power shall be bound to legal regulations and respect of the rule of law, there is a constant tension between direct democracy und rule of law. See Andreas Auer, Direkte Demokratie und Rechtsstaat, 31–42, in Giovanni Biaggini, Georg Müller, Jörg Paul Müller & Felix Uhlmann (eds.), Demokratie – Regierungsreform – Verfassungsfortbildung: Schwerpunkte aus dem wissenschaftlichen Werk von René Rhinow dargestellt von Schülern, kommentiert von Freunden und Kollegen (Symposium für René Rhinow zum 65. Geburtstag) (Basel, Helbing Lichtenhahn Verlag, 2009). From earlier literature see further Werner Kägi's basically theoretical paper preferring 'demokratischer Rechtsstaat' rather than 'rechtsstaatliche Demokratie': Werner Kägi, Rechtsstaat und Demokratie (Antinomie und Synthese), 107–142, in Demokratie und Rechsstaat: Festgabe zum 60. Geburtstag von Zaccaria Giacometti (26. September 1953) (Zürich, Poligraphischer Verlag, 1953); and Hans Schneider's work which comes to a negative evaluation of direct democracy on the basis of practical experience: Hans Schneider,

Volksabstimmungen in der rechtsstaatlichen Demokratie, 155–174, in Otto Bachof, Martin Drath, Otto Gönnenwein & Ernst Walz (eds.), Forschungen und Berichte aus dem öffentlichen Recht: Gedächtnisschrift für Walter Jellinek, Band 6 (München, Günter Olzog Verlag, 1955); cited by Komáromi, supra n. 7, at 111, footnote 15.

60. Klabbers, Peters & Ulfstein, supra n. 58, at 63.

61. Anthony Wilfred Bradley, Keith D. Ewing, Constitutional and administrative law, 105 (12th ed., London and New York, Longman, 1997).

62. Theodore Fortsakis, Principles governing good administration, 11, European Public Law, 207, 217 (2005).

63. According to László Trócsányi a possible justification for the denomination 'Basic Law' in lieu of 'Constitution' is that a reference to the historical constitution appears in the text of the Basic Law and the constitutional legislator intended to declare in the Basic Law that Hungary honours the achievements of the historical constitution and the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. Trócsányi's opinion is that, by applying the denomination 'Basic Law', the constitutional legislator indirectly declared the importance of the achievements of the historical constitution, which enables the judicial bodies to make references thereto. László Trócsányi, The Creation of the Basic Law of Hungary, 10, in Lóránt Csink, Balázs Schanda & András Zs. Varga, The Basic Law of Hungary: A First Commentary (Dublin, Clarus Press, 2012).

64. The previous constitution of Hungary was originally adopted in 1949, during the Soviet occupation of Hungary. In 1989 during the change of the political system the legislature approved a total amendment of the constitution, though formally (de jure) Hungary remained the only one among the former post-socialist countries that had not adopted a new constitution after the fall of Communism, since 2011. In spite of these, we refer to the Hungarian constitution since 1989 as a new one, because in the sense of it content, it became a 'rule of law constitution'. Patyi, Téglási, supra n. 55, at 205.

65. About the methods of how the Constitutional Court of Hungary handled the adoption of the new constitution and how the new constitution influenced the protection of basic human rights in the jurisprudence of the Constitutional Court see thoroughly: András Téglási, The Protection of Fundamental Rights in the Jurisprudence of the Constitutional Court of Hungary After the New Fundamental Law Entered into Force in 2012, 77–93, in Zoltán Szente, Fanni Mandák & Zsuzsanna Fejes (eds.), Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary (Paris, Éditions L'Harmattan, 2015). **10.1556/2052.2016.57.2.7**

66. The first chapter of the Hungarian Fundamental Law is identified as National Avowal. According to László Trócsányi the National Avowal is more than a preamble as a conventional element of national constitutions. In its content it resembles a festive declaration, but it does not place emphasis on the celebratory statement of the rights of the individual. Trócsányi, supra n. 63, at 10.

67. Kis, supra n. 37, at 34.

68. The Hungarian government has been received severe international criticism for violation of rule of law standards since the constitutional process for the new fundamental law started in 2011. However, according to Norbert Kis, the government has the power, depending upon its political/parliamentary strengths, to amend the constitutional conditions of the rule of law. Kis, supra n. 37, at 49.

69. The Fundamental Law regulates due process regarding administrative and judicial proceedings in two separate articles: XXIV and XXVIII; Art. XXIV para. 1 fills a lacuna uncovered by the practice of the Constitutional Court by the formulation of the right to fair administration. This adds a general meaning to the right to and requirement of a due process and the elements thereof, exceeding the range of criminal procedures. This right has not been mentioned in the Constitution in relation to administrative proceedings, but the Constitutional Court derived it from the right to a fair and impartial court hearing and the procedural guarantees emerging from the notion of rule of law. Zsolt Balogh, Barnabás Hajas, Rights and

Freedoms, 95, in Lóránt Csink, Balázs Schanda, & András Zs. Varga, The Basic Law of Hungary: A First Commentary (Dublin, Clarus Press, 2012).

70. Balogh, Hajas, Ibid. 96.

71. Balogh, Hajas, Ibid. 96.

72. The set of Hungarian reforms dubbed the Magyary Programme are a clear, and furthermore, somewhat extreme example of centralization. Gellén, supra n. 1, at 67–68.

73. All of these concepts are aimed at bettering state activities and functions while complying with the requirements of the effective and efficient administration under the rule of law.

74. Rixer, Ibid. 52.

75. Tamás Kaiser, Introduction, in Good State and Governance Report 2015, 1, http://ati.uni-nke.hu/uploads/media_items/good-state-and-governance-report-2015-final.original.pdf (accessed 5 January 2016).

76. Rixer, supra n. 3, at 135.

77. Rixer, Ibid. 139.

78. László Konrád, Reorganization of the Hungarian Regional Public Administration – in the Centre: District Offices, 222, in Csilla Gömbös, János Kálmán & Barna Arnold Keserű (eds.), Global and Local Issues from the Aspects of Law and Economy (Győr, Univeristas Nonprofit Kft. – Batthyány Lajos Szakkollégium, 2014), http://blszk.sze.hu/images/Dokumentumok/kiadv%C3%A1nyok/tanulm%C3%A1nyk%C3%B6tet/ny%C3%A1ri%20egyetem%202014/konr%C3%A1d.pdf (accessed 5 January 2016).

79. According to Art. P) of the Fundamental Law of Hungary natural resources and the cultural assets shall form part of the nation's common heritage, the State and every person shall be obliged to protect, sustain and preserve them for future generations.

80. Magyary Programme (2012) 6.

81. The importance of the adequate human resources cannot be over-emphasised. The creation and the sustainability of good governance, good

administration and the rule of law is inconceivable without well trained, well positioned and well educated public servants – being law enforcement officers, officers of the army, civil servants, or only employees of the government. This gives one of the reasons for the missions of the National University of Public Service.

82. The UN member states are committed to an open, equitable, rule-based, predictable, and non-discriminatory multilateral trading, and financial system.

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The Assumptions of a New Tax Ordinance in Poland

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Abstract: In 2014, the General Tax Law Codification Committee (GTLCC), responsible for drafting a new Tax Ordinance, was established in Poland. This paper intends to present, in two parts, the expectations of this new Tax Ordinance, which has been prepared by the GTLCC. The first details how the protection of taxpayers' rights will be fulfilled, and the second focuses on the legal constructs used to increase the efficiency and efficacy of the Tax Ordinance.

Keywords: tax; tax law; Tax Ordinance; general tax law; codification of tax law; Polish tax law

1. Introduction

The current Tax Ordinance, introduced in 1998, has been amended several dozen times, and yet despite this, fails to meet today's needs and standards. This was the main driving factor in establishing the General Tax Law Codification Committee (GTLCC),[1] which was formed by the Council of Ministers at the end of 2014. The aim of the Committee was to prepare for the development of a new Tax Ordinance, and (within 2 years from the day of adopting the assumption by Council of Ministers) to draft a bill for a new general tax act in conjunction with acts regarding its implementation.

The aim of this paper[2] is to present the most important elements of the revised Tax Ordinance objectives[3], and will be preceded by a short description of the current Tax Ordinance. Additionally, several reasons will be presented explaining the necessity of this new Tax Ordinance in being introduced; primarily that these regulations will fulfill two fundamental objectives. The first is to protect taxpayers' rights. This will be accomplished primarily through the mitigation of excessive rigor of the Tax Ordinance with regard to taxpayers. It is strongly recommended that legal mechanisms protecting taxpayers' positions in their contact with tax administration should be introduced in the new act. Regulations contained therein should be based on the presumption that a taxpayer is a reliable person who does not consciously commit tax law violations. The second main purpose of the new Tax Ordinance is an increase

in the efficiency and efficacy of the tax obligation's fulfillment. Tax laws, including Tax Ordinances, should serve for the collection of tax. Greater efficiency of tax authorities, however, cannot involve the infringement of taxpayers' rights.

2. Outlook of the Tax Ordinance of 1997

The currently binding Tax Ordinance came into effect on January 1st 1998. This act covers institutions of tax law which are common for all taxes that are in force in Poland. Regulations included in this Tax Ordinance can be divided into several groups. The first is composed of defining catch-all provisions. Certain concepts used by the legislator in tax statutes are not concurrently explained therein. However, they have been defined in the Tax Ordinance and may be used, to such an extent, as additional support. The second includes substantive law institutions that certain obligations from, burdening taxpayers most of all. Such an obligation, for example, is the need to pay default interest. This obligation supplements a primary duty, which is tax payment in due time. Within this framework, regulations imposing obligations on other subjects of tax law – third parties, legal successors, heirs, tax remitters, and tax collectors should also be indicated. The third part includes institutions granting specified rights connected with the execution of liabilities they are burdened with. They concern both a taxpayer's inter alia, the right to recover excess payment or the right to obtain postponement of maturity, but also a tax authority (security of tax obligations execution). The fourth part is procedural regulations–that is actions which are undertaken inter alia, from the moment tax proceedings are initiated, to the issue and service of tax decisions.

3. The reasons to introduce a new Tax Ordinance

There are approximately seven reasons why the currently binding Tax Ordinance should be replaced rather than amended. To begin with, there is need to create in the ordinance such mechanisms that would assure a balance between both the public and taxpayers' interests. Justifiable claims to increase the protection of a taxpayer's position in relation to tax service are commonly postulated. Such a delicate matter as tax must be solved not only with due

respect paid to taxpayers' rights but also the State's interest, i.e., the organization financed by all taxpayers, a fact which is frequently forgotten. The currently binding Tax Ordinance lacks institutional characteristics of a mature codification of tax law's general part. The leading one among them is the need to write down the principles of general tax law. Their catalogue will contribute to a better understanding and application of tax provisions contained not only in the Tax Ordinance.

Secondly, there is an urgent need to establish taxpayers' rights and duties in the form of a catalogue, included in one legal act of statutory power. This will improve the relations between taxpayers and tax authorities, which are negatively perceived by society. The new Tax Ordinance must embrace an enormous amount of the existing case-law of administrative courts on tax matters. Its impact, therefore, on the application of law is substantial. However, not all potential doubts could be successfully dispelled this way, which is why a new law is necessary.

Thirdly, due to numerous amendments, meaning and understanding of some solutions has changed over time, which can hamper the application of this Act. It is now no longer sufficient to understand a legal text and rules of legal interpretation, complemented by the knowledge of judicial judgments, to interpret Tax Ordinance. It is absolutely necessary to know the history of the multiple changes thereto, and to be knowledgeable of what unexpected outcomes they have sometimes resulted in.

Additionally, currently binding Tax Ordinance lacks institutions existing in most modern acts of this type. An example is of the clause against tax evasion, or regulations on soft forms of tax disputes' settlements not only within tax proceedings (mediations and agreements).

Moreover, there is a need for greater and more frequent use of electronic communication to contact taxpayers. This issue should be comprehensively and systematically regulated, which is not possible in the course of continuous amendments of the existing provisions.

Furthermore, due to Poland's accession to the EU, development of technology – as well as phenomena and processes that are subject to tax law – resulted in the objective expiry of solutions adopted in the Tax Ordinance several years ago. The legislator attempted to prevent this by implementing successive amendments thereto, sometimes quite extensively, but such a continually amended ordinance has lost its original structure, which itself has

not been free of defects. It has become clear now that the possibilities of improving and updating the Tax Ordinance in the course of further amendments has been exhausted.

Finally, it is necessary to harmonize the provisions of a new Tax Ordinance with other tax law provisions and regulations beyond this area. It is indispensable to clearly and precisely establish the relation of the Ordinance to the provisions on, among others, fiscal inspection, regulations on administrative execution, the Code of Administrative Procedure, or the Act on Freedom of Economic Activity.

4. The protection of taxpayers' rights

4.1 The principles of tax law

Since there is non-equivalence between tax debtors and creditors, there is a need to establish in the new Tax Ordinance provisions assuring the protection of taxpayers' rights, as they are a weaker party to the tax law relation than a tax authority. In proposing the introduction of a catalogue of tax law principles to the new Tax Ordinance, it should be restricted to norms determining the application of legal regulations within the scope of tax law. Regulations on tax lawmaking are, and should be left, beyond the scope of tax law principles codified in the provisions of general tax law. The reason being is that the issues of lawmaking are regulated in the Constitution of 1997, so there is no need to repeat the norms thereof in the new Tax Ordinance. Additionally, the matter of general tax law justifies such a scope of tax law principles. If the Tax Ordinance does not regulate the process of lawmaking, there are no grounds to include fundamental lawmaking principles within it. Tax law principles should therefore exclusively embrace the rules of applicable tax law; fundamental norms determining the relationship between a tax authority and an entity subject to taxation.

The justification for creation of a catalogue for this branch of legal principles, that would be uniform and common for both substantive and procedural tax law, also justify the codification of taxpayers' rights and duties.

4.2 Taxpayers' rights and duties

In order to improve potentially faulty, or even oppressive, operations of tax authorities, it is necessary to articulate to taxpayers their rights, to hopefully eliminate any knowledge disparities. Such citizen legal protections are reasonable due to the existence of a catalogue of recognized values, and when one considers contemporary standards of the relationship between citizens and their State authorities, which are based on ancillary roles of the State administration towards society. The State should use the powers it is entitled to in a manner assuring not only the fulfillment of its set objectives, but also respecting the interests of entities incurring the burden of its functioning (taxpayers).

4.3 New soft forms of tax authorities' operation

The new Tax Ordinance act will be provided with the following new forms of tax authorities' operation: taxpayer's guide and support; consultation procedures; agreements between taxpayers and tax authorities; tax mediation; and a program of correct settlement based on cooperation. Tax authorities are appointed to facilitate correct fulfillment of the duty to provide State authority with taxes. In the new Tax Ordinance, a taxpayer will be entitled to acquire, and be able to rely on, official information from many sources– deriving protective effects from the fact of applying it. Within general consultation procedures, an applicant and tax authority shall make arrangements on the past or future settlements of the taxpayer. This procedure could be done at the taxpayer's request within the scope of the evaluation of tax consequences of complicated transactions carrying a high tax risk for economic entities, estimation of the taxable object's value, and evaluation of the transaction object's character, etc. Within the procedure, factual arrangements shall be made, and evidentiary proceedings will be carried out. A decision issued in the procedure will be binding for both the tax authority and taxpayer, and will furthermore be subject to suability. The use of the consultation procedure will, in principle, be payable.

Agreements between tax authorities and taxpayers will be concluded in case of doubts as to the matter's factual state. This may be difficult to eliminate, on determination of the value of a taxable object, or transaction, on validity of the

application of reliefs in tax payment. The agreements will be documented by records containing, among others, the scope and content of the arrangements made. A tax authority will be required to reflect on the arrangements in tax inspection records, or tax decision. The subject of an agreement will not only cover a case settlement, but will also detail any issues that arise during tax proceedings, or tax inspection, that do not decide on the settlement (e.g. the scope of evidentiary proceedings that should be carried out). The amount of the tax obligation cannot be directly subject to the agreements.

Tax mediation shall be the procedure used to solve disputes with the participation of a third party – a mediator. It will be introduced as a procedural mechanism facilitating communication between a tax authority and taxpayer. This procedure will constitute particular proceedings initiated upon the request of one of the parties of a dispute (a taxpayer, or tax authority) upon agreement of the other party. This may occur at any stage during the course of the proceedings. The procedure will be constructed with respect for basic rules on mediation, among others: voluntariness, impartiality, neutrality of a mediator, and confidentiality. The parties thereto will select a mediator freely and jointly from the list kept by the Minister of Finance. Mediation costs will be borne by the State or municipality.

The purpose of the program will be to assure the observance of tax law through establishing close relations between tax authorities and taxpayers. The program will be addressed to strategic entities for the State budget. Its purpose is reflected in the slogan, 'transparency in return for certainty'. 'Transparency', because a taxpayer who is a participant of the program reveals any substantive tax issues that are potentially disputable between him/her and an authority. 'Certainty', because a tax authority responds to questions asked by a taxpayer without delay (after consulting a taxpayer him or herself and in the spirit of agreement and understanding for business).

The program of correct settlement based on cooperation shall be maximally deformalized, and based on a personal obligation of decision-makers in a business entity and tax authority. Participation in the program will be not obligatory. Conditions of the participation therein shall be well-functioning internal procedures of settlements in an entrepreneur's business ('tax governance'), verified by an audit before concluding an agreement with the taxpayer.

4.4 Advance tax rulings

Tax law is a complex field of law. This is, among other things, due to: the existence of different taxes and forms of taxation; their frequent changes; and binding EU and international law regulations, which all contribute to increasing complexity of law and uncertainty regarding its content and, in consequence, its interpretation and application. It is a source of potential conflict between the interests of taxpayers, and the tax administration which represents the State's fiscal interests. That is why, advance tax rulings (ATRs) of general and individual character, should be treated as a significant extension of the scope of protection of taxpayers' economic rights and freedoms. Additionally, ATRs are an important and stabilizing element of solving disputes between a taxpayer and tax authority. ATRs are one of the most vital guarantees protecting taxpayers' subjective rights. Undeniably, on the basis of these rulings, a taxpayer acquires knowledge within the scope of rules which, together with tax law provisions, co-create a potential legal situation of each addressee of tax law. These entities develop their sense of legal certainty and security not only on the basis of tax acts, but also on the basis of application of tax law by tax administration.

Within the scope of the fulfillment of fundamental objectives of the new Tax Ordinance, and the enhancement of guarantees resulting from binding rulings of tax law provisions, two aims should be achieved. First, we should strengthen the importance of general ATRs. Thus, there would be primacy of general rulings over individual ones. Individual rulings would be issued when general ones do not function in a given factual state; a possibility of quoting general rulings in an equivalent factual state. At present, a considerable number of individual rulings influences a lack of transparency in understanding tax law, and causes doubts in its application. The adopted solution will be to assure the elimination of divergent interpretations referring to the same factual state, and the need for multiple applications for the issue of individual rulings in the same factual state. The adopted solutions regarding solely general interpretations should introduce a possibility of asking legal questions by an authority authorized to issue such rulings to the Supreme Administrative Court.

Second, there should be a centralization of the process of issuing ATRs. The introduction of uniform principles within this scope, with regard to the

entirety of tax law provisions' rulings, regardless if a particular taxpayer constitutes income of the State budget, or local self-government units. It results from the need to undertake actions leading to the extension of the scope of services provided for the benefit of taxpayers and quality improvement. A modern, efficient, and national point of uniform tax information for taxpayers and tax administration employees should be created within this scope. This will guarantee uniform procedures and standards within the scope of issuing individual ATRs.

4.5 Discretionary reliefs

The new Tax Ordinance will prefer forms of support not resulting in failure to pay tax but allowing late, yet still effective, fulfillment of a tax obligation. The catalogue of applied discretionary reliefs shall be extended by the introduction of the possibility of a tax remission, or its part, in order to avoid the occurrence of tax arrears for a taxpayer, and is a condition of applying the relief. On the other hand, reliefs will be applied according to the principle of balance between public and taxpayers' interests using soft forms of arranging matters. In the case of tax-constituting municipal revenue, the application of reliefs to pay tax should be decided solely by municipal tax authorities.

4.6 Representation

This Tax Ordinance will also contain comprehensive regulation of powers of attorney, and proposes three distinguished categories: general, limited, and for 'service of process.' The general power of attorney will apply to all participants of tax procedures. The appointment of a general agent will eliminate any potential nuisance connected with the obligation to submit a power of attorney, or officially certified transcript of a power of attorney to be attached to the files of each tax case. This will not only limit bureaucracy in tax authorities, but also simplify representation of the party by an agent. General powers of attorney will be gathered in the electronic database, entitled Central Register of General Powers of Attorney, and will be instantly available for all State and self-government tax authorities, as well as tax inspection bodies. Limited agents will be authorized to act in the indicated tax case, or other indicated case within the jurisdiction of a tax authority, after submitting a power of attorney to the files of the specific case. The new Tax Ordinance will maintain the institution of an agent for service of process. The appointment of such an agent in Poland will be compulsory when a general, or limited

attorney, has not been appointed, and communication with a participant of tax procedure may be hampered due to a change of place of residence (stay), or lack of place of residence (stay) in Poland, or another EU Member State.

The new Tax Ordinance will introduce the institution of a temporary limited agent instead of a representative of an absent person. The prerequisite to appoint this type of agent shall only be for urgent cases, and a temporary agent will be appointed by a tax authority for an absent natural person. Whereas for a legal person, or organizational unit without legal personality, a temporary agent shall be appointed if their bodies are not present, or if it is not possible to establish the address of their official seat, the place of running a business activity, or the place of residence of persons authorized to represent their matters. Such a temporary agent would be empowered until a court appoints a guardian.

4.7 Limitation of tax obligations

During works on limitation, it is particularly important to distinguish the limitation of the right to tax assessment, and the right to collect tax. In the proposed model, a tax authority has time, determined by the provisions of law, to assess tax understood as submitting a decision determining, or establishing in nature by a first instance tax authority. Thus, it would be the period of time to question the correctness of tax settlements made by a taxpayer (e.g. in a submitted tax declaration), or issue a determining decision if a declaration is missing. Moreover, this time limit would bind a tax authority within the scope of issuing a decision determining the amount of tax obligation if the Act envisions such a manner of tax chargeability. During such a period of time, it should be possible to issue decisions aiming at recovery of dues the State is entitled to that have been wrongly remitted, or credited towards a taxpayer and which are subject to Tax Ordinance including, among others, the use of loss, or tax to be carried over, etc. In the case of a decision determining tax loss, one should support the solution according to which this decision could be issued during the period of limitation of the assessment of tax obligation during which a taxpayer settles the loss.

The second type of limitation, limitation of the right to tax collection, would be applied when tax obligation exists and its amount is known (it results, in principle, from a correctly submitted tax declaration, or declaration's

correction, or served decision). This limitation would apply after the period lapse of the limitation of tax assessment.

As far as the limitation of assessment is concerned, two periods of limitations should be introduced: three or five years, counted from the lapse of the term of payment, or tax obligation occurrence. A three-year-long period of the limitation of assessment would be applied with regard to tax settlements not connected to a business activity. A five-year-long period would refer to those tax settlements connected with a business activity. Thus, a three-year-long period of the limitation of assessment will cover taxpayers whose settlements, in principle, are of uncomplicated matters. This mechanism will concern, among others, most taxpayers subject to a natural person's income tax. And after the three-year lapse (not after five years as it is now), a large group of taxpayers will be exempt from the duty to keep records of documents regarding tax obligations. This shall be the case of the new Tax Ordinance except in certain situations where the limitation of assessment will occur after a five-year lapse. Specifically, the following cases should be covered by the five-year-long period of the limitation of assessment:

– Tax connected with running a business activity, i.e. tax that requires keeping tax records pursuant to separate provisions (the current Tax Ordinance defines tax records as accounts, revenue and expense ledgers, and registers and records taxpayers, remitters, or collectors are obliged to keep pursuant to separate provisions).

– Income tax owed for the so-called revenue from undisclosed sources.

– Income tax owed for the sale of real estate.

The introduction of a five-year-long period of the limitation of assessment in the above mentioned cases is supported by a more complicated nature of these settlements, which entails the need of using a wider catalogue of evidence during proceedings, or a greater number of tax law institutions (e.g. estimation).

The introduction of a five-year-long period of the limitation of tax collection should be postulated, because the introduction of a shorter period does not seem justified. If the obligation results from a submitted and correct tax declaration, or a final decision (possibly verified by a binding court ruling), pursuant to the principle of tax fairness, it should be executed. Therefore, it should go without saying that if someone is obliged to pay the tax whose existence and amount are, in principle, correctly established, s/he should pay

it. For this reason, the enforcement of tax owed is justified over a longer time period.

The institution of a tax limitation should be feasible in nature. Under this limitation of assessment, the possibility of an exclusion of the limitation should be regulated, whereas its suspension should occur solely for objective reasons. This would be independent of a tax authority in events such as: taxpayer's death; the need to obtain information necessary for taxation from another state; applying to a common court with a motion to establish the existence of a legal relation or right; suspension of proceedings due to the settlement of a representative case; as well as submission of a complaint to an administrative court. The application of prerequisites for the suspension of limitation of assessment should not prolong the period of limitation of assessment by more than five years in total.

Under the limitation of collection, prerequisites of the suspension or interruption of its activities should be restricted as well. Under the limitation of collection, the preservation of the following prerequisites of the suspension, or interruption of the activities of limitation should be postulated: division into installments; deferment of the deadline to submit a declaration, or payment; prolongation of the term of payment; voluntary or executive pledge; announcement of insolvency; or application of enforcement measures. The new ordinance should prepare and introduce solutions which would allow a maximum period for the prolongation of the period of limitation of collection, due to the suspension or interruption of the course of activities of the limitation of collection.

4.8 Excess payment

It is necessary to introduce legislative solutions within the scope of cases for when tax is paid unduly by a taxpayer who did not bear the economic burden thereof. The construction of some tax, particularly indirect, allows to transfer such burden upon a consumer of goods or services. Legal solutions and mechanisms within the scope of excess payment should not lead to unjust requirements of a taxpayer. Therefore, the introduction of the mechanism allowing the acquirement of excess payment by taxpayers subject to indirect tax should be postulated, provided they bear the economic burden of the tax.

Changes within the scope of legal regulations on tax excess and return should also contain the following:

– We should aim at the introduction of similar procedures for tax excess and return. However in the latter case, they will be applied if special provisions regulating the construction of the individual kind of return do not stipulate otherwise.

– It is reasonable to simplify the procedure of claiming tax excess and return, on proceedings to confirm overpayment initiated ex officio, or if a request should be introduced. A tax authority should, ex officio, in a simplified procedure (if possible), among others without the need to initiate proceedings, confirm overpayment each time it acknowledges its existence.

– The catalogue of cases where overpayment shall be returned without issuing a decision should be extended in instances, among others, when: overpayment results from a declaration, or the correction of a declaration is not questioned by an authority; when excess payment is a results of the motion of a taxpayer to confirm overpayment that is fully accepted by an authority; or when excess payment is confirmed ex officio. In the above-mentioned cases, a decision should be issued, but only when it is requested by the party. If an authority confirms excess payment without a decision, it also should not be obliged to issue decisions on overpayment (e.g. in the matter of crediting overpayment towards tax arrears), unless the party applies for it. Discontinuance of the issuing decisions mentioned above should be accompanied by the rule according to which a tax authority should inform the party about the settlement (e.g. crediting overpayment towards tax arrears), by means of electronic communication, or by a telephone. Simultaneously, the information regarding confirmed overpayment may also be delivered in this form. A vital supplement of the above-mentioned mechanism should be the solution according to which the settlement on interest (i.e. confirmation of its existence, or lack thereof), will be an element of the decision on overpayment. However, the subject of this settlement should not be the calculation of the amount of due interest, and it will not be necessary to initiate separate proceedings in the matter of interest. If an authority does not issue a decision to confirm overpayment, and a taxpayer is entitled to interest, an authority transfers interest without issuing a decision thereon. Nevertheless, each time a taxpayer should have the possibility of applying for granted interest which should be settled in the form of a decision, unless it is fully accepted.

– Determination of the relation between proceedings to confirm overpayment and proceedings establishing the amount of tax obligation (e.g.

with a statutory exclusion of the obligation to conduct recovery proceedings before the examination of a request to confirm overpayment).

– Extension of cases where overpayment is returned together with interest. Excess payment should be returned together with interest calculated from the payment date when it results from defective lawmaking (confirmed by the judgment of the Constitutional Tribunal, or the Court of Justice of the European Union), or the application of law. Additionally, from the lapse of the term of overpayment, if it was not returned within this time, and a taxpayer did not contribute to the delay. A taxpayer should not incur negative consequences connected with defective operation of the State authority, both within law making and the application of law. An important supplement of the above-mentioned mechanisms should be the solution according to which the settlement on interest (i.e. confirmation of its existence, or lack thereof) will be an element of the decision on overpayment.

– Extension of the group of entities entitled to obtain excess payment by all entities covered by the tax law relation, among others remitters, collectors, legal successors, or third parties, including such problems as, for example, the loss of tax capital group status, the loss of law existence, legal capacity or capacity for legal actions, and/or insolvency.

– A possibility to introduce the return of overpayment to entities indicated by a taxpayer.

4.9 Electronic communication

Contact with a taxpayer through modern communication technologies should be further emphasized. Thanks to this, proceedings' dynamics will increase, while their costs will diminish. It is not economical to instigate tax proceedings when the cost of their pursuit, including tax authorities' expenditures and costs of letter services, exceeds the inflicted amount of obligation. The new Tax Ordinance should enshrine the concept of a simplified legal environment, and the creation of facilities for taxpayers–including entrepreneurs. Indicated legal mechanisms and instruments are necessary for the development of e-administration. They confirm changes occurring in the approach of administration towards an individual. They also demonstrate a support-oriented attitude to individuals, and the need to provide them with more efficient, and effective, contacts with administration. Development of new IT and communication technologies, including electronic communication, exerts

a positive impact on digital society's development. This is particularly important within the rapid paced and progress-oriented context of the surrounding world.

4.10 Complaints

The new Tax Ordinance will contain provisions on complaints. Under the current legal status, the Code of Administrative Procedure applies thereto, however preservation of this status is unsubstantiated. It disrupts regulative uniformity of tax procedures, and limits taxpayers – who are potentially interested in submitting a complaint or request – from getting acquainted with the provisions specifying a relevant course, or even being aware of their existence. These provisions were previously located in another Act, but failure to adjust some of them to the specificity of tax cases can result in their identification and corrective potential to be unused.

5. Increased efficiency and efficacy of tax obligation's assessment and collection

5.1 Increased efficiency of tax proceedings

The right of a party to challenge a decision should be made feasible. The time limit to submit an appeal or complaint should be prolonged (up to thirty and fourteen days respectively). This will allow better preparation for a party to formulate complaints against a decision or order and more precise preparation of motions for evidence. For the same reasons, the time limit to apply for the withdrawal of a final decision after the judgment of Constitutional Tribunal, or Court of Justice of the European Union, should be prolonged from one to three months.

One of the general principles of tax proceedings is of expeditious proceedings. Inactivity of a tax authority, or protracted pursuit of proceedings, threatens citizen's confidence in State bodies. Therefore, it is reasonable to strengthen the position of a party to the proceedings through equipping it with effective legal measures for action in the situation of inactive, or protracted conduct, of a tax authority.

The economics of tax and judicial administrative proceedings justifies the creation of a possibility of suspending proceedings in similar cases, or in closely related ones. To begin with, a dispute in the 'representative' matter should be settled, while other cases should be suspended. This will allow a taxpayer to rationalize procedural costs and eliminate a risk of massive enforcement of decisions that may appear defective.

Tax authority should be authorized not to instigate and discontinue proceedings initiated ex officio if the expected amount of the obligation does not exceed a specified numerical limit. The new Tax Ordinance should follow the direction of standardization of motions in tax cases. Provisions on disciplinary penalties require fundamental changes. The Codification Committee decided not to recommend for further works: renouncement from an appeal for the sake of a direct complaint to a court, and presentation of the case's legal evaluation by an authority before issuing a decision.

5.2 Tax authorities

The new act should be aimed at simplified provisions concerning local jurisdiction, and would be more expansive than current applications of the same principle, which is binding in cases of all taxes collected by the authorities subordinate to the Minister of Finance. Moreover, changes within the scope of jurisdiction should embrace principles concerning the so-called ossification of jurisdiction which dictates that an authority involved at the moment of launching an inspection shall remain involved in all relevant issues connected with the subject of the case, both in tax and interlocutory proceedings (e.g. concerning security).

There are almost 2500 self-government tax authorities in Poland. Due to this, their expectations and needs cannot be ignored while creating a new Tax Ordinance. This is an issue of particular importance for tax authorities but also from the point of view of taxpayers. Self-government taxes such as real estate, agricultural, or forest taxes should be simplified due to their common nature. It is necessary to assume that all tax authorities should have similar powers as far as general tax law provisions are concerned. Deviations from this principle (including, most of all, specificity of tax assessed and collected by the corresponding category of tax authorities) will occur. Nevertheless, they must be sufficiently justified (the principle of adequacy). Moreover, the issue of complementary regulation of the status of municipal tax authorities in the

provisions of general tax law and structural system provisions is valuable. There is no legal act regulating structural, organizational, or functional matters of local self-government tax administration, except self-government appeal boards. In the long term, proposed actions are to improve self-government tax authorities' operations, increase their efficiency, and facilitate correct fulfillment of taxpayers' obligations connected with the settlement of taxes and fees constituting self-government revenue.

5.3 Tax inspection

It is proposed to establish a uniform and integrated procedure of tax inspection in the new Tax Ordinance provisions for taxpayers who, in principle, fulfill their duties, and introduce a separate regulation for more rigorous inspection procedures directed at fighting common revenue offences. The current procedure of tax inspection is, on the one hand, sometimes too burdensome for most taxpayers. Conversely, it can be too ineffective with regard to tax evaders. Therefore, it is important to diversify inspection procedures where the criteria of applying individual procedures should refer to the seriousness of irregularities, or the degree of harmfulness of committed revenue offences and the need to secure evidence promptly.

The procedure which refers to inspections aimed at fighting tax fraud and revenue offences should be contained in a legal act separate from the Tax Ordinance (Law on Fiscal Inspection) and connect the elements of current solutions of the Tax Ordinance, Law on Fiscal Inspection and Criminal Procedure. The legitimacy of the introduction of this procedure is confirmed by a recently observed increase in tax offences, particularly within the scope of value-added tax scams. These offences are especially detrimental because they result, on the one hand, in billions of PLN loss for the State Treasury (threatening its financial security) and on the other, in immeasurable consequences for the principles of competence, as well as the danger of eliminating honest entrepreneurs from the market. It is purposeful to create a catalogue of cases where this procedure would be applied. It should be used, in particular, in the following cases: activities in organized crime, or organizations aiming at committing revenue offences; money laundry; issuing documents on activities that have not been performed, or intentional forgery of tax documents.

5.4 The clause against tax evasion

There is a need to establish an anti-avoidance rule in new Tax Ordinance. The application of this clause will both deprive taxpayers of the tax benefits they intend to obtain, or those benefits obtained due to undertaking artificial arrangements which lacked economic justification, but were done for the purpose of obtaining tax benefits. Financial sanctions are not envisaged. The most vital form of the clause's impact should be prevention. The clause will embrace all State and self-government taxes except the value-added tax. One of the authorities entitled to apply this rule will be the Minister of Finance. Taxpayers could request the issuance of a decision by their specially appointed consulting body independent of tax administration.

5.5 Solidarity in tax law

Currently binding Tax Ordinance regulates the occurrence of joint/several obligations to a limited extent, particularly when it is necessary to issue and serve a decision thereto. Tax procedures conducted by tax authorities are not sufficiently regulated in binding provisions within the context of solidarity but also, for example, in the self-calculation of tax. Similar problems occur within the scope of the institution of reliefs to pay tax obligations when only some joint/several debtors apply for the relief.

Suitable changes connected with solidarity in tax law should be introduced to individual institutions regulated in the new Tax Ordinance. Basic principles of solidarity in tax laws, however, should be somehow factored out of general provisions due to their universal character. This solution is also supported by the heterogeneous character of joint and several liability in tax law which can be connected with the obligation of this nature, including those arising through the service of a decision. Nevertheless, it may also be the liability for another person's debt, therefore it may be the institution connected both with the stage when the tax law relation arises, and the assessment and performance of tax obligations.

5.6 Default interest

Default interest is the consequence of an occurrence of tax arrears, and the obligation to assess it exists regardless of the cause(s) of occurrence and taxpayer's fault within this scope. It should be required to pay interest without the notice of tax authorities, whereas payments towards tax arrears and default interest thereon should be proportionally credited. The catalogue of cases of non-application of default interest with regard to the binding legal status

should be extended by a new case. This would then be connected with non-application of interest during the period of judicial administrative proceedings on checking legitimacy of a tax authority's decision establishing, or determining, tax obligation that is pending for more than twelve months. Moreover, the prerequisite of non-application of default interest when a tax authority did not verify the declaration containing mathematical errors, or apparent mistakes under examinations thereof during two years should be modified. The maintenance of a two-year-long period envisioned in the currently binding provision, when tax authorities use electronic tools for a declaration's validation within the scope of arithmetic errors and apparent mistakes, cannot be justified. This period should be shortened to one year. The instrument aimed at maximizing the level of voluntary fulfillment of tax obligations in the new Act's provisions should be the introduction of a lowered default interest rate for taxpayers wishing to correct irregularities in the original declaration and immediately settle tax arrears with the simultaneous indication of time limits during which it will be possible.

6. Conclusion

For two primary reasons, the new Tax Ordinance has a chance to be a positive change in the field of Polish general tax law. First, it will introduce new institutions which currently do not exist in Polish legislation, such as the introduction of tax law principles, and the catalogue of taxpayers' rights and duties to the new Tax Ordinance. By introducing these legal solutions, a relationship will develop between tax debtors and creditors assuring necessary protection to the weaker subject. The complaint procedure, which will be introduced in the new act, will become an important element in the system of protection for taxpayers' rights. The course of submitting complaints will be most suitable to report possible infringements of some rights (such as the right to polite and professional treatment by civil servants). Among other things we can outline new soft forms of tax authorities' operations. The advantages of this are clear. This will create the conditions to observe and apply tax law in a way that is simultaneously efficient, effective, and appropriate. This will favor cooperation between tax authorities and taxpayers and discourage disputes. Another very essential elements of the new Tax Ordinance is the general anti-avoidance rule. This construct aims at setting a limit between tax planning and tax avoidance, sometimes referred to as aggressive tax planning. Such a norm

will establish the limits of a taxpayer's right to minimize his or her tax obligations.

Second, it will improve some tax legal constructs, which were claimed to operate improperly. Limitation stabilizes economic turnover through the restriction, or exclusion, of a possibility of redress. In tax law, limitation prevents either the assessment of tax obligation, or leads to its expiry. However, in the currently binding act, a consequence of several exceptions to the general rule is that its guaranteeing function is impaired. The construction of new provisions on excess payment should be accompanied by endeavors to simplify the procedure leading to the transfer of excess payments to authorized entities, as well as eliminate currently existing shortcomings in the application of this institution. Tax procedure must be modernized so that it may satisfy contemporary needs of taxpayers in a better way. Nowadays, in many fields of life and economy, procedures that are based on prompt and deformalized contact are developing. Basic issues within the scope of electronic communication should be contained in the general provisions of the new Tax Ordinance. Moreover, further provisions thereof will include special regulations connected with concrete institutions of tax law and reference to the issue of using modern IT and communication technologies.

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The absence of the financial investigation in the Slovak Republic and its consequences

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Keywords: financial crimes; financial investigation; forfeiture of property

1. Introduction

Pursuant to Criminal Procedural Code,1 assets from criminal activities are subject to evidence to the extent of their income, range, content, and height. From the perspective of the investigative process performed by the judicial and police authorities, the gathering of illegal assets as evidence deriving from criminal activities is required, and treated as any other subject of evidence as it relates to mens rea or actus reus.

The primary reason why it is necessary to investigate illegal assets from criminal activities is to create a sufficient procedural base for judicial impositions of the sanctions related to the confiscation of income from criminal activities.

Section 58(2) of the Criminal Code2 stipulates the first category of crimes punishable by the confiscation of property, while taking into account the circumstances under which the criminal offence was committed, and the personal situation of the offender. The court may order the forfeiture of property of the offender whom it sentences to life imprisonment or to unconditional imprisonment for a particularly serious felony, through which the offender gained or tried to gain large-scale property benefits or caused large-scale damage. The large scale benefit or damage is defined pursuant the Section 125(1) of the Criminal Code as a sum at least equal to 133,000€.

The second category when the court orders the forfeiture of property, even in the absence of the conditions referred above when sentencing perpetrators of criminal offences for so-called predicative offences,[3] is if the offender has acquired a substantial extent of property, or part thereof from the proceeds of crime. Substantial extent or damage is defined pursuant to Section 125(1) of the Criminal Code as a sum at least equal to 26,600€.

The third category when the court mandates the forfeiture of property, even in the absence of the conditions referred above, when sentencing perpetrators for the criminal offence of the legalization of proceeds of crime pursuant to Section 233 of the Criminal Code when his or her property or part thereof was acquired from the proceeds of crime, at least in the substantial extent pursuant to Section 233(2), or acquired his or her property or part thereof from the proceeds of crime to at least a large scale extent.[4]

2. Current status

Despite the legal obligation of the police and judicial authorities to gather evidence regarding illegal income from criminal activities and the mandatory obligation to impose the punishment of the forfeiture of property, statistics show conflicting data. Since 2011 there have been raised indictments in 111 cases, but no punishments have been imposed for the forfeiture of property, although individuals have been found guilty for the legalization of proceeds of crime pursuant to Section 233 of the Criminal Code.

While analyzing these cases, it is evident that the judicial ruling on the legal criteria for imposing the punishment of the forfeiture of property has not been met in these particular cases. The ruling may have been interpreted in a way that the judicial file has not included any or sufficient evidence to rule the forfeiture of the property. There should be a direct nexus proven between proceeds or assets and the particular criminal activity. Intent of the perpetrator to gather the proceeds or assets is insufficient for imposing the forfeiture of property.[5] The process of gathering the evidence of the proceeds of crimes is subjected to financial investigation.

Financial investigation is a proceeding of the police and judicial authorities that is independent from the investigation and the prosecution for the predicative crime. Financial investigation is a secondary and supplementary evidence gathering process focused on the trace and undercover of the proceeds from the criminal activities in order to establish reasonable ground to impose

the punishment of the forfeiture of property by the judicial authority, or to decide to freeze assets in the pre- trial or trial phase to ensure the proper execution of further judicial decision if the legitimate criteria are met.

Currently, the financial investigation has not been established by the Criminal Procedural Code, nor by any other relevant legal source, at least in a formal way. Additionally, financial investigations have not been incorporated into the organizational structures of police forces nor the prosecutor's offices. It is important to note that the police or judicial authority performing an investigation are currently completely allocated for the investigation of the predicative crimes, and they time time and/or personal capacity to perform a financial investigation.

Table n. 1. **Seizure of assets in Slovakia done by the Financial Intelligence Unit of the National Criminal Agency**[6]

Y2011	
Seizure of money acc. S. 95 of the Criminal Procedural Code	40
Seizure of security papers acc. S. 96 of the Slovak Criminal Code	1
Surrender of items acc. S. 550 of the Criminal Procedural Code (evidence in the judicial cooperation in the criminal matters)	7
Seizure of property acc S. 551 of the Criminal Procedural Code (the execution of the foreign asset related judicial decision in the judicial cooperation in the criminal matters)	2

Table n. 2. **Criminal offence of money laundering acc. Section 233 of the Criminal Code**
in the area of the district prosecutor's offices[7]

Y2011	
Prosecution	19
Indictment/Plea bargaining	17/0
Sentenced	Imprisonment-7 *Confiscation of property-0*

Table n. 3. Seizure of assets in Slovakia done by the Financial Intelligence Unit of the National Criminal Agency 8

Y2012		
	Criminal offence of money laundering acc. S. 233 and S. 234 of the Criminal Code	Other criminal offences
Seizure of money acc. S. 95 of the Criminal Procedural Code	40	45
Seizure of security papers acc. S. 96 of the Slovak Criminal Code	1	5
Surrender of items acc. S. 550 of the Criminal Procedural Code (evidence in the judicial cooperation in the criminal matters)	7	0
Seizure of property acc. S. 551 of the Criminal Procedural Code (the execution of the foreign asset related judicial decision in the judicial cooperation in the criminal matters)	2	0

Table n. 4. Criminal offence of money laundering acc. Section 233 of the Criminal Code in the area of the district prosecutors' offices9

Y2012	
Prosecution	47
Indictment/Plea bargaining	34/6
Sentenced	Imprisonment-8 *Confiscation of property-0*

Table n. 5. Seizure of assets in Slovakia done by the Financial Intelligence Unit of the National Criminal Agency10

Y2013		
	Criminal offence of money laundering acc. S. 233 and S. 234 of the Criminal Code	Other criminal offences
Seizure of money acc. S. 95 of the Criminal Procedural Code	12	0
Seizure of security papers acc. S. 96 of the Slovak Criminal	0	1

Code		
Surrender of items acc. S. 550 of the Criminal Procedural Code (evidence in the judicial cooperation in the criminal matters)	0	42
Seizure of property acc. S. 551 of the Criminal Procedural Code (the execution of the foreign asset related judicial decision in the judicial cooperation in the criminal matters)	0	48

Table n. 6. Criminal offence of money laundering acc. Section 233 of the Criminal Code in the area of the district prosecutors' offices[11]

Y2013	
Prosecution	46
Indictment/plea bargaining	24/8
Sentencing	Imprisonment-21 *Confiscation of property-0*

Table n. 7. Criminal offence of money laundering acc. Section 233 of the Criminal Code in the jurisdiction of the Special Prosecutor's Office[12]

Y2013	
Prosecution	11
Indictment/Plea bargaining	10
Sentencing	Imprisonment-0 *Confiscation of property-0*

Table n. 8. Seizure of assets in Slovakia done by the Financial Intelligence Unit of the National Criminal Agency[13]

Y2014		
	Criminal offence of money laundering acc. S. 233 and S. 234 of the Criminal Code	Other criminal offences
Seizure of money acc. S. 95 of the Criminal Procedural Code	22	198

Seizure of security papers acc. S. 96 of the Slovak Criminal Code	0	1
Surrender of items acc. S. 550 of the Criminal Procedural Code (evidence in the judicial cooperation in the criminal matters)	2	37
Seizure of property acc. S. 551 of the Criminal Procedural Code (the execution of the foreign asset related judicial decision in the judicial cooperation in the criminal matters)	7	24

***Table n. 9.* Criminal offence of money laundering acc. Section 233 of the Criminal Code in the area of the district prosecutors' offices**[14]

Y2014	
Prosecution	48
Indictment/Plea bargaining	31/4
Sentencing	Imprisonment-12 *Confiscation of the property-0*

***Table n. 10.* Criminal offence of money laundering acc. Section 233 of the Criminal Code in the jurisdiction of the Special Prosecutor's Office**[15]

Y2014	
Prosecution	12
Indictment/Plea bargaining	7/3
Sentencing	Imprisonment-3 *Confiscation of property-0*

We have provided the statistics regarding the legalization of proceeds of crime pursuant to Section 233 of the Criminal Code. The statement given above is in regards to the effectiveness of prosecution and the sanctioning of economic crimes as such.

A comprehensive financial investigation is considered one of the most effective tools to fight against organized crime. Seizing and sourcing out the income of organized crime works preventively, as it is able to stop generating

additional income by these groups. In this way it narrows the possibilities for serious criminal activities.[16]

3. The necessity of effective financial investigation

Verification and tracing of financial transactions, digital data in account or CRM[17] systems, or other databases may identify any illegal income, payments, secret accounts, non-justifiable items and entries in ledgers, and/or illegitimate depreciations. Financial investigations have led to the discovery of hidden SPVs,[18] acting in accordance with business relations or transaction schemes including information on real beneficiary owners.

The urgent need to identify any person who exercises ownership or control over a legal entity in order to ensure effective transparency has been articulated in the basic anti-money laundering legal source within the EU: the recently adopted IV. Directive. 'Identification and verification of beneficial owners should, where relevant, extend to legal entities that own other legal entities, and obliged entities should look for the natural person(s) who ultimately exercises control through ownership or through other means of the legal entity that is the customer. Control through other means may, inter alia, include the criteria of control used for the purpose of preparing consolidated financial statements, such as through a shareholders' agreement, the exercise of dominant influence or the power to appoint senior management. There may be cases where no natural person is identifiable who ultimately owns or exerts control over a legal entity. In such exceptional cases, obliged entities, having exhausted all other means of identification, and provided there are no grounds for suspicion, may consider the senior managing official(s) to be the beneficial owner(s).'[19] 'The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. Member States should therefore ensure that entities incorporated within their territory in accordance with national law obtain and hold adequate, accurate and current information on their beneficial ownership, in addition to basic information such as the company name and address and proof of incorporation and legal ownership.'[20] Member States should ensure that the widest possible range of legal entities incorporated or created by any other mechanism in their territory is covered. While finding a specified percentage shareholding or ownership

interest does not automatically result in finding the beneficial owner, it should be one evidential factor among others to be taken into account. Member States should be able, however, to decide that a lower percentage may be an indication of ownership or control.[21]

Linking true beneficiary owners and their assets with the committed crimes are key factors of a successful financial investigation. Tracing these links is usually known as a creation of an economic profile or asset profile of the accused. Economic profiling is a part of a financial investigation, and is usually based upon open source checks. The gathered evidence should not be used only for investigation and prosecution of money laundering, but as important evidence in the prosecution for the predicative crime (e.g. to provide a more complete picture of the structure of an organized group).

Another reason to support effective financial investigations in the Slovak Republic are detailed in the following recommendations of Money Val experts, which stipulate that: – the Slovak authorities could give more specific training on money laundering and terrorist financing offences, and the seizure, freezing, and confiscation of property that is the proceeds of crime, or is to be used to finance terrorism, to police, prosecutors, and judges;[22] and – an increase in dedicated resources and staff to the FIU for its activities in the supervision field, and for its performance of a more effective national coordination role.[23]

The experts also emphasized that:

– more training on terrorist financing-related issues, including those regarding the implementation of SR III requirements, should be provided to the National Bank of Slovakia's supervisory staff involved in Anti-Money Laundering / Combating the Financing of Terrorism (AML/CFT) initiative;[24]

– authorities should provide the FIU with additional resources to allow more detailed coordination on the national level;[25]

– there are some deficits on the effectiveness of money laundering and terrorist financing investigations;[26]

– there is currently a lack of sufficient coordination between major players of the AML/CFT regime;[27]

– more effective mechanisms are needed to coordinate at the operational level;[28] and – there is no evidence of concrete arrangements for coordination of seizure and confiscation actions with other countries, or for sharing confiscated assets with them, other than those provided under the Framework Decision applicable for EU Member States.[29]

4. Conclusion

Legal development in the Slovak Republic has grown significantly in recent years while continuously evolving and adopting new tools to make the fight against economic crime more effective. A new Whistleblowing Act,30 allows Parliament to address the act of criminal responsibility of legal persons. It is possible that all these legislative activities may become obsolete, and the Slovak Republic will fulfill the expected criteria only in a formal way. The current system of investigation and prosecution does not rely on the financial investigation, and the staff will not be able to put these (both recently adopted and still developing) legal tools into practice. The justification for the failure to do so will likely be that the 'practitioners have not got used to' the process, as evidenced in the statistics. Another such tool is the called in-direct criminal responsibility of legal persons, established through the sanction-protective measure of the forfeiture of money sum or forfeiture of property. It was been established in 2011, and since then, no claim against a legal person has been raised, and no legal person has been brought before the court.

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2. Act no. 300/2005 (Criminal Code).

3. Illicit manufacturing and possession of narcotics or psychotropic substances, poisons or precursors, and trafficking in them pursuant to Section 172 paragraphs 2, 3 or 4, or Section 173, criminal offence of trafficking in human beings pursuant to Section 179, criminal offence of trafficking in children pursuant to Section 180 paragraphs 2 or 3 or Section 181, criminal offence of extortion pursuant to Section 189 paragraph 2 (c), criminal offence of gross coercion pursuant to Section 190 paragraphs 1, 3, 4 or 5, or Section 191 paragraphs 3 or 4, criminal offence of coercion pursuant to Section 192 paragraphs 3 or 4, criminal offence of sharing pursuant to Section 231 paragraphs 2, 3 or 4, or Section 232 paragraphs 3 or 4, criminal offence of legalization of proceeds of crime pursuant to Section 233 or 234, criminal offence of forgery, fraudulent alteration and illicit manufacturing of money and securities pursuant to Section 270, criminal offence of uttering

counterfeit, fraudulently altered and illicitly manufactured money and securities pursuant to Section 271 paragraph 1, criminal offence of manufacturing and possession of instruments for counterfeiting and forgery pursuant to Section 272 paragraph 2, criminal offence of failure to pay tax and insurance pursuant to Section 277, criminal offence of failure to pay tax pursuant to Section 278 paragraphs 2 or 3, criminal offence of breach of regulations governing state technical measures for labelling goods pursuant to Section 279 paragraphs 2 or 3, criminal offence of establishing, masterminding and supporting a criminal group pursuant to Section 296, establishing, masterminding and supporting a terrorist group pursuant to Section 297, criminal offence of terror pursuant to Section 313 or Section 314, criminal offence of accepting a bribe pursuant to Section 328 paragraph 2 or 3, or Section 329 paragraphs 2 or 3, criminal offence of bribery pursuant to Section 334 paragraph 2 or Section 335 paragraph 2, criminal offence of counterfeiting and altering a public instrument, official seal, official seal-off, official emblem and official mark pursuant to Section 352 paragraph 6, criminal offence of smuggling of migrants pursuant to Section 355 or Section 356, criminal offence of procuring and soliciting prostitution pursuant to Section 367 paragraph 3, criminal offence of manufacturing of child pornography pursuant to Section 368, criminal offence of dissemination of child pornography pursuant to Section 369, criminal offence of corrupting morals pursuant to Section 372 paragraphs 2 or 3, or criminal offence of terrorism and some forms of participation on terrorism pursuant to Section 419

4. For the purposes of this article we have decided to illustrate the current status of the financial investigation in the Slovak republic at the statistics of the criminal offense of the legalization of proceeds of crime pursuant to Section 233 with the data analyses back to 2011, when the last Money Val evaluation took place. Evaluation report of the Slovak republic by the Money Val,
http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/SVK4_MER_MONEYVAL%282011%2921_en.pdf (accessed 21 September 2015) 5. Wouter H. Muller, Christian H. Kälin, John G. Goldsworth (eds.), Anti-money laundering-International law and practice, 12 (Chichester, John Wiley & Sons Ltd, 2007).

6. FIU Annual report 2011, translated by the authors, http://www.minv.sk/swift_data/source/policia/naka_opr/fsj/Vyrocna_sprava%20SJFP%202011.pdf (accessed 15 September 2015) 7. Annual statistics of the criminal and non-criminal agenda in 2011, Office of the Prosecutor General, translated by the authors, http://www.genpro.gov.sk/statistiky-12c1.html (accessed 15 September 2015) 8. FIU Annual report 2012, supra n. 6

9. Annual statistics of the criminal and non-criminal agenda in 2012, Office of the Prosecutor General, Translated by the authors, http://www.genpro.gov.sk/statistiky-12c1.html (accessed 15 September 2015) 10. FIU Annual report 2012, supra n. 6

11. Annual statistics of the criminal and non-criminal agenda in 2013, Office of the Prosecutor General, Translated by the authors, http://www.genpro.gov.sk/statistiky-12c1.html (accessed 15 September 2015) 12. Annual statistics of the criminal and non-criminal agenda in 2013, Office of the Prosecutor General, Ibid.

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16. Wouter H. Muller, Christian H. Kälin, John G. Goldsworth (eds.), Anti-money laundering-International law and practice, 22 (Chichester, John Wiley & Sons Ltd, 2007).

17. Customer management systems a.g. Oracle, SAP, SAS.

18. Special purpose vehicle- in this context a legal entity established for a single purpose mainly for the 'tax optimization', corruptive practices or money laundering.

19. Point 13 of the Preamble to the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention

of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri= CELEX:32015L0849&from=EN (accessed 15 September 2015) 20. Point 14 of the Preamble to the Directive (EU) 2015/849, Ibid.

21. Point 12 of the Preamble to the Directive (EU) 2015/849, Ibid.

22. Section 914, Compliance with the Recommendation n. 30 FATF, 4 Evaluation report of the Slovak republic by the Money Val, http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/SVK4_MER_MONEYVAL%282011%2921_en.pdf (accessed 21 September 2015) 23. Section 915, Compliance with the Recommendation n. 30 FATF, Ibid. The evaluators commented that the Slovak authorities should satisfy themselves that there are adequate resources allocated to set up and maintain the Anti-money laundering/Combating the financing the terrorism system on the policy level and that policy makers are appropriately skilled and provided with relevant training.

24. Section 918, Compliance with the Recommendation n. 30 FATF, Ibid. Section 919, Compliance with the Recommendation n. 30 FATF, Ibid.

25. Point 27, Table 1, Section 915, Compliance with the Recommendation n. 30 FATF, Ibid.

26. Point 27, Section 915, Compliance with the Recommendation n. 30 FATF, Ibid.

27. Point 31, Section 915, Compliance with the Recommendation n. 30 FATF, Ibid.

28. Point 31, Section 915, Compliance with the Recommendation n. 30 FATF, Ibid. The same has been pointed in Point 14 of the Preamble to the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 saying that more detailed and comprehensive statistics should be maintained with regard to the investigation and prosecution of ML and TF, as well as on the provisional measures applied and confiscation of

proceeds of all predicate offences. All these statistics should be analyzed on a regular basis to determine areas where more resources are required and to assess the effectiveness of the system.

29. Act no. 307/2014 (Whistleblowing Act)

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Taxation of professional team sport athletes in the Czech Republic[1]

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Abstract: The career of a professional athlete is unique when compared to other professions. Not purely the role and nature of the position (such as whether they are individual or team players), but also from the factual, legal, and especially tax perspectives. And since a professional athlete's income is subject to taxation, it is necessary that their activity is accurately determined for appropriate tax assessment. The main purpose of this article is to examine the taxation of income on professional athletes in team sports. Our study is based on case law determined by the Czech Republic's Supreme Administrative Court (hereinafter 'Supreme Administrative Court'),[2] which determined that it is necessary to tax the activities of team players as income from self-employment. The existing scientific literature on this subject in the Czech Republic is not particularly relevant, as it is mostly descriptive.[3] International scientific literature is more abundant and comprehensive, such as noted publications by Tetłak,[4] Simpson,[5] and Taxation of Artistes and Sportsmen in International Tax Law, edited by Loukota and Stefaner.[6]

Keywords: tax; tax assessment; professional athletes; self-employment

1. Characteristics of team player activity

The performance of a team player is largely determined by club rules and regulations in which his or her activity is performed. This differs considerably from the abilities of an individual athlete. Individual professional athletes (i.e. tennis players, boxers, etc.)[7] act on his or her own behalf and exhibit a great deal of agency in the decision-making process. He or she chooses which tournament(s) to play and with what frequency, he or she may be paid by several subjects (usually by the organizer of a sporting event), he or she bears the costs of hiring a coach, massage therapist(s), servicemen, and other people on his or her team, he or she chooses when and where they train, etc.

In contrast, team players (such as hockey, football, basketball players, etc.) are in a relationship only with one subject: the club in which they perform their activity. They do not act on their behalf nor in their own personal

interest, but only as members of a team or club. It is the leadership of the club who determines all functional duties, such as who participates in a specific competition, if a player is transferred during the season (with or without the player's consent), training, following a dietary regime, and other decisions that affect players. Furthermore, team players cannot usually influence who the club hires for coaching staff or the service team. Instead, team players must abide by regulations set forth by the leadership and their coaches. It is paradoxical that the more competitive a team becomes, the more it relies on the performance of its individual players–players who do not participate in the club's decision-making processes.

In some European countries, it is quite common that team players are employees of the club. In the Czech Republic however, professional team players (for all sports, not solely football) are self-employed.[8] The player and the club agree on a so-called 'professional contract' which is considered an innominate contract in the Czech legal order.[9] Professional contracts include mutual rights and obligations of the player and the club. Some kind of a model contract is included in the Directive on the Evidence of Professional and Non-Amateur Contracts approved by the Executive Committee of the Football Association of the Czech Republic.[10] This is somewhat contradictory to the notion of self-employment in team sports, because the first article states that, 'in accordance with the professional contract the player performs the sports activity as his or her main employment', which would indicate a dependent activity. However, according to the model professional contract for football,[11] 'in the area of income tax, social and health security, the player is considered to be self-employed in accordance with Art. 7 par. 2b) of the Income Tax Act[12] and his or her income arising from this contract is the income from independent employment, which is neither a profession based on a license nor entrepreneurship under special regulations'. It is important to note that similar contracts are implemented for other team sports, however any provision of this type in a private contract is, for the purpose of public tax law, irrelevant.

One element regarding the taxation of team player's income that is repeatedly discussed is the different rate of income taxation if the athlete taxes his or her income from employment, or self-employment. From a tax perspective team players consider themselves as self-employed because it is mutually favorable for themselves and the clubs. Athletes receive an undeducted fee, and it is their obligation to complete tax returns, and pay taxes

including social and health security. This obligation is therefore not on, all of which is not required for the club. This also enables the players to make deductions from their incomes costs, which they spend in accordance with their activity, something that is not possible with the taxation of employees. Any costs related to their employment can be deducted. This could include the washing of uniforms (although this is done by the club), cost for travel to European cup matches,[13] food to maintain their diet, accommodation, trips for training, and any additional costs incurred as they relate to a player's position as a member of the club's team.

The activity of a professional team player is unique, so it is not possible to apply (without limitations) all institutes of labor laws guaranteed by the Labor Act. One of the main areas for potential disputes that may arise is the possibility of a one-way termination of the employee (the player) from the club without any reason given. In this instance, a player could change clubs without receiving compensation. Additional potentially problematic issues include working hours, overtime and obligatory breaks at work, as well as limitations set for the conclusion of fixed-term employment contracts.[14]

The activity of professional athletes, while not expressly excluded from entrepreneurship by the Trade Licensing Act,[15] cannot be subordinated under permitted professional or unqualified trade (and neither as an independent profession). Many athletes (as well as sports clubs) consider relations arising out of the so-called professional contracts to be of a self-employed nature, and income arising out of these contracts is also considered income from self-employment. The basis for this opinion is from a commonly known ruling of the Supreme Administrative Court from 2011.[16]

2. Taxation of professional athletes' income

The terminology which defines the relationship between the player and the club are not essential regarding taxation of team players' income. It is necessary to determine the characteristics of the player's activity and its subordination under particular provisions of the Income Tax Act. Two basic types of incomes shall now be examined: income from employment, and income from self-employment.

Income from self-employment includes, among other things, income from trade, other types of business, and from an independent profession. In all of these cases, it is presumed that the player performs, and is responsible for, an independent activity. However, the team player cannot fulfill this requirement because he or she does not perform on his or her behalf, and does not make independent decisions. His or her income received from the club (whether it is for individual matches, in the form of a regular fee for his or her sport, or other performance in favor of the club) cannot be considered as income from self-employment, and the tax payer is not entitled to deduct from this income the relevant costs spent to reach, secure, and maintain the income, nor is he or she entitled to apply lump costs. However, income from advertising activities of the individual player, for example, which are not connected to his or her activity for the club, could be taxed as income from self-employment.

Income from employment includes payment in the form of an income from present or past employment and similar relationships, in which the tax payer performing the activity for the employer must complete the orders of the employer. In 2005, the Supreme Administrative Court dealt with these terms with the emphasis on the nature of a relationship similar to employment and similar relationships.[17] It stated that a 'similar relationship is a relationship which is not an employment and similar relationships, but which in its nature and role responds to the stated relationships, that means that its main characteristics are the same as with these relationships. Common to employment and similar relationships is firstly that it is a legal relationship, usually of a private nature but also of a public nature (typically an official relationship)… When examining whether the given relationship can be subordinated under the term 'similar relationship', it is always necessary to examine its actual content intended and wanted by the participants, especially if the participants pretend something different than what is the actual content of their legal relationship. The Court emphasized the principle of material justice, resp. the principle of content priority. When closing the so-called professional contract, it is not important what the title of the contract is and under which legal provisions it was made, but what is its content and what are the rights and obligations of the parties.

Another important feature of employment and similar relationships considered by the Supreme Administrative Court is the relationship of a 'long-term character', determined by whether employment is not completed on a

one-time basis by fulfilling a certain obligation. So-called professional contracts also fulfill this definition since they are often concluded for the term of one to five years.

Another significant feature of employment and similar relationships not only considered by the Supreme Administrative Court is the fact that the person who provides a certain performance is obliged to follow the orders of the person to whom he or she is bound by the employment contract. This obligation must be explicit, i.e. it must be written into the legal relationship between both participants. For example, under the model professional contract, a football player is obliged to fulfill assignments and orders of coaches during training, at training camps, and of course during matches.[18] For his or her performance, the player receives a fee, usually monetary.

It is without a doubt that the so-called professional contracts in the area of team sports fulfill cumulatively all signs of a relationship similar to an employment and other similar relationships, and therefore a team player's income should be taxed as income from employment.

The term 'dependent activity', was determined by the Supreme Administrative Court in its previous ruling.[19] It stated that in order to be considered as a 'dependent activity', a person cannot only perform an activity according to relevant orders, but it must be an activity truly dependent on the employer. The definition of dependency shall be given by the nature of the performed activity (typically performed at one place exclusively for one employer). It shall also be a long-term activity, and the employment relationship shall be made in favor of the person performing the activity. It is also important to note that athletes do not perform their activities in one place. However, it is necessary to consider the text of this ruling as somewhat inaccurate since undoubtedly many more activities exist with noticeable worker mobility. On the other hand, it is necessary to emphasize the section which relates to one employer. Especially with team players, it is unimaginable that a hockey player, for example, would play in one round of a long-term competition in more than one match for one club.

Incomes of team players received from the club are undoubtedly taxed as income from employment[20] because the relationship between the player and the club cumulatively fulfills all signs of a relationship similar to employment and other similar relationships. Partial tax base is the income from employment increased by the amount equivalent to social security and

contribution for state employment policy and health insurance, which the club, as the employer, is obliged to pay from these incomes.

3. Conclusion

The oft-discussed, and media favored 'sport tax' ruling of the Supreme Administrative Court[21] is not completely without fault. The Court paid attention mainly to the relationship between the player and the club, but sidelined issues regarding taxation of an athlete's income. The purpose of this article is not to determine the relationship which exists, or should exist, between the player and the club. We agree with the Supreme Administrative Court, that the application of labor law to the area of legal relationships between clubs and players is difficult, and if not in some cases (holiday, transfers etc.), impossible.

Whatever professional contract is agreed upon between the player and the club, it is always necessary for the purpose of taxation of a players' income in accordance with the principle of material justice to examine the contents of this relationship – rights and obligations of the parties. In most cases are these are for contracts over a long period of time (one to five years), in which the athlete (tax payer) is obliged to follow orders of the club (employer). He or she receives a fee for his or her performance, he or she cannot play for more than one club, etc. The so-called professional contracts of athletes in the area of team sports cumulatively fulfill all signs of relationships similar to employment, and therefore should be taxed as income from employment. Shall the taxation of players' income from self-employment be accepted, disguised labor relationships, made for the purpose of the unlawful lowering of tax burden, would be de facto legalized.[22]

It shall also be stated that not all players' income necessarily comes from the club.[23] The player may have entered into other contracts, for example sponsor contracts, the income from which would be usually taxed under income from self-employment. This is often the case internationally, as Zika, the football agent states: '…the player receives some money from the employment agreement. And then he has another contract, for example a sponsor contract, and he receives much more money through this other contract.'[24] It is apparent from the Spanish case of the Argentinian football player Messi, that even here should the financial administrative authority examine the content of

the legal relationship for determining the income to the right partial legal base.[25]

It would be appropriate to add that individual athletes (athletes in individual sports such as tennis players) tax their income under partial tax base from self-employment (given that they are not employed by the Ministry of Defense or Ministry of Internal Affairs), because apart from team players, they fulfill the conditions in Art. 7 of the Income Tax Act.

For the purpose of taxation of team player's income it is not necessary, in contrast to the opinion of the Supreme Administrative Court, to pass an adequate legal norm of their activity which would properly take into consideration the specifications of professional athletes. It is apparent from the abovementioned text, that even the regulation de lege lata makes it possible to enter into so-called professional contracts and properly tax an athlete's income. Financial administrative authorities, however, would have to properly apply legal norms to an individual athlete's income, as well as ignore very inaccurate, and with regard to the content of the ruling, misleading, legal sentence II. from the ruling of the Supreme Administrative Court, stating that from 'a tax point of view, an athlete may be considered as a self-employed person'. Yes, an athlete may, in the Czech Republic, be considered from a tax perspective as a self-employed person, but not in the case of team players who receive fees from their clubs. Our initial hypothesis, that the activity of team players should be taxed under the income from self-employment, has been partially confirmed regarding income from sponsors, however it was proved false in regards to income from clubs.

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1. The article comes out of the results of a project 'Vybrané aspekty přímých daní a jejich interpretace a aplikace v judikatuře' number MUNI/A/0856/2013, funded by the specific research of Masaryk University, which were published in a monograph Michal Radvan, Petr Mrkývka, Jana Kranecová, Michal Janovec & Martina Valachová, Vybrané aspekty přímých daní a jejich interpretace a aplikace v judikatuře (1st ed., Iuridica. Editio Scientia no. 503, Brno, Masarykova univerzita, 2014).

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7. Let's disregard team competitions in team sports – for example Davis Cup, Fed Cup, European Championships of Teams in Athletics.

8. A similar situation in the Slovak Republic is mentioned by for example Čollák. See Jaroslav Čollák, Profesionálna športová činnost: súčasnosť a možné trendy jej vývoja, vol. 63, no. 10, Justičná revue, 1400–1409 (2011).

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10. Fotbal.cz, eSports.cz, s.r.o, Directive on the evidence of professional and non-amateur contracts, http://nv.fotbal.cz/ftp/cmfs/legislativa/stanovy/07_Smernice_pro_evidenci_smluv_2.doc (accessed 10 July 2014).

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12. Act no. 586/1992 Col. on income taxes, as amended.

13. Jiří Sabou, ex-player of Zizkov and Teplice, stated among his costs a fee for his agent who was supposed to negotiate contracts for him in Manchester United, FC Barcelona, Olympique Marseille or AC Monaco even though none of these teams knew nothing about this average Czech football player. This whole matter was addressed by the European Court of Justice in Luxembourg. See Ruling of the ECJ, Oct. 22, 2013, case no. C-276/12 – Jiri Sebou v. Financial Directorate Prague. http://curia.europa.eu/ (accessed 29 November 2013). Also Aktualne.cz, Tomáš Fránek, Šéfa Manchesteru se ptali na nízké daně českého fotbalisty, http://sport.aktualne.cz/sefa-manchesteru-se-ptali-na-nizke-dane-ceskeho-fotbalisty/r~ad5e7aa0c44411e2a2010025900fea04/ (accessed 10 July 2014).

14. According to effective legal norms, it is possible to prolong an employment agreement only twice, shall it be prolonged one more time, the employment contract must be concluded for indefinite time.

15. Act no. 455/1991 Col. Trade Licensing Act, as amended.

16. Ruling of the Supreme Administrative Court, Nov. 29, 2011, case no. 2 Afs 16/2011-78, in this case, the court examined the activity of a professional hockey player and concluded that 'the activity of a professional athlete cannot be easily subordinated under "employment" in the sense of the Labor Act'. It cannot be therefore excluded, resp. considered illegal the conclusion of other than labor contracts between players and their clubs. It is disputable, whether it is necessary to interpret the term 'employment' and forget to deal with the similar but tax term 'employment'. This simplification then leads to a faulty conclusion of the court, which states: '… it is generally accepted in practice that professional athlete may – from a tax point of view – act as self-employed … To divert from this generally accepted practice, there would have to exist a very strong reason based on for example an explicit change of the legal norms. Otherwise it is possible to argue by way of certain level of normative power of facticity.' However this conclusion is wrong because the fact that something is happening illegally for a longer period of time cannot mean that this behavior shall become in accordance with the law.

17. See ruling of the Supreme Administrative Court, June 1, 2005, case no. 2 Afs 176/2004-140.

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Supporting the performance and efficiency of governance – Expediency control and performance measurement in SAI's audit

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Abstract: The main goal of the management of public funds and public assets is to promote social well-being. In order to realize this main goal and to evaluate individual measures, it is indispensable to sub-categorize the primary objective, determine the hierarchy of objectives, assign measurable criteria to the objectives, evaluate performance, and provide feedback. By performing objective, professionally-sound evaluations and providing feedback, independent audits contribute significantly to the improvement of performance. A basic requirement of all audits, however, is the auditability of the objective's implementation and effectiveness, and the definition of performance criteria for each objective. A large part of the proven methods and tools used in the for-profit sector for performance assessment can be applied successfully at organizations of the public sector as well. The audit findings of the State Audit Office of Hungary (SAO) confirm that the management and control systems of both public entities and state-owned enterprises need to be improved significantly in order to ensure good governance and public sector management. Indicators that capture and adequately measure the effectiveness and efficiency of public spending are important prerequisites for the efficient management of public funds and for the planning process.

Keywords: state audit office; audit; performance assessment; expediency; effectiveness; efficiency; public sector management; good governance

1. Introduction

The management of the diverse and complex economic, social, and environmental problems of our time presents a serious challenge for public management and governance. Programs and public services with high financing requirements must be implemented and provided from a limited amount of public funds, while there is also a need to meet the expectations of an information-intensive, competition-oriented society.

Mainly as a result of economic and financial crises, the state appeared as a market participant in several segments, increasing its participation, among others, in the banking sector and the energy service market (see for example, Turcsányi, 2008, or Domokos, 2015). In these areas, both sectoral governance and organization management are determined by different aspects than those seen at budgetary institutions. Companies have to be managed under market

conditions, in a continuously changing environment, with revenue and profit targets in mind. As a result, the management of state-owned companies is often forced to rely on the same management techniques as those applied by other market participants.

Although public entities do not operate under market conditions and typically enjoy monopolistic positions, they are linked to the private sector in several regards (purchases, recruitment, and certain services, e.g. deliveries). The hierarchy of objectives and the operational frameworks are fundamentally defined by legislation. Consequently, the organization is far less flexible than a business association, and it is at the discretion of the manager[1] to fill these frameworks with substance. In addition, the manager of a public sector organization needs to consider rapid shifts in the environment that pose numerous challenges, as regulatory changes tend to follow them with a lag or sometimes belatedly. Accordingly, public sector managers are increasingly expected to have innovation skills and an ability to promote risk management and organizational learning, and as such, their role goes far beyond a passive type of organizational management focusing solely on regulatory compliance.

It is clear, therefore, that governing a public entity and managing a state-owned company both require adequate managerial skills. The definition of the entire objective hierarchy, the optimization of organizational processes, performance-oriented, responsive and flexible operations, high-quality services, and the improvement of employee performance constitute the backbone of management expectations. In addition, with respect to public spending, management is required to meet the expectations of all stakeholders, i.e. households using the public services, market participants, civil society, etc. In our information society, the ability to monitor governance, the transparency of management, social dialogue, and results are basic requirements. This calls for a new approach on the part of public sector managers. The principles of 'good governance' reflect this new approach.

The basis of good governance is the thoroughly planned, effective, efficient, and responsible management of public funds. By controlling this process, state audit offices provide objective assessment and feedback on the performance of public spending. After the presentation of the theoretical background related to these qualitative aspects of good governance, this paper explores the subject based on the experiences of the State Audit Office. The paper provides a number of examples to demonstrate what happens when the objectives of

public spending are not defined adequately, or when no outcome criteria have been assigned to the pre-defined objectives. It shows the implications of a failure to collect data, which leads to a failure to monitor and measure the implementation of the objectives, and thus the use of public funds is either not expedient or it is impossible to determine whether it is expedient and effective. In the course of its performance audits, in many cases the SAO itself defined indicators in order to ensure its ability to assess the effectiveness and efficiency of public spending. This, however, raises several problems to be discussed later in the study.

2. Questions related to the effectiveness of governance

2.1 How does effectiveness relate to good governance?

Nowadays, good governance is expected to strive for reform of public administration and the enforcement of modern management and institution-organizational aspects (Pulay, 2014). Policy-makers and decision-makers often meet these expectations in consideration of the corporate governance principles and practices applied in the for-profit sector, even though the two sectors show significant differences. The hierarchy of objectives is wider and more sophisticated in the case of public spending, and social expectations necessitate tighter ethical requirements. If so, how can a management approach tailored to profit-oriented organizations gain ground in the non-profit sector? For what purpose and to what extent can the public sector adopt these management techniques?

Since the 1980s, public sector management in developed countries of the world had been subject to considerable changes. This can be attributed to the economic problems arising in the aftermath of the oil crisis on the one hand, and to shifts in the operating environment of governance on the other hand (Turcsányi, 2008). Establishing a cost-efficient state to reduce the burdens of economic participants became an increasingly important objective. The outbreak of the financial crisis in 2008 and the ensuing surge in public expenditure (as a percentage of GDP) pushed this objective back into the spotlight (Felméry, 2014). In addition, the continuous improvement in the quality of market services raised the expectations set for public services, which

also motivated the public sector to improve effectiveness and efficiency (Hajnal, 2004). The information technology boom and the development of the internet also called for the application of modern technologies which, in turn, gave rise to a dramatic development in management information systems and thus improved the transparency of the operation of the public sector. All of this incited policy-makers to adopt novel approaches to the problems of governance. Essentially, they were aimed at reducing state participation and improving the effectiveness, efficiency, and economy of the public sector and enhancing the quality of public services primarily by the adaptation of the management philosophies and techniques applied in the private sector.

The guiding principles of the new public administration mainly reflected the impact of the New Public Management (NPM) movement, but the new approach to public sector management also drew from the theories of neoliberalism,2 Public Choice,3 and neo-taylorism.4 According to Hajnal (2004), the government and administrative reforms implemented in recent years entailed the adoption and dissemination of NPM principles and methods (both among certain multilateral organizations such as the OECD – PUMA/PGC or SIGMA,5 and the developed countries of the world, including Hungary). An important component of the NPM is to establish a new culture for public administration and, in a broader sense, governance. This culture, 'is based on partnership and individual initiatives rather than (excessive) state power, effectiveness/performance rather than regularity, cooperation and flexibility rather than command and hierarchy and the values of (market) competition rather than (state) monopoly' (Hajnal, 2004). The effect of the NPM was also perceivable – and can still be perceived – in Hungarian administrative reform processes, such as the vertical breakdown of ministries (into a strategic control center – ministry – and a number of subordinate organizations), which was a typical structure until 2011–2012. Other examples include the connection of the private sector into the public service systems (e.g. through PPP projects and outsourcing), the performance assessment of public service employees, the system of ex ante and ex post impact assessment, and the application of quality assurance (e.g. ISO).

Subsequently, the adaptation of corporate management to the public sector in general, and the application and applicability of the NPM in particular, were subject to widespread criticism for several reasons. The challenged areas included, for example, problems surrounding the output measurement of

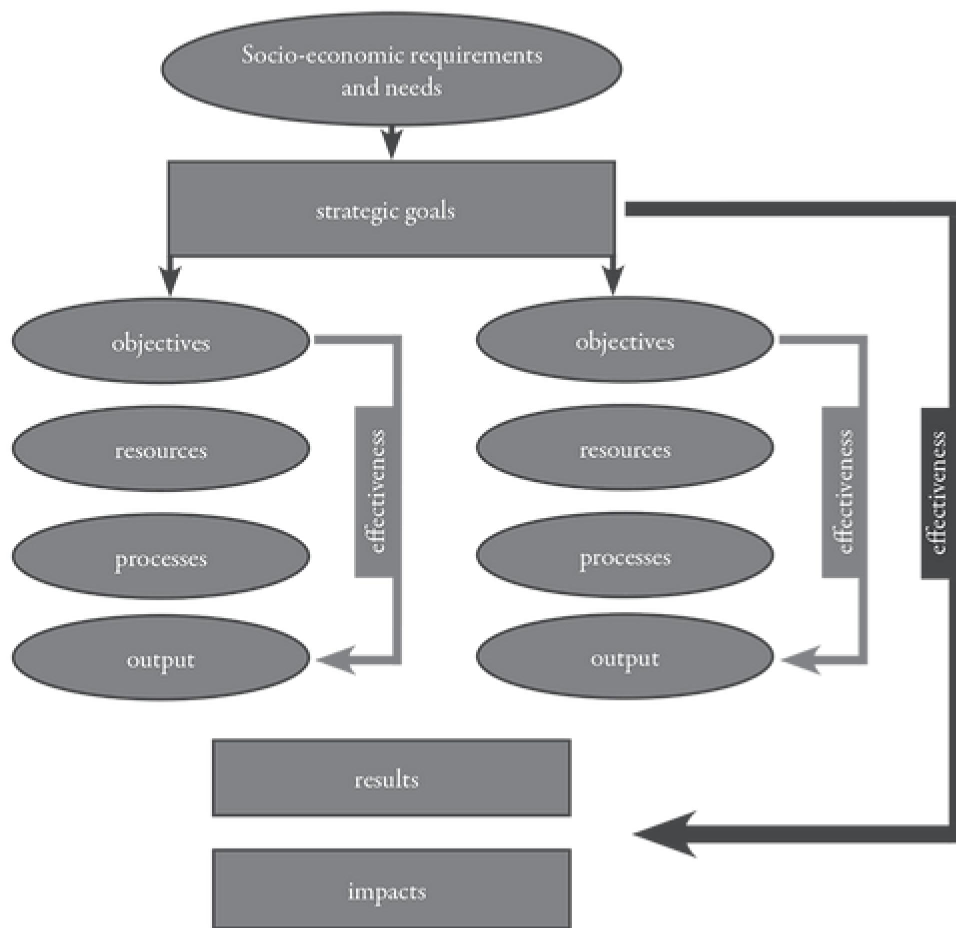
government activities, or the complexity and uncertainty of the issue of effectiveness and efficiency. In other words, what was to be considered the result of the activity, and whether the result that was achieved could be considered a positive result. This notwithstanding, the main tenets of the movement dominate public management to this day, and they are also reflected in some of the principles of good governance.

Indeed, effectiveness, economy, efficiency, and high-quality public services are the prerequisites of good governance. This is emphasized in the 2014 report of the OECD[6] and in several national-level recommendations and guidelines.[7] In short, objectives and measurable effectiveness criteria should be assigned to public spending. It must be ensured that each component – from addressing a problem through planning, decisions and implementation to feedback – is carried out transparently and checked against measurable effectiveness criteria. Only this can enable state audit institutions to ascertain and control whether the management of public funds is driven by real social needs, and if public spending indeed serves the interests of the public.

Objectives and results should be determined at multiple levels; therefore, expediency and effectiveness can be interpreted at several levels. This is illustrated in Chart 1.

As a first step, governance defines the strategic objectives to be achieved (e.g. to increase the activity rate) on the basis of socio-economic needs. Strategic objectives are usually defined (as policy strategy) in legislation (e.g. employment policy strategy). Strategic objectives are broken down to sub-objectives, which comprise a hierarchical system (e.g. easing labour market entry for inactive workers, including, for example, the establishment of a counselling network; increasing the number of new enterprises, including, for example, the introduction of tax benefits). Harmony between the objectives defined at the various levels is ensured by the hierarchy of objectives. Relying on the resources available, the given process generates an output (e.g. a new tax law). The processes serving the achievement of the strategic objective end with a certain result (e.g. 10% of mothers on maternity leave return to the labour market). The impacts arising from the implementation of the programme in other areas (e.g. negative/positive externalities) must be assigned to the results (e.g. number of employees crowded out by new labour market entrants).

Chart 1. Multi-level interpretation of effectiveness



Source: Own editing

In order to gauge the extent to which the public funds allocated to the given programme served the implementation of the pre-defined objectives, the effectiveness of the programme should be examined. While countless questions may arise regarding the measurement of effectiveness, it is extremely important to examine effectiveness at different levels in any case, depending on the level of the objective to which it can be linked. Problems surrounding the effectiveness should be explored and analyzed. On the one hand, this is performed by management as part of its monitoring duty, while the external assessment of performance is carried out by the shareholders, the controlling

organization or the proprietor, or – as an independent organization – state audit offices by way of objective and professionally sound audits.

In democratic and rule of law states, the final control of the management of public funds and public assets is performed by supreme audit institutions (SAIs), independently of the executive power. Essentially, SAIs can contribute to good governance in two different ways (OECD, 2014). First, through their existence and operation they reinforce the effectiveness of bodies responsible for government oversight and for public financial management. Professional and independent SAIs strengthen the accountability chain, which is required to ensure that public interest prevails over personal interest in decision-making. Alternatively, through performance audits SAIs assess the effectiveness, efficiency, and economy of individual programmes and hence, provide feedback on their performance. The fundamental mandate of supreme audit institutions responsible for financial and economic oversight is to strengthen public confidence in state institutions, primarily with respect to the fair, effective, and expedient management of public funds and public assets. This affects all other areas of citizens' confidence in their government.

Objective and reliable SAI assessments contribute to demonstrating that government decisions are well-grounded, and play an important role in informing decision-makers of the government and parliamentary representatives. In this context, SAIs verify the proper use of budgetary resources, the fulfilment of public policy objectives, whether the implementation of the policies comply with legislation and the objectives, and, in general, whether the performance of the government succeeded in implementing strategic objectives.

Upon performance audits however, SAIs often encounter the problem that the legislation providing the regulatory framework of public spending fails to provide the objectives to be achieved and the criteria against which objectives can be deemed as achieved. This poses severe problems in the evaluation of individual public projects as, in the absence of objectives and criteria, the objective of the government intervention must be presumed, and indicators for its measurement must be defined subsequently. The selection of objectives and indicators is a key factor. Indeed, the definition of which indicators must be met in order to reach a certain goal may determine the outcome of the assessment as a whole – some indicators could be relevant to certain goals, while others could be irrelevant. In addition, the selection of the indicators is

limited by the quantity and quality of the data available. Policy-makers can support and limit the evaluation of the use of public funds to a clear framework if they determine the objectives of government interventions in advance, allocate measurable indicators to them, and ensure the regular collection and processing of data required for the calculation of the indicators.

2.2 Regulatory environment pertaining to the expediency and effectiveness of public spending in Hungary

Below we provide a brief overview of the regulatory environment that defines the expediency, effectiveness and efficiency requirements of public spending.

It is a reasonable expectation of public spending that it should generate social benefits[8] (increase public good); therefore, the objective of public spending should always be measurable against a social utility target value. At the macro level, the objectives of the use of public funds are fundamentally determined by regulations and regulatory instruments under public law.

The basic principles of the strategic governance of the government are laid out in a government decree.[9] The decree supports the government's goal to ensure that strategic thinking becomes a fundamental element of organizational operations, and that the organization becomes capable of: concerted, high-quality strategic planning; identifying its short and medium-term objectives; defining the tasks and assigning responsibilities; as well as monitoring and assessing the implementation of the tasks and the pre-determined objectives. The legislation defines the hierarchy of strategy papers,[10] the individuals responsible for drawing up the documents, the principles of follow-up, evaluation and review, and rules pertaining to individual document types.

Sometimes, however, even the legislation fails to define the regulatory objective, which renders the interpretation of the expediency of public spending either difficult or impossible. Hungarian regulations do not include a requirement for the definition, application, and monitoring of effectiveness, efficiency, economy, or other performance indicators pertaining to the entire group of public fund users. By contrast, the legislation defines in detail the amount and the main allocations of the public funds available (prevailing Act on the Budget and the budget decree pertaining to local governments) and the

criteria for the use of public funds by budgetary institutions. They state that the economy, efficiency and effectiveness of the use of public funds and public assets must be ensured. However, the meaning of these concepts is unclear.

Besides legislation or in-house regulations, the performance criteria of the given organization can be enforced by other means. For example, by the expectations of the controlling body, the proprietor or the shareholder. This includes the public service contract concluded by the state and the public service provider, which is a written contract for the performance of a public function or a part thereof on behalf of the organization.[11] In addition to the basic requirements of the performance of public services, the contract also stipulates quality requirements and conditions.[12]

Obviously, the existence of the regulation cannot ensure effective and efficient operation in itself; it only provides a framework for it. The head of the organization is responsible for filling these frameworks with substance.

The greatest deficiency of the regulation, therefore, is the fact that it fails to enforce the declaration of the objectives, expected results, and performance criteria of public spending at the systemic level. It is therefore impossible to measure the subsequent effectiveness and efficiency of public spending. As has been confirmed by the findings of the State Audit Office, the deficiencies suggest that the social utility of public spending falls short of the level that could have been achieved by a clear definition of the objective and by result-oriented operation. Recognizing this problem, regulatory processes commenced in relation to a segment of the economic agents managing public funds: public administration organizations. These processes shift the system of public spending specifically toward strategic control and result-oriented operations. (Apart from this, there are a number of other policy programmes and government strategies where regulations have commenced. However, they are not targeted at ensuring the effectiveness and efficiency of public spending or demanding follow-up and evaluation).

3. Findings of SAO audits

The audits of the State Audit Office measure different aspects of performance to ensure that public funds are managed in an orderly, growth-stimulating fashion. The methodology of the SAO's performance audits are based on the INTOSAI standards (ISSAI 100 and ISSAI 300). Performance auditing promotes the transparent operation of organizations by providing, based on

the audit evidence, an independent and authentic perspective, by issuing conclusions for the targeted users of the audit results, and by offering an insight into the implementation and outcomes of audited activities related to the management of public funds and public assets. Accordingly, it provides useful information while serving as a basis for the acquisition of knowledge and performance improvement. Performance audits support the responsible parties in the improvement of accountability by offering new evaluation criteria. (SAO, 2015)

In addition, the SAO's compliance audits and results of the Integrity Survey13 also identified effectivity problems. These experiences can be used in the planning process of performance audits, too.

3.1 Audit findings of SAO's performance audits

The performance audits of the SAO shed light on a number of problems that derived from inadequate indicators, backtesting, or the inadequate definition of objectives. Németh and Kolozsi (2015) processed the audit findings, and the possible problems arising during the audits were found to be the following (the number in brackets correspond to the relevant audit report):

a) Objectives have not been set or proved to be deficient (e.g. the reorganization of psychiatric health care) [No. 1286].

b) Objectives have been set but the system of indicators and criteria designed to measure the successful implementation of the objectives is either missing or inadequate [subsidy scheme of public employment, No. 13097].

c) Objectives have been set, an indicator system has been designed, and a set of criteria have been developed and applied. However, there is no follow-up and the reasons for deviations are not analyzed [implementation of rural development objectives, No. 1293].

d) There are simultaneous deficiencies at multiple levels with respect to the definition of objectives, the performance criteria, as well as backtesting [financial management of business associations in majority state/local government ownership].

The following will examine each of these examples.

3.1.1 Reorganization of psychiatric care: consequences of the lack of efficiency objectives

In 2012, the State Audit Office conducted a performance audit with regards to the reorganization of psychiatric care. The purpose of SAO's first-time audit of psychiatric care was to evaluate whether the resources being spent on reorganizing psychiatric care were appropriately utilized and whether the reorganization was more cost-effective, and provided higher-quality, more easily accessible service. The audit covered the period between 1 January 2006 and 30 September 2011.

The audit found that goals had not been set at the macro level, neither in terms of effectiveness nor in terms of efficiency of psychiatric care (neither in the professional or public health, nor in the financial areas); the relevant indicators had not been designed, and therefore, it was not possible to monitor and evaluate the effects of the reorganization.

Due to such major deficiencies in planning, severe problems emerged in the already distressed health care system. For example, closing down the National Institute of Psychiatry and Neurology eliminated the national institution for psychiatric care that was meant to provide a comprehensive framework for individual types of psychiatric care, and the institutions designated to take over the tasks were unprepared. As a result, a substantial amount of financial liabilities accumulated.

The audit found that even though several government initiatives had been announced for the reorganization of healthcare in the period of 2006–2011, they did not specifically determine the tasks and size of psychiatric care. Hospital restructuring in 2007 terminated inpatient psychiatric care in 11 hospitals, curbed the number of total active beds in psychiatry by 20% nationwide, and closed down the National Institute of Psychiatry and Neurology – which was considered to be the apex of the mental health profession – without any surveys with respect to the regional distribution of psychiatric diseases, or to the expected impact of the decisions. In addition, there was no consultation with professional organizations or patient advocacy groups, and the health care system was unprepared for the dramatic change entailed by the reorganization. Although the goal of the reorganization – including the termination of the national institution – was to streamline the

care system, the lack of adequate professional planning deteriorated the conditions of psychiatric care. Bed cuts in inpatient psychiatric care as part of hospital restructuring did not address earlier capacity imbalances, nor were there any legal provisions on adjusting capacities in specialist outpatient care. The elimination of the National Institute of Psychiatry and Neurology – a top quality professional institution – was an unreasonable decision. Decision-makers failed to survey the financial implications of the institution's elimination in advance, and the institutions designated to take over the tasks were unprepared. The target date for the institution's liquidation, therefore, was delayed by a year.

Starting from 2008, the Ministry of Health, in conjunction with various Hungarian psychiatric professional organizations commenced the development of a criteria system suitable for measuring performance. However, the evaluation of cost efficiency and effectiveness did not have an established and applied methodology at the time, which resulted in the State Audit Office developing its own indicators suitable for performance assessment during the audit. Through the analysis of these indicators, the SAO found that the cost-efficiency and effectiveness of public spending on psychiatric care deteriorated in comparison to 2006. The primary reasons behind this deterioration were capacity imbalances in psychiatric care, and in the absence of disease registers, health care and social care capacities were not based on morbidity data. There was no organized care regulating services for patients, and regional access was unevenly distributed. Moreover, in the absence of accurate disease registers, no information was available on the actual prevalence of psychiatric disorders by region.

Reorganization has failed to lead to a more even distribution of hospital capacities or create a more sustainable care system better geared to treatment needs.

In summary: the centrally executed reorganization of the institutional system did not have a pre-determined hierarchy of objectives and the expected results were not defined; therefore, it was not possible to assess the objectives of the public funds spent on the project or identify the social utility of the reorganization. In such situations, there is a concern that objectives are hastily determined, reflecting immediate needs and interests rather than as a result of a thorough and concerted planning process with maximum consideration to social utility. In the absence of a hierarchy of objectives, it is impossible to

measure the expediency, effectiveness, and efficiency of the programme as a whole, which ultimately calls into question the expediency, effectiveness, and efficiency of public spending.

3.1.2 Public employment, and consequences from the lack of an appropriate indicator system and criteria

As it has become apparent, the establishment of a hierarchy of objectives is indispensable for expedient, effective, and efficient operations. The example presented below illustrates the possible implications of deficiencies in the indicators designed to measure the achievement of goals, the relevant criteria, and the information system supporting their measurement.

In September 2013, the State Audit Office published Report No. 13097 on the performance audit on the efficiency and effectiveness of the subsidy scheme of public employment and the related training programs. The objective of the audit was to assess the effectiveness and efficiency of the public employment system which had been in place between 2009 and 2012 Q1 (including the related subsidy scheme and training system and the changes introduced). This audit specifically sought to evaluate the cooperation between local governments and labour organizations efficiency and effectiveness in facilitating the return to work, and improvement of labour market positions, of individuals experiencing long-term unemployment with low-level academic qualifications capable of working through public employment or training schemes.

The audit found that the strategic objectives regarding public employment in the review period had been set (in several, interdependent documents), and from 2011, specific goals and tasks were defined in relation to the strategies. However, they either did not or insufficiently set the effectiveness and efficiency indicators and criteria suitable for confirming the implementation of the objectives, and allowing for continuous monitoring and ex-post evaluations. The entire infrastructure of the measurement was also either deficient or missing. Due to the lack of a comparable indicator system measuring the effectiveness and efficiency of the public employment system in place, there was no central evaluation.

Due to these limitations, wherever the quality and quantity of the data available allowed, the State Audit Office derived its own indicators from the pre-determined objectives, and drew its conclusions on the basis of the analysis of these indicators. As a result, the SAO found that the number of persons involved in public employment doubled from 2009 to 2011, which means that the public employment system was effective in supporting unemployed individuals in obtaining public employment, and in accomplishing the strategic objectives regarding subsidised employment. Public employment had a positive effect on both the employment rate and the unemployment rate (improving the employment rate by 0.8–1.1% and the unemployment rate by 1.4–2.0%). In addition, the subsidy scheme efficiently contributed to involving those of productive age and receiving social benefits in employment. Goals which were also employment policy objectives.

Based on the audit findings, the SAO issued a recommendation for developing a criteria and indicator system suitable for measuring the performance of public employment, and for setting up a monitoring system for the implementation of the pre-determined objectives.

Another problem explored by the audit was the fact that, owing to deficiencies in the continuity, timeliness, and reliability of registries and disclosures, the information system of public employment did not support regular reporting and feedback to policy-makers in the review period. In some areas, the quantity or quality of the data available was insufficient for the monitoring process. For example, they did not collect data systematically with respect to the exits of public workers from the open labour market. This would have been required for comprehensive government analyses, but no comparable data was available with respect to the entry of public workers into the open labour market (neither at the central nor at the local levels). Consequently, it was impossible to assess the effectiveness and efficiency of the efforts to facilitate the return of public workers to the open labour market. With that in mind, the SAO recommended the development of a data reporting system that provides reliable data for the evaluation of the implementation of public employment objectives.

In this case, it is not possible to decide whether the objectives were implemented effectively and efficiently, because in the absence of pre-determined indicators and criteria it remains unclear which outcome would have been considered effective and efficient by those who set the objectives. In

any event, the SAO found that the use of public funds contributed to the reduction of the unemployment rate and a significant increase in the number of public workers. Additionally, the efficiency of the public employment subsidy system improved by 2011 from the aspect of the central budget (i.e. the per capita subsidy amount declined with a simultaneous increase in the number of public workers). Ultimately, the results achieved by the use of public funds contributed to the implementation of the pre-determined objectives.

3.1.3 Implementation of rural development objectives; consequences of deviation from the objectives

Sometimes, even though strategic objectives are defined, the related, multi-level sub-objectives are set, and the adequate indicators and criteria are put in place, during implementation the program is modified (e.g. in terms of funding, the criteria system or target groups) on the basis of priorities that are not in line with the original objectives. Consequently, its effectiveness and efficiency fail to achieve the pre-determined level.

In August 2012, the SAO published its report on the performance audit on effectiveness and efficiency of the utilization of funds for the implementation of rural development objectives, and the strengthening of the role of local communities in the improvement of the quality of life in rural areas. The main purpose of the audit was to assess whether the utilization of funds allocated to the implementation of rural development objectives to improve the quality of life in rural areas, to encourage diversification of the rural economy, and to strengthen the role of local communities, was effective and efficient in the period of 2007–2011.

The audit found that the objectives of the New Hungary Rural Development Program (NHRDP) were in line both with the objectives of the National Development Policy Concept and with EU requirements. Output, result, and impact indicators were defined to measure the implementation of the targets and impacts (e.g. number of villages and micro-enterprises supported, number of new jobs, total amount invested, and net number of new jobs created as a result of development).

However, problems arose during the implementation of the program as a result of the low number of completed projects, the commitments undertaken in relation to the funding, and the limited rate of payments. The programme was modified several times, but the substance of rural development objectives remained the same. Thus, for example, there was a shift in the allocations between the measures aimed at improving the quality of life in rural areas and encouraging the diversification of the rural economy: more than a half of the funds allocated to the measure aimed at the creation and development of micro-enterprises was reallocated to the measure targeting the improvement of the image and attractiveness of rural life and the quality of services. This modification was contrary to the objective set out in the NHRDP's economic development programme, which was intended to strengthen micro-enterprises operating in rural settlements and to improve local employment. Increasing the resources for improving the image and attractiveness of rural settlements and the quality of services rendered did not contribute to managing the social tensions generated by the restrained economic activity of the population living in rural areas, by the low employment rates and hence, by the limited amount of income.

The reorganization of resources was not accompanied by an overall review of indicators intended to measure the implementation of the objectives (e.g. number of micro-enterprises supported, total amount invested, number of multifunctional service centres, etc.). The indicators were modified only in part, and without underlying calculations and impact assessments.

The monitoring committee was tasked with monitoring and evaluating the program results on a continuous basis. However, the efficiency of this, which was designed to supervise the quality of the execution – partly as independent of the executive organizations – was low.

In summary, although the objectives and the related effectiveness indicators were defined at the start of the project, during subsequent modifications of the program – justified by reasons irrespective of the project – the indicators intended to measure the results and the resources ensuring that such indicators were achieved were not significantly changed, and the results, performance, and impacts expected from the support system received less attention. Consequently, the originally defined regional development and convergence objectives were implemented only partially and therefore, the expediency,

effectiveness, and efficiency of public spending fell short of the originally desired levels.

3.2 Audit findings pertaining to state-owned enterprises[14]

The SAO reports prepared on the macro-economic correlations of fiscal processes (the latest one of which was issued in September 2015) pointed out that the ratio of public spending on economic functions to GDP had increased continuously since 2011. The increase in expenditures allocated to economic functions primarily reflects the high absorption of EU grants and state acquisitions. This trend also reflects the increasing economic participation of the state, which, according to Domokos (2015) opens up new opportunities (e.g. increasing national wealth, development of depleted but not replaced assets, increasing economic strength of the state), but also carries a certain degree of risk. For instance, the need to ensure the funding required for a more active participation in economic functions entails the reallocation or withdrawal of resources, which may pose funding risks over time in other areas (e.g. among those receiving reduced budgetary subsidies or subject to special taxes, as well as in areas receiving a smaller proportion of EU transfers). In addition, a competition for the acquisition of public funds materializes between traditional state functions and the economic functions of the state.

The fact that the state is at the same time a legislator, shareholder, and supervisor in an increasing number of economic areas may also be a risk factor. Being responsible for all three functions simultaneously gives rise to a conflict of interest between, for example, the legislator and the shareholder (the creation of a regulatory environment encouraging competition vs. the crowding-out of competitors and monopolistic endeavours). The change in ownership implies that, through its business associations, the state now operates in markets where its presence was previously limited to a regulatory role. Accordingly, there is a risk that the level of expertise required for the management of a state-owned company competing under market conditions is insufficient, and thus the operation of the organization is ineffective or inefficient. This increases the risk of losses and wasteful operation. These risks may be mitigated by an adequate regulatory environment and by the exercising

of ownership rights (e.g. shareholder's control), and by facilitating transparent and performance-oriented operations.

In consideration of the risks involved, the auditing of the financial management of state-owned enterprises (SOEs) has become a relatively new but increasingly important area of SAO audits (e.g. transportation companies, district heating providers, waste management companies, water and public utility companies, theatres). The audit findings contribute to improving the relevant regulations, as well as SOE's management and processes for exercising ownership rights and ultimately, to improving the state's performance.

The SAO performs the assessment of the companies in the context of compliance audits. Propriety audits are performed where certain issues cannot be judged on the basis of legal provisions or where there are clear deficiencies in legislation. Performance audits are intended to establish whether the stewardship of public funds and public assets complies with the principles of effectiveness, efficiency, and economy, and whether there is room for improvement. Typically, however, there are no effectiveness requirements in place (set by the exercisers of ownership rights, the bodies of the company, or its management) to determine the objective to be achieved and the desired impact. Therefore, in most cases the accountability of public spending is limited to its regularity and propriety. SAO audits are primarily intended to verify and evaluate financial standing, asset management, the existence of internal control systems and the regularity of the areas constituting an integral part of these items. At the same time, audit findings allow us to identify critical areas that may not be separated from the scope of responsibility of management and the exercisers of ownership or oversight rights.

SAO audits pointed out that deficiencies in the management of state-owned companies generate losses in numerous areas, including financial and non-financial losses (e.g. loss of confidence, moral hazards). These losses stem from various sources and could reflect deficiencies in the exercising of ownership rights and management-related problems. The materialization of deficiencies at multiple control levels may amplify one another, leading to significant economic, effectiveness, or efficiency losses.

3.2.1 Deficiencies arising in the exercising of ownership rights

Appropriate exercise of ownership rights, tight ownership control, and the definition of the direction of public asset management are indispensable factors in responsible public spending and asset management. Audit findings point to a lack or ambiguity of directives regarding the use of public funds and public assets (e.g. the National Asset Management Directives defining the strategic and annual frameworks for the responsible management of state property, or the Annual National Asset Management Programme have not been completed). Moreover, the exercise of ownership or oversight does not fulfil its intended role in several areas (definition of performance criteria, reporting system, ownership control, and evaluation). Audits and analyses on areas playing a key role in terms of competitiveness (acquisition and utilization of knowledge, investment projects, inexpensive energy, employment, market organisation, and sustainable development) found evidence for the absence of targeted indicators (indices) suitable for measuring results, direct and indirect benefits, and pointed out – in the case of the use of domestic funds – the lack (or deficiencies) of monitoring systems ensuring reliable and up-to-date data reporting and feedback. The SAO has drawn attention to these problems on several occasions, and identified the risks entailed.

Ownership control is a particularly important item of ownership rights which, in the case of local governments, is typically manifested in the activity of the Supervisory Board. The primary asset manager (Hungarian State Holding Company) monitored the activity of the companies primarily on the basis of controls relying on requested data disclosures. However, it failed to perform on-site inspections regarding the financial management, preservation, accumulation, and use of public assets. The company's disclosures were insufficient, and problems were detected with respect to the owner's reporting systems as well (non-compliance with regulations, failure to provide the required information, failure to demand reports), which impaired the enforcement of transparency.

The Supervisory Boards discussed and approved the annual business plans and the annual reports. However, they usually did not inspect – for the protection of the owner's assets and public interest – changes in wealth, the financial management of company assets, and stewardship of the state property entrusted to the company.

In order to ensure the accomplishment of the objectives, clear effectiveness requirements must be defined for management, and the fulfilment of these

performance criteria must be monitored and evaluated on a continuous basis. In case of deviations, the owner must take the necessary measures. Evidence shows that the performance assessment system of corporate managers is not consistent, and it lacks a related, efficient-incentive system.

With regards to ownership control, in addition to its recommendations based on the audit findings, the SAO also issued letters of warning, advising the exercisers of ownership rights to (among other things) review the financial management of the business association, and – in this context – define expectations regarding the content of business plans and reports, and to review and manage the accounts receivable of the business association. The SAO also advised the owner to define – in the context of exercising its ownership rights – a set of criteria to measure, for example, the efficiency of public service functions or professional standards for evaluating service levels for the company.

3.2.2 Management of state-owned companies

The audits found that, in many cases, the financial management of the companies did not comply with statutory requirements (e.g. important accounting policies were missing, prime cost calculations were unfounded or missing, the requirements of accounting separation were violated). Severe regularity and financial management problems went undetected in many cases; neither management, nor the exerciser of ownership rights, took measures to reduce the risks arising from these problems, and the Supervisory Boards failed to raise attention to the risks jeopardizing the implementation of the objectives.

For the most part, business plans did not include criteria pertaining to the effectiveness, economy, and efficiency of financial management and professional performance. In the absence of pre-determined criteria, the performance of the company's management cannot be measured, and the loss-producing or profit-generating areas cannot be identified. In numerous cases, the plans did not include detailed information about the scheduled projects. Therefore, it is impossible to make informed decisions regarding the allocation of public funds or investment projects.

The SAO found that, in many cases, the internal regulations pertaining to prime cost calculation did not adhere to legal regulations in the case of companies providing public services. This issue is not only important from the perspective of compliance with the Act on Accounting. Indeed, another important function of prime cost calculation – in the economic sense – is to support the decision-making process. In the case of business associations performing public functions and providing public services, there are numerous areas where it is impossible to make well-founded and forward-looking decisions in the absence of adequate prime cost calculations. These areas typically include the execution of planning tasks, price formation, cost analysis, and calculations providing the foundation for economic decisions–indicators designed to measure internal performance. These areas are also within the management's scope of responsibility and, through the approval of the business plans, they are of decisive importance from the perspective of the supervisory exerciser of ownership rights.

4. Conclusions

In several cases, the audits conducted by the State Audit Office of Hungary shed light on general problems that may give rise to risks that could potentially jeopardize the achievement of policy or social objectives. The audit findings of the SAO confirm that the control systems of both public entities and state-owned enterprises need to be improved significantly in order to ensure good governance and public sector management. This calls for a paradigm shift, and new horizons should be opened up in the public sector management approach. It is indispensable to ensure the transparency, publicity, and measurability of the public sector management's performance, because this is the only way to ensure effective, efficient, cost-effective, and sustainable public management, and to also increase social well-being.

First, the regulatory environment should be improved to identify objectives, to specify the expected performance and to develop the indicator system related to public spending. The owner must define the criteria for the implementation of objectives and sub-objectives in a manner that ensures the objective execution of performance assessment and control. At the same time, objectivity requires reliable databases, which are currently not available in the whole sector.

Parallel to this, it is also essential to improve the regulations pertaining to management along the lines of new aspects. The ethical requirements set for public managers should be tightened to properly reflect the fact that they act on behalf of the community, bearing responsibility for public property and for safeguarding the future of the community. Public confidence in management must be earned and retained. Good managers act as an example for all and do everything in their power to ensure that the organization entrusts them to fulfil the public purpose for which it was established.

The State Audit Office, as a supreme audit institution, plays a prominent role in the renewal of public management. Its performance audits are designed to evaluate the use of public funds focusing on expediency and effectiveness, enforcing its transparency and the measurability of performance. The execution of performance audits, however, is often impaired due to the lack of the required indicator system. Therefore, in recent years the SAO has supported – and will continue to support – the enforcement of the expediency/effectiveness/efficiency requirement in the planning, implementation, and evaluation of government objectives through the publication of a series of performance-oriented studies.

In its advisory role, the SAO has often called the legislator's attention to problems surrounding the effectiveness- and efficiency-based assessment of public spending, and issued a number of recommendations. Some of the proposals pertained to the selection, performance assessment and remuneration of management. The proposal package included the following recommendations:

– the performance of the management of state-owned companies should be evaluated from the perspective of compliance, effectiveness, efficiency, and economy on a continuous basis;

– the ability and activity of the exerciser of ownership rights to evaluate effectiveness should be strengthened;

– managers of state-owned companies should comply with strict ethical and integrity principles; and

– the remuneration system of company managers should be reformed.

The SAO wishes to continue to play a leading role in the creation of a knowledge base in order to enable economic actors responsible for the management of public funds, as well as those controlling and supervising the

process, to safeguard public funds and public assets in an ethical and highly professional manner.

References

1. Certainly, the frameworks imply different things at different management levels; moreover, even subordinate public sector employees have a degree of independence, and hence, responsibility.

2. According to the neoliberal movement, since competition strengthens the economy, the state should be downsized, public services should be steered to the market and in general, the economic role of the for-profit sector should be increased.

3. In the bureaucracy theory of Public Choice, policy-makers and executive officials seek to maximize their personal utility, and the movement explores the implications of this choice.

4. Taylorism studies the topics of process management and performance improvement.

5. OECD PUMA (Public Management Committee) and subsequently, PGC (Public Governance Committee) were established to provide support to participating Member States in the planning, implementation and evaluation of public policies and public services.

6. Partners for good governance: mapping the role of supreme audit institutions (OECD, 2014)

7. E.g. the 2004 publication entitled The Good Governance Standard for Public Services by the Independent Commission for Good Governance in Public Services, or the publication entitled Principles for Good Governance and Ethical Practice by the Independent Sector in the USA; Good Governance in Practice, Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (BMZ), 2012; International Framework: Good Governance in the Public Sector, Chartered Institute of Public Finance and Accountancy (CIPFA) and the International Federation of Accountants® (IFAC®), 2013; Good governance guide for public sector agencies, Government of Western Australia, 2013.

8. Social utility means the benefits reaped by society as a whole. It consists of direct and indirect components, and considers environmental impacts and, for example, the effects on job creation. It is a broader category than financial utility. It is primarily used for cost-benefit analyses prepared for development projects financed from EU funds.

9. Government Decree No. 38/2012 (III. 12.) on Strategic Governance

10. Strategic planning documents: country forecast, national medium-term strategy, ministerial programme, institutional work plan (i.e. mandatory documents), as well as the long-term concept, the white book, policy strategy, policy programme, institutional strategy and green book (optional)

11. Pursuant to Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organisations (Act on CSOs).

12. As prescribed, for example, by Act XLI of 2012 on Passenger Transport Services or Government Decree No. 317/2013 (VIII. 28.) on the Selection of Municipal Waste Management Service Providers and on the Contract on the Municipal Waste Management Service.

13. The goal of the series of surveys performed annually by the SAO since 2011 has been to identify the risks which may adversely influence the integrity of the given organisations within public sector institutions. In addition to identifying the risks, the survey also maps out the coverage levels of controls serving to manage these risks. In addition to the fight against corruption, expanding the circle of institutions that accept and endorse the integrity-based mentality is another high priority of the integrity surveys. The ultimate goal is to promote cultural change and to create integrity-based institutional operation and to spread thinking in terms of risks in the Hungarian public sector.

14. State Owned Enterprises (SOEs) are enterprises where the state has significant control through full, majority, or significant minority ownership (owned by the central or local governments).

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Case studies

The right to information: Whether or not to publish information on salaries of employees paid from public funds

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Abstract: The right to information is an important instrument for a control of public authority in any democratic state. Ocasionally, however, there may be a conflict between this right and the right to privacy. In this context, the Czech Supreme Administrative Court was tasked with solving the question of whether information on the salaries of employees who are paid from public funds can be published.
Keywords: right to information; right to privacy; recipient of public funds; information on salaries

Ensuring access to information is essential for the proper functioning of any democratic society, and the exercise of public power in a democratic legal state should be open to public debate and control. These principles of publicity, transparency, and openness in the exercise of public authority is recognized and consistently applied in the Czech Republic. And the institute of the right to information significantly contributes to the fulfillment of these principles. 'The right to information is a constitutionally guaranteed right', (Article 17, Czech Charter of fundamental rights and freedoms states [hereinafter 'Charter'1]). This clearly states that the freedom of expression and the right to information are guaranteed, and that state bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore, and the implementation thereof, are provided for by law – namely by Act no. 106/1999 Coll., Free Access to Information. This Act is based on the presumption that all information must be published, unless the law provides an exception.

From this Act, a highly discussed and controversial issue emerged: whether information shall be provided (i.e. published) on the salaries and other benefits of employees who are paid from public funds. Regarding this issue, the Czech Supreme Administrative Court was very clear in judgment no. 8 As 55/2012-

62, dated 22 October 2014.[2] The respective case concerned whether information on the salary of the director of an elementary school should be published. While this was one specific case the judgment is essential, because it provides generalizing (general) conclusions on whether and why such information should be published by employers (those represented by state and local authorities, and various public institutions) if citizens request this information under the Act.

The Supreme Administrative Court dealt primarily with the apparent conflict between the right to free access of information, and the right to privacy. Both are guaranteed by the Charter, as Article 10 provides that anyone has the right to be protected from the unauthorized gathering, public revelation, or other misuse of his/her personal data. According to Article 7 of the Charter, the protection of the person and of his/her privacy is guaranteed, and this may only be altered in cases provided for by law. However the Act on Free Access to Information states that there will be personal data provided on those individuals who receive public finance (a so-called recipient of public funds), to this extent: name, surname, date of birth, municipality where the recipient has a permanent residence, amount, and purpose and terms of provided public funds. A public administration employee receives a salary for his/her work, which is paid from public funds. He/she is therefore considered (by the Act on Free Access to Information), 'a recipient of public funds'. Therefore, the amount of a salary and other financial benefits in connection with the name and surname of the person is personal data that should be published.

How does one reconcile the conflict of these constitutionally guaranteed rights? There is no doubt that the right to obtain information on the recipients of public funds represents a not insignificant interference with the recipients' privacy. Such information is certainly at odds with personal data protections outlined in Article 10 of the Charter, and also in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In a situation which contradicts two fundamental rights, the legislator (the state – i.e. the Czech Republic) must carefully weigh which of them will be given priority; to what extent and under what conditions. The legislator must consider whether the solution to this conflict can be determined on a general level, or whether discretion should be given to the administrative authorities, or courts, for the consideration of individual cases. It should be noted that the

conflict between the right to information and the right to privacy requires (to a certain extent) the prioritizing of one basic right over the other.

The Supreme Administrative Court, after a thorough analysis of the law (including aspects of EU law), concluded that the Act on Free Access to Information does not allow the court to determine which right should supersede the other (ie. to apply the principle of proportionality). While the legislator did favor the right to information of recipients of public funds, the legislator noted that certain information should be completely eliminated (for example, information regarding recipients of pensions or unemployment benefits) and in all other cases only a limited amount of personal data shall be provided, in an effort to provide some privacy to recipients.

The reasoning which led to this conclusion was summarized by the Supreme Administrative Court as follows: 'The basic purpose is to control public power through access to information on the spending of public funds.' It is generally known that the modern state manages a large amount of money, and through public budgets passes almost half of the gross domestic product. These funds are redistributed and used for a variety of purposes, from pensions and other social spending, to a variety of grants and subsidies, to salaries of public sector employees and operating expenses. And there is a strong public interest that these funds be effectively managed and spent in accordance with the law. Besides control through public authorities, a direct control of management of public funds by the citizens is very important because each citizen should be informed of how public power manages public finances. Each power, even democratic, corrupts, and the less it is monitored, the greater the risk of its misuse is. The control of public authorities significantly prevents the abuse of public power and strengthens the democratic legitimacy of the political system. Another purpose is that the findings obtained through the Act on Free Access to Information can be used to effectively reflect of public authority itself. If a fault is detected, there should follow a correction of the behavior and management of public authorities.

Finally, we cannot underestimate the preventive effect of this Act. The fact that the public authority may be exposed to questions from the public which it is required to answer, usually leads to more proper behavior of public power authorities. But it is also beyond doubt that public control can have negative consequences and that this institute could be abused by citizens. However, the court adds that the positives certainly outweigh the negatives.

The inclusion of employees among the recipients of public funds, on which such information must be provided, is legitimized by the intense public interest in controlling public authority and the efficiency and effectiveness of its activities in the areas of employment and remuneration. It is suitable and in a modern state is a very useful instrument in controlling the public sphere. The costs for salaries (wages) and other financial benefits to employees are an important item of public expenditure, and the public power has a relatively high degree of discretion. Therefore, there must be a broad, general, and effective public control. The control mechanisms which are available to the public sphere itself, without public participation, would not be sufficiently effective. The Supreme Administrative Court stated that publishing salaries does not represent, for someone who is paid from public funds, any material injury. Information on salaries cannot be considered information that would have shamed the recipient or otherwise reduced their human dignity. Arguments that this information can lead to envy and discord among the staff, or the unrest in their personal lives, must be rejected. The individual who determines the salary is obliged to follow the law, and must be able to justify his/her decision and defend their authority, which underlies his/her discretionary authority. Furthermore, the Supreme Administrative Court adds that neither fear nor envy can be considered relevant. Envy is a human trait stemming from the pettiness of the soul and we cannot face it by legal means.

Despite the above findings, however, the Supreme Administrative Court accepts that the employer is not obliged to provide salary information relating to recipients of public funds –only for certain exceptions. If the employee participates in the activities of the employer only indirectly and in an insignificant way, concurrently there is no doubt that public funds are spent efficiently. This will apply in particular to employees who perform ancillary and service jobs (e.g. maintenance, cleaning, catering, etc.). In relation to these employees, a publishing of the information about their salaries may be denied (on the principle of proportionality), even if they are paid from public funds. If there are doubts, a preference should be given to provide information.

The judgment of the Supreme Administrative Court thus provides the following general conclusions for practice in the publishing of data on the salaries of employees who are paid from public funds:

1. Information on the salaries of employees paid from public funds must be provided according to the Law on Free Access to Information.

2. The employer does not provide information on employee's salary. Only rarely – in cases when such a person participates in activities only indirectly and in an insignificant way, and concurrently there is no doubt that public funds are spent efficiently.

This decision of the Supreme Administrative Court can be undoubtedly evaluated positively. Although the publishing of information on employee salaries may bring some negatives or may be abused, this author believes that it is a necessary and effective instrument in controlling public authority. Citizens have the right to exercise control over the management of state public funds, which consist largely of taxes that are paid by citizens. Consequently, the judgment is a significant step towards fulfilling the principle of publicity and transparency in the exercise of public authority in the Czech Republic.

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Legal remedies against state funding decisions in Slovakia

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Abstract: Legal remedies against decisions of central state administration or special administrative bodies instead of the standardly used appeal (which is more or less identical in all Visegrad states) special types of legal remedies step in, which can be still considered as ordinary remedies. In Slovakia, the standard legal remedy in administrative procedures is the appeal (in case of organs of central administration called remonstrance) regulated by Act no. 71/1976 on Administrative Proceedings, however in case of special organs this regulation is often overwritten by special rules and by special legal remedies. Latter mentioned – from a jurisprudential point of view - raising the question, whether they can really serve as a tool for a real legal remedy if they represent an effective tool of decision supervision. The following case study introduces the standard procedure of use of such special legal remedy against a decision of the State Fund for Housing Development in Slovakia.

Keywords: administrative procedure; legal remedies; appeal; remonstrance; suggestion of error; bodies of central administration; state funds

The possibility to defend oneself against the decision of an administrative body is one of the basic principles of administrative procedure. An appeal is a universal tool against an administrative decision in the Slovak Republic; an ordinary legal remedy. The basic regulation of this legal institute is given by Act no. 71/1967 on Administrative Proceedings (Administrative Code). This statue contains the basic principles and rules of administrative procedure, as lex generalis. In the system of the Administrative Code, the ordinary legal remedy is referred to as an 'appeal' or 'remonstrance', depending on whether it is used against central administration bodies or not. Regarding regular administrative organizations, the appeal applies, while in case of groups of central administration, remonstrance is used. The main difference between these two is that remonstrance has no devolutive effect, and according to the regulation (paragraph 61 section 2) 'remonstrance shall be settled by the Chief Officer of the central body of public administration based on the motion of a special committee established by the Chief Officer'. This legal construction in itself raises the question of whether it can guarantee substantive and effective review of a decision, because it is carried out by the same authority which issued the decision in the first instance. Among the Visegrad states, this legal construction can be considered universal, with the exception of Hungary. Hungary, in

accordance with paragraph 100 Act no. CXL of 2004 on the General Rules of Administrative Proceedings and Services, cannot submit an appeal '...against any decision of the first instance adopted by a minister, by the head of an autonomous government body, an autonomous regulatory agency or other similar government agency;' or '...against any decision of the first instance adopted by the head of a central government body'. In these cases, 'the decision of the first instance may be subject to judicial review'.

The regulation is somewhat different in cases of special procedures. For various reasons, the Administrative Code does not apply to administrative procedures (proceedings in which the rights, the legitimate interests and the duties of the citizens and organizations regarding the public administration are decided), or applies, but only to a minor extent. These procedures are regulated by special laws, which therefore contain special rules exclusively for these procedures, the lex special derogat legi generali rule applies, and the use of the Administrative Code can be excluded partially or completely. The uniqueness of these procedures can be due to numerous factors, such as by the specialty of the organization making the decision. In the case of these procedures, the extent to which basic principles and basic procedural rights (right to legal remedy, fair procedure) apply is always problematic, as generally these special rules do not contain a complex regulation of the given procedure. Alternatively, there has to be a core regulation (mainly concerning principles and basic party rights), which has to be part of every procedure, regardless of its relation to the Administrative Code. For instance, such rule is to be found in the Czech regulation. According to paragraph 177 section 1 of Act no. 500/2004 on Code of Administrative Procedure, in spite of which 'fundamental principles of activities of administrative bodies... shall apply in public administration also in cases where special law provides that Administrative Procedure Code shall not apply but the special law itself fails to contain relevant provisions corresponding with the principles'.

The case in question deals with this kind of special procedure, with the decision-making of state funds, namely the State Fund for Housing Development. State funds in the Slovak Republic are legal persons, constituted by law for financing specialized state tasks (see paragraph 5 of Act no. 523/2004 on Budgetary Rules of Public Administration). State funds are under the supervision of a central state administration body, while their budget is influenced by the Government. State funds can be considered administrative

bodies in a wider sense, legal persons of public law. State funds often decide on rights, legitimate interests, and duties of the citizens, so in this regard they can be considered as bodies of public administration; sometimes the Administrative Code is applied for their procedures, but in many cases their procedures are regulated by different, special rules.

The State Fund for Housing Development is constituted in Act no. 150/2013 on State Fund for Housing Development (hereinafter as Act on Housing Development Fund). The competence of the Fund for Housing Development (hereinafter as Fund) has its own specialties as well, which must be explained in some extent, according to the actual case, which is concerned with the subsidies granted for local self-municipalities. Local self-municipalities in Slovakia can apply for a subsidy combined from a non-repayable grant and a long-term loan for housing acquisition. The grant is provided by the Ministry of Transport, Construction, and Regional Development of the Slovak Republic (hereinafter as Ministry), while the loan is provided by the Fund. The loan is advanced under favorable terms (a mortgage loan with a 20-30 year duration and a fixed 1% interest rate). As a thumbnail rule it is valid that the Ministry finances approximately 1/3 of the cost of acquisition, while 2/3 of the price is financed through the Fund's loan. The decision-making of the Ministry is regulated by Act no. 443/2010 on Grants for Housing Development and on Social Housing (hereinafter as Act on Grants for Housing Development), the decision-making of the Fund by the Act on Housing Development Fund. One of the basic conditions of approving the loan is that the applicant did not breach the financial agreement during the disposal with the Fund's financial assets (this refers to previous time periods). Additionally, a basic condition of approving the grant is that the applicant has disposal over the remainder of the acquisition price. In this way, the application for a loan goes hand-in-hand with the application for a grant.

For approving the subsidy (neither for the grant, nor for the loan) there is no legal entitlement, which means, that despite that the applicant fulfills all conditions, his/her application can be rejected. Of course even in these cases, the negative decision cannot be arbitrary – it must be properly reasoned in line with the expectation (or principle) of good administration. The loan can be declined due to the fact that the Fund ran out of its annual budget for this objective or the application failed to fulfill the conditions prescribed by the Act on Housing Development Fund (see paragraph 15 section 19). Legal remedies

are determined by the Act on Housing Development Fund, which states that against a negative decision a suggestion of error (hereinafter as suggestion) could be submitted within 30 days after the delivery of the decision, while the decision-review is carried out (in another 30 day period, after filing the suggestion) by the Ministry, as the supervisory body.

A particular case deals with the application for a subsidy (grant and loan) of the local self-government Holice, which is a small settlement of approximately 2000 inhabitants in the southwestern region of Slovakia, on Great Rye Island. An application for a grant was to finance the acquisition of 13 housing units, where 30% was financed from a grant, and 70% of the price from a loan.

The application was submitted on 15th January 2015, rejected by the Fund's decision on 9th July 2015, with the justification that the applicant breached the budgetary discipline during the disposal with the Fund's financial assets (see above), due to the fact that the annual auditor's report labeled the short-term liability of the local self-government risky. In other words: the self-government's cash flow was rather low. Based on this decision, the Ministry also refused (23rd July 2015) acknowledgement of a grant, due to the fact that the applicant could not prove the disposal over the 70% of the acquisition price. Both decisions were filed on 24th July 2015 at the self-government. In this way, the decision of the Fund affected the subsidy as a whole, as the loan and the grant in this case are mutually dependent.

Against the decision of the Fund, a suggestion of error was filed, which is an ordinary-like legal remedy regulated by the Act on Housing Development Fund. The suggestion highlighted that the annual auditor's report cannot serve as a reason for breaching the budgetary discipline. Since the report was positive, the auditor stated no breach of law. It only declares that the self-government's capacity of settling short-term debts has a higher risk factor. Furthermore, low cash flow alone is not enough to fulfill the condition of breaching the financial agreement in accordance with disposal of the Fund's financial assets, as there must be a connection between the low cash flow and the using of (previous) financial assets of the Fund, while this connection simultaneously causes a breach of the Act on Budgetary Rules of Public Administration - otherwise it cannot be considered as breaching the financial agreement. The suggestion was handed over to the Fund on 27th July 2015, the overview was ensured by the Ministry in rejecting the suggestion on 4th September 2015. According to its argument, having a low cash flow alone does

not mean there was a breach of the financial agreement. However, during the review process it was determined that the local self-government failed to pay on-time the credit installment from previous loans from the Fund, so these late payments can be considered as breaching budgetary discipline.

From a boarder perspective, the procedure is legal, but not flawless in all regards. It is certainly positive, in that in accordance to the principles of legality and material truth, the decision can be changed also to the disadvantage of the applicant. This shows that the suggestion can serve as a tool of objective legal protection. Furthermore, the decision-review does not limit itself only to legality, but also extends to technical issues, and it is quicker when compared to judicial review. On the other hand, this standard procedure has its own issues. Probably the most important among these is the (legal and practical) effect of a successful suggestion – in such case a restitutio in integrum would be in place, so that the applicant should regain his former status and legal position among the other applicants. The problem is that: 1) submitting an suggestion has no delaying effect (the Fund's loans can be approved to other applicant instead), so it can lead to a situation, where the Fund depletes its financial assets for loans meantime and despite the successful suggestion the restitution is de facto impossible; and 2) submitting an suggestion has no effect whatsoever on the Ministry's grant (so the grant can be awarded to another applicant meanwhile), which could lead to a similar situation, because budgetary limitations on grants are serious. From the applicant's point of view, the loan without the grant is practically worthless, and the grant without the loan is legally inaccessible. Additionally, the factual impossibility of the restitutio in integrum cause, that the use of suggestion in this case is mostly formal, so there is a little to no chance of a review favorable for the applicant. In this way the subjective legal protection of the applicant is negligible – and it raises the question of whether a formal guarantee of legal remedy could really serve as an effective tool of decision-overview.

Book reviews

Tax Ordinance – Directives on Constituting a New Regulation[1]

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The publication Tax Ordinance – Directives on Constituting a New Regulation [Ordynacja podatkowa – Kierunkowe założenia nowej regulacji] was the effort of a team of authors led by Professor Leonard Etel, an expert in the field of tax law, and Chairman of the General Tax Law Recodification Commission [Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego]. This Commission was established in November 2014 in order to prepare and submit to the Council of Ministers complex and systemic changes in Polish tax procedure. Over the next two years, the bill (new act) was to be prepared. During the preparation of the official opinion of the Commission, there were various compromises and modifications when compared to the original draft. Authors therefore decided that they would write and issue their ideas and suggestions regarding new regulations of tax administration in Poland in the form of a currently peer-reviewed monograph. This type of format allows more space for the presentation of various ideas, currently insurmountable for several reasons (whether political or with regard to conservatism).

The current Tax Ordinance [Ordynacja podatkowa] came into effect in 1997. But since the Polish economy has changed and developed over time, and Polish taxpayers and their internationalization have changed with it. It now seems more than appropriate to consider a comprehensive and systematic change in the legal regulation of tax administration. These changes are also necessary for the proper functioning of financial management and efficient tax collection. Keeping this in mind, it is necessary to continue to ensure the fundamental rights of taxpayers. More and more often (and as we see in Czech courts) there is a misunderstanding of the function and role of taxes in the state regarding its fundamental duty – the production of material to ensure the creation of public goods. Taxes are often viewed as quite the opposite, similar

to restrictions on economic activities of entities operating in the market. This leads to measured and varied interests of the state versus interests of the individual.

The Commission also worked interactively, and during the work partial results were presented, and numerous suggestions from the tax and customs administration were collected. One such example was IX scientific conference 'Ordynacja podatkowa w teorii i praktyce' organized by the Faculty of Law, University of Białystok in the picturesque Augustów, in May 2015.

The book is a compilation of proposals for changes to improve the quality of legislation with regard to its impact on public budgets and the addressees of legal norms–tax subjects. The authors analyzed a number of sources: scientific literature, case law and legal regulation, and were inspired by a wealth of both international experience and foreign regulations. The book contains a number of theories on what the new regulation of tax administration should look like. There are three different opinions and approaches to solving the current problems with the aim to improve the future regulation, but not at the cost of its rigidity and casuistry, but in order to simplify and streamline the system.

This publication is highly recommended. Its concepts and settings of the effective functioning of financial management, with the maintenance and guarantee of taxpayers' rights, makes it a recommended read both for those who are involved in tax procedures, and legislators outside of financial law.

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Chapters on Special Public Administration[1]

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The main aim of the three-volume series, Chapters on Special Public Administration is to place practical public administration into focus. Through creating an awareness-raising presentation of national basic functions, economy, infrastructure, and human public services based on legislature, in a comparative way with historical analyses, and fulfilling the need of course books and professional books as well. It is the first relevant publication in Hungary which attempts a comprehensive analysis and description of as much particular sectors of public administration as possible. For this reason, a nationwide 'work group' was established (the series has over 30 authors) under Editor András Lapsánszky. The volumes are special and unique in this way, because they are also the result of a work group which is characterized by a high degree of professionalism and true collegiality. It is the common, harmonized work of Hungary's departments of public administration and the National University of Public Service.

The relationship of general (general administration) and special public administration (special administration) must be clarified, because of the possibilities of shade and sharp demarcation in the Hungarian doctrinal system. In understanding this system, general administration is indispensable, but the distinction between the two branches is mostly virtual. The system is a theoretical basis and general doctrine of special administration. Therefore the general notional order and structure of public administration is described by the general public administration (science of public administration and legal systemic) – ensuring unity in the more particular world of special administration. The law of special administration focuses on individual sectors of public administration. However, it cannot be separated from the basic notions, apparatus, or procedure of public administration, nor can it be understood in itself, since it cannot be scientifically analysed without the general doctrines.

As for the theoretical basis, it is important to note that national tasks and functions provide a certain framework for special administration: the activity of authorities belonging to public administration is the route of carrying out state administration. As a result, modern public administration is essentially special administration, as public administration bodies carry out their activities with regards to one sector, in one given area. The rapid improvement of society generates newer and newer needs, and fulfilling them occurs through newer and newer national engagements (therefore, the restrictive listing of tasks is impossible, as it is constantly changing). The realizations of these tasks occur mostly via public administration, in the frame of the modern 'administrative state.' The general aim of nearly all cases is to increase citizens' quality of life and to realize social wealth.[2]

The administrative tasks of the state prevail in many areas (and this is by no means an exhaustive list): operation of national economy; health and social insurance administration; social administration (decreasing social differences, labour administration, social net); public education; cultural (human) administration; protection of nature and the environment; consumer protection; transportation administration; communication and media administration; police administration (averting catastrophes, acting against terrorism); energy and industry administration; etc. The volumes elaborate on the most significant branches of special administration, and endeavour to highlight information which conveys the important theoretical basis both for students and professionals, such as: reasons and degree of national intervention; most significant institutions of the sector; relevant legislature; historical characteristics of sectorial administration; international comparative analysis; and regulative models. Therefore the dual objective, so the volumes may serve as course books and special books as well, has been fully realized. Also, it should be emphasized, that the volumes present elaborate on such areas of special public administration which have not been previously discussed in Hungary. While most of the areas explored are rich in literature, in these cases a systematization and a dogmatic unification is carried out.

The theory of organizing special administration chapters into a book can be understood in the wider subject of administration. Based on this, the first volume details the basis of special administration and state functions. It presents the current form of European public administration law, as well as: its expected means of improvement; the system of national registers; the basis of

police administration and police law; administrative rules referring to foreigners; regulations of the right of asylum; national defence administration; tax and customs administration; judiciary administration; public finance administration; and the special administration basis of e-public administration. The second volume covers economic and infrastructure administration, such as: the administration of the national economy; economic competition; energy and mining administration; water administration; information communications; the construction administration; trade; rules of regional development and area management; administration of environmental protection; the special administration basis of financial services; hunting administration; transportation administration; and the law of national support. The third volume centers on: connections to human administration, such as health law and administration; education; the administrative basis of public education; child protection and social service administration; cultural administration; social administration; and media regulation.

To summarize, these three volumes are professional, accurate, and rooted in law. They are not only interesting, but can be learned, taught, and utilized. They will greatly assist those to better understand such a comparative analysis that takes multiple perspectives, from not only international and European viewpoints, but also from the perspective of students and researchers.

The discovery and understanding of public administration beyond administrative procedure proves to be a serious challenge, but the three volumes of Chapters on Special Public Administration provide an outstanding guide in this endeavour.

References

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