Central European Public Administration Review

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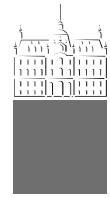

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The Use of Facebook in the Slovenian Local Self-Government: Empirical Evidence[1]

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ABSTRACT

The paper presents a contribution to the rapidly growing field of social networks usage in public administration organizations. Despite the increasing volume of research in this field, there is a lack of detailed empirical evidence. To address the issue, we aim here at comprehensive empirical analysis of the usage of Facebook as the most popular social networking site among Slovenian municipalities. The methodology of research is based on 21 indicators measuring usage, engagement, multichannel features, multi-media content, and the existence of a social networks usage strategy. The measurement has been performed in each of the 212 Slovenian municipalities. Their Facebook interaction has been observed in a period of six months, from November 2015 to May 2016. The analysis results reveal that only 36% of the Slovenian municipalities were present on Facebook in 2016, with almost a quarter having a zero interaction rate on their Facebook pages/profiles in the observed six-month period. In particular, one-way interaction was recorded on municipal Facebook pages, leaving considerable room for improvement as regards the usage of Facebook as a social network with the highest potential of reach and engagement in terms of number of its users. The results are useful for information and benchmarking purposes for Slovenian and foreign municipal managers.

Keywords: *citizen engagement, e-participation, e-governance, municipalities, local self-government, Slovenia, social media, social networks, Facebook*

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1 *This article is a revised version of the papers entitled 'Social media usage in public administration – initial literature review' and ‚Facebook v slovenskih občinah: rezultati empirične raziskave' presented at the NISPAcee 2017 conference and Slovenian Dnevi slovenske uprave conference 2017. The contributions are not publicly available.*

1 Introduction

Social media represents "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user generated content" (Kaplan and Haenlein 2010, p. 61). In the context of public administration, social media is understood as Web 2.0-based technologies fostering engagement with citizens, businesses and other organisations (Criado, Sandoval-Almazan and Gil-Garcia, 2013, p. 320).

Social network platforms (e.g. Facebook) represent a (sub-) group of social media tools (Jukić and Merlak, 2017), used by 2.62 billion people worldwide. This number is expected to increase to 3.02 billion by 2021 (Statista, 2018a). In the EU, 63% of Internet users participate in social networks (51% in Slovenia) (Eurostat, 2017). Private companies have recognised the potential of such user concentration relatively soon and are now using social media platforms as some of the most powerful marketing tools enabling to build their image, market their services and/or products, improve customer service, and involve users in the development of new products and services.

Even though the main motive of public administration organisations' functioning is not to create profit (as it is the case in the private sector), they can benefit greatly from (active) social media platforms usage, especially in terms of improved service delivery, transparency and organisation image, as well as more inclusive policy processes. However, in most countries, public administration organisations have been rather conservative in the adoption of these tools (Jukić and Merlak, 2017). On the other hand, the topic has lately gained considerable attention in the research field (e.g. Mossberger, Wu and Crawford, 2013; Reddick and Norris, 2013; Maultasch Oliviera, 2013; Bennett and Manoharan, 2016; Mergel, 2013 etc.). Still, in-depth empirical evidence, especially in Slovenia, is relatively scarce. In Slovenia, for example, empirical research was conducted among state administration organisations in 2015 (Jukić and Merlak, 2017).

The aim of this paper is to provide in-depth empirical evidence on social networks usage in the Slovenian local self-government, i.e. municipalities. More precisely, the paper focuses on the usage of Facebook by all (212) Slovenian municipalities. The hypothesis put on test was: "The Slovenian municipalities do not exploit the full potential of Facebook." Full potential relates to a two-way interaction between municipalities and their Facebook followers. Facebook was chosen since it has the highest number of users – 2.234 million (Statista, 2018b).

The paper is organised as follows. In the next chapter, a review of the literature in the field of social media usage in public administration is provided. In the third chapter, the methodological framework and the results of the research measuring Facebook usage in Slovenian municipalities are presented. Finally, in the discussion, suggestions for further research are given.

2 Literature Review

The literature on social media usage in public administration organisations has increased greatly in the last five years. Still, a lack of empirical evidence can still be noticed. The approaches taken so far differ mainly in terms of: (1) geographical focus, (2) social media evaluated, (3) measurement unit (e.g. local government, state agencies, selected departments, etc.), and (4) research focus (e.g. adoption rate, adopting factors, situation in a specific area, such as emergency management, etc.).

Most often, the research in this field has been conducted in the US. Mossberger, Wu and Crawford (2013) analysed the usage of social media in large US cities in the period of 2009 and 2011. Their measurement was performed indirectly, i.e. through the presence of links to cities' social media accounts on their websites. Their results revealed that, in 2011, approximately 90% of the observed cities have had established Facebook and Twitter presence, and the majority of them were using YouTube as well. All cities with established Facebook/Twitter presence were enabling other users to post comments on their social media channel. In the same year (2011) the research on social media usage in US local government has been performed by Reddick and Norris (2013), who came to the conclusion that two thirds of the observed organisations have established social media presence (mainly via Facebook and Twitter), but one-way interaction dominated. A year later, social media usage in the US local governments was performed by Maultasch Oliviera (2013); similarly, their results revealed that the majority of cities (88%) adopted at least one social media channel with Facebook and Twitter being most frequent. Feeney and Welch (2016) also performed their research in among the US local governments in 2012. Similarly as Reddick and Norris (2013), they concluded that one-way interaction was the main reason for social media presence of the observed organisations, however the positive trend of using social for getting feedback on service quality, internal and enabling/facilitating citizen participation has also been noticed. The increasing adoption of social media in US local governments (and elsewhere) raises the need for policies guiding the use of social media and enabling transparent engagement with citizens. Such policies were in focus of the research by Bennett and Manoharan (2016), who revealed that many US cities lacked social media policies guiding the usage thereof, despite the fact that most of them integrated social media in their daily operations (see also Mergel, 2013).

A relatively high level of social media adoption has been noticed in Romania (Urs, 2016) and Lithuania (Sinkienė and Bryer, 2016) as well. Urs (2016) focused his research on the Facebook accounts of Romanian city halls. 17% of them did not establish Facebook presence in the observed period. Five of those with established Facebook presence were mostly inactive on their accounts (with less than five published posts) and 19 city halls (40%) had more than 100 posts published over 454 days (574 on average). Sinkienė and Bryer (2016), who focused on Facebook adoption in Lithuanian municipalities, came to the conclusion that the majority (77%) of municipalities used Facebook,

with most of them (41%) creating their accounts in 2015 (year of elections) or later. Mainly one-way interaction with very little feedback has also been noticed in their research. The latter (i.e. one-way interaction) holds true for Egyptian government's social media usage (Abdelsalam et al., 2013) and Czech regions (Špaček, 2017).

Some research analysed the barriers to social media adoption in public administration organisations. In this context, Mergel and Bretschneider (2013) developed a three-stage adoption process for social media usage in government: (1) intrapreneurship and informal experimentation, (2) constructive chaos, and (3) institutionalisation. Table 1 summarises the main characteristics of all three stages.

Table 1: Three-stage process model for social media adoption in government organisations

	Role of Organizational Structure	Role of Technology	Role of Outcomes	Organizational Response
Stage 1: Decentralized, informal experimentation	Important to allow for experimentation	Following outside best practices (replication of successes)	Early tests lead to first insights	Unsanctioned accounts, not on the organizational radar screen
Stage 2: Coordinated chaos	Important to consolidate heterogeneity of use	Increases in importance but mainly because of innovative use and routines	Highly important to create business cases	Task force, steering committee, draft policies/strategies
Stage 3: Institutionalization and consolidation	New organizational structures	Set of accepted technologies versus wide range of innovative technologies to support different purposes	Important for future resource allocation	Formalized institutions, work assignments, tasks, roles, dedicated resource allocation, formal social media policies

Source: Mergel and Bretschneider (2013, p. 397).

3 Facebook Usage in the Slovenian Local Self-Government

3.1 Methodological framework

The research analysed the Facebook profiles of all 212 Slovenian municipalities, focusing on the content published over a period of six months, from 15 November 2015 to 14 May 2016.

For each municipality, 21 indicators were measured and classified into five groups:

1 Usage
   a) Presence of municipality on Facebook
   b) Type of presence: page or profile; organisations can create a page or a profile on Facebook. The Facebook page is meant primarily for organisations, while the Facebook profile is meant for citizens/private users (still, some organisations decided to establish a profile instead of a page.). Facebook users can 'like' a page and do not need any confirmation from the organisation. On the contrary, when Facebook users send requests for friendship to other Facebook profile owners, they need confirmation from the profile owner. Friendship requests were sent to municipalities owning a Facebook profile with the intention to get a full insight in their Facebook activities.

c) Year of entry on Facebook
d) Number of posts published from 15 November 2015 to 14 May 2016
e) Types of posts: (1) posts calling for cooperation/ opinions through Facebook, (2) posts calling for cooperation/ opinions through other channels (e.g. e-mail), (3) posts providing information on past events, (4) posts providing information on upcoming events, and (5) other posts.
f) Topical orientation of posts: (1) food, cooking, health, sports, recreation, (2) culture, cultural and social events, (3) infrastructure, (4) tourism, (5) the work of the municipal administration and council, (6) other.

2 Multi-channel features
a) Availability of link to the Facebook page on the organisation's web page
b) Availability of link to the organisation's web page on the Facebook page

3 Engagement
a) Number of likes/friends on 15 May 2016
b) Possibility of writing on the Facebook page by other users
c) Number of posts submitted by other Facebook users
d) Number of likes of posts
e) Number of shares of posts
f) Number of comments on posts
g) Number of comments submitted from municipality
h) Number of comments submitted from other users (citizens, organisations)
i) Page level interaction rate
j) Number of polls
k) Number of prize contests

4 Multi-media content: number of posts with multi-media content (images, videos, audio)

5 Strategy: existence of social networks usage strategy (an e-mail with this question was sent to the municipalities with established Facebook presence)

3.2 Presentation of results

3.2.1 Usage and multi-channel features

Results of the analysis show that 76 or 36% of Slovenian municipalities are present on Facebook. The results below relate to municipalities present on Facebook.

The first municipality that joined Facebook was Poljčane (4444 residents, northeaster Slovenia) in 2009. 12 (16%) municipalities followed in 2010 and 10 (13%) in 2011. 13 (17%) municipalities began to use Facebook in 2012 and

another five (7%) in 2013. The largest share of municipalities joined Facebook in 2014 (21%) and 2015 (20%). In 2016, four new municipalities joined Facebook by 15 May.

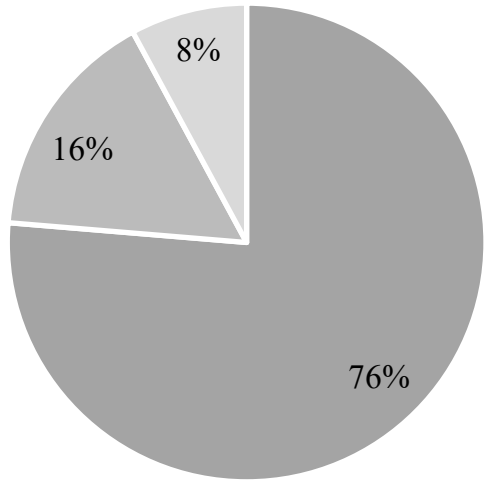
66 municipalities (87%) established a Facebook presence with a page, while the remaining 10 had Facebook profiles designed primarily for citizens/private users and requiring the organisation's approval to follow its full content (except if the profile is set as public, which is rarely the case and never in our research).

Once a Facebook page is set up, the challenge is to attract the target groups (i.e. fans, the target group of messages/posts published on the Facebook page). One of the basic principles in the digital marketing is to put the link to the Facebook page on the website of the organisation, thus informing the website visitors that the organisation is present on Facebook as well, and that they can follow its posts via additional channel(s). On the other hand, Facebook, in the context of web marketing, is a good channel to attract visitors to the organisation's website (with the link in the "About" section which is devoted to the presentation of the organisation). 71 of the municipalities present on Facebook had a link to their website in the section About. Only 46 municipalities (61%) created a link to their Facebook site/profile on their official web site.

The main feature used by Facebook users (be it individuals, businesses, or public organisations) are posts – messages published on the wall/timeline of a specific Facebook page. On the Facebook pages/profiles of the municipalities, 9350 posts were posted between 15 November 2015 and 14 May 2016, which on average represents one post per municipality per day. On average, 51 posts were posted per day on the municipalities' Facebook pages or profiles. Most posts were posted by the municipality of Velenje with 32736 residents, which lies in northeaster Slovenia (572, 3 posts per day on average). Five municipalities did not publish any post in the period concerned. Literature for public administration does not specify the optimal number of posts per day because it very much differs from case to case. Nevertheless, some experts have determined, based on their research, the range of posts published in one day that organisations in the private sector should consider on Facebook. SocialBakers found out in their survey that the largest enterprises posted on social media on average one post per day. Thus, they proposed one to two posts per day (Rezab, 2011). Based thereon, it was examined how many municipalities provided for the proposed frequency of publishing posts. In the municipalities that began to use Facebook after 15 November 2015, the number of days from the date of entry on Facebook to 14 May 2016 was taken into account. Based on the frequency of posts suggested by the Rezab (2011), it was examined how many municipalities were consistent with this proposal. The results show that only 12 (16%) of the municipalities that used Facebook were consistent with the proposed frequency of published posts per day: Brda, Črna na Koroškem, Domžale, Ivančna Gorica, Izola, Kranj, Ljubljana, Medvode, Nova Gorica, Ruše, Šentilj and Trbovlje; these municipali-

ties don't have a homogeneous geographical position. Six (8%) municipalities posted with greater frequency than proposed. 58 municipalities posted less posts than proposed (Figure 1). The calculation of correlation between the size of the municipalities (number of residents) and the number of their Facebook posts reveals a weak correlation (Pearson coefficient 0.26).

Figure 1: Shares of municipalities present on Facebook based on their frequency of posting (n=76)



Source: own calculations.

3.2.1.1 Purpose of the posts

The posts on Facebook walls of the municipalities were categorised by type of post (Table 3). Seven posts called for cooperation/opinions through Facebook. 32 posts called for cooperation/opinions through other channels (e.g. e-mail). 1867 posts were related to past events and 3417 posts provided information on upcoming events. The largest share of posts were 'other' posts. The 4027 posts categorised as other posts accounted for 43% of total posts. The result suggests that in preparing the methodology, the category other posts should have been further split into more specific categories.

Posts calling for cooperation/opinions through Facebook accounted for 0.07% of the total posts. Posts calling for cooperation/opinions through other channels (e.g. e-mail) accounted for 0.34% of total posts. 20% of total posts were posts that provided information on past events while 37% provided information on upcoming events.

The posts calling for cooperation/opinions were 39 in total, posted by 17 municipalities (22% of the Slovenian municipalities present on Facebook). The municipality Markovci (eastern Slovenia, 3997 residents) mainly posted posts calling for cooperation/opinions (seven). The municipality that posted the

largest share of posts calling for cooperation/opinions was Beltinci (also eastern Slovenia, 8267 residents) with 4% (5 out of 129 posts in total).

Facebook enables municipalities to inform the public about events that occur in the municipality. 68 municipalities posted at least one post to inform about events. The total number of such posts was 5284 or 57% of all posts posted on municipalities Facebook walls. The Slovenian municipalities mostly informed about upcoming events (65% of posts informing about events). 53 out of 68 municipalities that posted at least one post to inform about events had on their wall more posts about upcoming events than about past events. Data on posts by purpose are presented in Table 4.

Table 2: Purpose of posts on municipalities' Facebook pages/sites from 15 November 2015 to 14 May 2016 (n=9350)

	No. of posts	% of posts
Posts calling for cooperation/opinions through Facebook	7	0.07%
Posts calling for cooperation/opinions through other channels (e.g. e-mail)	32	0.34%
Posts informing about past events	1867	20%
Posts informing about upcoming events	3417	37%
Other posts	4027	43%
Total	9350	100%

Source: own calculations.

3.2.1.2 Topical orientation of the posts

The posts were divided into categories according to their content. Posts on the municipalities Facebook walls mostly related to culture and cultural and social events. The total number of such posts was 4130 (44% of all analysed posts). Posts related to food, health, cuisine, sports and recreation (1263 in total) accounted for 14% of all posts. For a municipality it is important to inform citizens about the work of the municipal administration and council and about municipal infrastructure: 1216 posts related to the work of the municipal administration and council (13% of total posts). 590 posts (6%) informed about infrastructure. Municipalities inform the least on tourism, which for some municipalities (e.g. Bled, north-western Slovenia, 8088 residents) can be crucial as they are very dependent on tourism. 203 posts related to tourism, which was only 2% of total posts. 21% were posts on other contents (Table 4).

Table 3: Number of posts by content on municipalities' Facebook pages/sites from 15 November 2015 to 14 May 2016 (n=9350)

	No. of posts	% of posts
Food, health, cuisine, sports and recreation	1263	14%
Culture, cultural and social events	4130	44%
Infrastructure	590	6%
Tourism	203	2%
Work of the municipal administration and council	1216	13%
Other	1948	21%
Total	9350	100%

Source: own calculations.

3.2.2 Engagement

The number of likes or friends varies significantly from municipality to municipality. On 15 May 2016, only the municipality of Ankaran (south-western Slovenia, 3237 residents) had 0 friends. That was probably the result of not actively using their profile and not confirming friendship requests. The municipality with the lowest number of likes was east-positioned Duplek with 6755 residents (40 likes). Most likes were recorded by the largest Slovenian municipality Ljubljana (9789 likes). The average number of likes or friends of the Slovenian municipalities on Facebook was 1178. The calculation of correlation between the size of the municipalities (number of residents) and the number of their followers reveals a very strong correlation (Pearson coefficient 0.85).

A municipality's openness is also reflected by allowing other Facebook users to write posts on the wall of the municipality. 79% of the municipalities present on Facebook allowed other users to write on their walls. Yet, only a few users chose to do so. 138 posts were initiated by other Facebook users, accounting for 1% of the total number of posts. The posts initiated by other users were posted on the walls of seven (geographically heterogeneous) municipalities: Vodice, Straža, Kuzma, Kostel, Hrpelje – Kozina, Dobrovnik and Dobje. The municipality with the largest number of such posts was Kostel (southeast Slovenia, 643 residents) with 44 posts (75% of all posts on their wall).

User engagement (Table 5) was measured by the number of comments on posts, the number of shares, and the number of likes. Facebook users liked the posts on municipalities' Facebook walls 142273-times (15 likes per post on average). The municipality of Ljubljana had the largest number of likes on its posts: 21000 or 73% likes per post. The calculation of correlation between the number of Facebook followers and the number of likes on Facebook posts reveals a very strong correlation (Pearson coefficient 0.88).

The analysed posts were shared 13114-times, which is on average one share per post. The municipality with the most shares was (again) Ljubljana, with seven shares per post and a total number of 1931 shares. It is followed by Črna na Koroškem with 3342 residents (4) and Žiri with 4846 residents (4).

Table 4: Number of likes, shares and comments on posts posted on municipalities' Facebook pages/profiles from 15 November 2015 to 14 May 2016 (n=9350)

	Total no. for all posts	Avg. no. per post
Likes	142273	15
Shares	13114	1
Comments	7287	1

Source: own calculations.

There were altogether 7287 comments on posts in the observed period. This means that there was on average one comment per post. Again, the municipality of Ljubljana had the largest number of comments per post, i.e. five, followed by the fourth biggest Slovenian municipality Kranj (3) and the fifth smallest Slovenian municipality Kostel (3). The calculation of correlation between the number of Facebook followers and the number of comments on the Facebook posts reveals a very strong correlation (Pearson coefficient 0.83).

Of all comments, 6698 were written by other Facebook users, which accounts for 92% of all comments (Table 6). The municipalities posted 589 comments (8% of all comments). With 126 comments, Ljubljana had the most comments by municipality, while Kranj had the highest average of comments by municipality per post with 0.45 comment. Most comments from the municipality compared to comments from other users were posted by Trzin with 3862 residents (Central Slovenia) (61%). Ljubljana had the most comments from other users (1364 comments), which was also the highest average of comments from other users per post (5 comments per post).

Table 5: Number of comments on posts on municipalities' Facebook pages/profiles from 15 November 2015 to 14 May 2016 (n=7287)

	No. of comments	% of comments
Comments written by municipalities	589	8%
Comments written by other Facebook users/followers	6698	92%
Total	7287	100%

Source: own calculations.

In order to evaluate the whole page engagement/interaction rate, the following formula was applied, where L stands for all post likes, C for all post comments, S for all post shares, F for page fans, and P for all page posts in the observed period. The same formula is used by Quintly software for social media analytics (Quintly, 2018).

The results reveal that almost a quarter of the municipalities with established Facebook presence (24%) has a zero interaction level, most of them (41%) have a 1% interaction level, 17% have a 2% interaction level, 12% have a 3%, 7% have a 4%, and 1% has a 7% level of interaction. While it is hard to say what is a good interaction level in the context of public administration organisations, it is worth mentioning that the average rate for all private sector industries is 0.21 (Gottke, 2017). Nevertheless, these results should be observed with some reservation or in a broader context. Namely, the highest level of interaction was recorded by the fourth smallest Slovenian municipality Kobilje (a municipality in eastern Slovenia with 561 residents), but that was due to a very high number of post likes (630) and a low number of posts (27). This means that in this specific case, the municipality was rather inactive with post publishing, but each post received a relatively high users' attention.

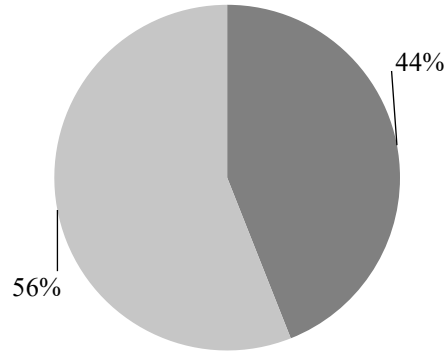
Prize contest enables to quickly and easily attract new followers to a Facebook profile or page (Marrs, 2017). Among all posts, 17 posts included a prize contest launched by the municipalities. Eight municipalities posted prize contests, with Kranj (the fourth biggest Slovenian municipality, positioned in north-western Slovenia) posting the highest number thereof – six.

Municipalities can promote the participation of citizens also through surveys. There were 29 surveys published by 16 municipalities. Most surveys were posted by the municipality of Domžale (Central Slovenia, 35195 residents), namely four. All posts about surveys had web links to external websites.

3.2.3 Multi-media content

When publishing content on social networks, it is important that the posts contain multimedia content, such as images, video and audio. These kinds of posts attract more attention of readers (Lesser, 2017). 5241 out of 9350 posts contained multimedia content, accounting for 56% of all analysed posts (Figure 2). Of the municipalities that actively used Facebook (on average, they posted at least one post per day on their Facebook wall), the municipality of Medvode with 15979 residents had the highest share of posts with multimedia content – 88%. It is followed by Ljubljana (85%) and Trbovlje (84%).

Figure 2: Share of posts on municipalities' Facebook pages/profiles with multimedia content posted from 15 November 2015 to 14 May 2016 (n=9350)



Source: own calculations.

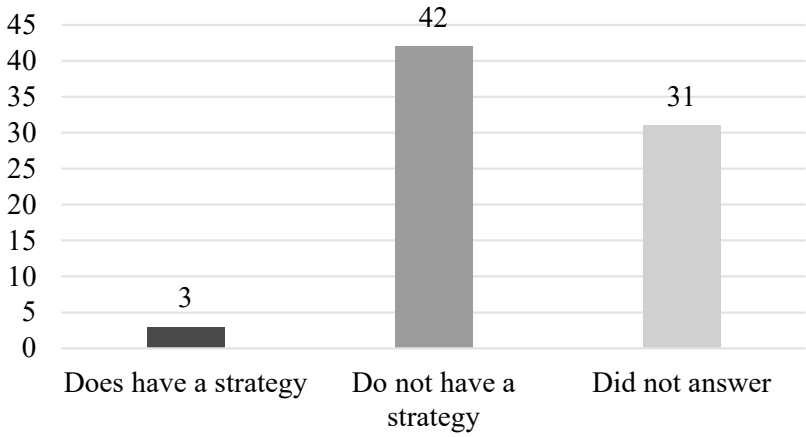
3.2.4 Strategy for using social networks

An e-mail was sent to the municipalities with established Facebook presence asking if they had established a social networks usage strategy in their municipality.

45 municipalities (59%) answered the question, with three of them (4% of those with established Facebook presence) saying they did have such strategy, while 42 (55%) did not (Figure 3).

Some municipalities established ground rules and a vision, but rather loosely. Two municipalities (Medvode and Ljubljana) established 'unwritten' rules.

Figure 3: Number of municipalities with established social networks usage strategy (n=76)



Source: own calculations.

4 Discussion and Suggestions for Future Research

While private entities have recognised social media and, specifically, social networks as a very valuable marketing tool, public organisations (including Slovenian municipalities), on the other hand, seem to be still experimenting. The initial hypothesis can be confirmed – the Slovenian municipalities do not exploit the full potential of Facebook as a social networking platform with the highest potential of reach and engagement in terms of number of its users. First, only 36% of them were present on the Facebook in 2016. Second, among those with established Facebook presence, less than two thirds (61%) created a link to their Facebook page on their official web site. Third, the frequency of publishing content has also revealed room for improvements. Fourth, 21% of municipalities did not allow other users to write on their Facebook walls; in addition, less than 0.5% of all posts published in the observed period, called for cooperation/opinions (i.e. two-way interaction) – which may also be the reason why only a few users chose to. Finally, almost a quarter of the municipalities with established Facebook presence, had a zero interaction level in the period observed.

Based on the three-stage adoption process for social media usage in government developed by Mergel and Bretschneider (2013) and presented in the second chapter, it can be concluded that the Slovenian municipalities are at the first stage – intrapreneurship and informal experimentation. In order to proceed onto the next stages, they will have to adopt a social media strategy and related guidelines. This may be challenging for many of them, since more than half (52%) of the Slovenian municipalities has less than 5000 residents and thus smaller administrative capacities compared to larger ones. Since (proper) administering of social media communication is time-consuming, most municipalities could establish an editorial system in which content is created by several employees – this indeed requires training in the field of social media communication, but not necessarily additional staff.

Even though the comparison with other countries is limited due to different methodological approaches and different administrative systems, some common (and eloquent) points can be identified, but should be observed with some reservation. First, only 36% of the Slovenian municipalities established Facebook presence, which is much less than in the US. In fact, almost 90% of the US cities observed by Mossberger, Wu and Crawford (2013) were on Facebook in 2011. Even though other research in the US revealed a bit lower adoption rate of social networks platforms in local government units – e.g. two thirds, as revealed by Reddick and Norris (2013) – the results put the Slovenian local self-government in a weaker position. The same can be concluded when compared to Romania, Lithuania and Egypt. Mainly one-way interaction on Facebook pages, on the other hand, was identified in most other studies observing this or related indicators, and the same holds true for the low level of social media strategy adoption, which is a weakness identified not only in Slovenia, but also in the US.

The main shortcoming of our research is the classification of Facebook posts on municipal Facebook pages according to their type and content. Namely, a large portion thereof fell into the category 'other'. This leaves room for improvement in terms of posts content and improved coding scheme.

Still, the results are very eloquent and useful for benchmarking purposes for municipal managers in Slovenia and abroad.

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Open Government, Social Media and Western Balkan Countries[1]

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ABSTRACT

This article analyses the presence and activity on the field of social media in the countries that belonged to the same state in the past: Bosnia and Herzegovina (BIH), Kosovo, Montenegro, Serbia, the Former Yugoslav Republic of Macedonia – these named as Western Balkan Countries (WBCs) – and, Slovenia and Croatia as EU member states. The authors have analysed the official profiles of the respective countries on social media and calculated the Facebook Assessment Index (FAI) for WBCs, and Croatia and Slovenia as a benchmark. The results show that Twitter and Facebook are the most used social media. In WBCs group, the FAI index could not be calculated for BIH and Serbia, while the other two countries had high index values. Benchmark countries have lower values but they are significantly highlighted by individual sub-indices. The governments of the researched countries mostly publish promotional information about their work. Consequently, they have a relatively small number of friends/followers/subscribers and comments/shares/likes on social media. Therefore, these countries fail to use the full potential of social media to increase visibility and transparency of their work and to ensure communication channel for idea and information exchange between government and citizens, making the public policies design more inclusive and increasing trust between government and citizens. The findings provide an insight into the nature of activity on social media in WBCs. While FAI scores show that WBCs do not lag far behind established benchmarks, the research proves that some of the weights proposed in the literature and used in the calculation of FAI index are too simplified to adequately evaluate posts on the Facebook pages. Hence, this article contributes above all to the awareness regarding further potentials and the interdisciplinary aspects of stately social media usage, in theory and practice alike.

Keywords: *open government, e-participation, social media, Facebook, Twitter, Western Balkan, benchmark*

JEL: H7, L86

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1 Introduction

An emerging development of Web 2.0 technologies, specifically social media, caused a significant shift in everyday usage of technology. Kaplan and Haenlein (2010, p. 61) define social media as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of "User Generated Content". As most of the authors stressed, social media have significantly changed the way how people communicate to each other (Kietzmann et al., 2011; Solomon and Schrum, 2010; Song, 2010) by allowing them to actively design content through cooperative participation and permanent connection (Wirtz et al., 2014). Kaplan and Haenlein (2010) defined the following social media categories: blogs, collaborative projects, social networking sites, content communities, virtual social worlds and virtual game worlds.

For the needs of presented research, the authors decided to analyze only social networking sites (SNSs). As a web-based services, SNSs enable individuals to create their public or semi-public profile within a bounded system, a list of users (friends) with whom they want to share a connection and to view and traverse their list of connections and those made by others within the system (Boyd and Ellison, 2007). They are social media tools designed to facilitate the creation and maintenance of social relations. Today, some of the most popular social network sites are Facebook, Twitter, LinkedIn, and Google+.

Since social media offer the richness of interactions, they are fostering the involvement at the individual level providing potential for true collaboration (Srivastava, 2016). Governments and public agencies recognized the potential of social media and started to use them around 2009 (Klang and Nolin, 2011). Since then, they have tried to harness social media's potential for public purposes and the fulfillment of the open government promises (Gunawong, 2015).

Although there is an overall agreement that former USA president Obama with his *Memorandum on Transparency and Open Government* directed the implementation of the Open government plans by federal agencies (Orszag, 2009) and had huge merit in the popularization of the term open government, the concept itself is not new. The first written reference dates back to 1957 when Parks (1957) published "The open government principle: applying the right to know under the Constitution." Later, in the 1970s, the British government promoted several initiatives aimed at achieving more information freedom and more access to government's activity and, therefore, at reducing opacity (Chapman and Hunt, 2006).

While OECD defines Open Government as a "transparent, accessible and responsive governance system, where information moves freely both to and from government, through a multitude of channels" (OECD, 2009: 8), according to Evans and Campos open government "is widely understood as the leveraging of information technologies to generate participatory, collaborative dia-

logue between policymakers and citizens" (Evans and Campos, 2013: 173). The basic idea of the open government concept is to increase citizen trust into the government through transparency, participation, and collaboration (Janssen et al., 2012; Lee and Kwak, 2012; Reddick and Ganapati, 2011, Wirtz and Birkmeyer, 2015, United Nations, 2014). In Table 1 is summarized what transparency, participation and collaboration mean in the context of open government.

Table 1: Open government principles and related concepts (Gascó, 2013)

Principle	Related concepts
Transparency	Information access; Accountability Legitimacy and trust in government
Participation	Consultation and deliberation with citizens Participation in decision-making processes Participation in public policy design
Collaboration	Interoperability Co-production (Social) innovation

In 2010 the European Commission (EC) Directorate General for Communications Networks, Content and Technology (DG CONNECT) launched the *Digital Agenda for Europe* (European Commission, 2014) with the aim to support the open government initiative and to foster citizen participation and engagement by getting the most of digital technologies, particularly social media (Karakiza, 2015).

The political instruments for implementation of the Digital Agenda are the eGovernment Action Plans that should advance the modernization of public administrations across the European Union. The Digital Single Market Strategy for Europe (DSM) announces the launch of the new eGovernment Action Plan for 2016-2020. The main purpose of the new Plan is to remove existing digital barriers to the Digital Single Market and to prevent further fragmentation arising in the context of the modernization of public administrations. The final goal is that by 2020, public administrations and public institutions in the European Union should be open, efficient and inclusive, providing borderless, personalized, user-friendly, end-to-end digital public services to all citizens and businesses in the EU (European Commission, 2016).

Open data and open action are two essential tools which government can use to foster transparency, participation, and collaboration, e.g., to put into life main open government principles. Open data refers to data available in standardized, structured and machine-readable formats and that are guaran-

teed to be freely available over time. Open action means the use of web 2.0 tools and, particularly, of social media and blogging (Gascó-Hernández and Fernández-Ple, 2014).

However, despite huge potential of social media in providing open government, the governments generally fail to exploit them to the full capacity. The research presented in this paper try to answer the following question: what is the situation regarding use of social media as a tool for ensuring open government in transition countries. In this case, those countries are Western Balkans countries that belonged to one state in the past (Bosnia and Herzegovina, Kosovo, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia). The authors decided to analyze those countries because of a similar level of economic development and reforms in government institutions. The main research question is whether and how the WBC governments use social media to foster open government. Also, the results of research can be used for analyzing these countries related to the context of open government, and for the evaluation of previously taken activities on transparency and collaboration with citizens. Although governments of chosen countries accepted social media as a communication channel, they used them mostly to publish promotional information about their work, while two-way communication with citizens is still missing.

1.1 Literature review

Although most of the authors agree that social media have a huge potential in addressing the open government challenge (Bonsón et al., 2012; Evans and Campos, 2013; Lee and Kwak, 2012), the governments still struggle with implementation of social media. According to (Wirtz et al., 2017) the scientific literature related to the use of social media as a tool that fosters open government can be divided into three groups (Table 2) regarding implementation process and maturity, social media deployment and use and coproduction factors and benefits.

Table 2: Short literature review according to Wirtz et al. (2017) classification

AUTHORS (YEAR)	RESEARCH ORIENTATION
1. Implementation process and maturity	
Dadashzadeh (2010)	Social media usage at local, regional, and national public authorities (governments) should be the result of strategic planning at all levels.
Mergel and Bretschneider (2013)	They suggest that the implementation and use of social media applications follows a three-step process: from experimental and informal, via informal standards, to formalized policies.
Lee and Kwak (2012)	They provide a maturity model on social media for open government. They propose a sequential development of open government principles with increasing social media-based public engagement. These studies outline the technological and functional development stages and implementation processes.
Criado and Rojas (2012)	The use of social media by public administrations is an expanding and multidisciplinary phenomenon.
Landau (2011); Lindsay (2011)	Social media's attributes (immediacy, ubiquity, and availability) make them very useful in sharing, especially in times of crises or emergency situations
Picazo-Vela et al. (2012)	Public administrations use social media with different purposes: to carry out recruiting tasks, to reach citizens and other stakeholders, to share information with other public organizations, to promote citizen participation in public issues or to improve transparency.
2. Social media deployment and use	
Sandoval-Almazan and Gil-Garcia (2012)	Address the development of local government portals in Mexico regarding collaboration and participation. They showed that only a fifth includes tools for interaction and participation, concluding that open government initiatives should be supported by social media
Bonsón et al. (2012)	Analyze the use of Web 2.0 and social media within local governments in the European Union. They concluded that social media implementation shows a heterogeneous picture and that the full potential of social media is not exploited.
Unsworth and Townes (2012)	Analyze social media used by the United States Department of Agriculture. Their key outcomes are that social media are not used in a way that promotes open government.
Katz and Halpern, 2013; Ma, 2013; Riarh and Roy, (2014)	Empirical studies are dealing with the adoption of social media in an open government context of different countries. The studies show relatively low social media adoption rates and unsatisfactory utilization of installed applications
Bryer (2011)	Analyzes challenges of the deployment of social media in the context of public participation. The study emphasizes the importance of considering multi-stakeholder relationships instead of unidirectional or asynchronous communications ways
3. Coproduction factors and benefits	
Meijer's (2011)	The study highlights the role of virtual communities for networked coproduction in the public sector.
Linders (2012)	Focuses on the coproduction factor and emphasizes the importance of citizen coproduction in the delivery of public services in the age of social media.
Chun and Cho (2012)	Study the implementation and outcomes of a social media participation platform that is used for citizen participation in policy decision-making in Korea.

This short literature review presented in Table 2 shows that the authors are aware of the importance of social media for citizen collaboration and as a tool that can foster transparency and participation. The authors recommend implementing social media within open government initiatives, but they stressed the necessity to better exploit advantages and disadvantages of social media (e.g., Bryer and Zavattaro, 2011; Chun and Cho, 2012; Linders, 2012).

Regarding research related to Western Balkans countries, the ReSPA (Regional School of Public Administration) together with its E-Government Network members and respective regional and international experts conducted two comparative studies. The first one was conducted in 2013, and it was devoted to e-government in the Western Balkan region. The second one, follow up study - "From E-toOpen Government" was made in 2015.

The results of the last study showed that Bosnia and Herzegovina is performing less well than the regional average on both e-government and open government. Namely, BIH had relatively well results referring to transparency, but less well on collaboration and poorly on participation. Regarding the Former Yugoslav Republic of Macedonia (FYRM), it is similar to BIH, performing less well than the regional average on e-government, but it had an exceptional performance as a leader on transparency and a good performance on participation in the context of open government. According to this study, Kosovo is the weakest of the six participants in both e-government and open government. As opposed to the other WBC, Kosovo started later and still has huge political and institutional challenges. The study showed that Montenegro is a regional leader in both e-government and open government. Montenegro is doing extremely well in participation and very well in collaboration compared with the average, but related to transparency has only an average score. Regarding Serbia, the study showed the average level of both e-government and open government. Serbia has very well results related to transparency and participation, but it has a lack of any real efforts regarding collaboration (ReSPA, 2015).

The ReSPA studies showed that, in spite of all challenges, the WBC try to catch up with developed countries related to both e-government and open government. In line with that efforts, the researchers from the WBC have become more interested in analyzing the use of social media as a tool for fostering open government in their countries (Mabić et al., 2017; Rexepi et al., 2016; Đurić-Atanasievski and Bobar, 2016; Budinoski and Trajkovik, 2012).

1.2 Open government initiative in Western Balkans countries

The previous literate review shows that the governments all over the world have become aware of the potential of social media in reaching more transparent, collaborative and participant government. That was the main driver in establishing the Open Government Partnership (OGP) as a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new

technologies to strengthen governance. The Open Government Partnership formally started in 2011, when eight founding governments (Brazil, Indonesia, Mexico, Norway, the Philippines, South Africa, the United Kingdom and the United States) endorsed the Open Government Declaration and announced their country action plans. Since 2011, OGP has welcomed the commitment of 67 additional governments to join the Partnership (OGP, 2017).

In its current strategy, OGP defined that its "*vision is that more governments become more transparent, more accountable, and more responsive to their own citizens, with the ultimate goal of improving the quality of governance, as well as the quality of services that citizens receive*" (OGP, 2016: 2).

The analysis of the first five OPG's years showed that the national OGP process has helped countries to establish institutional mechanisms that give continuity and legitimacy to an open government reforms, made dialogue and co-creation of regular features of the interactions between OGP reformers, and initiated reforms that change the status quo and benefit citizens (OGP, 2016).

However, there are significant differences by OGP's membership countries related to establishing necessary institutional mechanisms as prerequisites to open government reforms and in achieving government's transparency, partnership, and collaboration. Table 3 presents a current status in OPG by WBC, except Kosovo which is not a member of OGP.

Table 3: Open government partnership – WBC status

Joined	No. of Commit-ments	No. of theme covered	Action Plan Thematic focus (themes that governments have focused on in their commitment development)	Status in OPG
Bosnia and Herzegovina				
2014	0	0	Bosnia and Herzegovina did not submit National Action Plan	The government of Bosnia and Herzegovina has a new deadline till August 31, 2018, to submit a two-year national action plan ending on June 30, 2020
Montenegro				
2011	56	0	20% Conflicts of interest 18% Legislation and Regulation 14% Private sector	Inactive (The Government of Montenegro has not submitted its new NAP) Montenegro has now acted contrary to the OGP process for three consecutive action plan cycles: 2014, 2015 and 2016
Serbia				
2013	27	11	71% Legislation and Regulation 57% Public participation 50% Public service delivery	Second National Action Plan 2016-2018 is posted
The Former Yugoslav Republic of Macedonia				
2011	120	22	47% e-government 32% Legislation and Regulation 29% Subnational	National Action Plan 2016-2018

Source: https://www.opengovpartnership.org/participants [Accessed: March 21, 2018].

As it is visible from Table 3, there are substantial differences between WBCs in status in the OGP. The situation is slightly different from the ReSPA research from 2015. Namely, in the ReSPA study, Montenegro was a leader in both e-government and open government (ReSPA, 2015), but currently has inactive status in the OGP because it did not submit obligatory a two-year National Action Plan on Implementation of the Open Government Partnership Initiative since 2014 and did not cover any of committed themes. As expected, BIH only signed a partnership, without any defined nor covered committed themes. In addition, BIH did not submit a two-year National Action Plan on Implementation of the Open Government Partnership Initiative until now.

2 Methods

The empirical research included the government websites of WBCs: Bosnia and Herzegovina, Kosovo, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia. These states belonged to one state in the past and today have a similar level of economic development and reforms in government institutions. Except for these countries, the analysis was carried out for Croatia and Slovenia as a kind of benchmarks. These counties are already members of the European Union, but share the same past with WBCs (former Yugoslavia). It is interesting to compare them with WBCs in order to see if there are any differences, e.g., if the EU membership influenced their progress in the use of social media in government.

Table 4 shows a list of countries included in research and their governments' web addresses.

Table 4: List of countries included in research

Country	Official website of the Government
Bosnia and Herzegovina (BIH)	http://vijeceministara.gov.ba/Default.aspx?langTag=hr-HR&template_id=91&pageIndex=1
Kosovo	https://www.rks-gov.net/sr-latn-cs/pages/fillimi.aspx
Montenegro	http://www.gov.me/naslovna?alphabet=lat
Serbia	http://www.srbija.gov.rs/
The Former Yugoslav Republic of Macedonia (FYRM)	http://www.vlada.mk/
Croatia	https://vlada.gov.hr/
Slovenia	http://www.vlada.si/

Source: authors' preparation.

An analysis of links to social media platforms on their governments' websites was conducted.

Activities related to the content that WBCs' governments publish on social network sites were analyzed through two aspects. It was investigated whether the links to social network sites were available on the official WBCs' websites and whether these links were valid and active. If the links were not found on the home page, it was checked whether they were available on the contact page. Availability of WBCs' web pages on social network sites was also checked directly by searching on the social networks sites.

Basic characteristics of official SNS profiles of the governments (numerical indicators available on the social network sites and published content) were analyzed on the most common social networks sites. The analysis was conducted during March 2018.The descriptive statistical analysis was performed

about the adoption and use of each social media application by the government of Western Balkans countries.

Additionally, the Facebook Assessment Index (FAI) of the researched WBCs' governments was calculated. FAI is adapted according to Miranda et al. (2013) and uses three categories to evaluate the essential information on a selected Facebook page: popularity, interactivity, and content (Miranda et al., 2013; Malhotra, Singh, 2016).

For measuring popularity, two indicators are available on FB pages: a number of followers (or fans) of their pages and number of persons talking about the site (Michaelidou et al., 2011; Miranda et al., 2013; Malhotra, Singh, 2016). The analysis used a number of followers (NF). Since researched countries have a different number of population, as a corrective factor for calculation of indicators necessary for FAI is used number of population (N) - data available on the Eurostat (the official website of the Statistical Office of the European Union. According to available data on the Eurostat website, the number of population for researched WBC on 1.5.2018. was as follows: BIH 3515982, Montenegro 622359, Serbia 7001444, FYRM 2075301, Croatia 4105493, Slovenia 2066880.

In line with input parameters, the popularity index (PI) is calculated according to formula [1].

$$PI = \frac{\frac{NF}{N}}{max\left(\frac{NF}{N}\right)} \quad [1]$$

Interactivity is measured by activity (number of comments, shares or likes) with current and potential friends, in the case of a government with citizens. Miranda et al., (2013) and Malhotra & Singh (2016) analyzed the level of interactivity through number of adjusted indicators: 1) Number of wall posts made by the government in the last 7 days; 2) Average number of "likes" per post, calculated from the last 10 posts; 3) Average number of comments per post, calculated from the last 10 posts; 4) Average number of shared posts, calculated from the last 10 posts.

However, the authors think that the period of 7 days is very short and that the number of posts can significantly vary because of different events. Because of that, the authors decided to conduct the analysis for the first five months of the year 2018 (151 days in total). The sixth month (June 2018) is excluded purposely because of FIFA World Cup in Russia

The following parameters were used for the calculation of interactivity:

1) Number of wall posts made by the government in the first 151 days (NWP);

2) Mean number of "likes" per post, calculated from the151 days (MNL);

3) Mean number of comments per post, calculated from the 151 days (MNC);

4) Mean number of shared posts, calculated from the 151 days (MNS).

Based on the listed parameters, Interactivity (IV) is calculated according to the formula [2].

$$IV = \frac{\left(\frac{NWC}{max(NWC)} + \frac{\frac{MNL}{NF}}{max\left(\frac{MNL}{NF}\right)} + \frac{\frac{MNC}{NF}}{max\left(\frac{MNC}{NF}\right)} + \frac{\frac{MNS}{NF}}{max\left(\frac{MNS}{NF}\right)}\right)}{4} \text{ [2]}$$

Content sub-index provides a measure of the quantity of content items available through Facebook to the citizens. Evaluating only the presence/absence of certain information as an indicator of "quality" probably may not be the best alternative, but it is the solution proposed in the literature to avoid the use of subjective factors (Miranda et al., 2013). In building index of content value for government, 12content items (CI) are analyzed: location, phone, address, e-mail, web address, additional contact information, video, photos, related pages, links to other social networks, the sites they like, reviews. Each item included in category available on a government Facebook page is marked by 1, so the maximum score was 12points and minimum zero. A content score of a particular government is calculated as the percentage of items that a government FB page contains related to the total number of possible items. In line with that, content sub-index (CV) is calculated according to the formula [3].

$$CV = \frac{\sum_{i=1}^{12} CI_i}{12} \text{ [3]}$$

The final index value is a weighted sum of the scores obtained in each of these categories. Facebook Assessment Index can be calculated according to the following mathematical expression:

$$FAI = (w1xPV) + (w2xIV) + (w3xCV) \text{ [4]}$$

PV, IV, and CV represent popularity value, interactivity value, and content value respectively. The weights (w) for each category were obtained from a Miranda et al. Delphi study, and the following were the assigned weights: popularity 25%, interactivity 40%, and page content 35% (Miranda et al., 2016). Miranda et al proposed the weights after performing a Delphi between experts in social networks (Miranda et al., 2016). The specified weights Miranda et al. (2018) were used to analyze Facebook activities of the local authorities in USA, UK and Spain.

Respecting the specified weights, the authors calculated FAI index according to formula [4a].

$$FAI = (0.25xPV) + (0.40xIV) + (0.35xCV) \text{ [4a]}$$

3 Results

Table 5 shows social network sites where the analyzed countries have official pages. Data related to Kosovo are not found, so Kosovo is excluded from this analysis.

Table 5: Use of SNS across governments

	BIH	Montenegro	Serbia	FYRM	Croatia	Slovenia
Facebook	●*	●*		●	●	●
Twitter	●	●	●	●	●	●
Flickr				●	●	●
YouTube	●			●	●	●
Instagram				●	●	●
LinkedIn					●	
Google+		●				

Note: ● link available on government official websites;
*the profile founded by additional search (Google or SNS search);

Source: authors' preparation.

It should be stressed that the search on Facebook for specific countries offers profiles that look as official, but neither one has a note that confirms that it is an official profile. Also, some of the profiles in their description have statements that resemble official government portal (description of one of the founded profiles of the Government of the Republic of Serbia on Facebook is Education Website). Official profiles of the countries included in the research are in local language, except the Government of the Republic of Slovenia which has two official profiles, one in Slovenian and other in English.

The results of the conducted research show that WBCs have a significant lag in using SNS compared to neighboring countries, Croatia and Slovenia, which are members of the EU. Croatia and Slovenia have official profiles on six SNS, while most of the WBCs have one to two SNS, except FYRM, which has profiles on five SNS. Regarding the links to SNS on official websites, BIH has two links, Montenegro and Serbia have one, FYRM has five, while Kosovo has no links to SNS. Additional search on Google and specific SNS showed that Montenegro and BIH have official profiles on Facebook although they are not specified in the official websites of these countries.

The analysis of the link accessibility to SNS on official websites of researched countries gave some interesting results. Namely, on the websites of Montenegro and Serbia governments exists the option of eGovernment. Website of Montenegro government has a link to Open Government Partnership site. RSS (*Really Simple Syndication*) – as an option which notify logged users about new posts founded at the official websites of the Kosovo, Montenegro and Serbia governments. At the website of the Council of Ministries of Bosnia and

Herzegovina exists logo for e-Government, but clicking on it nothing happens. At the same website on the menu exists option eGovernment which offers two possibilities: the sitemap and the sessions, but under sessions, there is no any information.

Regarding the fact that it was founded that most of the researched countries have an official profile on Twitter and Facebook, a detailed analysis of the official profiles on SNS was conducted only on Twitter and Facebook.

Table 6 shows numerical data of official Twitter profiles.

Table 6: Numerical characteristics of official profiles on Twitter and numerical analysis of the last 30 tweets

	BIH	Montenegro	Serbia	FYRM	Croatia	Slovenia
Tweets	783	3947	2711	10,7 K	58,5 K	16,4 K
Following	349	291	120	177	19,3 K	10,2 K
Followers	807	8293	12,5 K	6840	168 K	63 K
Likes	2	1526	207	269	5553	303
Last activity	29.3.2018	1.4.2018	28.3.2018	2.4.2018	2.4.2018	30.3.2018
Joined	Apr. 2016	Dec. 2011	Jun. 2012	Sep. 2011	Dec. 2011	Jun. 2009
Photos/videos	360	1867		830	6666	1477
Lists		1		1	15	
Moments						1
Period of the last 30 tweets (Days)	16.3.-29.3 (14)	23.3.-1.4. (10)	26.1.-28.3. (62)	28.3.-2.4. (6)	30.3.-2.4. (4)	29.3.-1.4. (4)

Note: Analysis completed on 03/04/2018;

Source: authors' preparation.

According to the dates of last posts and the analysis of the time for the last 30 tweets on Twitter, it can be concluded that researched governments relatively actively use their Twitter profiles. The only exception is Serbia because it realized its 30 Tweets in considerably longer time compared to other countries (Serbia through two months, while other countries through two weeks). The activities on other SNS are not indicative. The posts are especially rare on YouTube and Google+.

The analysis of the activity and attractiveness of analyzed governments on SNS, based on numerical data available on official SNS profiles, shows that Bosnia and Herzegovina has considerable lag compared to other countries. This lag refers to the number of followers, number of following, number of likes and shares, except for the number of posts. The reason for this lag can lay in the fact that the Council of Ministers of BIH is present on Twitter just

since the April 2016, while the governments of other countries have been on Twitter more than five years.

Table 7 shows numerical data of official Facebook pages for analyzed countries for period from 1.1.2018. until 31.5.2018.

Table 7: Numerical characteristics of official Facebook pages

	BIH	Montenegro	Serbia	FYRM	Croatia	Slovenia
People like this	61	16791		29092	155519	3700
People follow this	64	17026		29579	152680	3828
Last activity		29.5.2018		31.5.2018	29.5.2018	30.5.2018
Number of posts with						
Likes		234		300	27	143
Comments		144		149	27	88
Shares		192		257	26	138
Mean number of ... per post						
Likes		193.87		57.04	253.46	22.02
Comments		10.26		9.05	83.93	6.94
Shares		7.96		7.19	21.42	6.75

Note: Analysis completed on 31/05/2018.

Source: authors' preparation.

The sub-indices for popularity, interactivity and content are calculated using data from table 7, and formulas [1], [2], [3].Here is the example of calculation for Montenegro:

$$PI(Montenegro) = \frac{\frac{17026}{622359}}{0.03719} = 0.7356$$

$$IV(Montenegro) = \frac{\left(\frac{234}{300} + \frac{\frac{193.87}{17024}}{0.01139} + \frac{\frac{10.264}{17024}}{0.00181} + \frac{\frac{7.9635}{17024}}{0.00176}\right)}{4} = 0.5943$$

$$CV(Montenegro) = \frac{10}{12} = 0.8333$$

FAI indices for WBCs are calculated on the basis of obtained results for sub-indices, according to the formulas [4], [4a] and [4b].

Table 8 shows results for all sub-indices and FAI index for analyzed WBCs for period from 1.1.2018. until 31.5.2018.

Table 8: Numerical characteristics of official Facebook pages and FAI scores

	BIH	Montenegro	Serbia	FYRM	Croatia	Slovenia
Popularity	0.0005	0.7356	-	0.3833	1.0000	0.0498
Interactivity	-	0.5943	-	0.3690	0.1545	0.7455
Content	0.3333	0.8333	-	0.8333	0.5000	0.5000
Scores (weights according Miranda et al.)						
FAI		0.7133		0.5351	0.4868	0.4856

Note: Analysis completed on 02/04/2018.

Source: authors' preparation and calculation.

The results in Table 8 show that it was possible to calculate the FAI score just for two WBCs (FYRM and Montenegro). Namely, the first analysis of the existence of official profiles on social networks founded that the government of Republic of Serbia has no official profile on Facebook, while the Council of Ministers of Bosnia and Herzegovina has two profiles, one marked as official but without any posts or activities, so it was impossible to calculate the index of interactivity. According to that, Serbia was excluded from any calculations, while for BIH only two FAI components were calculated. The highest FAI value (weights according Miranda et al.) of 71.33% is scored by Montenegro, while FAI of FYRM is 53.51%. Comparing with results of Croatia and Slovenia, both EU countries have higher FAI index. It is interesting that analysis of FAI in the range from 0 to 100%, showed that both benchmarking countries (Croatia and Slovenia) have result less than 50%. The reason for that can be the results of specific FAI components. The index of popularity is highest for Croatia and lowest for Slovenia, while WBCs are somewhere between these countries, although Montenegro has almost twice higher value for the index of popularity than FYRM. Slovenia has the highest interactivity score followed by Montenegro, while FYRM and Croatia have relatively low scores for interactivity, especially Croatia. Related to the content score, it is important to stress that both WBCs (FYRM and Montenegro) have a higher score than Croatia and Slovenia.

Generally, the content analysis of SNS's profiles showed a high diversity of posts. Namely, the governments have different portfolios, duties, and responsibilities, so it makes sense that the posts are uneven.

Published content mostly includes messages with announcements or schedules about activities to be held by the government or some of their institutions or public agencies. Above all, there is the information about the meetings of governments' officials with officials from foreign countries, as well as the information about participation at different events. All that information belonged to the promotion. It is clear that citizens should be informed of these activities, but for them, it is more important the information about concrete activities that governments take and which influence their quality of work and life in the specific country. It should stress that on the Twitter pro-

file of BIH government one can find agendas for some sessions of the Council of Ministries of BIH, while that is not the case with other WBCs.

4 Discussion

The presence of WBCs' governments on SNSs showed significant lag related to Croatia and Slovenia. The exception is FYRM. One of the reasons for higher activity of Croatia and Slovenia on SNSs can be an easier implementation of the good EU practices when the country is already in EU (easier access to EU funds, obligation to follow EU guidelines, etc.).

One of the biggest problems of WBCs is lack of systematic approach, i.e. lack of the strategy related to the use of SNSs in governments, or if strategy exists, the lack of its implementation.

As it was presented in Introduction, although researched WBCs (except Kosovo) are members of OGP, there are substantial differences between them related to the status in OGP. Serbia and FYRM have made some progress, while status of Montenegro is inactive and BIH only signed partnership without submitting the two-year National Action Plan on Implementation of the Open Government Partnership Initiative.

However, the results related to the interactivity should be taken with caution. Generally, all four researched countries whose governments are presented on Facebook have a lot of posts, but the content of these posts is very uneven which significantly influence the reaction of their followers. By that, in the further research, the FAI index should be calculated by the type of posts (content). In that case, the result of interaction will be more precise. However, in the calculation of interactivity, only the number of likes to post is calculated, although Facebook today enables the expression of different emotions through liking (cry, anger, love, wonder, etc.). It means that the index of likes should be corrected by emotions.

5 Conclusion

The analysis of WBCs status in OGP (Table 3) shows that there are differences related to establishing necessary institutional mechanisms as prerequisites to open government reforms and in achieving government's transparency, partnership and collaboration (FYRM and Serbia are leaders, Montenegro lags, BIH is at the beginning, while Kosovo is not member of OGP). The research shows that there are differences among WBCs related to the use of SNS in reaching the goals of OGP. Since the main goals of OGP are promotion and increase of governments' transparency, there is a lot of space for the use of SNS that have a huge potential in addressing the OGP goals. The analysis of SNS profiles of researched governments shows that SNS can provide a high level of transparency, citizens informing and interaction with government. The results of the research show that the government of the researched WBCs are

presented on SNS, some of them more (FYRM), some of them less (Serbia, BIH), depending on the analyzed social network. However, these countries do not lag far behind established benchmarks – Croatia and Slovenia. Moreover, as FAI scores show, the content score for FYRM and Montenegro is higher than for Croatia and Slovenia.

However, it is important to stress that presented research cannot be used to make any general conclusions. The main reason for caution lay in the fact that analysis was not done according to the types of posts (that can directly provoke, or not, the reaction of followers), but just according to the frequency (only numerical/quantitative data was used). It means that the authors did not analyze the content of post, i.e. the type of post. In future research all activities (like, comment, share) should be analyzed in the context of the type of post, because the response of citizens is not the same if the post is about higher prices for some goods/services, or the post is about new laws/regulations, or is about visit of foreign countries delegations, or about sport success and etc.

According to the current situation, researched countries have no any or have poorly developed and/or unimplemented Plan for SNS activities, meaning that most of WBCs started their SNS story following the general principle "everybody is present on SNS, so we also should be there." But, the analysis of WBCs' status in OGP (Table 3) shows that there are differences related to establishing necessary institutional mechanisms as prerequisites to open government reforms and in achieving government's transparency, partnership and collaboration (FYRM and Serbia are leaders, Montenegro lags, BIH is at the beginning, while Kosovo is not member of OGP).

In the presented research, the authors in calculation of FAI index used weights defined by Miranda et al. (2013). However, for the future analyses authors propose conducting of the research for defining weights for all categories of indices before FAI calculation. For example, the sub-index content was calculated only according to the number of items like address, phone numbers and working time, which can be found at official government Facebook page. The authors' opinion is that such type of content should be less important than popularity, but it has to be confirmed.

Inevitably, the question is, are governments posting on SNS the contents that are important to their citizens or themselves? On the one hand, transparency means that data and information related to the activities of government should be presented to citizens, but it is not enough. In order to achieve open governance, the government should find a balance between transparency, participation, and collaboration. Unfortunately, that is not the case with WBCs because participation and collaboration are still huge challenges for their governments. The publishing of just promotion activities and the announcement of events makes an impression on WBCs citizens that all SNS activities are in

service of government's official promotion and for the sake of keeping their positions and benefits.

A SNS is just one of the different social media that can support governments in the implementation of open government initiative. As OPG proposed, WBCs should adopt a strategic approach related to the implementation of SNS in order to establish institutional mechanisms that will provide continuity and legitimacy to open government reforms.

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Consumer Online Dispute Resolution (ODR) – A Mechanism for Innovative E-governance in EU[1]

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ABSTRACT

Online Dispute Resolution (ODR) could be the first important step towards adjusting the public Administration to the requirements of the digital era by introducing new e-disputes. In this context, this article examines the significance of the emergence of consumer ODR systems in EU as a new mechanism for resolving disputes, online ones included. It takes a theoretical research approach to evaluate the nature and scope of ODR development in the emerging field of e-governance and combine it with a comparative data analysis to identify the core positive and negative challenges in the use of ODR. Some EU member states have already adopted ODR as a tool for digital e-government and others are still in the period of its implementation. ODR has already proved effective resolution for at least some disputes (e.g. cross-border disputes), but unfortunately has not yet reached its full potential. The lack of relevant ODR case law is another issue that contributes to only gradual usage of ODR systems and their efficiency. Key findings are formulated as a list of challenges that EU has to face for efficient use of ODR and it as an important part within innovative European e-governance in the future.

Keywords: *dispute resolution, consumer protection, online dispute resolution (ODR), e-disputes, digital era governance, innovative e-governance, EU*

JEL: D18, K23

1 Introduction

New conflicts, especially e-disputes, are the consequence of nowadays interaction through information and communication technology (ICT). Conflicts may be in our daily lives deleterious or beneficial – whether you see a change as a conflict or a valuable lesson depends only on our prospective (Ibbs et al.,

1 *This article is a revised version of the paper entitled ´Consumer Online Dispute Resolution (ODR) – As a key cultural change – Mechanism for invoative Public Administration in EU´, presented at the 25th NISPAcee Conference in Kazan, Republic of Tatarstan, Russia Federation, 18 May – 20 May 2017. The NISPAcee contributions are not publicly available.*

2001, p. 159). Governments need to deal with the entire range of disputes in society, mostly on the area of citizen or consumer protection – whether under civil or administrative law. A wide range of goods and services are today available online, but there is no truly adequate mechanism for legal certainty. Therefore, the important role of the government is providing valuable information to citizens or consumers through e-governance with easy-use mechanisms to help resolve small value disputes, which arise from e-commerce transactions.

After EPRS (2016, pp. 1-3) e-commerce can offer reduced transaction costs, more flexible contract terms with lower prices and broader choices to consumers, and is currently widespread in sectors of electronics, clothing, shoes and digital content. The overall value of business/government-to-consumers (B2C or G2C) e-commerce is estimated at almost 2% of the EU's GDP.[2] According to the European Commission (hereinafter: EC), in 2014, 44% of EU consumers purchased online domestically and 15% from other EU countries, furthermore, in 2015 one of three consumers experienced problems with online buying, which manly concern delivery and product conformity. The Consumer Conditions Scoreboard EU (2015) revealed that cross-border purchases cause European consumers number of problems related with limited awareness of some key consumer rights guaranteed by EU legislation.[3] Scoreboard indicates a quarter of all consumers with problems did not complain, they believe in low chances of success or are not aware of other possible mechanisms of the complaint procedure. Meanwhile, consumers were most satisfied with alternative dispute resolution (hereinafter: ADR) complaint-handling bodies,[4] followed by those who complained directly to the service providers.

The Online Dispute Resolution (ODR) – so called online ADR – potentially offers a useful set of tools for resolving disputes – both online and offline. EU has proposed applicable ODR platform as a tool for digital e-government especially to resolve cross-border online disputes. EU ODR platform is now in the last developing stage. Although, EU is still facing different barriers caused by translation, internal non-harmonized ADR systems and administrative dilemmas according to existing legal gaps across Member states. EUs' goal has been set – till the end of 2018 every Member state is obligated to introduce ODR platform in their (digital) legal system. Therefore, this paper focus is on the development of the Consumer ODR systems in EU as an innovative reform of e-governance with the new ODR regulation in the future.

2 With tangible goods and offline services according for the bulk of online spending (in average 760 EUR in 2014), followed by online services and digital content (94 and 107 EUR).

3 Only 9 % of all respondents were familiar with the right not to pay for or send back unsolicited product, the right to a free repair or replacement of defective goods.

4 Of all cases of complaints dealt with by the European Consumer Centers (ECC) across the EU in the past 10 years, 50,000 involved e-commerce and almost 5,000 were referred to some form of ADR. Failure to deliver goods, contract cancellation, and goods that may be faulty or not compliant with the order regularly account for around 45% of all complaints received by ECCs.

2 Methods and Data

This paper is based on the use of different research methodologies, techniques and analysis. Theoretical research is mainly based on classifying, identifying and differentiating of Consumer ODR systems in EU, what gives a clear picture of non-complete ODR development. With theoretical data analysis of ODR systems across EU after different authors and comparative data analysis of main existing ODR platforms, we propose results as key findings with important issues and challenges, which EU has to face to complete ODR developing stage and ODR to become available for efficient use. Because of a lack of relevant case law on ODR procedures and its final online decisions with private security premise of the process, we could not determinate realistic use of ODR systems and its efficiency. The results of theoretical and comparative analysis of ODR systems helped us in the discussion whether EU ODR platform can be connected to e-governance or not. The discussion is based on data analysis of different common EU principles combined together in one framework and answer main research question, what can be done for a more innovative e-governance in EU.

3 Consumer ODR and E-governance in EU

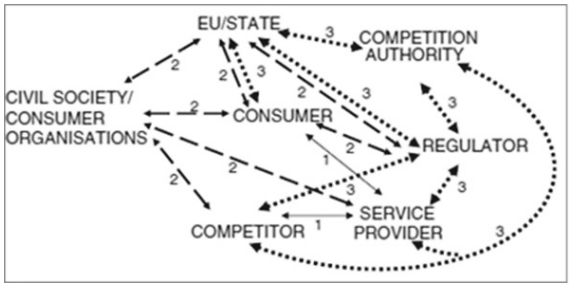
ICT and Public Administration cannot exist without each other. Governments have worldwide used ICT to create new dimensions of economic and social progress. Public administration renovated with ICT exist online as e-governance, which includes three dimensions (Okot-Uma, 2000, pp. 5-11):

- E-democracy: encompass all forms of e-communication between government and citizen for a more open government (interaction with a civil society) and citizen's access to information and knowledge (about the political process, services, and choice availability).[5]
- E-government: refers to the processes and structures pertinent to the electronic delivery of government services to the public. This dimension strongly depends on governments' 'branches' and 'levels' and information sharing as a service delivery within and in-between. Normally, public service delivery touches different field of citizens' live, such as information regarding passports, local government, social security, health, transport, defense, public services support, national savings, water, inland revenue, employment, power utility, environment and others.
- E-business: a broader definition of Electronic Commerce (e-commerce), not just buying and selling but also servicing customers/consumers and collaborating with business partners, and conducting electronic transactions within an organizational entity.

5 Main principles of information management are access, process to information, awareness of information, communication and learning the experience, involvement and participation in decision-making process. More informed citizen has a better position to exercise its rights, play its role, carry out its responsibilities and define its relationships to others.

E-government with e-business structures various relationships for exchanging information and commodities or sale of goods and services. Most important e-commerce relationships that occur in consumer disputes are: government-to-government (G2G), government-to-business (G2B), government-to-citizen/consumer/public (G2C), citizen/consumer/public-to-government (C2G), citizen/consumer-to-business/public (C2B), government-to-business (G2B), business/private-to-government (B2G), intra-government (e-business). After Jeretina (2016, p. 196-197) parties can be interpreted by various legal regulation with different legal conceptions under civil or administrative legal frameworks. Furthermore, theoretically and normatively there is no consensus on the definition of the parties, which is causing divergences in legal relationships (e.g. C2B or C2G, B2C or G2C, B2B or G2G, B2G or G2B). In figure 1 is shown the complexity of legal relationships that occur within e-commerce transactions. For example consumer or citizen is namely an everyday user of public services (PSO or USO – service provider or its competitor), which are on the domestic level regulated by Regulators (consumer organizations/agencies/competition authority/government), and on the international level by EU or Member state. If the regulation is not complementary between domestic and international level and also inter-domestic level its' own, then this can cause legal gaps in the use of legal provisions and drawing the line between public and private domain. The aim of administrative proceedings is an overall balance of public and private interests; more specifically, protecting the rights as a uniform, legitimate, and effective dispute resolution between public authorities (G) and private parties (C or B).

Figure 1: Complex e-commerce relationships between different actors in EU



Source: Szyszczak and Davies, 2011, p. 174.

Despite divergences in complexed e-commerce relationships, governments could provide relevant online information, mostly as 'know how' methods to resolve e-disputes. The ODR may be used in various legal relations between public and private actors (C2B, B2C, B2B, B2G, G2B or G2G). Often public providers are considered to be carried out under the public administrative law. Therefore, legal relationships between the parties in e-commerce can be interpreted by various legal regulations – under civil or administrative law. ODR mechanisms can be the perfect option for efficient consumer protection in

administrative proceedings. ODR as a fourth dimension within e-governance can bring new behavior and online interactions, which introduce us to various challenges dealing with new online conflict resolution management.

3.1 Consumer ODR as a new mechanism for resolving e-disputes

ODR is considered as an online ADR or out-of-court resolution of e-disputes (mostly cross-border disputes) via digital platforms, which helps citizens as consumers resolve their disputes with traders when they have problems with purchased good or services in an internal market. It is a fast and efficient tool with the presence of a third virtual-neutral party (mediator or similar person), who facilitates in order to reach a common settlement in resolving disputes between consumers or citizens (C) and businesses as private or public entities (B or G). "Virtual mediators" have the important role and increased responsibility for virtually facilitate parties from different States to the consensual decision on digital platform. The ODR platform can be considered as a "forth party" with the role of technology, which frames the parties' communication and provides the value traditionally provided by a mediator (Katsh and Rifkin, 2001). The "fourth party" is metaphorical like a mediator that can play different roles with a different impact in different contexts. In the ODR process, the "fourth party" can provide democratic values often found in mediation, by assisting the parties to identify common interests and by helping them to generate mutually acceptable solutions to reach consensual agreement. After Katsh (2006, p. 5) in other words, where there is a virtual mediator, the "fourth party" can alter the role(s) of a third party since the third party will increasingly be interacting with an electronic ally as well as with the disputants.

After Heuvel (2000, p. 8) exist four types of ODR systems: 1. Online settlement, using an expert system to automatically settle financial claims; 2. Online arbitration, using a website to resolve disputes with the aid of qualified arbitrators; 3. Online resolution of consumer complaints, using e-mail to handle certain types of consumer complaints; 4. Online mediation, using a website to resolve disputes with the aid of qualified mediators. Performing ODR as an ADR method and system together via a central ODR platform can be driven into two ODR processes (Landry and Thibault, 2003):

1. **ODR system provides an integrated ADR solution to consumers and businesses conducted online**. System enables an authorized trader to link its e-commerce web-site to the dispute resolution services centralized on the ODR platform. The link is performed by a distinctive, recognizable Trust Mark displayed on the e-commerce web-site and identifying the ODR services,[6] after ODR platform provides an online framework for the parties to exchange information and proposed solutions for resolving their dispute. Qualified mediators are appointed to resolve e-disputes, which the parties are unable to settle by themselves.

6 The consumer browsing the e-commerce web-site hyperlinks to the ODR platform by clicking on the Trust Mark.

2. **ODR system provides ODR services to any parties who agree to use it.** A contract clause providing for such an agreement is made available on the ODR platform for parties to insert in their contracts. The parties may agree to use one or more ODR services, including negotiation, mediation or arbitration; the mediation and arbitration are performed online by qualified third neutral parties.

Before main ODR systems have rely on fixed communication technologies (static computers), while today can be provided also with mobile technologies, tablets and other flexible technologies. After Conley Taylor (in Agustí et al., 2009, p. 90) till 2006 existed more than 146 different ODR sites that were launched with examples in each continent (including Africa, Peru and Philippines). Many of them have since then closed down or appear to be dormant or without significant activity. Most of this sites were launched in Amerika (50 %) and Europe (33 %), but are also growing in Asia Pacific (14 %). Furthermore, it is hard to make a fair comprehensive judgement, whereas the ODR statistic cases can be sometimes difficult to accomplish. Namely, there exist a lack of information for more than 70% of this sites and some also do not include information on their results, because of confidentiality requirements. However, the most known ODR sites that handle the high number of cases are: SquareTrade[7] (over 1.5 million), Cybersettle[8] (over 100,000), eBuy[9] (through SquareTrade over 60 million received complaints as reviews), iCourthause (over 11,000 cases filed), clickNsettle[10] (over 10,000 cases per a year), iLEVEL, Smartsettle,[11] WebTrader (over 2,000 cases each), Youstice,[12] Amazon,[13]

7 SquareTrade offers a password protected "Case Page" on which parties may utilize to communicate directly, without the aid of a mediator or other SquareTrade personnel. If the parties are unable to settle the dispute, information about the case can be submitted to a mediator. According to SquareTrade, self-service tools achieve over 80% successful resolutions. See more in Abernethy, S. (2000): Trusted Access to the Global Digital Economy/Square Trade International ODR Case Study, UNECE Forum on Online Dispute Resolution, Palais des Nations, and on https://www.squaretrade.com/.

8 See more on http://www.cybersettle.com/.

9 It is an online store that have a bad review handling case as a bad product commercial (first ODR step process) and after (as second) complaints handling through a Trust Mark: SquareTrade. More on http://www.ebay.com/.

10 ClicknSettle is a wholly owned subsidiary of NAM (National Arbitration and Mediation), a national provider of arbitration and mediation services and electronic case management software. The company maintains Hearing Officer Rosters and conference facilities nationwide. Over 10,000 cases are handled annually involving every area of law: Personal Injury, Contracts, Construction issues, Medical Malpractice, Commercial/ General Liability, Employment Practices, Environmental conflicts, amongst others. See more on http://www.namadr.com/.

11 Smartsettle is applicable to virtually any situation where there are multiple decision makers with conflicting objectives. Smartsettle's primary function is to support decision makers, whether individually, in groups or on opposing teams. Smartsettle's products are designed to be able to help with any conflict, no matter how big or small. Smartsettle can be used in different ways with different schemes: Two-party or single-issue case, negotiation, mediation, facilitation and arbitration. More on https://www.smartsettle.com/.

12 Youstice is web application that helps resolve customer complaints and make shopping trouble-free. With Youstice, companies can seamlessly communicate and handle customer complaints. Similarly, disgruntled customers can get prompt assistance with their issues and save valuable time. Companies and customers are able to communicate, negotiate directly, and resolve issues. More on https://www.youstice.com/en/.

13 Online store that resolve all complaints through a Trust Mark: SquareTrade. More on https://www.amazon.com/.

TRUSTe[14] (1000 of complaints), and others. Most of these ODR platforms use different ODR schemes and have formal policies and procedures, including management protocols, rules and standards of conduct, codes of practice and privacy policies. The most used ODR schemes till 2004 are mediation, arbitration, negotiation and complaint handling. Along these ODR schemes are today's most popular also single-case and two-party handling, reviews handling, conciliation and facilitation.

The ODR procedure is confidential and information exchange enjoys strict data protection under policy of privacy. Main advantages of ODR process are not just voluntariness, informality, security and privacy of the procedure, but also fast final decision, which must be reached within 90 days. The ODR Advisory Group (2015, pp. 8-9) has proposed main court challenges, which ODR can provide in resolving e-disputes.[15] ODR can provide can provide intelligible and trustworthy citizen, who have affordable, proportionate and appropriate online access to justice with consistent, focused and reliable third party that is able to bring under robust laws a speedy, focused and final decision at avoidable high costs.

3.2 Historic and legal overview of consumer ODR

Existence of many Internet access limitations was the main reason for ODR taking two decades to be finally realized. In 1996, the National Center for Automated Information Research (NCAIR) was the first who promoted and sponsored ODR on its conference, because of the growing number of online disputes arising out of online activities (Katsh, 2006, p. 3). Since 1996, ODR has been developed through four different stages, from which the last is still as ongoing process (Katsh and Rifkin, 2007, pp. 47-72, Conley Taylor in Agustí et al., 2009, pp. 87-88, Cortés, 2010a, pp. 55-56):

1. **"Hobbyist phase"** (from the creation of the internet till 1995, when ODR has not exist): The first disputes arose from the internet and informal ODR mechanisms were used. Ideas started appearing in the different methods as to how these disputes could be solved in an effective manner. Individual enthusiasts started work on ODR, often without formal background.
2. **"Experimental phase"** (from 1995 to 1998): More disputes started to appear and the first ODR initiatives were used by foundations and internatio-

14 TRUSTe privacy programs hold companies to high standards – helping them protect the privacy of parties' personal information. Company's back this up by offering TRUSTe powered ODR, which lets users report potential violations of posted privacy statements and specific privacy issues that pertain to TRUSTe clients. TRUSTe investigates all eligible complaints and mediates solutions between users and clients. More on https://www.truste.com/.

15 *Affordable* – for all parties in the dispute; *Online Accessible* – for citizens with physical disabilities; *Intelligible* – self-representation; *Appropriate* – for an increasingly online society; *Speedy*; *Consistent* – providing some degree of predictability in its decisions; *Trustworthy* – users can have confidence; *Focused*; *Avoidable* – involving a judge is a last resort; *Proportionate* – lower costs; *Fairness* – citizens can present their cases to an impartial expert; *Robust* – clear rules of procedure; *Final* – court users can get on with their lives.

nal bodies funded academics and nonprofit organizations to run pilot programs.

3. **"Entrepreneurial phase"** (from 1998 to 2002): The ODR industry started to emerge and commercial enterprises as a for-profit organizations launched private ODR sites and had successful initiatives (e.g. SquareTrade and CyberSettle).
4. **"Institutional phase"** (from 2002 and continues to the present): It refers to the adoption of ODR programmes by public bodies, including courts, government dispute resolution agencies.

In this context, the development of ODR have been driven from two main forces:

1. The difficulties in traditional methods for resolving e-disputes have led to interest in faster, low-cost, more proportionate cross-jurisdictional dispute resolution methods. Special interest in this force have shown governments and intergovernmental organizations in promoting e-commerce (OECD, 1999), whereas traditional courts were not a realistic option for disputants.
2. The forces that promoted ADR as an alternative to courts are also driving the development of ODR.

ODR is today a political priority for the EU. The beginnings of EU's special attention with the promotion and development of effective consumer protection date back to early 1975. For instance, the EU legal basis regulation for ADR are provided by article 114 and 169 of the Treaty on the Functioning of the European Union (hereinafter – the TFEU).[16] Although, the TFEU indirectly promotes also ODR, while giving particular importance to citizen (part II) and consumer protection (title XV) through trans-EU networks (title XVI) in terms of supporting their interests, providing high protection and promotion of their rights by awareness building, education and self-organization. The first steps of developing ODR systems were highlighted through promoting ADR schemes as 'soft law' in two EC Recommendations,[17] to ensure greater choice and flexibility for consumers, particularly with respect to e-commerce and the development of communication technology. Furthermore, the EC drafted the Green Paper on ADR in Civil and Commercial Law[18] in 2002 with the aim to initiate a broad-based consultation of those interested in legal issues. The most

16 TFEU, OJ L EU, No. 83/2010, pp. 47-199. Article 114 regulates EU competences for the approximation of the laws concerning the establishment and functioning of the internal market, while article 169 lists the EU competences for promotion of the interests of consumers and ensuring a high level of consumer protection.

17 The first Recommendation 98/257/EC of 20 March 1998, OJ L 115, 17. April 1998 was on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, and the second the Recommendation 2001/310/EC of 19 April 2001 (2001/310/EC), OJ L 109 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. Main principles are: principle of independence, transparency, adversarial principle, effectiveness, legality, liberty, representation, objectivity, efficiency and fairness.

18 The Green paper on Alternative Dispute Resolution in Civil and Commercial Law (2002), COM (196 final).

important soft law proposals today are Regulation on ODR[19] and ReNEUAL Model Rules on EU Public Administrative procedure (book IV, 2014), which we can combine together in order to increase consumers' empowerment in administrative appeal. After Dragos and Marrani (in ReNEUAL, 2014, p. 540) administrative appeal may be in a broader sense included in category of ADR tools, what has been strongly recommended by Council of Europe and has found its way into most of the jurisdictions, as well as in the EU law. Special rules on the field of administrative contract law are considered in ReNEUAL Model Rules,[20] because there is no consensus on the "public contract" definition. The ReNUAL has proposed that a public contract can be divided into three phases,[21] which are usually common to all legal systems.

Parallel to the proposals as 'soft law', EU also established formal legislation in the terms of 'hard law' – different EU directives, so called "Consumer acquis"[22] – Directive on electronic commerce was the first step to create ODR platforms. Furthermore, a number of EU directives as sector-specific legal regulation[23] focus primarily on the critical area of universal services (telecommunication, tourism, energy etc.), which require the establishment of appropriate and effective ODR systems. The new EU legal framework on consumer protection is increasing the development of ODR, but it is questionable whether the existing EU legislation can assure a consistent ODR platform in all Member States. The EC adopted new hard law legislative framework: Directive on ADR for consumer disputes[24] with Regulation on ODR, which aim is to encour-

19 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

20 ReNEUAL Model Rules on EU Administrative Procedure, Book IV- Contracts, Hofmann Herwig C.H., Schneider Jens-Peter, Ziller Jacques (eds), 2014, Version for on line publication.

21 1. *Administrative procedure leading to the conclusion of a public contract* – governed by administrative procedure and public procurement rules (G2G or G2B/B2G); 2. *Conclusion of the contract* – governed by the rules establishing the prerequisites for the validity of a contract in the right to invoke invalidity (G2B/B2G or G2C/B2C or C2B/C2G); 3. *Execution and end (expiration) of the contract* – above all governed by the law of obligations (G2G or G2B/B2G; B/G2C or C2B/G).

22 Such as Directive 93/13 EEC of 21 April 1993 on unfair in consumer contracts, OJ L 95; Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66, 66; Directive 2009/72/EC on concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55; Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94, p. 55, 94; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1.

23 A series of adopted directives in the field of consumer protection. Such as Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users` rights relating to electronic communications network and services; Directive 2002/65/EC of 9. October 2002 concerning the distance marketing of consumer financial services, article 14; Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspect of timeshare, long-term holiday product, resale and exchange contracts (art 14(2)), OJ L 33, article 14; Directive 2008/6/EC amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal service, OJ L 52, article 3; Directive 2002/92/EC of 15 January 2003 on insurance mediation (Art 11(1)), OJ L 9, article 11.; Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC, OJ L 145/1, article 33 and others.

24 Directive No 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for consumer disputes and amending Regulation (EC) No

age formation of high-quality bodies for resolving contractual disputes. The Directive also touches three main problems,[25] which are important to build efficient ODR structure in the future. The new EU policy aims that empowered consumers are the heart of the Single Market supported with the new EU Consumer program (2014-2020).[26]

3.3 Current state of the ODR platform in EU

The development of extra-judicial dispute resolution has been European concern for the last ten years. The promotion of ODR is simply the next step of a well-established policy.[27] In addition to promote ODR through different regulation, the EU has been active on several fronts to boost its development, essentially on the field of e-commerce. The first ODR initiative that has been financially supported by the EU was the ODR provider called ECODIR.org[28] - Trustmark research project for commercial sites, offering different ODR schemes (such as negotiation, mediation and recommendation) until June 2003 (Kaufmann-Kohler and Schultz, 2004, pp. 86-87). In order to improve the functionality of the common EU market with the power to increase ODR practice, in EU exist three networks: FIN-NET (Network of ADR entities for financial services),[29] the ECC-NET (European Consumer Centers),[30] and SOLVIT ('online problem solving network').[31] Although all three networks have not yet reached the desired levels, were actually the first step towards establishing a common ODR platform in EU.

2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

25 1. Incomplete coverage of consumer ADR at sectoral and geographical level, 2. Consumers' and businesses' lack of awareness about existing ADR bodies, 3. Variable quality of consumer ADR.

26 European Commission (2014): Consumer program 2014-2020, see more on http://ec.europa.eu/consumers/strategy-programme/financial-programme/index_en.htm.

27 The political priority was specifically asserted in the context of the infomration society, where the role of new ODR has been recognised as a form of web-based cross-border dispute resolution'). See more in Green Paper (2002), n. 22, p. 1.

28 ODR provider supported by the EC, used a three-step process of negotiation, mediation and recommendation. Ecodir.org used an online facility that allows online registration and, subsequently, negotiations using e-mail, and only after negotiations fail will mediation be utilized. ECODIR project was a pilot project that provided online consumer conflict resolution services until the end June 2003.

29 Financial Services Complaints Network, established for the development of special ADR bodies on the basis of the document – Commission 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115/31. FIN-NET is network of national ADR, which deals with cross-border disputes between consumers and financial service. FIN-NET has 50 members from which there are 19 EU Member states and Ireland, Liechtenstein in Norway. This means that Bulgaria, Cipher, Estonia, Hungary, Lithuania, Romania, Slovakia, Slovenia and Croatia are still not members of FIN-NET.

30 European Consumer Centers Network, established as Extra-Judicial Network (EEJ-NET) with the EC Resolution 2000/C on a Community-wide network of national bodies for extra-judicial settlement of consumer disputes, OJ C 155/1. ECC-NET is European network particularly for consumer protection which directs consumer to an adequate ADR body. The Annual reports (2005-2009) confirm, that in the last two years number of ADR cases increased from 410,000 in 2006 to 530,000 in 2008 (DG SANCO, 2009, p. 13).

31 SOLVIT – online network for out-of-court settlement in legislation misapplication by public authorities on the Single market. More on SOLVIT on http://ec.europa.eu/SOLVIT/.

EC (2016) in line with new Regulation EU/524/2013 on consumer ODR[32] and with Directive 2013/11/EU on consumer ADR, propose new EU-wide ODR platform, which seeks to help consumers resolve disputes arising in connection with their online purchases without going to court. EU ODR platform[33] has become available on 15 February 2016, which provide an easy, fast and inexpensive way to assist in resolving e-disputes between consumers and traders.[34] EC is the currant and main manager of the platform. The ODR platform is easy to use with instructions in all European languages (through 'Your Europe Portal'), which is pay-free and available to all consumers and businesses in the EU. However, the ODR procedure could potentially include a fee defined by the specific ODR body chosen to deal with the process, which will apply its own procedural rules, including regarding the costs.

The ODR platform is a single point (as a Trust Mark) of entry for consumers and traders seeking to resolve e-disputes regarding contractual obligations stemming from online sales and service contracts.[35] ODR procedure is four-step online process:

1. Submitting an online complaint (consumer or trader) via an electronic complaint from in the desired language,
2. Agreeing on the ODR body (within 30 days, in case the parties fail to agree on ADR entity, the complaint will not be taken any further and the complainant is informed of other available means of redress),
3. Complaint handling by ODR body (both parties acts as 'referee' in resolving their dispute),
4. Outcome and closure of complaint (within 90 days, all procedures within the ODR platform are conducted online, while also ensuring the privacy of the users from the outset).

After EU Parliament (2016, p. 2) ODR platform is a user-friendly interactive and multilingual website, which enables consumers and traders to settle their disputes over domestic and cross-border online purchases at the click

32 Regulation (EU) No 524/2013 (complemented in 2015 by Commission Implementing Regulation EU/2015/1051), applicable since 9 January 2016, provides the legal basis for the establishment of the ODR platform at EU level. The platform provides a tool for dealing with disputes initiated by consumers resident in the EU against traders established in the EU (see Article 4(2) of Directive 2013/11/EU for the definition of 'established trader'). It will transmit disputes to designated national ADR bodies that comply with the binding quality requirements established by Directive 2013/11/EU.

33 Available on http://ec.europa.eu/consumers/odr/.

34 A '*consumer*' is a natural person acting outside their trade, business, craft or profession. If an online sales or services contract is concluded for purposes partly within and partly outside the person's trade, with the trade purpose limited and not predominant in the overall context of the supply, that person should also be considered as a consumer. Namely, consumer can be interpreted as citizen, user, insurer, patient etc. '*Trader*' means any natural persons, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession. See Regulation EU/524/2013 on ODR.

35 The online sales or service contract (Article 4 (1/e) of the Regulation EU/524/2013 on ODR) is one where the trader, or the trader's intermediary, has offered goods or services through a website or by other electronic means (for instance, a mobile telephone), and the consumer has ordered those goods or services on that website or by other electronic means.

of a mouse. To ensure the proper functioning of the platform – each Member state had to designate one ODR contact point hosting at least two ODR advisors and to communicate the relevant details to the EC. Member states were able to confer responsibility for the ODR contact points to their centers belonging to the ECC-net. After Directive on ADR, EU traders established an electronic link to the ODR platform on their websites, alongside their email address, thus signaling to consumers their first point of contact. To ensure a higher consumer awareness about ODR process, Member States need to ensure bigger promotion on existence of the ECC-net and ADR bodies connected to the ODR platform. On the ODR platform there is applied exact 365 ADR bodies cross EU, except bodies from Romania and Spain, which are currently not available.

Additionally, through ODR platform was till 30.09.2018 filed 84,745 complaints, from which 58.91 % are national and 41.09 % cross-boarding complaints. Most complaints were filed in the field of airlines service (12.87%), clothing and footwear (10.98 %), ICT goods (6.97 %), electronic goods (4.88 %) and others. Important is that ODR does not deprive consumers or traders of their rights to seek redress before the courts. In fact, ODR boost the enforcement of consumer rights across the EU in the context of an ever-growing e-commerce sector and offer consumers a swift alternative to court procedures. It can also prove to be very helpful in those Member States which have a substantial backlog of cases pending before the courts (for example Croatia). Overall, the platform aims to contribute to strengthening consumer trust in online purchases, in line with the goals of the Digital Single Market strategy.

4 Results: Key Findings in the Use of Consumer ODR Systems in EU

EUs' goal is to develop an efficient ODR platform. ADR structure across EU is set with clear legal regulation. Member states have to complete the ODR implementation till the end of 2018 and recognize its potential. Namely, every Member state has to deal with key issues regarding the use of ODR systems that may remain as a progress or problems in its development process. Some of these advantages and disadvantages are highlighted in the table 1.

Table 1: Key issues in the use of ODR systems

PROGRESS (advantages)	PROBLEMS (disadvantages)
Time savings	*Lack of personal contact (face-to-face)*
– Speeding the process - flexibility using ODR communication. – ODR work at any convenient time (24/7)	– Facilitate misrepresentation of identity and miscommunication. – Videoconferencing or other online technologies. – The interpretation of written communications may require different trainings. – The internet enables parties to self-represent, thus removing prejudices.
Convenience of the procedure	*Technologies problems*
– ODR communications allows the parties to be prepared to produce their best response without being easily intimidated or bullied. – Parties can think more thoroughly than in verbal exchanges before sending their messages. – ODR facilitates the parties to start working on their disputes immediately and allows neutral third parties to continue assisting the parties after key communications.	– Parties may have different levels of knowledge and skills. – No equal technical standards, i.e. technology advances differ in every country. – In EU many people still use dial-up as well as broadband connections.
Cost savings	*Language barriers*
– Lower cost without travel and accommodation expenses. – ODR facilitates self-representation and fast settlements resulting. – ODR appropriate for small value disputes.	– Existing ODR services use manly English or German – difficulty in expressing accurate information. – Barrier not just for those parties who do not speak the language but also for those parties who use it as a second or third language. – ODR translation programs are not efficient.

PROGRESS (advantages)	PROBLEMS (disadvantages)
Litigation	*Need for party consent*
– Greater control over the processes and decisions. – The parties create their own agreement without the third party. – Parties need not legal representatives – the third parties are experts on the particular dispute area, who can remove the need for lawyers and expert witnesses. – Rules of evidence do not apply in consensual ODR.	– Litigation = adversarial procedure familiar to those who use it regularly. – For those who refuse to participate in court proceedings, the latter may summon them with subpoenas and fines.
Control over outcomes	*Loss of public access and pressure*
– More control over the outcomes, increasing conflict resolution options and encouraging enforcement. – Reaching agreements without the limitations imposed by the law.	– ODR generally applies confidential procedures which may cover up important information about defective products, poor customer service, discriminatory practices and other unethical business conduct that, if publicly known, would impact on consumer purchasing choices. – ODR can be used as an effective mechanism to obtain fast and fair redress for consumers.
Appropriateness	*Legal difficulties*
– ODR is the most appropriate tool to address online disputes.	– No clear legal standards for ODR creates many difficulties from arisen of public enforcement to legal gaps across EU regulation.

Source: Cortés, 2010a, pp. 55–59 and author's own.

Most of listed issues can be overcome through appropriate practice, technologies and law. As we can see theoretically ODR is the most sufficient mechanism for resolving online disputes. Its advantages are confirming that ODR is the best tool for resolving e-disputes in e-commerce relationships. Parties can self-represent in a private and secured online compliment process through the Trust mark of a forth party – technology with the help of a well-trained neutral third party and within 90 days reach consensual online agreement. Despite all positive features, disadvantages are showing clear picture what is

missing out in the ODR process – face to face communication, language barriers, authority control over its outcomes, enforceability of final decisions etc. Unfortunately, there is existing a lack of ODR case law, because of its security and privacy provisions, so we cannot determine whether final decisions are binding or not. Although, good ODR practices (e.g. ODR in Belgium and Netherlands) are confirming its good potential to be used in all e-commerce cases also in cases of administrative matters. Namely, ODR development is not yet fully complete. Listed key issues were helpful to specify main challenges how to develop one coherent ODR system in EU. These challenges are after different authors listed in table 2 bellow.

Table 2: Main challenges of the development of one coherent ODR system in EU

FUNDING	
Public – Most ODR project (B2C) have obtained funding from public bodies (e.g. ECODIR) or, court connected services with a standard court process. – Public funding mechanisms: grant funding (e.g. the Online Ombudsman Office), government funding (e.g. EU ODR platform), membership fees (Youstice), advertising revenue, Subsidy from other services.	*Private* – Private funding mechanisms as user fees of ODR providers in many forms: a filing fee, an hourly rate for third parties, an administration fee or online "room" rental, a standard service fee - a set number of hours, a percentage of settlement, a per round bidding fee.
AWARNESS	
Transparency and informing parties – Participation may depend on the chosen ODR process (arbitration, mediaton, negotiation etc.). – Appropriately advertised ODR. – Intermediaries – lawyers, consumer organizations and chambers of commerce, may influence the type of remedies available to the parties. – In order to obtain the parties' confidence in ODR it is necessary to attain the right balance between transparency and confidentiality.	*Trust* – Costs, including fees and possible extra costs when decisions need to be enforced. – Rules that serve as the basis for the body's decisions. – Security measures to keep private data confidential and enforceability of decisions. – An annual report evaluating the functioning of the provider and effective feedback system.

FAIRNESS and DUE PROCESS	
Impartiality – Third parties must be aware of the jurisdiction and the disputants' cultural background, who may perceive impartiality in different manners. – Rule observes that computers are less concerned with perceptions of bias, e.g. ODR providers, such as Square Trade, automatically display a list of common resolutions depending on the type of dispute.	*Selection of neutral third parties and Legal representation* – Necessary training to obtain the appropriate skills for assisting in ODR. – Training for third parties how to use an ODR platform (answer technical questions, and send efficient and frequent communications). – ODR must allow legal representation when it is needed - disclosed to the other parties.
ACCESS	
Accessibility with Hardware and software support – Accessibility of the sites to people with disabilities and slow connection speeds – giving the option of a non-Flash version. – Access to a computer with minimum hardware and software support.	*Language of services – choice offered* – English remains the most common languages for ODR services, followed by Spanish, French and German. – EU ODR platform is offered in all 31 languages. – A single language service is still the most common model (74%), increasing number of bilingual (15%) or multilingual services (11%).
PRIVACY, DATA SECURITY and CONFIDENTIALITY	
The role of technology as a 4th party – Organize information, send automatic responses, shape writing communications in a more polite and constructive manner - blocking foul language. Monitors performance, schedule meetings, clarify interests and priorities etc. – The first challenge confronting ODR platform is choosing among the different types of online communications. *Privacy and Security issues* – ODR websites are at risk of virus infections, intrusions or computer or networking crashes. Firewalls, back-up policies and antivirus systems are needed standard mechanisms.	*Data Security and Confidentiality* – Protection of the data and guarantee for confidentiality work through encryption - asymmetric crypto system: this system uses two different keys (a public and a private key) for encryption and decryption of data. This means that without the right key no one can read the messages. – Minimum security standards: identification of each massage, evidence for completely sent documents, integrity of submitted information, protected information stored on a database from unauthorized parties, distinguish an original form a copy.

POLICIES and PROCEDURES	
The shadow of the law – compliance – Regulation on ODR with Directive on ADR. – Rules of the Member states' Bar Association. – UNICITRAL arbitration rules – EUs' Code of Ethics for Mediators – Model Standards of Conduct for Mediators – Various provisions within ADR/ODR general and sectoral regulation in Member states etc.	*Self-regulation* – Article 16 of the E-commerce directive urges Member States and the Commission to encourage self-regulation[36].
IDENTITY and ONLINE SIGNATURE	
Identity – Digital signature and digital records have the same legal validity as written documents - easier to check someone's digital identity. The identity of the person you are dealing with is not always clear.	*Online Signature* – A digital signature is an authentication method that uses public-key cryptography and plays an important part in ensuring the authenticity, integrity and non-repudiation of data communication.
ENFORCEMENT	
Public entities' enforcement – Governments must ensure that ODR providers comply with minimum standards of due process - they perform public functions, which may ultimately require courts to enforce the outcome. – There is no clear case law of directly enforceable online agreements on the court. The first ODR enforceable decisions will come from public institutions, such as the Spanish Online Consumer Arbitration Boards.	*Self-enforcement mechanisms* – Some ODR services have designed efficient self-enforcement mechanisms. If a legal proceeding is initiated, then enforcement will not take place until the judicial proceeding concludes. – Court actions are extremely rare: 1. the high cost of litigation; 2. the fact that cyber squatters may consider their chances for redress very low or; 3. the 10 day period to bring a court action may be too restrictive.

Source: Heuvel, 2000, pp. 13–22, Conley-Taylor, 2004, pp. 9–12, Cortés, 2010, pp. 6–10, Cortés, 2010a, pp. 75–85, and author's own.

Answering questions regarding ODR funding (public or private), access (ICT support, all languages offered), awareness (transparency, openness), priva-

36 The Electronic Commerce Platform Nederland (ECP.NL), an association between the business community and the Dutch Ministry of Economic Affairs, has drawn up a model 'Code of Conduct for Electronic Commerce'.

cy and security standards (public and private description keys), policies and provisions (self-regulation, regulation compliance), identity (online profile, online signature) and enforcement (public or private, binding or non-binding online agreement), would lead us one step closer to a more coherent ODR system. EU need to fulfill all main points to develop efficient use of the ODR platform. First EU has to ensure proper ODR funding and harmonized regulation strategies, which depend from each Member states' economic and legal framework. Then with good translation, identification program and public or self-enforcement mechanism provide efficient ODR structure, which is available to all ODR users on the Single market. Best solution for EU legal harmonization would be, if ODR platform would be incorporated through one Trust mark within e-governance. If this is theoretically possible to achieve, we discussed in the next section.

5 Discussion: Consumer ODR Within E-governance in EU

Implementing ODR inside e-governance can be risky, difficult and requires change. As OECD (2003, p. 6) stated: "Current practices tend to resist pressures for change, leading to wasted opportunities and unnecessary expenditure…When ICT projects go wrong, cost overruns and service delivery failures can be highly visible." Namely, online services raise issues and bring new challenges in order to pursue changing customers' expectations, privacy concerns and fulfilling public-private interest. In addition to the variety of public administration structures and regulations among Member states, common principles of e-governance can guide them throughout administration convergence. OECD (2003, p. 3) has proposed guiding principles for successful e-governance in EU. These principles can be combined with common principles of European Administration Space (hereinafter: EAS) and realized through ODR principles after Regulation EU/524/2013 on ODR.

1. Vision or political will: leadership and commitment are crucial to managing change. Committed leaders are required to deal with disruptive change to establish visions and plans for the future. ODR needs to be integrated within e-governance into broader policy and service delivery goals, public management reform process and activity of information society. Integration can be achieved through Rule of the Law with ODR principle of fairness, expertise, independence and impartiality (Article 1 and 6). ODR system should facilitate as an independent, impartial, transparent, effective, fast and fair online resolution process, where parties have the possibility freely comment on written online arguments, evidence, documents and facts. Furthermore, parties can reach a consensual online agreement with the help of third and fourth party, and are given a statement of the grounds on which the outcome is based. Therefore, the important role is given to competent authorities (Article 15), data confidentiality and security (Article 13) and resolution of the dispute (Article 10).

2. **Consumer/customer focus:** governments should pursue policies to improve access to online services in the way that customers should have a choice in the interaction method with government and resolving their disputes (principle of "no wrong door"). E-government services could be high qualified and engage citizens in the policy process (feedback mechanisms, information quality policies, strengthen citizen participation). Open and transparent government can be reached with establishment of a transparent and appropriate ODR platform (Article 1, 2, 5) within e-governance. The network of ODR contact points provide easy understandable information on whole ODR process (Article 7), submission of the complaint (Article 8), access to the personal database related to the dispute (Article 12). Traders and all competent ADR entities shall provide on their websites an electronic link to the ODR platform, which shall be easy accessible for all consumers (Article 14).
3. **Responsibility:** E-government can open policy process and enhance accountability, which could ensure clear responsibility for shared projects and initiatives. Accountability is displayed within the rule of law through the principle of liberty, which can be achieved with the whole ODR process (Article 8) with its processing and transmission (Article 9). Namely, upon receipt of a completed complaint, the ODR platform shall, in an easily understandable way, without delay, transmit to the respondent party, in one of the official languages of the ADR institutions chosen by that party. Principle of legality can be reached with the final online signed agreement (Article 10), which does not require the physical presence of the parties or their representatives.
4. **Common frameworks and cooperation:** e-governance is most effective when Member states' public officials, agencies etc. work together in customer-focused groupings across EU. Government/agency managers need to be able to operate within common frameworks to ensure interoperability, maximize implementation efficiency and avoid duplication. ODR infrastructure needs to be developed to provide a framework for individual initiatives, which encourage collaboration. ICT spending, where appropriate, needs to be treated as an investment, with consideration of projected streams of returns. A central funding program could help foster ODR and support key innovation projects. It can accomplish established policy goals in legislation and in its enforcement, which shall be the start of efficient functioning of ODR platform (Article 1 and 6) with effective ODR management data exchange (Article 7, 11).

Realization of above listed guiding principles represent a start of uniform European Public Administration. This combination approach confirms that theoretically is possible to combine ODR platform as a fourth dimension with e-governance. ODR systems in some Member states (e.g. Belgium, Netherlands, UK) are connected with all public and private authorities as one ADR or Mediation umbrella, which work fast, cheap, reliable with high quality, and

is due to the independency and connectivity recognizable to all citizen in the country (Hodges et al., 2012). Good ODR practices are the evidence for building a new dimension of e-governance in the sense of full administrative capacity, decision-making rationality, citizen and civil servant empowerment.

6 Conclusion

A wide range of products and services are available to consumers and companies online, but there is no truly adequate legal certainty. ODR can increase access to justice and ensure greater legal certainty by reducing the costs and time required by reaching a consensual e-settlement. The EU need to build an overall environment with 'smart' policies where citizens can rely on the basic premise of safety. This is the only way for full citizens' empowerment, which helps them effectively benefit from the best online offers on goods and services. In such an environment, citizens are able to self-represent, be more confident and 'know how' to act in resolving e-disputes process. Building institutional and administrative capacity across EU is improving the quality of legislation and foster economic growth with employment. ODR within efficient e-governance under one European public administration umbrella can increase economic productivity through speedy online decision process, improved and more accessible services. Legal certainty in consumer disputes within EU ODR platform is a pre-condition for the successful design of common framework to promote more friendly mechanism for resolving e-disputes. Facing main challenges and key issues is the first step towards efficient ODR platform with harmonized EU legal regulation on the field of civil and administrative law, which would erase divergences in definition of the parties in consumer disputes. This would lead us to easy-transpose process of EU regulation into each Member states' legislation and establishment of 'one e-governance cloud' across whole Europe. EU's action is to develop a coherent ODR platform within e-governance. In fact, if we connect ODR system to e-governance as a Trust mark, which is available to all citizens and they can easily use it, would higher consumers' awareness. Essentially, by building a transparent ODR system, we are consequently establishing democratic uniform European Public Administration platform, where all citizens educate themselves about their new ways of access to justice. Innovation agenda that recognizes the complexity of these various choices in one framework offers better prospects for understanding the consequences with learning and for integrating new tools more usefully into the broad performance of e-governance across EU.

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Making Transparency Work: Experiences from the Evaluation of the Hamburg Transparency Law[1]

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ABSTRACT

Freedom of information acts (FOIA) aim to improve the public's opportunities to access official information from public authorities and hence to increase the level of transparency. Thus, it is important to know whether and to what degree the effects intended by establishing FOIAs are achieved and how their implementation could be improved. Hence, this article presents the evaluation of the Hamburg Transparency Law (HmbTG) – Germany's first FOIA that binds authorities to disclose government information proactively. The purpose of the paper is to provide a valuable example of how evaluating FOIA might produce useful information for policymakers and public authorities. The analysis results, based on a mixed set of methods (i.e. standardised surveys, statistical secondary data, qualitative expert interviews, and criteria-driven document analysis), lead to the conclusion that the HmbTG was very effective in providing the direct access. On the other hand, it was found that strategies for implementing the law varied considerably between authorities, yet proactive disclosure was overall implemented effectively. Moreover, this law shows some weaknesses to be improved in the future. Besides providing practitioners with valuable insights into how a transparency law may be implemented, the evaluation of the HmbTG also provides researchers with ideas how FOIA evaluation might be conducted comprehensively.

Keywords: *access to information, proactive transparency, FOIA, Hamburg transparency law, evaluation*

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1 Parts of this article have already been published in German, see Herr, M., Müller, C.E., Engewald, B. and Ziekow, J. (2018a). Transparenzgesetzgebung in Deutschland in der Bewährung: Erfahrungen einer Gesetzesevaluation. Die öffentliche Verwaltung, 2018(5), pp. 165–174, as explicitly allowed by the publisher.

1 Introduction

Providing the public with open access to official information by means of freedom of information (FOI) laws – also referred to as transparency laws – is often considered to be a well suited approach for decreasing public sector corruption, improving governance, increasing bureaucratic efficiency and accountability, constraining politicians, or empowering citizens and journalists (e.g., Vadlamannati and Cooray, 2016; Berliner, 2010; Escaleras, Lin, and Register, 2010; Worthy, 2010; Piotrowski and Rosenbloom, 2002). Therefore it is not surprising that many countries have already passed FOI laws in order to "institutionalize transparency by creating legal guarantees of the right to request government information" (Berliner, 2010, p. 479). A common feature of all FOI laws is that they are supposed to increase the level of transparency by improving the public's opportunities to access government information from public authorities. Yet there are also substantial differences concerning the details of FOI legislation. For example, most FOI laws only cover the public's right to access government information by filing a request, while only a minority require the authorities to disclose official information proactively. Transparency laws also differ with regard to aspects of enforcement, ease of access, coverage, and exemptions (e.g., Ackerman and Sandoval-Ballesteros, 2006).

Regardless of the contents and formulation of FOI laws, for the public and for policymakers it is crucial to know whether the effects intended by establishing a transparency law are achieved. Although previous research has already investigated potential effects with regard to public sector corruption (e.g., Cucciniello, Porumbescu, and Grimmelikhuijsen, 2018; Bauhr and Grimes, 2014; Escaleras et al., 2010; Lindstedt and Naurin, 2010), governance (e.g., Cucciniello et al., 2018; Islam, 2006), accountability (e.g., Cucciniello et al., 2018; Riddell, 2013), bureaucratic efficiency (e.g., Cucciniello et al., 2018; Vadlamannati and Cooray, 2016), perceived transparency (e.g., Worthy, 2010; Relly and Sabharwal, 2009), perceived government performance (e.g., Porumbescu, 2017a), and trust in government (e.g., Cucciniello et al., 2018; Porumbescu, 2017b; Grimmelikhuijsen et al., 2013; Worthy, 2010), most of these studies involved cross-national comparisons for assessing the effects of transparency laws. Yet comparing transparency laws between countries can be problematic because of "differences from one country to another, including varying political systems, disclosure procedures, and measures of public use and awareness" (Michener, 2011, p. 149). Thus, cross-national comparisons are not well suited to assessing the individual effects of a transparency law, and they do not provide policymakers or the public with specific knowledge about how the FOI legislation in a given country could be adjusted and improved.

A fair assessment of a country's FOI legislation needs to take into account the individual formulation of the transparency law as well as its implementation – a unique and very country-specific process – which is crucial for its effectiveness (Relly and Sabharwal, 2009; Islam, 2006). Therefore, the current state of

research calls for comprehensive evaluations of individual transparency laws at national or even federal state level. An FOI law evaluation which serves as a valuable example of how such an endeavour might produce useful information for policymakers and public authorities is the evaluation of the Hamburg Transparency Law (HmbTG) from 2016 to 2017 (Herr et al., 2018b; see also Herr et al. 2017 for an on-line version of the final evaluation report). The evaluation was commissioned by the Hamburg Ministry of Justice and comprised various evaluation tasks, including the assessment of the effectiveness of the HmbTG and the quality of its implementation as well as an in-depth analysis of the legal document itself. Besides providing practitioners with valuable insights into how a transparency law may be implemented in order to achieve its intended effects, the evaluation of the HmbTG also provides researchers with ideas about how an FOI law evaluation might be conducted in evaluation practice.

This article provides readers with a brief description of the contents of the HmbTG, the methodological approach of its evaluation, and the main findings of the evaluation. Before that, however, the historical background of the HmbTG is briefly explicated.

2 The Hamburg Transparency Law

Germany is a federation, which is why FOI legislation has taken and still takes place at different levels and different speeds. It is crucial to differentiate between federal and federal state (*'Land'*) level because each entity can only bind its own governmental bodies and administration. At the moment, Germany ranks 12th in the 2017 Corruption Perceptions Index and 24th in the Global Open Data Index.

At federal level, FOI legislation started in 1994 when Germany implemented the Council Directive 90/313/EEC by passing the Environmental Information Act (UIG). The UIG guarantees access to environmental information without prerequisites such as stating a reason for the interest in the information requested. Consequently, one might say that at federal level, German FOI legislation was initiated by EU legislation (Mecklenburg and Pöppelmann, 2007, p. 16). In 1998, the Federal Ministry of the Interior drafted a federal FOI law, whose legislation took three legislative periods (the 14th, 15th, and 16th) (Mecklenburg and Pöppelmann, 2007, p. 15). In 2002, an alliance of representatives of journalist and civil rights organisations joined the discussion with their own draft (Mecklenburg and Pöppelmann, 2007, p. 15). The German Bundestag passed the Federal Act Governing Access to Information held by the Federal Government (IFG) at the end of 2005, and the IFG entered into force in 2006. Under the IFG, anyone is entitled to access official information from the authorities of the Federal Government. The IFG only applies to federal bodies and contains an obligation to release government information after a request has been filed. Yet the IFG does not force the authorities bound by the law to disclose government information proactively.

At *Land* level, FOI legislation is more diverse. Four *Länder* passed FOI laws several years before the Federation. The first was Brandenburg, whose FOI law dates back to 1998. It was followed by Berlin (1999), Schleswig-Holstein (2000) and North Rhine-Westphalia (2001). During the next two years, seven other *Länder* – Hamburg, Bremen, Mecklenburg-Western Pomerania, Saarland, Thuringia, Rhineland-Palatinate, and Saxony-Anhalt – followed. In 2018, Hesse included ten sections regulating the access to information upon request in its data protection law. Like the IFG, all these laws entitled everyone to access official information from the authorities of the respective *Land*. All the applicant needs to do is request the information. In 2012, Hamburg replaced its Freedom of Information Act with the HmbTG. The HmbTG was the first FOI act in Germany that included an obligation on the authorities to disclose information proactively on line. By 2017, three other *Länder* – Rhineland-Palatinate, Bremen and Schleswig-Holstein – had revised their respective FOI laws and installed an obligation to disclose official information proactively too. Baden-Württemberg installed this obligation in its first FOI legislation in 2015. Therefore, in the autumn of 2018, the landscape of German FOI legislation is still fragmented. Five *Länder* force their authorities to disclose information proactively, eight *Länder* and the Federation give applicants the possibility to request information, whilst three *Länder* have not provided the public with access to official information by means of an FOI act so far.

2.1 Genesis of the HmbTG

In 2006, Hamburg's parliament – the '*Bürgerschaft*' – passed the Hamburg Freedom of Information Act (HmbIFG). Its core feature was the obligation on public authorities to release official information on request. Yet the HmbIFG was not the end of Hamburg's efforts to make its administration transparent, because six years later, a more rigorous transparency law entered into force in an unusual manner.

As in many other *Länder*, in Hamburg it is possible to pass a law via referendum. (See Article 50 of the Constitution of the Free and Hanseatic City of Hamburg). To initiate a referendum a people's initiative has to collect 10,000 signatures from citizens entitled to vote for the Bürgerschaft. Then the Bürgerschaft has to tackle the issue. If they do not make a positive decision on the matter, the people's initiative can move on to a referendum and ultimately have the citizens pass the bill.

In 2011, the not-for-profit organisations Transparency International, Mehr Demokratie, and the Chaos Computer Club Hamburg founded the people's initiative 'Transparenz schafft Vertrauen' ('transparency creates trust') (Maatsch and Schnabel, 2015, p. 1). The initiative aimed to pass an FOI law containing an obligation to the proactive disclosure of information (Maatsch and Schnabel, 2015, p. 1) in order to impede corruption, prevent the waste of taxpayers' money, reduce mistrust, strengthen trust in politics and the administration, simplify administrative processes, and facilitate co-determination

(Bürgerschaft der Freien und Hansestadt Hamburg, 2011, p. 5). They intended to overturn the system of FOI legislation by creating a central information register (Bürgerschaft der Freien und Hansestadt Hamburg, 2011, p. 5) in which official information had to be published. The citizens were to have the possibility to inform themselves before political decisions were made (Bürgerschaft der Freien und Hansestadt Hamburg, 2011, p. 6).

The initial draft of the bill of the people's initiative was written with the help of an on-line tool (Humborg et al., 2012, p. 56). By the end of 2011, the initiative had gathered the 10,000 necessary signatures (Maatsch and Schnabel, 2015, p. 1). The Bürgerschaft discussed the draft in early 2012 and the people's initiative 'Transparenz schafft Vertrauen' revised it in order to make it the basis for a referendum (Maatsch and Schnabel, 2015, p. 1). This revised draft was the basis for the bill of the HmbTG made by all fractions of the Bürgerschaft (Kleindiek, 2013, p. 188). Unlike the initial draft of the people's initiative 'Transparenz schafft Vertrauen', this draft was elaborated by only six to eight people (Kleindiek, 2013, p. 194). On 12 June 2012, the people's initiative and all fractions of the Bürgerschaft held a press conference and announced that the bill of the HmbTG would be passed the next day (Maatsch and Schnabel, 2015, p. 1f.). It would not be an exaggeration to say that the legislative process was very high-speed, particularly towards the end (Maatsch and Schnabel, 2015, p. 2).

2.2 Content of the HmbTG

The HmbTG was the first FOI law in Germany that forces public authorities to disclose official information proactively. It is divided into four sections – the principle of transparency, information on request, the Hamburg Commissioner for data protection and freedom of information (HmbBfDI), and final provisions. The principle of transparency consists of the Sections 1-10. This includes the purpose of the HmbTG, terms and definitions, the scope of application, the protection of personal data, the exemptions, and the technical details of the obligation to proactive disclosure. The information on request is dealt with in three sections that regulate application, access to information, and the procedure. The final provisions govern the relationship between the HmbTG and other FOI legislation, state treaties, treaties older than the HmbTG itself, and the evaluation.

With regard to the goals of the law, the HmbTG [in Section 1 (1)] first aims to facilitate the democratic formation of opinion and enable the monitoring of government action beyond the existing possibilities of information. To achieve this, information held by the authorities mentioned in Section 2 (3) HmbTG is to be made accessible to the general public. Nevertheless, the protection of personal data is guaranteed. The justification of the law adds that the proactive disclosure facilitates democratic opinion-making, enables the public to monitor the actions of the state and prevent corruption (Bürgerschaft der Freien und Hansestadt Hamburg, 2012, p. 12). The HmbTG is fur-

ther designed to support trust in the actions of politics and the administration (Bürgerschaft der Freien und Hansestadt Hamburg, 2012, p. 13). At the same time, the law is intended to raise cost awareness within the administration inasmuch as the possibility to raise questions creates pressure to justify the costs (Bürgerschaft der Freien und Hansestadt Hamburg, 2012, p. 13). Finally, Section 1 (2) HmbTG provides everyone with the right to direct access to information under the provisions of the HmbTG.

Section 2 HmbTG contains various definitions. These include the very important terms 'obligation to proactive disclosure' and 'obligation to provide information upon request'. According to this section, all files – no matter in which form they are stored – are considered to be information. The information has to be published in a central, electronic, publically available register. Moreover, not only the public administration but also companies which perform public tasks (particularly public services) and are under the control of Hamburg have an obligation to proactive disclosure. In addition, direct and indirect public administration have to give access to information on request. Indirect public administration consists of legal entities under administrative law created by the state to fulfil the duties of the state.

Section 3 HmbTG governs the scope of application. The areas that come under the obligation to proactive disclosure include public service contracts, budgets, administrative regulations, official statistics, studies carried out on behalf of the authority, geodata, the tree cadastres, urban land use plans and landscape plans, the main provisions of granted building permits, and subsidies and grant awards [Section 3 (1) HmbTG]. Contracts whose publication is of public interest should be published as long as this does not negatively affect the economic interests of Hamburg [Section 3 (2) HmbTG]. All information that falls under the obligation to proactive disclosure also falls under the obligation to provide information on request [Section 3 (3) HmbTG].

Sections 4-7 and Section 9 HmbTG deal with the exemptions. Exemptions are mainly made for personal data, some authorities, the protection of public interest, and trade secrets. Section 4 HmbTG regulates the protection of personal data. This means a general obliteration of personal data as in Section 4 (1) sentence 1 HmbTG. The remaining parts of Section 4 govern the exemptions from the non-disclosure of personal data. Section 5 HmbTG deals with exempted authorities. Among others, the courts and the Court of Auditors (as long as they operate in judicial independence), the State Office for the Protection of the Constitution, matters of tax assessment and collection, and broadcasters are exempt from the information obligation. Furthermore, Section 6 HmbTG exempts some public interests. These include the decision-making process of the Senate and draft decisions as well as protocols and consultations protected by special laws. In addition to Section 4, Section 7 (1) HmbTG exempts business and trading secrets insofar and for as long as the interest in non-disclosure outweighs the interest in disclosure. It is the first legal definition of the term 'business and trading secret'. Finally, Section

9 HmbTG contains some further restrictions of the obligation to inform. For example, contracts with an intrinsic value of less than €100,000 do not need to be published.

Sections 8 and 10 HmbTG are technical regulations. The authorities have to take measures so that exempted data can be separated easily from the rest of the information [Section 8 HmbTG]. Section 10 regulates the information register and its use and the further use and distribution of the information. This includes a special regulation for contracts. All contracts must be concluded in such a way that they become effective only one month after having been made public, and in such a way that they can be revoked by the authority within that period [Section 10 (2) HmbTG].

Sections 11 to 13 HmbTG contain the application procedure for information that is not subject to proactive disclosure. Section 11 regulates the request. The request should be filed in written form, but an electronic or oral request is also possible [Section 11 (1) HmbTG]. The claimant has to name the information required [Section 11 (2) sentence 1 HmbTG]. The authority has to counsel the claimant [Section 11 (2) sentence 2 HmbTG]. The authorities have to provide the claimant with the name of the authority which has the information if they do not have it themselves [Section 11 (2) sentence 3 HmbTG].

Sections 12 and 13 HmbTG govern the access to information. The authority has to give the claimant access to the information or provide the information depending on what the claimant is requesting. If exemptions pursuant to Section 4 or Section 7 HmbTG hinder the provision of access, the authority has to ask the respective third party for its consent in order to provide claimants with access to the information requested. With regard to time frames, the access to information requested has to be provided within one month but the deadline can be prolonged by another month. Equally, the rejection has to be made within a month too. The rejection has to be in written form, but an oral request can be rejected orally. Finally, costs and fees apply.

Section 14 HmbTG regulates the HmbBfDI, who assumes the role of an ombudsman. Anyone who believes their rights under the HmbTG have been violated can appeal to the HmbBfDI. The HmbBfDI can only counsel and provide the advice-seeking individual with an informed opinion. In addition, the HmbBfDI informs the public about the right to access information and counsels the authorities. Furthermore, if the HmbBfDI identifies deficiencies in the way the authorities treat the citizen's right to access official information, the HmbBfDI can ask the authorities to remedy those deficiencies.

Finally, Section 16 HmbTG governs the relation between the HmbTG and state treaties. The HmbTG also applies to treaties older than the HmbTG itself [Section 17 HmbTG]. Section 18 (2) stipulates that the HmbTG has to be evaluated four years after it entered into force. The Senate (the government of Hamburg) has to inform the Bürgerschaft about the results of the evaluation.

3 Evaluation of the HmbTG

3.1 Objectives of the evaluation

According to the evaluation clause in Section 18 (2) HmbTG, the overall purpose of the evaluation was to assess the law's implementation and effectiveness. With regard to the latter, the evaluation team was to check whether the objectives stated in Section 1 HmbTG – providing official information to the public, supporting democratic will- and opinion-forming processes, and enabling the public to monitor government actions – were achieved. Moreover, the evaluation team had to assess whether the objectives specified in the justification of the law (Bürgerschaft der Freien und Hansestadt Hamburg, 2012, pp. 12f.) were achieved, namely increasing the public's acceptance of administrative action and enhancing trust in government actions.

The second central evaluation task was to provide the client of the evaluation with empirically founded insights into the law's implementation by the public authorities bound by the law and into the implementation of the Hamburg Transparency Portal, the information register specified in Section 10 HmbTG. The evaluation team was expected to uncover implementation problems and identify potentials for optimisation. In this context, not only implementation processes had to be investigated but also the legal document itself, which means that the evaluation team also had to assess whether or not the formulation of the HmbTG supported or hampered the implementation of the law.

In order to comply with the evaluation goals, both the obligation of the public authorities to disclose official information proactively and their obligation to release government information on request were considered by the evaluation team. Since the HmbTG was the first transparency law in Germany that forced authorities to disclose government information proactively, however, the evaluation put special emphasis on the implementation and effects of this special feature and the infrastructure – namely the Hamburg Transparency Portal – that was necessary for implementing the proactive disclosure of information.

3.2 Methodology

Basically, the evaluation of the HmbTG was conceptualised as an ex-post regulatory impact assessment (Böhret & Konzendorf, 2001), which means that the evaluation of the legal measure did not start until the regulation had already come into force. In the present case, the evaluation started four years after the HmbTG had entered into force. It started in July 2016 and was completed in July 2017. In conducting the study, the evaluation team availed itself of an integrative mixed-methods approach that combined the use of quantitative and qualitative methods of empirical research as well as social scientific and legal perspectives. Moreover, the team followed a participative approach to evaluation (Stockmann, 2008), which means that relevant stakeholders were

involved in the evaluation process – for example, in the course of instrument development and sampling – in order to exploit their domain-related expert knowledge for evaluative purposes. To ensure a study of high quality, the evaluation team followed the standards of the German and Austrian Evaluation Association (DeGEval, 2016).

The evaluation of the HmbTG required the collection of empirical data from various sources. In cooperation with the Hamburg Ministry of Justice, the evaluation team identified four relevant stakeholder groups from which data had to be gathered: (1) public authorities bound by the HmbTG who have to implement the law; (2) users of the Transparency Portal who are the main target group of the HmbTG's obligation to proactive disclosure of information; (3) the employees of the city of Hamburg who have to deal with the HmbTG in their daily work; (4) members of the advisory board of the former project 'Implementation of the Hamburg Transparency Law' – a committee mainly composed of representatives of civil society organisations that was intended to accompany and control the implementation of the HmbTG.

In the course of data collection, the evaluation team followed different strategies.

First, all the stakeholder groups mentioned above were subjected to an online survey. Depending on the recipients of the survey, a broad range of information was gathered.

The survey of the public authorities bound by the law included various questions concerning the amount, type, and quality of information published and released, about the organisational structures and processes adjusted for implementing the HmbTG, and about the quality, manageability, and effectiveness of the law. The survey was conducted in two waves in order to collect a sufficient amount of information on objective data (i.e., on information published and released). The first wave started in October 2016 and aimed to collect objective data for the period from 2012 to September 2016. The second wave started in March 2017 and was intended to collect objective data for the period from October 2016 to February 2017. In total, 93 authorities participated in the first wave and 83 in the second. Because the evaluation team was not provided with a full list of all authorities bound by the HmbTG, a response rate could not be calculated. However, according to the evaluation client the response rate was very high.

The users of the Transparency Portal were mainly asked about their user behaviour when using the portal and about their perceptions of the effects of proactive information disclosure. Because it was not possible to recruit survey participants randomly, the evaluation team had to rely on a specific type of convenience sample. More specifically, survey participants were recruited via flash-layers – a non-intrusive type of pop-up – while surfing on the Transpar-

ency Portal. The survey was on line from October 2016 to February 2017. In total, 412 visitors to the Transparency Portal participated in the survey.

The survey of the employees of the city of Hamburg mainly contained questions about the law's practicability and its potential effectiveness. The on-line questionnaire was distributed via the joint portal of Hamburg's administration. The survey was on line from October 2016 to December 2016. In total, 896 employees of the city of Hamburg participated.

Finally, the survey of the advisory board also contained questions relating to the implementation and effectiveness of the HmbTG. All 17 members of the advisory board were requested to participate in the survey from October 2016 to December 2016. Only five institutions took up the offer, which equals a response rate of 29%.

Second, as an accompanying measure, the evaluation team conducted 13 semi-structured interviews (see list in annex) with experts and representatives from different institutions – namely, from the authorities bound by the law, indirect public administration, the above-mentioned advisory board, the office of the HmbBfDI, and the Technical Control Center for the Transparency Portal. These interviews were primarily used as an instrument to get deeper insights into the implementation of the HmbTG and obtain expert assessments about the practicability of the law, its effects, and any revisions that might be necessary.

Third, statistical secondary data relating to the Transparency Portal – containing information on the amount, subject, date, and type of information published by authorities and on usage patterns (e.g. monthly click numbers; search terms; use of help function) from September 2014 to February 2017 – were analysed to provide the evaluation client both with a detailed overview of the official information proactively published on the portal by the public authorities and with an assessment of the level of public demand for government information in the city of Hamburg.

Finally, the evaluation team conducted a criteria-led content analysis of the Transparency Portal by screening documents published on the portal in order to assess whether they met the requirements specified by the HmbTG (exemplary criteria: accuracy, completeness, and comprehensibility of information provided; access to information provided; timely provision of information; etc.) and whether they were prepared in a user-friendly and comprehensible way (exemplary criteria: quality of information on the purpose and the site operator; quality of presentation of the page contents; provision of examples; quality/degree of visualisation/graphical presentation; quality of search function; provision of a help function; etc.). Half the documents were selected based on their relevance, whilst the other half were selected randomly. In total, 40 documents published on the Transparency Portal were analysed.

While the evaluation team collected and analysed empirical data, its members also conducted a thorough assessment of the legal text of the HmbTG against the background of the jurisprudence relating to it, the legal commentary of the HmbTG, the internal comments on how to implement the HmbTG developed by the Hamburg Ministry of Justice, the activity reports of the HmbBfDI, and the available articles by legal scholars relating to the HmbTG. The results of the legal assessment were combined with the empirical findings in order to paint a comprehensive picture of the quality of the HmbTG.

3.3 Results

The following sections contain selected evaluation findings with regard to the effectiveness of the HmbTG, its implementation, and the formulation of the law. A complete and detailed overview of the findings – including the numbers and statistical data – can be found in Herr et al. (2018b; 2017).

3.3.1 Effectiveness of the HmbTG

First, assessing the effectiveness of the HmbTG included an analysis of the outputs induced by the passing of the law. Typical output indicators of an FOI law like the HmbTG are the amount of information that is published proactively, the numbers of FOI requests filed, granted, and refused, and the extent of delays of information disclosure. The evaluation of the HmbTG provided detailed information on all these outputs and a lot more. For example, it was found that about 66,000 data files were published on the Transparency Portal from September 2014 to February 2017. Almost two thirds of the data published on the Portal referred to the subject areas 'infrastructure, construction and housing' and 'politics and elections', the majority of which were published without any delay. With regard to the demand side, the Transparency Portal was accessed more than 22.5 million times from April 2015 to February 2017, mostly by private citizens. In addition to that, the evaluation found that during the period from October 2012 to February 2017, Hamburg's authorities received more than 4,000 requests for accessing official information that had not been published on the Transparency Portal. In more than 75% of these cases, complete access to the information requested was granted. In contrast to that, considerably fewer than 10% of the requests were fully denied. It is worth noting that only a small fraction – about 13% – of the requests with a positive decision needed more time for processing than is allowed by the HmbTG. Finally, in the majority of cases, the authorities charged claimants only moderate fees or provided the information requested free of charge.

Second, evaluating the effectiveness of the HmbTG involved an assessment of whether or not it was a suitable instrument for achieving the goals specified in Section 1 HmbTG. For this purpose, the authorities bound by the HmbTG, the employees of the city of Hamburg, and several experts were asked to provide assessments in the on-line surveys and expert interviews conducted. The results of the evidence collected suggested that the expediency of the

HmbTG was assessed ambiguously. Whereas the authorities bound by the law and employees of the city of Hamburg were, on average, slightly critical of the HmbTG's expediency for achieving the goals stated in Section 1 HmbTG, the advisory board and several of the experts interviewed were rather more positive on this issue. More specifically, 73.6% of the authorities bound by the HmbTG and 71.8% of Hamburg's employees believed that the HmbTG did not fulfil its purpose or only partially fulfilled it. Further, in a follow-up correlational analysis, it was found that the degree of expediency as assessed by the bound authorities and Hamburg's employees was positively associated with their assessments of the manageability (authorities: $r = .42$, $p < .01$; employees: $r = .54$, $p < .001$) and comprehensibility of the HmbTG (authorities: $r = .29$, $p < .05$; employees: $r = .40$, $p < .001$). This means that the perceived expediency of the law at least partially depends on aspects of its formulation and wording.

Finally, determining the effectiveness of the HmbTG included assessments by different stakeholder groups as to whether the HmbTG had impacts on a variety of specific aspects. In this context, a majority of the users of the Transparency Portal believed that the disclosure of government information increases trust in government actions (66.3%), opportunities for political participation (78.0%), and opportunities for monitoring government actions (55.3%). With regard to the latter, however, this was assessed differently by the majority of the Hamburg employees surveyed who – on average – did not see an increased potential for public monitoring of government actions. More specifically, only 32.6% of the employees believed that the HmbTG increases the opportunities to monitor government actions. In addition to that, the majority of the employees (72.6%) were negative about whether or not the introduction of the HmbTG led to increased cost awareness within the public authorities bound by the law.

3.3.2 Implementation of the HmbTG

The effective implementation of an FOI act is an important prerequisite for its impacts because "without effective implementation, an access to information law – however well drafted – will fail to meet the public policy objectives of transparency" (Neuman and Calland, 2007, p. 182). Consequently, analysing the implementation of the HmbTG had to be an essential part of the evaluation. Due to the vast amount of data collected, however, the results of the implementation analysis cannot be presented in full detail here. Instead, the following paragraphs provide a brief overview of selected findings.

Basically, one can distinguish between two areas of implementation of the HmbTG, namely the implementation that takes place within the authorities bound by the law and the implementation that takes place outside those authorities. Both areas were considered by the evaluation team. First, with regard to the law's implementation within the bound authorities, the evaluation team put some emphasis on changes in organisational structures and processes. In this context, it was found that the authorities bound by the law

introduced diverse types of organisational structural change – for example, new positions within authorities managing the proactive disclosure of information and handling the processing of incoming requests were created or specific responsibilities assigned – in order to respond to the requirements made by the HmbTG. Furthermore, the evaluation team observed the introduction and adjustment of processes and workflows in respect of reviewing, recording, and monitoring incoming requests and the data which have to be published. The evaluation team also found that the authorities established new and adjusted existing processes of quality management, data protection, and complaint management, and they observed that specific routines for handling exceptions and preparing the information for publication were developed. At the end of the day, only a small fraction of authorities stated that they did not make any adjustments in response to the introduction of the HmbTG. In this context, an important finding was that there was no generalisable 'best practice' in respect of how authorities responded to the introduction of the HmbTG in terms of organisational and procedural adaptation. On the contrary, it became clear that the strategies for implementing the law varied considerably, depending on a number of factors such as the nature, size, and administrative culture of the individual authorities.

Second, with regard to the implementation of the HmbTG outside the authorities bound by the law, the evaluation team mainly investigated aspects relating to the technical infrastructure required for implementing the obligation to proactive disclosure, namely the Hamburg Transparency Portal. It goes without saying that the functionality of such an information register depends on the technical implementation of the portal and the quality of the workflows employed by the authorities to make their data available on the portal. While the technical implementation was considered to be good by the majority of the authorities, many of them reported minor problems with the developed workflows. However, almost two thirds of the authorities stated that technical problems with the workflows are usually solved in a very timely manner, which guarantees the functionality of the portal. This brings us to an important aspect, namely the existence of a sufficiently well staffed and experienced technical support unit. And indeed, the work and advice provided by the responsible support unit in Hamburg was assessed as very important and helpful by the authorities. Moreover, the effectiveness of the portal depends not only on technical aspects but also on its clarity and usability and the preparation and comprehensibility of the information published on the portal. Neither the clarity nor the usability were rated as negative or positive by several groups of stakeholders (e.g., the surveyed users of the portal and the employees of the city of Hamburg). One of the main reasons for these mediocre assessments is the search engine embedded on the portal, which still has to be improved. A correlational analysis showed that the better the search engine was rated, the more positive the assessments of the clarity ($r = .64$; $p < .001$) and usability of the portal as a whole ($r = .72$; $p < .001$), and the greater the satisfaction of the users with the time needed to find the information being sought ($r = .59$; $p <$

.001). Yet if the information being sought is eventually found by the searchers, it fulfils its purpose in most of the cases. The users of the Transparency Portal – and some representatives from other stakeholder groups in the expert interviews – stated that the information obtained on the portal was mostly comprehensible, complete, and useful. 65.3% of the portal users surveyed stated that the information obtained met their information needs (in contrast to 7.1% who claimed that it did not meet their needs), 69% had the impression that the information was complete (in contrast to 12.1% who considered it incomplete), and 79.3% found that the information was comprehensible (in contrast to fewer than 3% who found it not to be comprehensible).

Finally, the evaluation team collected data on whether existing advisory services and support measures provided by the Hamburg Ministry of Justice, the HmbBfDI, and other actors played an important role in implementing the law. In this context, the authorities bound by the HmbTG mainly referred to the internal comments of the Ministry of Justice that were indispensable for handling the law in everyday practice. Similarly, the authorities stated that it was important to have their employees trained for working with the HmbTG by qualified training institutions. On the contrary, the advisory services of the HmbBfDI were only rarely used by the authorities, although the existence of such an offer was considered to be important.

3.3.3 Formulation of the HmbTG

The effectiveness of a transparency law depends not only on its implementation, but also on its formulation. The more comprehensible a transparency law is to those bodies that have to work with it, the higher the degree of manageability and as a consequence, the easier its implementation. Because of these relationships, the evaluation team took a close look into the formulation of the HmbTG. From an empirical perspective, this mainly meant that those who deal with the law in everyday practice were asked whether the HmbTG is comprehensible and manageable in practice. With regard to comprehensibility, representatives of the authorities bound by the law and employees of the city of Hamburg who had to deal with the HmbTG in their daily work rated its comprehensibility to be only average. More specifically, more than 80% of the authorities and employees surveyed did not rate the comprehensibility of the HmbTG as good or very good. Therefore, it is not surprising that the manageability of the law was also rated as mediocre. Here too, more than 80% of the authorities and employees surveyed did not believe that the manageability of the HmbTG was good or very good.

Besides these rather general aspects, the legal analysis showed that the HmbTG poses several specific legal problems. The most complicated problem revolves around indirect public administration and its mention in Section 2 (3) and (5) HmbTG. The German administrative doctrine refers to 'indirect public administration' if the state creates a legal entity under administrative law to fulfil its duties. Those legal entities are not to be confused with legal entities

under civil law. According to Section 2 (3) sentence 1 HmbTG, an authority is what Section 1 (2) of the Hamburg Administrative Procedure Act defines as an authority. Section 1 (2) of the Hamburg Administrative Procedure Act says that any entity which performs tasks of the public administration is an authority. This is the functional definition of 'authority' (Maatsch and Schnabel, 2015, p. 141). This definition includes direct as well as indirect public administration (Maatsch and Schnabel, 2015, p. 141). Unfortunately, Section 2 (5) HmbTG refers to the authorities pursuant to Section 2 (3) HmbTG and indirect public administration separately, which raises a question: does indirect public administration fall under the obligation to proactive disclosure or not? A lengthy discussion among legal scholars followed. Some believe that indirect public administration is under the obligation to proactive disclosure, whilst others claim that it is not. The HmbTG has its own definition of authority. The latter group has to answer a second question: if indirect public administration does not fall under the obligation to proactive disclosure found in Section 2 (3) HmbTG, does it fall under the obligation to publish as stated in Section 3 (2) HmbTG? Some deny this because Section 3 (2) only relates to Section 3 (1) HmbTG. After the evaluation had been completed, both the Administrative Court Hamburg and the Hamburg Higher Administrative Court subsequently and unanimously ruled that the indirect public administration does not fall under the obligation to proactive disclosure (VG Hamburg, Urteil vom 18.9.2017 – 17 K 273/15 and Hamburgisches OVG, Beschluss vom 16.4.2018 – 3 Bf 271/17.Z). Personally, we believe that indirect public administration does fall under the obligation to proactive disclosure. The wording of both Section 2 (3) and (5) HmbTG is of no help. Although they are both easy to understand and clear, they contradict each other. The definition of 'authority' under German administrative law is the same in the Federation and the *Länder*. It is fairly old and has so far proved to be a clear, easily understandable, working definition. Given that good regulation is clear and easy to understand, it seems very unwise to change this in favour of a second term for 'authority' which only applies to one single law. A law which requires the direct administration entities controlled by the state to publish information but does not apply the same requirement to the indirect administration entities is unsystematic. Moreover, it was the intention of the people's initiative to have the whole administration fall under the obligation to proactive disclosure. Therefore, in order to solve the problem, we recommend a revision of Section 2 HmbTG.

Another important legal problem is found in Section 3 HmbTG: many of the law's terms and definitions are unclear. For example, Section 3 (1) No. 1 provides for publication of the petitions of the decisions of the Senate. While petitions exist, they are not part of the decisions. Moreover, according to Section 3 (1) No. 8 HmbTG, reports and studies which were commissioned by an authority, affected the authority's decision, or served the purpose of preparing a decision, have to be published. It is unclear under which conditions a report or study is 'commissioned' by an authority. It is equally unclear whether the reports and studies have to be commissioned and used or if the use of a

study by a third party is enough to warrant publication. Another example can be found in Section 3 (1) No. 15 HmbTG, which provides for publication of the salaries of the CEOs of the businesses under the control of the city of Hamburg. Yet it is conceivable that the legislative power for regulating this subject is held not by the city of Hamburg but by the Federation. Furthermore, this may or may not impair the CEO's right to informational self-determination.

Another legal problem has to do with Section 4 (1) sentence 1 HmbTG, which concerns the obliteration of all personal data. The obliteration of all personal data sounds easy in theory, but it is complicated in practice because it does not provide for an exemption for ministers. The purpose of Section 4 (1) sentence 1 HmbTG is that the author of a published document is unrecognisable. This extends to the names of ministers since there is no exception for them. It is, however, easy to find out who held which post in which government. An obliteration of the minister's name is not enough to obliterate the author. Even the name of the ministry, the date, and the content of the document may provide hints on who the author is. As a consequence the document cannot be published. Personally, we recommend a revision of Section 4 (1) sentence 1 HmbTG.

Finally, Section 10 (2) HmbTG, which regulates the possibility to revoke a contract, is unique in German law. Unfortunately, it is not problem-free. Dogmatically, it is unclear where it fits in to German civil law which provides the *leges generale* for the revoking of contracts. Only the Federation has the legislative capacity to change civil law. Additionally, the Civil Code prohibits a right to withdrawal written in standard terms and conditions if the withdrawal is unconditional. Section 10 (2) HmbTG does not provide for any conditions for the withdrawal. It is unclear whether or not this violates the Civil Code.

4 Discussion

Taken together, the evaluation findings suggest that the intended goals of the HmbTG were widely achieved. Particularly with regard to the outputs, the findings show that one of the main goals of the law – namely, providing the public with free and direct access to government information – was largely met. We believe that this is true despite the fact that no target attainment criteria were specified prior to the evaluation, which would have made it easier to assess whether goals were achieved or not. Further, since the results acquired by the output analysis are based on objective secondary data, they can be considered as quite reliable. In contrast to that, the findings with regard to the expediency and the impacts of the law are less reliable for two reasons. First, there were no baseline, time-series, or control group data available (see Mueller 2018), which is why the evaluation team had to rely exclusively on stakeholders' perceptions and subjective assessments of potential outcomes. Although these ratings provide valuable hints about whether or not the HmbTG is effective in changing various aspects – such as increasing

the acceptance of administrative action, trust in government actions, the opportunities for political participation, and the opportunities for monitoring government actions – the findings should not be interpreted as causal effects of the law. Second, the expediency of the HmbTG and the impacts as perceived by different groups of stakeholders were rated ambiguously. Whereas some stakeholder groups saw neither a high expediency nor any positive outcomes of the HmbTG, others were confident that the commencement of the law has led to positive changes regarding several aspects. As stated by Herr et al. (2018b), these ambiguous perceptions are presumably caused by different viewpoints between those required to implement the law and deal with it in everyday practice and those who benefit from the law by gaining access to official information. Hence, it is concluded that it is likely that the HmbTG has at least had some positive effects on its intended target groups, but that future research should further investigate its causal effects.

When it comes to the implementation of the law, the evaluation findings provide practitioners with several important implications. First of all, it became clear that there is no best way of implementing the law, but that any authority bound by the HmbTG should find its own individual strategy for implementation. Second, the evaluation showed that the introduction of the law did not lead to a cost explosion as expected by some of its critics. This is an important message to all those countries or federal states that still do not have a transparency law containing an obligation to proactive disclosure. Third, the findings also clearly showed that accompanying measures – such as detailed comments about how the law is applied and training and consulting measures – are indispensable in order to support the authorities by implementing the law. Consequently, such measures should be developed even before the law enters into force so that they can provide authorities with the necessary support right from the beginning of the implementation process. Moreover, it has become clear that developing a working technical infrastructure – including the existence of a sufficiently well equipped and experienced technical support unit – is indispensable for guaranteeing the smooth execution of the obligation to proactive information disclosure.

Finally, the evaluation findings suggest that the quality of the formulation of the HmbTG should be improved in future revisions because the comprehensibility of the law determines its manageability for practitioners, which in turn affects its effectiveness in respect of producing outputs and inducing impacts. Hints on how the HmbTG might be revised are provided by the results of the legal analysis of the HmbTG (Herr et al., 2018b) and by more than 50 specific recommendations made by the authorities bound by the HmbTG (Herr et al., 2018b, pp. 340-350). Recommendations are, for example, to restrict the amount of information that has to be published, to specify and concretise legal terms and definitions, to revise the regulations concerning the charging of fees, and to introduce instruments for sanctioning if authorities do not comply with the legal requirements.

5 Conclusion

This article was devoted to presenting the background and results of the evaluation of the HmbTG, Germany's first FOI law that forced public authorities to disclose government information proactively. The evaluation findings showed that the introduction of a transparency law can lead to advantages as well as disadvantages in various stakeholder groups. In general, however, the evaluation team concluded that the advantages which have accompanied the introduction of the law outweigh the disadvantages. Because of this overall conclusion, introducing transparency laws forcing public authorities to publish government information proactively and release information on request seems to be a reasonable approach for increasing the level of transparency in Germany.

The present article also showed how valuable a comprehensive FOI law evaluation can be. Besides the fact that it contributes to the scientific literature by providing researchers with unique insights into the effectiveness and functionality of a transparency law, it also provides the legislative power with useful information for revising the law and practitioners with valuable information about how to deal with the law in everyday practice.

In order to ensure the quality of future FOI law evaluations, they require their clients to make various types of preparation. First, when commissioning an evaluation, one should be clear about the goals pursued by it (e.g., assessing the effectiveness or implementation of an FOI law) and communicate these to the evaluators in a clear manner. Second, evaluation clients should provide evaluators with sufficient data, particularly when it comes to causal impact assessment, because this evaluation task depends crucially on the availability of certain types of data (e.g., longitudinal or control group data). Thus, it is reasonable for public authorities to start collecting data even before an FOI law comes into force and to continue with data collection until the evaluation starts. Third, since the evaluation of FOI laws takes time and involves costs, evaluation clients should provide sufficient temporal and monetary resources so that evaluators can conduct the evaluation appropriately. This is particularly important for estimating the causal impacts of an FOI law, which often consumes more resources than other evaluation tasks (e.g., White, 2006). Fourth, evaluation clients should provide FOI law evaluators with organisational assistance, for example by giving them access to the relevant information carriers (e.g., public authorities which are responsible for implementing an FOI law, lawmakers, or civil society actors). Finally, it seems reasonable for clients to ensure the publication of evaluation reports. This is not only relevant for various kinds of actor in order to learn from the evaluation and work with the evaluation results, but also enables researchers to summarise the results of FOI law evaluations and provides the basis for 'meta-evaluations', studies that "check evaluations for problems such as bias, technical error, administrative difficulties, and misuse" (Stufflebeam, 2010, p. 99).

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Annex: List of interview partners

Authorities bound by the HmbTG:

Senatskanzlei Hamburg (Hamburg Senate Chancellery)

Behörde für Umwelt und Energie Hamburg (Hamburg Ministry for the Environment and Energy)

Behörde für Stadtentwicklung und Wohnen Hamburg (Hamburg Ministry of Urban Development and Housing)

Finanzbehörde Hamburg (Hamburg Ministry of Finance)

Bezirksamt Hamburg-Mitte (District Office Hamburg-Mitte)

Indirect public administration:

Handelskammer Hamburg (Hamburg Chamber of Commerce)

Hamburg Port Authority

Businesses bound by the HmbTG:

Gebäudemanagement Hamburg GmbH

Hafencity Hamburg GmbH

Members of the advisory board of the former project "Implementation of the Hamburg Transparency Law":

Chaos Computer Club Hamburg

Transparency International Hamburg

Hamburgischer Beauftragter für Datenschutz und Informationsfreiheit (Hamburg Commissioner for Data Protection and Freedom of Information)

Fachliche Leitstelle Transparenzportal (Technical Control Center for the Transparency Portal)

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The (Draft) European Charter of the Commons – Between Opportunities and Challenges

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ABSTRACT

The concept of ownership, which (in Italy and similarly in other European systems) is still essentially based on private law rules, is currently not sufficient to ensure the satisfaction of the general interest in an increasingly wide access to scarce resources, in the perspective of equality and fairness on the field. At the same time, strong criticism has been expressed about the frequent phenomenon of privatisation of originally public assets and resources. The threats to the pursuit of the public benefit posed by privatisation may be tackled by constructing a new legal framework, aimed to protect the right of the populations to be involved not only in the use, but also in the management of the commons. An expression of this idea is the draft European Charter of the Commons, which is the result of a collective brain-storming by a group of scholars rather than a source of law. Its non-normative nature has allowed its authors to express particularly 'brave' positions. This article takes the Charter as a starting point to focus on some open issues. The main proposal concerns the possible exploitation of new participatory models for the involvement of communities of users in the strategic decisions on the management of the commons. In such perspective, a brief reference to the Italian legal system is made. In Italy, there are no systemic rules about the commons, but some procedures to involve the interested local communities in the strategic choices have been experimented, which can serve as an illustration also for other EU countries.

Keywords: *European Charter of Commons, innovation, participation, public benefit, Italy*

JEL: K19

1 Introduction: Methods of the Paper and Expected Results

This paper is focused on the analysis of the draft European Charter of the Commons, which is a very peculiar document. It is the result of the seminar on *The European Charter of the Commons* (International University College, Turin,

2-3 December 2011).[1] Despite being structured as a statute, the draft is neither an act produced by the institutions operating at the European level, nor a legal source in a national system or an act of soft law. It is just an expression of views by a qualified multi-disciplinary group of scholars, who tried to give a contribution about the broader legal regime of the commons. Its purpose is to serve as a proposal in order to induce legislators and policy-makers on one hand, and the doctrine on the other, to consider the issue of the management of the commons. The text was published without any further comment and no access is allowed to any minutes of the meetings or preliminary acts. Therefore, the articles of the draft are the only starting point for reasoning. Some issues arise therefrom and are particularly interesting in the perspective of administrative law.

As it is well known, such perspective is quite original, because the commons are often studied by economic and sociological scientists, or else in relation to the protection of the environment and natural resources, while in administrative law, research on this topic is more fragmentary. The reason seems to lie, at least partially, in the existence of different opinions about the systemic position of the commons in the conceptual background of public law, especially from the point of view of their legal qualification as private or public (or even intermediate) ownership. This open question raises several doubts. The first one regards, of course, the necessity – or at least the opportunity – to lay down a list of commons; this clearly involves the issue of indication of the proper role to be played by national and supra-national legislators and of the possible binding strength of the rules of law in this field. Another open issue arising from some statements contained in the draft Charter regards justiciability. In such perspective, the Charter offers some interesting food for thought, especially in terms of the legitimacy to bring action in defence of the right of the users before a court.

In the paper, some ideas about *how* the commons may – and perhaps should – be concretely managed, are proposed. A possible solution is found – also in light of the analysed content of the draft European Charter – in the participation by groups of users (primarily, the local populations) in the strategic decisions on the proper management of the scarce resources to be considered as commons. The suggestion is that the basic taxonomic dilemmas about *what* the commons are should be surpassed, because there is no single, universally applicable answer to this question. The accepted definition of the commons may change depending on the context, but indicating a method to decide what is to be considered a common may be a first, fundamental step toward a full citizenship of the commons in administrative law. In absence of scientific empirical data on the possible value of such approach, the paper briefly describes some preliminary implementations in the Italian legal system of participation, as a method to manage common resources. These tools could be extended to the management of the commons in the strict sense. The comprehensive aim is to offer some keys to understand this complex and compli-

1 Available online at: http://zofijini.net/wp-content/uploads/sites/5/2013/04/skupnost-eu-Rim.pdf.

cated phenomenon that, in the present as well as in the future, will increasingly involve the concepts and mechanisms of administrative law.

2 A Fragmented Landscape for Ownership in Europe (Short Remarks)

The economic crisis has deeply influenced several categories of public law, which are now perceived differently than they used to be. One of the fields where this phenomenon is particularly evident regards the appropriation of goods and the ownership of rights (Glyn, 2007; Leijonhufvud, 2009, p. 741.; Levet, 2012; Gibson, 1993, p. 147; Giddens, 1991).

Especially in Western Europe, the idea of property/ownership is traditionally strong, even though the divergences between the various experiences are deep. In synthesis – and with a certain degree of approximation – one could say that, in the *civil law* tradition countries, legislators and scholars pay attention primarily to the formal method to acquire, transfer (and possibly lose) the right of property on single goods. In particular, from a theoretical point of view, private and public ownership is still essentially based on private law rules. The latter is conceived, of course, as an exception to the former, but the general coordinates of the legal concepts are the same. In other contexts (the *common law* tradition countries), however, the main element is how the subjects use the goods, while no particular attention is paid to the formal title of belonging (Bell, 1992, p. 3; Haller, 1998, p. 166; Hopkins (ed.), 2013).

The difference is clear, but, in reality, its practical consequences are not as deep as one could infer. In fact, in many cases the two traditions follow similar paths to reach similar goals, in terms of protection of individual interests and – at the same time – fair distribution of resources among all the parts of the population (Sirgiovanni, 2017, p. 229; della Cananea, 2009, p. 297; Lange, 1981, p. 147; Freedland and Auby, 2006; Samuelson, 2006). Furthermore, independently from the legal historical landscape, it is at present widely recognised that the traditional rules about appropriation are no longer sufficient to ensure the satisfaction of the general interest, which requires an increasingly wide access to scarce resources in the perspective of equality and fairness. In the light of the current crisis, the side of distributive justice has become more and more relevant. From this point of view, the ethical aim at equality has started to produce legal effects, in the sense of a transformation of the sensitiveness for the traditional concepts and categories (Council of Europe, 2011).

3 The Tragedy of the "Traditional" Tools of Appropriation?

As it is well known, according to economic scientists (Ostrom, 1988; Ostrom et al., 1994; Ostrom et al., 1999, 278-282; Barnes, 2006), a common is a material or non-material resource, which is 'not exclusive', as it is shared by a community (Leyronas and Bambridge, 2018, p. 11). Clearly, in this economic sense,

a resource is a common if all the members of a community may (physically) use it. Nonetheless, this (widely shared, but very broad) definition is based on the structural and functional inherent characteristics of certain kinds of assets and resources, while it is not deeply rooted, from an epistemological point of view, in a conceptual and scientific background. Therefore, even though it is concretely used and managed 'in common', a resource may not be recognised as a common on a social or legal ground (Ostrom and Hess, 2007; Stiglitz, 1999; Grazzini, 2011). Actually, the gap between possible efficient common use (or, maybe better, use in common) of some resources and their legal regime is rather frequent. Normally, in fact, goods are either private or public. This means that the rules on appropriation were laid down according to the idea of exclusion of third parties from the strategic decisions about the most fruitful exploitation of such resource.

The efforts to produce a unitary concept of the commons have failed and, at present, there is no decisive (and widely accepted) notion (Hardin, 1968, p. 1243). On the other hand, it is necessary to realise that, for different reasons, it is not possible to create a catalogue thereof serving as a kind of *numerus clausus*. First, the perception of general interests and needs is quite different among the European populations, depending on both the national economic situation and the inhomogeneous lack or wealth of resources. Second, the existence and typology of public ownership is perceived, from a legal point of view, differently across Europe. Third, also from the perspective of single national legal systems, the introduction of the concept of the commons with a partially "new" physiognomy would request a deep reconsideration of the traditional ownership categories, which are still mostly based on the public/private dichotomy. It is very difficult to subsume the commons under these concepts, also because they are normally not the subject of individual rights. Therefore, it may be useful changing the point of view: from the kind of ownership to the rules about the management of the commons, possibly with a direct involvement of the communities of users. Consequently, the scientific debate about the commons has been often turned into a speech about the indication of the legal tools that may be used to protect a general right to 'universal resources', the use of which should be granted to everyone (Mishori, 2014, p. 335; Martinez Lopez and Cattaneo, 2014; Camerlengo, 2016, p. 557; Cerulli Irelli, 2016, p. 529; Ciolli, 2016, p. 457; D'Andrea, 2016, p. 433; Staiano, 2016, p. 415; Viola, 2016, p. 381; Caputi Jambrenghi, 2017, p. 1).

In my opinion, none of the 'traditional' legal instruments seems to be, in itself, truly efficient. The conversion of private property into public ownership of entire categories of goods and/or resources, for instance, may not be the best solution, because it is still deeply rooted in the rules of appropriation where the owner is an almost absolute 'master'. An alternative could be the attribution of atypical property rights, either directly to the local communities that are the main users, or to *ad hoc* non-profit entities with direct and strict links with the same communities (Nussbaum, 2010). Nonetheless, this

choice is rather complex and requires a potentially deep transformation of the established institutional balances, connected with the transformation of a 'property-based' system into a 'non-strictly-property-based' one. Technically speaking, in fact, the commons are formally not owned by anyone, but their management and use may be useful to all (Pennacchi, 2012; Marell, 2012; Atkinson, 2008). Another possible attempt is to look at the commons not as goods (in a 'classical' sense), but essentially as the subject of expectations (of the communities) and performances (by the public bodies). Hence, the "static" conception of the commons (essentially based on the effort of defining a group of assets and resources to be used in common and some basic rules to be laid down and implemented for this purpose) can be usefully replaced with a more 'dynamic' view. In such 'dynamic' view, the main issue is the method allowing the assets and resources, which – at least partially, on a case-by-case basis – are considered as commons, to be properly managed. All the mentioned topics are well known to the authors of the draft European Charter of the Commons, which represents an effort to properly address this challenge (Ferrarese, 2010; Mattei, 2011; Borch and Kornberger, 2015, p. 1).

4 Open Issues Arising From the Draft European Charter of the Commons

4.1 The (partial) disregard for the legal theoretical background about ownership

The authors of the Charter decided not to give a close definition of the meaning of the word *commons*. Besides, the Charter does not include a closed catalogue of the commons. Of course, the reason lies in the different perception of public ownership and the commons as such among the various national legal systems, which makes it almost impossible to find a point of synthesis. Therefore, the concept enshrined in the Charter is very wide and includes the "collective goods or services to which access is necessary for a balanced fulfillment of the fundamental needs of the people". The conceptual ground of the notion is based on the substantial intensity of the population's interest, but has no certain boundaries. Consequently, the aim is to produce "a Europe-wide catalogue of the commons to be updated regularly because the commons, not being a mere commodity, are a highly dynamic social institution changing in time and space".

This is where one finds all the unavoidable contradictions of an experiment that tries to compound traditional legal tools and new goals. The open problems, in fact, are many and relevant. The authors of the Charter directly give some indications about the typology of the commons to be protected. Here, the double nature of the commons (intended as both goods and utilities) is clear. In fact, according to an expressed rule, "it is necessary that the commons are understood not only as living resources, such as forests, biodiversity, water, glaciers, seabeds, shores, energy, knowledge and cultural goods,

but also as organized public services, such as schools, healthcare facilities, and transportation". Which, of course, also shows an implicit will not to take into consideration the conceptual aspects related to the appropriation system.

Another contradiction is related to the legal effect of the production of the catalogue, which should be "based on the irreversibility of ecological legal protection, eventually to be granted constitutional status as heritage of Europe in trust for future generations". A logical problem arises from the idea according to which the catalogue must be the starting point of an irreversible legal protection of all its elements. Therefore, it would only be possible to integrate the list with new additions rather than, so to say, by removing some items. This approach, however, does not take into account the inherent scarcity of some resources that could lead to their exhaustion despite a fair and efficient management. Another relevant aspect is the possible scientific and technological progress, which may change the evaluation criteria of the quality of life; in a few years, in fact, what originally was a scarce resource could – in the general perception and, consequently, in legal terms – lose such attribute.

More evidence of uncertainty in managing the traditional legal concepts for new purposes results from a careful study of the concept expressed in the Charter about privatisation in the public sector. A common element throughout Europe can be indicated in the growing importance of this phenomenon over the latest decades (Clarke, 2004, p. 27; Bortolotti and Siniscalco, 2002; Bennett, 1997; Mejstrik et al., 1997; Frydman and Rapaczynski, 1994; Ramanadham, 1993). The authors of the Charter note that the expansion of privatisation and a strong legal favour for corporate power has unduly turned citizens into consumers. This has influenced the perception of common resources and of the (mainly productive) aim of their use. Consequently, privatisation should be allowed only in exceptional cases, when the national legislature, after a deep and careful evaluation, finds that it is strictly necessary.

In my opinion, this is one of the weaknesses – from a conceptual point of view – of the Charter. In fact, besides the explicit reference to a 'traditional' administrative law instrument (privatisation), there is an effort to change its nature according to fairer distributional parameters. It is established that "in the exceptional cases in which privatization may occur, there must be full compensation, recognized and guaranteed *ex ante* to restore the commons". In this regard, many questions may be asked. It is not clear who is responsible for shelling out compensation, even though the most logical answer seem to be the central authorities in a legal systems, which must take the final decision in each privatisation case. However, nothing is said about the quantification criteria of the amount of compensation. The main open issue, finally, regards the identity of the addressees of compensation. Perhaps, they should be the local populations that are the most direct users of the goods or resources, but their exact identification could be very complicated (and contains at least partial arbitrariness). A possible alternative is to empower the territorial authority, giving it the competence to decide, in light of a participatory sub-pro-

cedure involving all the stakeholders, how the money should be spent in the public interest.

Finally, the authors of the Charter have indeed kept in mind some other theoretical conceptual elements. In particular, it is made clear that the management of the commons must always be related with "the logic of access and not of exclusion", especially with the aim of granting the widest possible fruitful use to the young and future generations. Although the Charter does not directly address the problem of the possible transformation of property/ownership, it often refers to *heritage*. This may be relevant because the typical characteristic of *heritage* is its natural destination to survive and to be transmitted. Therefore, "reproduction and sustainability" must be the main purpose of their use, "no matter if publicly or privately owned".

4.2 The role of supranational law

The need for a strong intervention by the legislators at the level of general principles is clear to the authors of the draft European Charter, stating that "a true commonwealth of Europe is possible only by means of constitutional safeguards of the commons through a direct participatory process". This means that the perception of the primary importance of the procedure as a tool for the protection of the commons in the general interest is so strong to require not only its translation into legal terms, but even its codification in hard law at the highest institutional level.

This step calls for both national and supranational legislative efforts. Yet, interestingly, the draft Charter expresses a strong distrust of the traditional supranational dialogue system. The authors assume a somehow political point of view, which is based on a vigorous criticism against the "collusion between the private and public sectors, between State and market actors", which, in practice, is able to preclude "national elected officials to represent the common interests of the people". As it is well known, the lack of democracy has often been indicated as the true weakness of the European institutions, as well (Azman, 2011, p. 242; Follesdal and Hix, 2006, p. 533; Crombez, 2003, p. 101; Eriksen and Fossum, 2002).

As regards the management of the commons, this element could lead to inefficiency in the basic choices. Thus, it could be proposed that an integrated system of rules is developed and implemented at the national constitutional level and at the basic European legislative level. In the national constitutions, there should be an indication of resources and interests, the use of which must be granted to everyone, while the European rules should contain the basic elements for a uniform legal framework about management and involvement of stakeholders and populations.

It can also be noted that, notwithstanding a (at least partially) negative view of European law, the draft Charter contains more than one reference to the

need for an explicit protection of the commons at the constitutional level of European hard law. The need for a strong legal obligation to ensure a minimum degree of protection of the right of direct access of the populations to the resources is clearly perceived and expressed. Very clear, as well, is the idea according to which the rules presently in force are not sufficient to obtain the aimed result. Therefore, it is necessary to lay down some basic reforms, both at the national and at the supranational level (Varvello and Montaldo, 2017).

The invitation to the European legislator is formulated in very specific terms. Concerning its relationship with the Member States, "a Directive should be issued […] to provide for the protection of the commons". As regards, instead, the European system itself, the draft states that the Commission should introduce "a new form of legitimate and democratic European Constitutional Law" and should "take all the necessary steps in order for the European Parliament […] to be granted Constitutional Assembly Status in order to adopt a Constitution of the Commons".

The overall aim is to create "a correct balance between the public and the private sector". This means that, notwithstanding the background idea about the inherently dangerous privatisation phenomenon (Mattei, 2013, p. 366), there is a strong awareness among the authors of the Charter about the necessity of conciliating public and private legal categories. Such hope is gradually (even though slowly) being put in place, as the civil society has lately started a rich and deep dialogue with the EU institutions (especially with the European Parliament) in order to obtain further attention for the commons in supranational hard law. An example thereof is the first European Commons Assembly, held in Brussels in November 2016, with the main purpose of raising awareness in the European institutions (for information, see https://euroalter.com/2017/commons-political-force).

4.3 The protection of the commons and beyond: the problem of justiciability

Another open issue which clearly arises from the draft European Charter relates to the possibility for the populations, i.e. owners of the right of access to resources, of being protected in case of a breach. Of course, this issue is strictly connected with the physiognomy of each legal system and is partially a consequence of the legislative choices about the implementation of private and public ownership in the field of commons.

Nevertheless, the authors of the Charter decided to follow a rather extensive path. Thus, they provided for a general right of everybody to "always access the courts of law to protect the commons by mean of injunctive relief". This shows a strong will to give individuals immediately 'executive' legal positions, which may be efficiently protected by a judicial order addressed to an authority or to a private service provider. This instrument is flexible enough to be

useful both when the commons are (material or non-material) goods and when they are services.

The implementation of these general tools, however, has the potential to produce important consequences in terms of identification of the subjects entitled to bring action. As the commons are seen as instruments to ensure a good quality of life to all people, each human being must be put in the condition to protect his or her subsequent rights. Taken to its maximum effect, this idea indiscriminately and uncontrollably enlarges the scope of possible stakeholders, which may occur parallel to the progressive extension of the concept of citizenship, which is a well-known phenomenon in many legal systems (Desforges et al., 2005, p. 439; Armstrong, 2006; Isin and Turner, 2007, p. 5; Joppke, 2007, p. 37; Lister, 2007, p. 49; Joppke, 1997, p. 6; Dahrendorf, 1974, p. 673). But, paradoxically, this view may be highly inefficient because of the lack of realistic awareness of the individuals about the true legal significance and implications of their rights. Therefore, the intervention by intermediate bodies, such as associations and local institutions – especially in cooperation with each other – could represent a good solution to produce an efficient system of justiciability.

5 Ruling the Commons in a Dynamic Perspective: The Importance of Participation

Nowadays, public authorities have the wide function to ensure the improvement of social welfare, compatibly with the rationalisation (and, possibly, a reduction) of spending. Thus, it is essential to indicate a series of goals that correspond to the satisfaction of basic general interests. Considering the commons in this dynamic view could bring a change in the idea of efficient and fair use of scarce resources, which does not require a deep revolution in the legal concepts connected with ownership and appropriation rules. In fact, shifting the attention from goods to substantial interests and their possible fulfilment gives administrative law a more incisive role. The main issue becomes the indication of a group of tools intended to enable an efficient management of the commons.

Therefore, it can be said that the 'guest of stone' in a legal discourse on the commons is greater concern for the mechanisms of involvement of the citizens. In such a view, when a resource may be strategic to ensure a good (or better) quality of life to the members of a community of users, these parties must be involved in the strategic decisions about the management and use of the commons. Acknowledging a new decisional role to the citizens may be a virtuous turning point towards a more efficient administrative action for a fair distribution of resources. It could also contribute to overriding the voices that, from different fields and points of view, express strong criticism about the frequent transfer of the tasks previously fully covered by administrative powers and competences from the public to the private sphere. The risk of

undue prevalence of a logic of immediate economic gain is inherently linked with the growing implementation of managerial criteria to actions held in the public interest. A possible method to tackle this problem is to construct a new legal framework to protect the right of the populations to be involved not only in the use, but also in the management of the commons.

This solution is appropriate for two reasons. Primarily, it allows the emersion of minority needs and sensitiveness, which the institutions hardly even detect. Besides, a preliminary confrontation among the different groups of stakeholders reduces the risk of conflicts which, particularly in moments of crisis when the scarcity of resources is even more accentuated, is dangerously high (Heller, 1998, 622; Sabel and Zeitlin, 2008, 271; Sennett, 2011). The key (at least partially) is the broad conception of the democratic principle and the use of a dialogic approach to understand and solve problems. Thereby, it might also be possible to restore a harmonious relationship between private parties and public authorities, founded on good governance and ethical values. The Charter is, in my opinion, congruent with the direction indicated above. In addition, many open issues regard the time and method of involvement of the populations.

The problem is how to obtain their opinion. Moreover, the question is whether participation is desirable only to manage or also to select the commons. In fact, the importance of a resource or of a service may be perceived differently in different situations; hence, what is 'felt' as a fundamental need to be satisfied by a community might not be 'felt' as such somewhere else. The same is true (as already noticed) in the diachronic perspective. To address these doubts, a wise use of the *inquiry model* might be appropriate. In fact, inquiries are sometimes used in administrative law in order to involve in public decision-making also the citizens, who are to be the recipients – not individually, but as stakeholders, owners of a general or collective interest – of such decisions. This method allows the competent authority to obtain and connect information and opinions expressed during a dedicated procedure by the concerned groups of people. The *inquiry model*, therefore, is an evolution of the ancient 'right to be heard', but it is more complex than the acquisition of single participatory acts and requires, in order to work efficiently, a primary filter by the institutions (Simonati, 2014, p. 84). This may regard both the preliminary indication of groups of resources, among which the elements of the catalogue could be chosen, and the indication of specific stakeholders – representatives of specific wide-shared interests – whose intervention in the procedure is compulsory.

In the comprehensive architecture built by the Charter, another issue is how to measure the degree of efficiency of the management of the commons. Depending on the different legislative and institutional situations, many paths may be followed. As regards the 'property field', besides the 'classical' instrument of public ownership, different forms of collective domain may be used (Capone, 2016, p. 597; Borrini-Feyerabend, 2013; Eriksen, 1993; Hirsch and

O'Hanlon, 1995; Nevola, 2011; Notaro and Paletto, 2011, p. 137; Pretty and Ward, 2001, p. 209; Stevenson, 1991). As regards the 'dynamic' forms of management, the implementation of local autonomies may be placed alongside the promotion of action by associations or other (at least, formally) private subjects.

The great heterogeneity of the concerned fields requires the choice of a common key, which may represent some kind of a *passe-partout* guarantee for democratic participation. This precious legal key may be indicated, in my opinion, in a wide use of the administrative procedure. Of course, in this specific field, the best practices which can be implemented are strongly influenced by the rules on administrative procedures in force in the various legal systems and there is no 'one fits all' solution. The next chapter presents some proposals with reference to the Italian legal system.

6 A New Administrative Proceduralisation to Manage the Commons? Remarks with Reference to the Italian Experience

Finally, some remarks may be expressed about the Italian legal system, which is relevant for various reasons. First, Italy is where the Charter was written, as the International University College has its institutional framework in the University of Turin. Second, in Italy the scientific debate on the commons among legal scholars is strong, especially as regards their systemic position 'between' private and public ownership. Moreover, the absence of specific rules on the commons at the national level has frequently driven the Italian local entities toward original experimentations. In the field of administrative action, such efforts must not neglect the applicable rules regarding administrative procedure, which compel the authorities to follow specific steps when issuing their decisions. From this point of view, indeed, the basic role of administrative procedure is commonly recognised in Italy.

Of course, simplification is a value for administrative action. Nonetheless – especially when many different public and private interests must be harmonised, such as in the field of management of the commons – the fragmentation into various steps of the exercise of power only apparently leads to complication, as in reality it ensures a more efficient participation by all the stakeholders. The Italian Constitutional Court's case law goes in the same direction. According to the Court, in fact, administrative procedures are the natural location for the fair involvement of all subjects and groups which aim at the protection of their respective interests (among others: Constitutional Court, 2 March 1962, No. 1; Constitutional Court, 21 March 1989, No. 143; Constitutional Court, 2 February 1990, No. 41; Constitutional Court, 29 April 1993, No. 204, Constitutional Court, 1 June 1995, No. 220; Constitutional Court, 3 June 1998, No. 211; Constitutional Court, 11 July 2000, No. 300; Constitutional Court, 2 May 2005, No. 172; Constitutional Court, 8 March 2006, No. 104).

Actually, the fragmentation of the legal physiognomy of the commons prevents to consider the implementation of administrative procedure in the strict sense as the method to ensure their use in the public interest. In other words, the Italian law on administrative procedure (Law of 7 August 1990, No. 241) is not flexible enough to be suitable. In fact, it is based on participation of specific stakeholders in the procedure in which they have a direct interest. In the field of the management of the commons, however, the appropriative model is not clear and the indication of the subjects able to actively dialogue with the authorities is not simple. Therefore, more efficient participatory circuits, which allow gathering the contributions by groups of (public and private) stakeholders in a less formalised way, are needed. The main difficulty regards the involvement of all the members of the community of users, who *in re ipsa* are the holders of a participatory expectation.

Widespread participation is nowadays possible thanks to e-participatory instruments, but it would be utopian to believe that everyone is actually able to easily and freely access to the internet (Chadwick and May, 2003, p. 271). Therefore, the role of the public authorities – especially at the local level – as serious interlocutors and representatives of various groups of private stakeholders (and especially of the economically and socially weakest ones) must be re-established. Action by institutions can be fundamental also to grant a fair dialogue among different groups of stakeholders (for instance, the local populations and the private investors), who are often in opposite and rival positions as regards the exploitation of scarce resources (Hirshrnan, 1986).

This kind of cooperation among private subjects, groups and public bodies might give efficient answers to allow an effective empowerment of the populations, which are the main users of the resources, and simultaneously avoid factual and (so to say) 'self-managed' perceptions by each local group of inhabitants. In fact, too much fragmentation is dangerous as it is not governable, and a central coordination is necessary. Thus, the aim is to create (and enforce) collaborative networks among stakeholders, promote public-private partnerships, and involve citizens in strategic decisions. To reach these goals, a strong consensus among the interested populations is necessary. As consensus seems to be the result of a diachronic gradualism, its creation may be fruitfully based – even if no rules of law impose it – on a succession of logical and chronological steps.

In Italy, an interesting example of efficient administrative procedure best practices even in absence of hard law imposing such is spatial strategic planning (Gioioso, 2006, p. 37; Cangelli, 2012, p. 123; Perulli, 2004). At the first step of the procedure, the leading authority involves public and private stakeholders which may normally participate in the procedure either individually or through mediation of their associations (Lecci, 2011, p. 103 and p. 134; Gastaldi, p. 22). Then, according to a strongly collegial method, all the involved subjects and groups collaborate in indicating the basic results to be obtained in the public interest. In this step, the importance of public communication

is fundamental (Kunzmann, 2000, p. 259) and has a double function. First, it diffuses among the interested populations a correct knowledge of the discussed points before strategic planning reaches its final version. Second, it stimulates the involvement of the socially and legally 'weakest' citizens, who are assisted in the comprehension of technicalities. Finally, the head of the leading authority undersigns a formal agreement with the representatives of all public and private partners. The legal power of the agreement is not clear, but it primarily aims at increasing the public opinion's attention for the planned projects. Normally, the strategic plan is also formally transferred into a public decision. After its formal emission, the implementation starts and is based on gradualism and flexibility of results, even if special bodies have the power (and the duty) to constantly monitor progress. This scheme, which in Italy is usually adopted as best practice (especially by several municipal-level authorities) (Simonati, 2015, p. 2404, where various practical examples are indicated), may be fruitfully applied also to implement democracy in the management of the commons.

7 Short Conclusions

The traditional legal conceptual background does not provide for efficient tools to describe and regulate the commons. Property law, in particular, is only partially useful because the basic point of the commons is not the kind of ownership, but how they are managed to maintain their public function. Therefore, the right perspective is perhaps to underline the potential importance of best practices of democratic participation of the directly involved populations in the procedures, followed by the administrative bodies to take the basic choices.

Another important issue regards the introduction of a new concept of administrative procedure, different from the one codified in general national laws. In fact, the traditional administrative procedure is normally aimed at issuing an individual final measure, the recipient of which is a single subject. The subject of the 'new' proceduralisation here proposed, instead, are the administrative decisions on the management of the commons: they have general content and their recipient is a group of people as a whole. This is, of course, an important difference which determines the specific needs of the pertinent procedure. In particular, it should be more flexible than the traditional one, but should be based on the same principles of pursuit of the public interest, fairness, impartiality, transparency, and participation by the interested parties. The necessary respect for such fundamental principles, even in absence of detailed rules on such procedures, provides a fundamental benchmark for all the practical implementations and experimentations, ensuring greater uniformity also among European countries.

These suggestions are coherent with the content of the draft European Charter, which was the starting point of the analysis conducted in the paper. As

regards other issues, I cannot totally share the approach adopted. In particular, delegating all the strategic choices fully to the citizens (as it seems to be the aim of the document) may be too expensive in institutional terms. On the contrary, a gradual codification of participatory best practices, which have already been experimented – especially at the local level – to involve citizens in administrative decisions, might be a good idea. This would also allow postponing the 'revolutionary' stances about established legal tools, such as ownership and administrative procedure in the strict sense. Finally, from the point of view of the desirable legislative reforms, setting out merely principle rules would leave the institutions a chance to express their role, through a careful adaptation of the participatory mechanisms, in the light of the characteristics of an individual context.

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The Service of Documents in Administrative Procedural Law – A Comparative Analysis[1]

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ABSTRACT

This article presents a comparative and empirical analysis of the service or the delivery of documents in procedures, as the key procedural action to constitute legal effects in legal relationships. In Slovenia, service is largely defined by the three main procedural laws – the General Administrative Procedure Act, the Criminal Procedure Act, and the Contentious Civil Procedure Act. These relate to different types and specifics of relationships; for instance, in administrative proceedings, the public interest prevails over private ones. The presented research, applying predominantly normative and comparative methods and analysis of case law, aims to show the importance of the specificity of the different areas and of the rules of service in different proceedings. The results of the research suggest that in certain cases service should be regulated in a uniform manner. Yet the specific aims of various legal relations require individual solutions. Thus, the article opens up grounds for future comparative research and practical regulatory improvements.

Keywords: *administrative procedure law, case law, serving documents, procedural delivery, comparative analysis, Slovenia*

JEL: K19

1 Introduction

Service – seen as a procedural action[2] – is one of the most important institutions of any procedure: if service is not effected properly, the act is not final/enforceable. In Slovenia, the legal relationships between an individual party and the Government are regulated according to the procedures prescribed by the relevant procedural laws. The research presented in this article includes a

1 *The article is a summary of the master's thesis of Ines Golob: Analiza vpogleda v spis in vročanja v upravnih, kazenskih in pravdnih postopkih [An analysis of access to the file and delivery in administrative, criminal and civil procedures] (https://repozitorij.uni-lj.si/IzpisGradiva.php?id=90898), prepared under the mentorship of Prof. Polonca Kovač, PhD, and defended at the Faculty of Administration of the University of Ljubljana on 11 July 2016.*

2 See Breznik et al., 2008, Jerovšek et. al., 2004.

comparison of the systems of service under the three most important procedural laws – the General Administrative Procedure Act (hereinafter: the ZUP), the Criminal Procedure Act (hereinafter: the ZKP), and the Contentious Civil Procedure Act (hereinafter: the ZPP). Despite the differences concerning the method of service, all three procedural laws have a significant influence on the legal relationships between different actors and contribute to legal certainty in the country.

Procedural law is an extremely demanding legal field with a considerable impact on the parties involved in legal proceedings. The systemisation of law is necessary in particular to regulate individual narrower and broader units of law within a single system, thereby contributing to transparency of law. All legal areas together constitute the national legal system applying in a specific country. However, each legal area has its own peculiarities, which are reflected both in substantive law and in procedural laws governing a certain legal area. Typical examples of procedural law in Slovenia include criminal procedure law, civil procedure law, and administrative procedure law[3].

In their work, administrative bodies in Slovenia apply several procedural rules when deciding on rights, obligations, legal benefits, or other legal statuses of the parties. Administrative bodies primarily operate under the ZUP, the courts mainly apply the ZKP, the Minor Offences Act, the ZPP and the Non-Contentious Civil Procedure Act, while other state bodies also apply special regulations adapted to their specific proceedings (e.g. the Tax Procedure Act in financial matters).

Administrative law is primarily applied by those public administration bodies that decide on internal affairs, social security, health care, environment and spatial planning, education, agriculture, etc. The general administrative procedure is a legally regulated sequence of actions aimed at establishing a relationship under administrative law. This relationship differs from other legal relationships since it arises on the basis of a unilateral and authoritatively declared will of a representative of the public interest. In the process of establishing this relationship, parties are not equal as the representative of the public has stronger powers (Jerovšek et al., 2004, p. 36).

Criminal law is applied by state authorities dealing with criminal offences defined under substantive criminal law. According to the widespread belief, criminal law has two basic functions: to protect and to guarantee. In its protective aspect, criminal law protects the fundamental social values that are articulated in the modern times primarily as human rights and fundamental freedoms. / ... / The basic means by which criminal law exercises its protective function is repression or, more simply, punishment. /... / In its guarantee function, criminal law provides individuals with protection against the possible arbitrary, unlawful and inhumane acts of the state repressive apparatus (Turk et al., 2004, p. 73).

3 See Selinšek, 2007, Ude et al., 2005.

Civil law covers the legal norms governing property relations between equal entities on the basis of the dispositive principle; the violation of these norms implies property sanctions. Civil law is divided into substantive and procedural law / ... / Substantive law provides which and what rights and obligations can exist between individual legal entities, while procedural law regulates how and before which authority these rights and obligations are enforced (Toplak, 2002, p. 17).

The institution of service under a particular procedural law is regulated specifically for the legal area in question, hence the differences between individual procedural laws. Service in Slovenia is therefore a rather complicated issue. In certain proceedings, the elements and systems of service provided under different procedural laws intertwine, which leads to errors in the work of the competent authorities and to a lack of understanding of the provisions on service among the parties in the proceedings.

The article examines the systems of service under the three main procedural laws – ZUP, ZKP and ZPP – and compares the various elements of service provided therein to find similarities and differences. When serving a document, an official person must choose the appropriate manner of service which depends on the type of document being served (whether the document gives rise to certain legal consequences for the party), on the party's request concerning service (service to be effected electronically, personally, on an authorised person, etc.), on the party's location (abroad, in prison, etc.), on whom the document is to be served (natural person, state authority, legal person, attorney, etc.), and other reasons.

The aim of the article is to present the differences of service under a particular procedural law and the consequences of a particular regulation for the parties in the proceedings through the empirical analysis of the relevant judgements of the Supreme Court of Slovenia.

By means of a normative and comparative analysis, the article first examines the different manners of serving and the similarity and differences between individual procedural laws. Later on, an empirical analysis of the relevant judgements of the Supreme Court between 2013 and 2016 is provided. The judgements of the Supreme Court represent unified case law, thus ensuring judicial protection of an individual or other entity against authoritative decisions of the administration. For the sake of interpretation of this article, it is important to know that in deciding in administrative matters, the Supreme Court has different powers than, for example, in a criminal or civil proceeding where it acts as a third-instance body i.e. a body that decides after extraordinary legal remedies have been exhausted. The main research question is the comparison of the different manners of serving and the resulting advantages and disadvantages thereof. In this context, the article investigates the hypothesis that the elements and systems of service under different procedural laws intertwine, which leads to errors in the work of the competent authori-

ties and to a lack of understanding of the provisions on service among the parties in the proceedings, as stated in the abstract.

2 Overview of Literature and Procedural Law Characteristics of Service in Slovenia

In Slovenia, service is regulated by various procedural laws and in various manners. As a rule, the administrative authorities in Slovenia effect service under the ZPP, the ZKP, and the ZUP. Certain administrative authorities serve under specific laws: financial offices serve pursuant to the Tax Procedure Act (ZDavP-2), while courts in certain cases follow the Court Register of Legal Entities Act (ZSReg) and the Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act (ZFPPIPP).

The forms and manners of service are further affected by other laws, such as the Postal Services Act (ZPSto-2), which in Chapter VII prescribes that postal items are delivered in accordance therewith or in accordance with other laws.

Recently, electronic service is coming to the fore. Such manner of serving is partly regulated by the Electronic Business and Electronic Signature Act (ZEPEP), providing that electronic signature is equivalent to the physical signature of the party.

Since Slovenia is a member of the EU, it must also take into account Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

According to Kovač, service, although an extremely important issue in a democracy, is often underestimated in practice. The serving (at least fictitious) of an act by an authority is a precondition for the arising of legal consequences, yet the manner of serving can be limited (e.g. service only by public notification or on an authorised person) (Kovač, 2013, p. 219).

Below is a presentation of some of the most important manners of service and a comparison between individual procedural laws.

2.1 Personal serving

All documents that in any way affect legal certainty, give rise to legal consequences, from the serving of which a time limit begins to run, or are relevant for the party to become acquainted with the procedure and the decision of an authority, must be served personally on the person for whom they are intended.[4] Personal serving means that a document is served on the addressee

4 If the person that should accept a document refuses to do so without any legally provided reason, the server shall leave the document in the apartment where such person lives or on the premises where they are employed, or shall affix the document on the door of the apartment or premises or leave it in a letterbox. If service is effected in the manner referred to in the preceding paragraph, the server shall write on the proof of service the day, the hour and

directly or personally. However, the addressee may explicitly authorise another person to take over the document on his or her behalf. Personal serving is possible both physically and electronically into a secure mailbox of the addressee (more in Kovač & Remic, 2008).

Jerovšek and Kovač suggest that service is the key procedural action, because it is a prerequisite for the creation of legal effects of the document being served. Until served, it is deemed that an act has not yet been issued (in the sense of creation of legal consequences in relation to the parties or other addressees and the issuing authority) (Jerovšek & Kovač, 2010, p. 114).

Similarly, Androjna and Kerševan argue that the service of a document has important legal consequences for the document to be served, for the authority issuing the document, and for the person to whom the document is served or intended. A decision "issued" in an administrative proceeding that has not been notified or pronounced orally does not give rise to any legal effect until it is dispatched or served on the party. Legally speaking, a decision that has not been served on the party does not yet exist – hence, it is not binding neither for the party nor for the body that formulated the content thereof. Therefore, before it is served on the party, the decision is considered an internal act and can still be changed or withdrawn by the issuing body (Androjna & Kerševan, 2006, p. 227).

the reason for the refusal of acceptance, as well as the place where they left the document; service shall thereby be deemed effected. (ZUP, Art. 95)

Table 1: Personal serving

Procedural law	To be served personally
ZUP Art. 87	Decisions and procedural decisions as well as other documents from the serving of which a time limit begins to run must be served on the person for whom they are intended.
ZKP Art. 120-121	Documents are to be served personally: – on the defendant (a summons to the first interrogation in pre-trial procedure and a summons to the main hearing), – on the defendant who has not retained defence counsel (the indictment, the judgement, all decisions for which the time limit for appeal starts to run from the day of serving, and the complaint of the other side against the rejoinder), – on the defendant who has a defence counsel (the indictment, the judgement, all decisions for which the time limit for appeal starts to run from the day of serving, and the complaint of the other side against the rejoinder are served on the defence counsel and the defendant), – on the private prosecutor and the injured party acting as private prosecutor (a summons to bring private charges or indictment and summons to the main hearing, decisions for which the time limit for appeal starts to run from the day of serving, and the complaint of the other side against the rejoinder).
ZPP Art. 142	An action, a court's decision subject to appeal, an extraordinary legal remedy, the order for payment of the court fees for the motion, a summons to the party to a settlement hearing or to the opening hearing.

Source: own analysis, 2018.

The above comparison shows that the addressees that need to be served in person vary considerably depending on the law or type of procedure. For example, according to the ZUP, personal service applies to any person for whom the document is intended, and no distinction is made as to the role of the party in the proceedings. These persons are served decisions, procedural decisions and other documents from the serving of which a time limit to file a legal remedy begins to run, or the service entails an obligation for the addressee to do or allow something or acquire a certain right. The ZKP distinguishes between personally serving on the defendant or on a private prosecutor and the injured party, while additionally defining the cases of service on the defendant depending on whether or not they have a defence counsel. According to the above, the defendant is served all documents, while the private prosecutor and the injured party as the prosecutor are only served a list of documents.

According to the ZPP, the parties to the proceeding are served all those documents that affect their status of a party, similarly to the ZUP (action, court's decision subject to appeal, extraordinary legal remedy, order for payment of the court fees for the motion, summons to the party to a settlement hearing or to the opening hearing).

A comparison of personal service under the abovementioned laws shows that the ZUP and the ZPP are quite similar, whereas personal serving under the ZKP is rather specific and more complex. The latter involves a particular type of relationship between the State and the individual, where the consequences for the individual are much more severe than under the other two laws. In criminal proceedings, the focus is on the protection of the constitutionally presumed innocence, meaning that a person is innocent until found guilty by a final judgement.

2.2 Fiction of service

According to Kovač, Rakar and Remic, the ZUP establishes fiction of service in cases of unsuccessful personal service on the addressee (Art. 87), service by public notification (Articles 94, 96 and 96a) and refusal of acceptance (Article 95). In order to establish fiction of service, however, it is essential that the addressee is aware of the consequences if the document is not taken over within 15 days of the day the note was left. Therefore, fiction of service cannot arise if the server leaves in the places specified only a note stating that the addressee must report to the postal office. According to the above three authors, fiction of service is based on the actual acknowledgement by the party of the obligation to take over the document and of the consequences of not doing so within the period set for each particular type of service (Kovač et al., 2012, pp. 180-181).

Under the ZKP, fiction of service is regulated differently than under the ZUP, which is understandable considering the different status of the parties in court proceedings (defendant, defendant with a defence counsel, private prosecutor, injured party acting as private prosecutor, etc.) and the legal consequences for the parties arising from the judgments.[5] According to the ZKP, fiction of service is established when the court is unable to serve the document[6] at the address of the defendant (the defendant is not found at this address or has changed the address without notifying it); in such a case, the court posts the document on the court board and after eight days it is deemed that valid service has been effected (ZKP, Article 120). In a similar way, the court serves on the private prosecutor, the injured party acting as

5 Article 126 of the ZKP provides that in cases not covered by the provisions of the ZKP, serving of documents is effected according to the provisions applying to civil procedure; which probably means that even in criminal proceedings the court can, in certain cases, establish fiction of service.

6 In such a manner, it may serve other decisions for which the time limit for appeal starts to run from the day of serving or the complaint of the other side against the rejoinder, but may not serve a ruling on the issue of a punitive order, a ruling on prison sentence, etc.

private prosecutor and their legal representative when the document cannot be served on their hitherto address (ZKP, Article 121). Article 122 of the ZKP provides that when the recipient refuses to sign the proof of service, the server makes a note thereof indicating the date of service, whereby the service is considered effected. However, this is not the same fiction of service as provided by the ZUP.

Horvat argues that if the addressee does not take delivery of the document within the time set, service is deemed not effected. In such a case, the court may, subject to certain conditions, post some of the documents on the court board and only then, after eight days, service is deemed to have been effected. The ZKP does not contain a provision such as some other regulations (ZUP and ZPP), whereby even if the addressee does not take delivery by the set deadline, service is deemed to have been effected (Horvat, 2004, page 262).

Horvat points out that serving a decision by posting it on the court board implies legal fiction, therefore the defendant cannot prove that he/she was not aware of its content. Serving a judgement by posting it on the court board is permissible only if the defendant failed to notify a change of address, i.e. when the defendant knows that criminal proceedings were initiated against him/her and was warned that he/she was obliged to report to the court every change of address. Hence, this manner of service is not appropriate for judgements on the issue of punitive orders, since such judgements are issued without hearing the defendants and without warning them of their duty to report to the court any change of address (Horvat, 2004, pp. 264-265).

According to the Supreme Court of Slovenia, legal fiction means that a fact that certainly does not exist is considered true. Thus, fiction of service applies as a special legal institution to determine the moment of the beginning of the time limit for bringing an action (or filing a request to initiate proceedings) or filing a legal remedy, or for the creation of other legal consequences in a number of proceedings, and must therefore be implemented in the same manner although the laws governing these procedures do not regulate it in the same way.[7]

The ZPP (Article 142) regulates fiction of service very similarly to the ZUP, whereby under the ZUP service is considered effected on the day of expiry of 15 days, whereas under the ZPP it is considered effected after the expiry of 15 days.

7 Legal opinion by the Supreme Court of Slovenia of 14 January 2015.

Table 2: Fiction of service

Procedural law	Fiction of service when service cannot be effected personally
ZUP Art. 87	If the addressee fails to take delivery of the document within 15 days, service is considered effected as of the day when this time limit expires. After the expiry of such time limit, the server leaves the document referred to in paragraph one of this Article in the addressee's house letterbox or the detached letterbox. If the party has no letterbox or if it cannot be used, the server shall return the package to the sender. The written note must contain information on the consequences of such service.
ZKP Art. 120-121	If the defendant (without defence counsel) is to be served a judgement by which he is sentenced to imprisonment and the judgement cannot be delivered to his hitherto address, the court appoints a defence counsel *ex officio* until the new address of the defendant is obtained. The court determines a time limit within which the appointed defence counsel is required to study the file, after which it delivers the judgement to him and continues proceedings. Where a document to be delivered is a decision for which the time limit for appeal starts to run from the day of serving, or a complaint of the other side against the rejoinder, the court posts the decision or the complaint on the court board and after a lapse of eight days it is considered that the serving has been effected. If the defendant has a defence counsel, the court delivers the documents from the second paragraph of this Article to the defence counsel and to the defendant according to the provisions of Article 119 of the ZKP. In that case, the time limit for filing a legal remedy or for a rejoinder starts to run from the last serving. If the decision or the complaint cannot be served on the defendant because he failed to report the change of address of residence, the decision or the complaint is posted on the court board and after eight days the serving is considered to have been effected. If a summons to bring private charges or an indictment and a summons to the main hearing cannot be delivered to the addresses of the private prosecutor or the injured party acting as a prosecutor, the court posts that summons, decision or complaint on the court board and after eight days it is considered that the serving has been effected.
ZPP Art. 142	If the recipient fails to collect the documents within 15 days, the service is considered to have been effected after the expiry of such time limit, and the addressee must be warned thereof in the note referred to in the preceding paragraph. After the expiry of the said time limit, the server leaves the documents referred to in the preceding paragraph in the addressee's house letterbox or the detached letterbox. If the party has no letterbox or if it cannot be used, the documents are returned to the court and the addressee is informed thereof with a note.

Source: own analysis, 2018.

Fiction of service means that service has been effected although there is a possibility that the addressee has not been informed of the content of the document despite such being placed in the letterbox. The ZUP and the ZPP consider that fiction of service has been effected even if the addressee has not arranged or does not have a house letterbox at all, and even though the document has been returned to the decision-making body (see Table 3).

Fiction of service has particularly important consequences when it comes to documents that should be served on the party in person. Fiction of service presupposes that the party has not received the documents from the court. Nevertheless, legal consequences arise (e.g. deadline for responding to an action, deadline for filing a complaint or an extraordinary legal remedy, failure to pay a court fee within a specified time frame that leads to fiction of withdrawal of the action), which may be very difficult for the party. For this reason, some experts ask themselves whether such a fiction of service jeopardises the constitutional right to judicial protection or equality before the court (thus jeopardising the constitutional rights under Articles 22 and 23 of the Constitution) (Ude, 2002, p. 195).

As regards fiction of service, an interesting case is Nunes Dias v. Portugal, where the European Court of Justice confirmed that it was not necessarily contrary to Article 6 of the ECHR if the Court served the judgement under the rules on the fiction of service (by posting it on the court board). Such practice was admissible in that specific case since the court first performed reasonable inquiries with the help of the Police in order to find out the exact place of residence of the defendant. Only after this could not be established, service was effected by posting the judgement on the court board and an ad in the national newspaper. In fact, according to national law, the protection of the defendant is ensured by the fact that, within five years from the final decision or in the enforcement procedure, he/she can dispute the regularity of service (Galič, 2004, pp. 175-176).

Regarding fiction of service, Galič argues that it is wrong that the system of service under Articles 141 and 142 of the ZPP in Slovenia is often considered fiction of service. When served in a letterbox, there is a high degree of probability that the addressee acquaints himself/herself with the document. According to Galič, this is not fiction but a very real assumption. On the other hand, fictitious service is serving on a legal entity at its registered address if it is apparent to the server that the legal entity does not actually operate there. True fiction of service (by posting on the information board) is provided by Article 145 of the ZPP only if the defendant changes residence during the proceeding and fails to report this to the court (Galič & Betteto, 2011, pp. 140-141).

It seems that fiction of service and the related deadlines will continue to be a bone of contention between theoreticians and practitioners. The point of the article is that serving by fiction should be unified in all areas where such applies, since only uniform legislation can lead to uniform practice. However, it is unacceptable that the provisions on the fiction of service under the ZUP and the ZPP are interpreted uniformly, on grounds that "the problem is in the details".

2.3 Special examples of service – service abroad[8]

Service abroad is organised in different ways at the international level. Documents (acts, decisions, judgements, summons, etc.) can be served, for example, through diplomatic channels. Such a manner of serving can be very complex and time consuming because of the large number of bodies involved. Service is also possible on the basis of a bilateral convention concluded between two countries; in such case, serving is effected, as a rule, through the competent ministries of justice. Slovenia has concluded bilateral treaties on legal aid in civil and criminal matters with Croatia, Macedonia, Russia and Turkey (these treaties also include provisions on cross-border service). Likewise, service can be effected on the basis of multilateral conventions (the Hague Convention of 1 March 1954 on civil proceedings, the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters).

8 See European Commission, 2013.

Table 5: Service abroad

Procedural law	Service abroad
ZUP Art. 89 and 92	– If the party or his or her statutory representative is abroad and does not have an authorised person in the country, they shall be required, on the serving of the first document, to appoint an authorised person or authorised receiver within a specified time limit, and shall be informed that an authorised receiver or temporary representative shall be appointed to them *ex officio* if they do not themselves appoint an authorised person within the time limit determined. – Natural persons and legal persons abroad may be served directly or through diplomatic channels, unless otherwise provided by treaty.
ZKP Art. 124	– Serving on Slovenian nationals abroad shall be effected via diplomatic or consular missions of the Republic of Slovenia, provided that the foreign country in question does not oppose such manner of serving and that the recipient agrees to accept it. The authorised person of the diplomatic or consular mission shall sign the serving form as the server if the document is delivered in the premises of the mission; if the document is sent by mail he shall confirm it on the serving form.
ZPP Art. 135 and 146	– If a document is to be served on a person or institution based in a foreign state or on a foreign citizen enjoying immunity, service shall be effected through diplomatic channels, unless otherwise provided by a treaty or the ZPP. Documents can be served on a citizen of the Republic of Slovenia residing in a foreign state through a consular or diplomatic representative. Such service shall be valid only if the person to be served is willing to accept such. – Upon filing of the action, the plaintiff shall appoint a person authorised to accept the service in the Republic of Slovenia. If the plaintiff fails to appoint such person upon filing of the action, the court shall appoint to the plaintiff, and to his expense, a temporary representative authorised to accept the service, and shall through such temporary representative order him to appoint a person authorised to accept service in a specified period of time. If the plaintiff fails to do so, the court shall reject the action. – Upon the first service of documents, the court shall order the **defendant** to appoint a person authorised to accept service in the Republic of Slovenia. If the defendant fails to do so, the court shall appoint to defendant, and to his expense, a temporary representative authorised to accept service, and shall inform the defendant thereof.

Source: own analysis, 2018.

Galič emphasises that in order to regulate cross-border service, account must be taken of the fact that the manners of serving in individual countries, including within the EU, vary considerably. In some countries (e.g. Slovenia), service is a task of the court (usually by mail). In other countries, it is up to the party to ensure that a document will reach the opposite party, and the court is only informed that service has been effected (therefore, action to the court is brought only after it is served on the opposite party, or the court defines, at the time the plaintiff brings action, a period within which the judgement should be served). In some countries, serving is the task of professional private servers. There are also significant differences in terms of substitute service and service to the house letterbox, as well as in terms of the possibility of "fictitious" service when the defendant cannot be found (Galič, 2010, p. 52).

The comparison clearly shows that individual laws regulate service abroad rather specifically; according to the ZUP, documents can be served directly, according to the ZKP they are served through diplomatic missions, while according to the ZPP they can be served through diplomatic missions, based on Regulation (EC) No. 1393/2007, or otherwise. The author's opinion is that service abroad should be simplified and specific situations regulated in some other manner.

3 Analysis of Slovenian Case Law Regarding Service

3.1 Methodological basis

The research analysed the judgments of the Supreme Court of Slovenia in terms of service in administrative, criminal and civil matters between 2013 and 2016.[9]

75 Supreme Court judgments were examined, of which 28 from the administrative department, 34 from the criminal law department, and 13 from the civil department.

This analysis was based on the judgments of the Supreme Court that represent unified case law and thus ensure judicial protection of individuals or other entities against authoritative actions of the administration. This is also suggested by Kerševan, stating that judicial protection is guaranteed against every authoritative action by the administration, with the court being the final arbitrator on the meaning and content of administrative law used as a basis for assessing the legality (legal regularity) of the administration's actions. (Kerševan, 2008, p. 1137).

9 The time frame 2013–2016 was chosen due to the high number of cases in such regard and because of the significance of the legal opinion by the Supreme Court of Slovenia of 14 January 2015.

3.2 Quantitative analysis of the judgements of the Supreme Court by type of procedure

The analysis of the judgments of the Supreme Court in relation to service shows (Table 6) that between 2013 and May 2016, a total of 76 judgments were issued in relation to service. The search in case-law actually showed 51 cases related to 'serving' and 101 cases related to 'service' in connection to the ZUP, ZKP and ZPP, yet a further review revealed that some cases were reported more than once. In addition, following a substantive analysis of the judgments, some were excluded because they did not relate to the research topic.

Table 6: Number of Supreme Court judgements concerning service and applicants

Department	Number of judgements	Party	State[10]
Administrative	29	29	0
Criminal law	34	26	8
Civil	13	13	0
Total	76	68	8

Source: own analysis, 2018.

When analysing the parties that initiated the proceedings before the Supreme Court, an interesting conclusion could be drawn, namely that in 68 cases proceedings were initiated on request of the parties and in eight cases on the initiative of a representative of the State. Interestingly, even in cases where proceedings before the Supreme Court were initiated by a representative of the State (in our case, the Supreme State Prosecutor), they were initiated in favour of the party/defendant, according to Article 421 of the ZKP. Table 6 also indicates that as regards the applicants, service is regulated slightly more specifically under the ZKP than under the other two systems.

Table 7: Supreme Court decisions concerning service

Procedural law	Number of judgements	In favour of the party	In favour of the State
ZUP	26	8	18
ZKP	26	5	21
ZPP	24	7	17
Total	76	20	56

Source: own analysis, 2018.

10 In all eight cases, the Supreme State Prosecutor filed a request for protection of legality in favour of the defendant (ZKP, Article 421).

Table 7 shows the decisions of the Supreme Court by procedural law. In order to obtain the above data, individual elements of service were examined depending on the procedural law under which service was effected. Data reveal that in 2013-2016, 26 judgments related to service under the ZUP, 26 to service under the ZKP, and 24 to service under the ZPP. In 20 cases, the Supreme Court decided in favour of the party, which means that the state authority made a mistake in service. Here are some examples of incorrect conduct of a state body under the ZUP[11]: Judgment IV Ips 144/2013 of 21 January 2014, where the Court did not serve the summons on the attorney although she was authorised by the perpetrator and the court was informed thereof; Judgment IV Ips 98/2014 of 17 March 2015, where the court did not send a summons on the offender to the address of permanent residence but rather to a temporary address, although the address of permanent residence was indicated in the central population register as the address for service; Judgment IV Ips 17/2014 of 18 March 2014, where the court wrongly concluded that the complaint was sent too late because it was mailed through an authorised Petrol service station instead of the post office, but did not take into account that Petrol d.d. had a contract with the Slovenian Post allowing registered mail to be mailed through authorised Petrol stations. Examples of incorrect service under the ZKP: Judgment I Ips 15883/2010-128 of 14 January 2016, where the server acted inappropriately since he could have effected service in the manner prescribed in Article 123 of the ZKP only if the addressee refused to accept the documents or would not want to accept them without a lawful reason; Judgment XI Ips 9660/2009-341 of 11 September 2014, where at the time of serving the indictment the defendant could not be at the address for service in Slovenia since he was detained in Croatia and was later unable to leave the territory of Croatia. Examples of incorrect service under the ZPP: Decision I Up 148/2015 of 30 September 2015, where the server left the documents on a desk at the office and did not serve them on the person authorised to accept mail; likewise, it is not correct to state that someone who refuses to accept mail by phone refuses to accept in accordance with the provisions of the ZPP; Decision I Up 189/2015 of 10 September 2015, where service at the debtor's address was incorrect since it should have been effected at the address of the insolvency administrator as an authorised person.

The cases presented above show that the system of service in Slovenia is very complex and non-systematic. A practical example thereof is minor offence bodies having to act in accordance with both the ZUP and the ZP-1 when serving minor offence acts. Moreover, in 56 cases, the Supreme Court ruled that the state body correctly implemented the provisions on service under a particular procedural law.

11 According to Articles 58 and 67 of the Minor Offences Act (ZP-1), the provisions of the ZUP relating to service apply *mutatis mutandis* also in minor offence proceedings. However, Article 140 of the ZP-1 provides that a written ruling on a minor offence is served on the defendant, the defence counsel, the defendant's legal representative, the owner of seized property, and on the proposer, i.e. on all the above.

The analysis of the judgements shows that the number of cases by individual departments of the Supreme Court (administrative, criminal law, civil) does not match the number of cases under procedural laws (ZUP, ZKP and ZPP). This means that there are situations where, for example, the criminal law department deals with service under the ZUP or the ZPP, or the civil department deals with service under the ZUP. The initial assumption was that service under a particular procedural law was consistently effected only under such law, but this is not the case.

Table 8: Supreme Court decisions concerning the elements of service

Element of service	ZUP	ZKP	ZPP	Total
Fiction of service	16	8	9	33
Serving on authorised person/defence counsel	23	7	9	39
Change of address/address for service	2	11	4	17
Refusal of acceptance	0	4	1	5
On specific persons	0	1	0	1
Electronically/by fax	0	6	1	7
Other	6	6	3	15

Source: own analysis, 2018.

Table 8 shows which elements of service were dealt with at the Supreme Court. It needs to be noted here that certain judgments contained several elements of service, since, for example, a judgment may have involved fiction of service, change of address, and refusal of acceptance at the same time. The analysis showed that the most challenged elements were service on authorised person/defence counsel (39 cases), fiction of service (33 cases), and change of address/address for service (17 cases).

The results of the analysis suggest that, by challenging the above elements of service, the parties wished to alter the decisions of the state bodies made to their prejudice, thereby misusing the legal remedies in order to also misuse the provisions on service. Interestingly, as regards service on authorised person or defence counsel, the parties often point out that service was not effected properly, i.e. not on the person actually authorised to accept the documents. Moreover, they often argue (especially in the field of criminal law) that their defence counsel was not informed of the documents or that the party was wrongly served. Regarding fiction of service, the parties most often criticise the fact that service is considered effected after the expiry of the deadline for taking delivery of the documents when the server does not find the party at the address for service (in criminal proceedings, such service is effected by posting on the information board), and the incorrect counting of the deadline for filing a complaint. As regards the change of address, the parties most often dispute the fact that they are served at an address where

they are not present although they have not reported a change of address, as they are bound to do under the applicable procedural law.

The analysis shows that the institution of service is very vulnerable to misuses by participants in the proceedings when they wish to turn the decision of a state (administrative or judicial) body to their favour. Considering the number of cases solved in favour of the State (56 cases or 74% of the total), it can be concluded that the plaintiffs are rather unfamiliar with the institution of service, the elements of service, and the legal consequences arising therefrom.

3.3 Analysis of selected Supreme Court and Constitutional Court judgements regarding service

The importance of fiction of service in terms of the protection of the rights of the parties is demonstrated by the legal opinion of the Supreme Court of Slovenia of 14 January 2015, adopted with a view to unifying case law as regards the beginning of fiction of service in all proceedings where the provisions on fiction of service apply pursuant to Article 87 of the ZUP or Article 142 of the ZPP, when the deadline for service expires on a Saturday, a Sunday, a national holiday which is a work-free day, or another work-free day in Slovenia. According to the opinion of the Supreme Court, the acceptance of a document at the post office that is to be effected by a party is not a procedural action to be carried out with the body (administrative body or court) that conducts the procedure. In fact, paragraph two of Article 101 of the ZUP expressly stipulates: "If the last day of the time limit coincides with a Sunday or a national holiday of the Republic of Slovenia or a work-free day in the Republic of Slovenia or some other day on which the authority where a procedural action is to be performed does not operate, the time limit shall expire on the end of the next working day". However, the provision of paragraph four of Article 111 of the ZPP is different: "If the last day of the period happens to be a Saturday, Sunday or a holiday provided as such by the Public Holidays Act, the time period shall expire on the next working day". The Supreme Court argues that it is necessary to ensure equal treatment of the parties who take delivery of the documents and those who are subject to fiction of service. In most major cities, mail is delivered also on Saturdays. This means that if the party is served the document on a Saturday or on a day before a holiday, the time limit for bringing action or filing legal remedies begins, or other legal consequences arise, on a Sunday or a holiday. On the other hand, if a person is left a note of service in the letterbox and fiction of service should arise on a Saturday (this is especially important for locations where mail is not delivered on Saturdays), a Sunday or a holiday that is a work-free day, fiction service following the provisions on the expiry of procedural deadlines under the ZUP or ZPP would actually arise only on the next working day, placing such person in an unacceptably privileged position.

The Constitutional Court dealt with a case in which the Higher Court rejected a complaint for being filed too late, since in the complainant's case fiction of service arose according to paragraph four of Article 142 of the ZPP and the rule

referred to in paragraph four of Article 111 ZPP could not be taken into account. This could only apply for an addressee who actually accepted the document, while an addressee who was fictitiously served would not be entitled to such an extension as referred to in paragraph four of Article 111 of the ZPP. In the case of fiction of service, the deadline expires on the last day, regardless of whether it falls on a Saturday, a Sunday, a holiday, or other work-free day. In his complaint against the Higher Court, the complainant alleged that the subsequent enforcement of the legal opinion of the Supreme Court led to an actual change of the legislation, interference with legal certainty and predictability, and unequal treatment in cases where a document is served by regular mail and cases where it is served by fiction. He stated, inter alia, that he acted as allowed by law until the Supreme Court's legal opinion, which he only learned about after receiving the decision, against which he filed the complaint.

With regard to the complainant's allegations about interference with legal certainty and predictability of the complainant's situation, the Constitutional Court replied that the law and the conduct of all state bodies must be predictable, as this is required by legal certainty (the court may not treat a party unequally by deciding in his/her case differently than in other similar cases). Moreover, Article 2 of the Constitution refers to the competing principle of the law adapting to social conditions, respecting human rights and fundamental freedoms (the right to equal protection of rights under Article 22 of the Constitution does not mean that case law should not change over time). The Constitutional Court went on by explaining that, no matter how clear a rule of law was, it became the subject of (judicial) interpretation. Yet, to its view, also the development of case-law should be predictable to the extent that the addressees of legal norms could adapt to legal developments resulting from changing case law. The court therefore needs to determine whether the individual could reasonably anticipate the conduct required from him by the changed (new) case law. In doing so, it should take into account the law applying in the given moment as well as the case law applying before the new legal rule was adopted, as well as other important circumstances, such as whether case law was subject to criticism in legal literature, the consequences of the application of the new rule for the party, in particular the positive or negative effect on his legal position, etc. Therefore, in that particular case, the Constitutional Court decided that – given that the complainant had filed the complaint before the described change of case law resulting from the legal opinion – the position of the Higher Court following the changed case law could not have been reasonably predicted.

4 Discussion and Recommendations

Upon comparing procedural laws and their subject matter, the fundamental principles and the objectives thereof, it becomes clear that the institution of service must be regulated differently for different procedural processes. Nevertheless, the analysis of the judgements (e.g. the legal opinion of the

Supreme Court of 14 January 2015) and procedural law (e.g. the ZKP in certain cases refers to the ZPP and ZUP) in relation to service under the ZUP, ZKP and ZPP leads to conclude that some elements of service could be unified for all three procedural areas. In fact, in some cases, even the procedural laws themselves refer to other procedural laws, which leads to confusion and lack of clarity in the work of state bodies.

Each of the legal areas under consideration has its specifics, which confirm that the institution of service should be regulated differently in a particular procedural law. Still, there are certain similarities between them, which speak in favour of a common regulation of certain elements of service.

The research also revealed that the interpretation of service in individual procedural laws is not uniform – a good example thereof is the legal opinion of the Supreme Court of 14 January 2015, which had to set uniform practice in terms of counting the deadlines in the event of fiction of service. Nonetheless, case law still differs, which is confirmed by the judgment of the Constitutional Court Up-164/15-14 of 18 February 2016, adopted one year after the published legal opinion of the Supreme Court. With regard to the complainant's allegations about interference with legal certainty and predictability of the complainant's situation, the Constitutional Court replied that the law and the conduct of all state bodies must be predictable, as this is required by legal certainty (the court may not treat a party unequally by deciding in his/her case differently than in other similar cases). Moreover, Article 2 of the Constitution refers to the competing principle of the law adapting to social conditions, respecting human rights and fundamental freedoms (the right to equal protection of rights under Article 22 of the Constitution does not mean that case law should not change over time). The Constitutional Court went on by explaining that, no matter how clear a rule of law was, it became the subject of (judicial) interpretation. Yet, to its view, also the development of case law should be predictable to the extent that the addressees of legal norms could adapt to legal developments resulting from changing case law. The court therefore needs to determine whether the individual could reasonably anticipate the conduct required from him by the changed (new) case law. In doing so, it should take into account the law applying in the given moment as well as the case law applying before the new legal rule was adopted, as well as other important circumstances, such as whether case law was subject to criticism in legal literature, the consequences of the application of the new rule for the party, in particular the positive or negative effect on his legal position, etc. Therefore, in that particular case, the Constitutional Court decided that – given that the complainant had filed the complaint before the described change of case law resulting from the legal opinion – the position of the Higher Court following the changed case law could not have been reasonably predicted.

The analysis reveals that in Slovenia, the rules on service are such that even administrative bodies sometimes do not know under which law and how to order service. Hence, the rules of criminal procedure interfere with the provi-

sions of the ZUP in minor offence cases, the ZKP sometimes refers to the ZUP and the ZPP, and there are also other specific features regarding service, for example, in tax procedures.

Upon comparing procedural laws and their subject matter, the fundamental principles and the objectives thereof, it becomes clear that the institution of service must be regulated differently for different procedural processes. Nevertheless, the analysis of the judgements (e.g. the legal opinion of the Supreme Court of 14 January 2015) and procedural law (e.g. the ZKP in certain cases refers to the ZPP and ZUP) in relation to service under the ZUP, ZKP and ZPP leads to conclude that some elements of service could be unified for all three procedural areas. In fact, in some cases, even the procedural laws themselves refer to other procedural laws, which leads to confusion and lack of clarity in the work of state bodies. Therefore, the author believes that comprehensive changes of some elements of legislation and further concern for its implementation are necessary.

5 Conclusion

The aim of the article was to present the differences of service under a particular procedural law and the consequences of a particular regulation for the parties in the proceedings.

The empirical part of the analysis, focusing on the judgements of the Supreme Court of Slovenia, was intended to determine whether the differences between the ZUP, ZKP and ZPP are such that these laws should have their own provisions on service, or should these provisions rather be included in a single regulation. The analysis of Supreme Court judgments revealed that the issue is not as unambiguous as it seems. Although certain elements of service could indeed be unified, at least as far as the ZUP and ZPP are concerned, there are some exceptions that call for a specific regulation of service. In any case, it is up to the legislature to decide whether to unify the provisions on service, thus simplifying it, or to preserve the existing situation which, however, is no longer manageable in terms of an easy understanding of the provisions on service. Based on the analysis of the judgements, it turned out that the institution of service is subject to constant misuses by citizens i.e. participants in the proceedings. Misuse is all the more common, the more complicated is the system of service. An unspecified and unclear article regulating service can lead to different interpretations which individuals with a good knowledge of law efficiently take advantage of.

The comparison of relevant procedural laws reveals that there is considerable confusion as regards service. Service in Slovenia is too rigid and complicated, and the differences under individual procedural laws are significant (the provisions are even drafted differently, although they are supposed to be interpreted in the same way). It also turned out that the authorities understand the same provisions in a diametrically opposite way and therefore also act

differently. The process of service is further complicated by the servers (postal services, authorised servers, bodies serving directly), which leads to errors and legitimate claims by the parties to annul, renew or otherwise resolve the matter. Although the judgments of the Supreme Court supposedly constitute case law, it appears that the authorities do not follow the judgments of the Supreme Court when serving, which may, inter alia, be attributed to the lack of knowledge of case law, the authorities being overly self-confident, or other possible reasons.

The author sees the results of the research as a possible contribution to the modernisation of the ZUP, ZKP and ZPP in a way that the legislature will be more attentive to certain inconsistencies and contradictions and will adopt laws that will be more coherent when it comes to service, while also taking into account the specifics of individual procedural laws.

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The Impact of the Public Procurement Control System on the Hungarian Public Administration

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ABSTRACT

The complexity of public procurement and the related controls are a significant issue that public authorities are facing in Hungary. The "fear" of being controlled by state authorities and EU auditors is affecting decisions in public procurement. However, research on the effects of such a system is largely absent. The purpose of the article is to explore the functioning of the control system related to EU funded public procurements and to examine its actual and potential impact on the purchases of public authorities. The method is first an introduction of the features of the control system and then the analysis of data from the relevant bodies in order to see the effect of controls and possible difficulties with the system. The results show that despite the seemingly positive impact on the regularity of procedures, the interference in the decisions of public authorities and the delays caused are problematic. It is therefore suggested that the Hungarian government should consider streamlining the control process such as through checks based on samples or focusing on the most risky procedures. The research is the first academic analysis of data related to public procurement control in Hungary, yet it can already inspire the Hungarian and other governments to review the effectiveness of such procedures and to reduce administrative burdens for public authorities as much as possible.

Keywords: *public procurement, administrative burden, audit, ex ante controls, EU funds, Hungary*

JEL: H11, H70, K39

1 Introduction

When purchasing goods and services public administration bodies across the European Union must use a public procurement procedure. This can be a long and complicated process which can often be challenging for public authorities. The process of purchasing through public procurement involves a number of stages and in each of these the public authority (contracting authority) has to make some kind of decision. In case the procedure is not followed, remedies may be sought before the national review bodies where damages can be awarded or even the contract may be declared ineffective. In addition, the correct use of public procurement receives special attention in the context of EU funded projects, since an incorrect application of the rules[1] can lead to a finding of irregularities and therefore financial corrections (i.e. a withdrawal of funding from a project) (European Commission, 2013).

The use of EU funds is monitored by a number of bodies including the European Commission, the European Court of Auditors and national audit authorities. In order to avoid public procurement irregularities, it is useful to establish additional control systems at national level which help to avoid these. Here we focus on controlling the legality of the actions of contracting authorities. This can also be referred to as supervision of public procurements (Bianchi and Guidi 2010) or audit of compliance (OECD, 2013).

Hungary has established a control system for EU funded public procurements. While all EU Member States are obliged to have adequate systems of supervision and control, no other country is known in Europe that would control public procurements on such a large scale. The Hungarian system involves controlling documents and procedures both *ex ante* and during the procedure itself for all EU funded procurements above the EU thresholds for goods and services and above HUF 300 million (approx. EUR 1 million) for works contracts.[2] In addition, *ex post* controls exist for all procedures below these values.

The principal aim of this article is to show the functioning of the Hungarian control system and to investigate how this rigorous control system is impacting on the functioning of public authorities, when the procurement is at least partially funded from EU sources. The article includes both a theoretical analysis of the difficulties related to the control system and data received from the control body is also analysed in order to estimate the actual effect of controls on the behaviour of public authorities. Our hypothesis is that public authorities take more care when carrying out public procurement, although this, and the length of the control process itself is likely to cause delays in the process. Further, if the procurement is not prepared with due care, then this can result in even more interruptions in the process due to repeated calls for

1 Public procurement in the EU is governed by the public procurement directives, i.e. Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU.

2 The general EU threshold for goods and services is EUR 144 000 for central government authorities, EUR 221 000 for other contracting authorities and EUR 5 548 000 for works contracts. A separate control system exists for certain public procurements funded from purely national funds, but this article focuses on EU funded public procurements.

missing documents by the control body or a refusal to grant a green light for the process. While little reference can be found in the academic literature to such an analysis of control systems of other countries, brief mention is also made of the types of controls that exist elsewhere.

The present article first describes the processes involved in EU public procurement procedures and the mandatory controls carried out by the Hungarian control authorities and how this compares with the systems in other countries. A theoretical analysis on the possible impact on the control system is followed by a discussion and analysis of data received from the Department of Public Procurement Control (DPPC) of the Prime Minister's Office to see also how far the figures confirm that the control system has a real effect on the public procurement procedures. Finally it is discussed whether the level of interference in public procurement procedures is too high or whether the rate of irregularities really makes the application of this system necessary.

2 Key Stages of the Public Procurement Procedure

Conducting a public procurement procedure involves a significant amount of preparation and a number of decisions. Preparation and planning are critical and influence all future activity on the contract. However it is often the case that the contracting authority will either underestimate the planning stage of the process or not carry it out at all (European Union, 2015). The most significant decision that has to be made during the preparation process is the 'decision on what to purchase'. Here we are concerned with the choice of a contracting authority as to what goods, services or works it wishes to purchase in order to fulfil its needs. While the Directives do not impose restrictions on "what to buy", in fact for EU funded projects there are restrictions imposed by EU legislation in form of the so called eligible costs. So for the eligibility part the contracting authority who is a beneficiary of EU funds must carefully select the goods, service or works it wishes to buy from the funds awarded to it.

2.1 Preparatory stages

Once the first step described above is made, it must be decided how the purchase is going to be made, i.e. whether a public procurement is necessary. Any purchase has to be made by means of a formal public procurement procedure, as long as the estimated value of the procurement exceeds the thresholds set out in the Directives (or the corresponding national legislation). Nevertheless, the contracting authority should check whether any exceptions[3] in the Directive are applicable.

2.2 Designing the procedure

As long as it has been established that a public procurement procedure is necessary, the procedure has to be planned very carefully. All necessary informa-

3 E.g. in-house procurement, research and development services etc.

tion has to be set out in the procurement documents, which has to be made available to all the potential tenderers interested in the contract.

An important feature of the procurement documents is the definition of technical specifications which is a detailed description of the product, service or work to be purchased. The decision as to what to put in the technical specifications can be influenced by the involvement of experts, and also by the rules that ensure that there is no discrimination against certain economic operators. Where possible, specifications should be defined in terms of performance or functional requirements and if there is a reference to certain standards or if standards or in exceptional cases specific makes or sources are referred to, the description must use the words 'or equivalent'.

The contracting authority must also make an important decision when choosing the most appropriate procedure for conducting the procurement. Under the Directive, open and restricted procedures can always be used, while other types (competitive procedure with negotiation, competitive dialogue and negotiated procedure without publication of notice) are only available if certain strict conditions are met.

Another important aspect of the procedure is the definition by the public authority as to what selection criteria and award criteria should apply during the procedure. The contracting authority may also set conditions for the performance of the contract, which, according to the Directive, may include economic, innovation-related, environmental, social or employment-related considerations.

2.3 Conducting the procedure and awarding contract

Once the procurement documents have been prepared and tenders (or requests to participate) have been submitted, a series of decisions have to be made during the conduct of the procedure. First the contracting authority must establish whether the tenders (or requests to participate) conform to the conditions set out in the procurement documents and the applicable legislation. In case some documents have not been submitted, a request for the supply of missing information should be issued to the tenderers concerned. Under this principle only minor errors may be corrected and any changes must not affect any features of the offer which are evaluated under the award criteria. So, whether to allow the supply of missing information or correct errors is an important decision, again, subject to legislative restrictions and strict controls.

Probably the most important decision that a contracting authority has to make in a public procurement procedure is to whom the contract should be awarded. This must be based on the evaluation of tenders on the basis of the award criteria set out in the procurement documents. In case only numerical criteria are used (e.g. price and cost only) then the selection of the winner is essentially automatic, based on the tenders submitted. However, in case subjective criteria are used (e.g. aesthetic characteristics, quality of staff), then the contracting authority does have a certain amount of discretion in

the evaluation of these aspects. Nevertheless, this discretion is again limited by the principles of equal treatment and transparency, which is subject to the control mechanisms described in section 3.

Finally one must mention that a decision whether, after the its signature, the contract should be modified, is also strictly limited by the Public Procurement Directives. Modifications without assessment of the strictly defined conditions are inter alia possible where the so called de minimis conditions are fulfilled: where the value of the modification is below 1) the EU threshold values, and 2) 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts. In addition the modification may not alter the overall nature of the contract.

3 The Public Procurement Control System

3.1 The necessity and possible effects of establishing a control system

In general, efficient enforcement is of utmost importance for compliance with the rules in any field of law, including public procurement (Arrowsmith 2011). The EU obliges all Member States to have an effective remedies system in order to increase compliance with the rules. However this is not always thought to be sufficient, since applying for remedies might be a costly and burdensome exercise and not all interested parties might be willing to start a case before the competent review bodies. So most EU Member States have decided to set up additional control systems to increase compliance with the legislation on public procurement.

The control processes receive special attention in the context of EU funds, due to the severe sanctions and the possible loss of funding. The statistics also show that public procurement is a risky area in the context of using EU funds. In fact when spending EU funds, public procurement is the area most affected by irregularities in the EU Member States. For the 2007-2013 EU programming period, 349 billion euro was allocated in the area of cohesion policy through the European Regional Development Fund (ERDF), the Cohesion Fund (CF) and the European Social Fund (ESF). Almost half of all projects in relation to these three funds audited by the European Court of Auditors (ECA) over the 2009-2013 period involved one or several tenders (ECA, 2015). According to the experience of audits, the infringement of the public procurement rules was the most significant type of irregularity that occurred during the implementation of the Funds mentioned (ECA, 2015). According to a system audit of ECA in 2011, 44% of quantifiable errors were related to public procurement (ECA, 2011). These infringements can have serious consequences. If a breach of the rules is found, then the European Commission (or the Member State authorities) may impose financial corrections, meaning that the EU financial support from the project is partially or totally withdrawn. In addition if the public procurement system does not function properly, pay-

ment of funds may also be suspended, causing potential delays in the necessary payments to be made.

Public procurement procedures also involve a quite high corruption risk. This partly comes from the fact that large sums are available from EU funds and there is some discretion on how to allocate funding. A study involving the Czech Republic, Slovakia and Hungary revealed that when additional public resources became available for discretionary allocation, there was a considerable increase of corruption but this could be counter-balanced by more stringent regulation, monitoring, and transparency (Fazekas et. al. 2013). The risk of corruption involving EU funds is also an issue in other countries such as Romania, which also has a large share of EU funds in its public spending (Dimulescu et al. 2013). Beyond the European context, in the American literature we can also find reference to the importance of internal controls to fight procurement fraud (Rendon and Rendon 2015).

When concluding its Partnership Agreement for the use EU funds, the European Commission established that Hungary did not meet the so called *ex ante* conditionality related to public procurement. The evaluation related for example to the arrangements for the effective application of EU public procurement rules and ensuring the adequate transparency of award procedures. Therefore an action plan was agreed with the Commission in order to ensure compliance. A proper control system was a key feature of the action plan, ensuring the fulfilment of the conditions established. Therefore a desire to reduce the number of irregularities coupled with a pressure from the Commission was the main reason to establish the current system of controls.

In light of the above, strict controls of EU funded public procurement have the aim of ensuring the lawful spending of funds and avoiding the loss of funding from the EU through changing the attitudes and behaviour of public authorities. If funds are withdrawn, then the burden of paying for the projects in question falls exclusively on the national budgets. While changing the behaviour of authorities is a key element to success, it is also important to design the control process in a way that does not constitute an excessive burden for public authorities that receive EU funds. In particular the delays, the administrative burdens and the autonomy of the decision-making should be minimised. Nevertheless our hypothesis is that a "fear" of being controlled always changes the way in which the controlled entities behave. In an ideal situation they ensure that their procurement decisions are always in conformity with the public procurement rules and therefore auditors will not find any irregularities in the procurement processes. Furthermore, strict control can also cause them to be very careful in the application of the rules, leading to a situation where they do not carry out their procurement in the most official and optimal way, but use procedures and criteria which surely conform to the relevant legislation.

For monitoring the correct use of EU funds, Hungary has opted for a very strict control system, which has various elements of *ex ante*, *ex post* control and control integrated in the process. This is supplemented by the manda-

tory remedies system required by EU law[4] other checks by national audit authorities and the control of public procurement notices by the Public Procurement Authority. The key feature of the system is that practically all EU funded public procurement procedures are subject to the mandatory control process. The main Hungarian body responsible for the control of public procurements funded from EU funds is the Department for Public Procurement Control (DPPC) of the Prime Minister's Office. Lower value procurements are controlled by the competent Managing Authority (authority responsible for selecting beneficiaries of EU funds). The control system is described below in more detail.

3.2 The international perspective

The amount of literature on the control systems of other countries is fairly scarce. Nevertheless from the information available it can be seen that they tend to be less comprehensive than the Hungarian system. A detailed comparative study has been carried out for the Public Procurement Network by Bianchi and Guidi (2010), which can offer an insight into the institutional system of EU Member States, including the authorities responsible for the supervision of public procurements. According to the study, a number of countries, such as Italy, Austria, Belgium, Bulgaria, Greece and Spain appoint their national court of auditors to control the legality of public procurement procedures. In other countries the role of supervision and control is carried out by specialised bodies that belong to the government structure (Lithuania, Poland, Romania, Slovakia and Malta). In Slovenia, audits are carried out by the National review Commission whose members are nominated by Parliament. In some countries the supervision of public procurements belong to the national competition authority, which is the case in the Czech Republic, Sweden, Finland, the Netherlands and Denmark. In Greece, controls are carried out before the conclusion of the contract by the national court of auditors for contracts above EUR 1 million. In Italy an independent body, the Authority for the Supervision of Public Contracts has been set up.

In Poland the main controller of procurement procedures compliance is the Public Procurement Orders Agency, which carries out scheduled and unscheduled documentary inspections of procurement at the request of state bodies, public organizations and citizens and analyses information in the procurement bulletin. Procurements that are financed or co-financed by EU funds, equal to or exceeding EUR 10 million in respect of the procurement of goods and services and EUR 20 million in the case of works are subject to mandatory control (Yaremenko and Shatkoviskiy). Further, a good example of a country taking steps to fight corruption in public procurement is Malta, which has also established a system investigating fraud and corruption in Public Procurement, where after receiving any form of reporting concerning fraudulent activities in public procurement, the Director of Contracts, after

4 Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (as emended by Directive 2007/66/EC)

having conducted his own investigations, can forward reports and findings to the Police Commissioner or the Internal Audit and Investigations Department (Department of Contracts 2017).

The main feature of the supervisory bodies mentioned is that unlike in the Hungarian case, their controls are based on a sample of procedures and in some cases on complaints, so generally they do not control every single procedure. In Sweden for example priority is given to cases where the authority thinks that their actions will have the desired effect (SCA, 2016). The Finnish authority also seeks to focus on the essential issues and avoid inflexible and prolonged procedures (FCCA, 2017). Furthermore, generally the approach of other countries outside Hungary is that no prior consent of the control body is required to launch the procedure or to award and conclude the contract. For example in the case of Poland, in general the Public Procurement Orders Agency may make recommendations, turn to the review body or fine the contracting authority (Yaremenko and Shatkoviskiy). As we saw above, mandatory *ex ante* controls do also exist in Poland, however their thresholds are much higher than in the case of Hungary. Finally it should be reiterated that controls of national courts of auditors generally close with a report stating the evaluation of the controlled activities and containing recommendations on how to address these (Mazur 2016).

3.3 *Ex ante* controls

In Hungary, *ex ante* controls are carried out by the DPPC for public supply contracts, public service contracts and public service concessions reaching or exceeding the EU thresholds and for public works contracts and public works concessions reaching or exceeding HUF 300 million (approx. EUR 1 million). In this control process both the competent Managing Authority and the DPPC are involved.

As a first step the contracting authority (who in this case is also the beneficiary) must send the procurement documents to the Managing Authority who checks the eligibility, accountability and technical aspects of the procurement within 5 working days. The contracting authority must modify the documents, if necessary, in accordance with the comments of the Managing Authority. Then the contracting authority sends the procurement documents to the DPPC for *ex ante* control. Control by the DPPC is carried out in two stages. First the DPPC checks whether exclusion criteria, selection criteria, award criteria, contract performance conditions and securities ensuring contract performance have been defined in conformity with the public procurement rules. A certificate on the launching of the procedure is issued within 5 working days. If it is found that some aspect of the procedure does not comply with the law, then the documents, including the contract notice must be amended. When this process is complete, the DPPC checks all other public procurement law aspects of the relevant documents within another 5 working days. During both processes calls for missing documents may also be issued, which can slow down the process considerably. Finally a supportive certificate, a supportive certificate with

conditions or a non-supportive certificate is issued with respect to the contract documents. In the second case amendments to the documents must be made, while in the last case the documents must be withdrawn.

It must be highlighted that until the end of 2016, the *ex ante* control was carried out in one step and the contracting authority was barred from starting the procedure until a supportive certificate (with or without conditions) was issued by the DDPC. However the legislation in force from 1 January 2017 now allows the contracting authority to start the procedure at the same time as sending the documents to the DPPC (expect for accelerated procedures or negotiated procedures without publication of a notice). The decision to start the proceedings (i.e. publication of the notice) in parallel with the controls is a significant one, since the contracting authority cannot be sure that the contract documents do not contain any irregularities. This might lead to a necessity to amend the contract documents, even several times. Therefore the contracting authority is faced between a choice of uncertainty and delays caused by the control process. Nevertheless it is expected that the overall time for purchases can be reduced for those contracting authorities that are brave enough to launch the procedure before the conclusion of the control procedure.

3.4 Controls integrated in the process

Once the first part of the procurement process is complete, i.e. the time limit for submitting tenders has been reached; the control process is continued with a control integrated in the process. The DPPC delegates an observer to each procedure who has the right to attend the meetings of the evaluation committee and has to right to observe all documents and decisions related to the procedure. At the end of the procedure all documents have to be sent to the observer who, within 10 working days, issues a closing certificate on the lawfulness of the procedure.

Since 1 January 2017 the contracting authority may award the contract at the same time as the control procedure is carried out and may also conclude the contract; however the contract cannot come into force until the DPPC has issued a supportive closing certificate. In this case the contracting authority is faced with the same dilemma as with *ex ante* controls. It has to make a decision whether to wait for the closing certificate from the DPPC or award and even conclude the contract in order not to delay the procedure. In the latter case it has to be fairly confident that everything has been carried out lawfully during the procedure. Otherwise it might have to repeat the award process and conclude the contract with a different economic operator. This dilemma also has a significant potential to affect the decisions concerning the exclusion and evaluation of tenders and the award of the contract. Nevertheless, despite causing some uncertainty, the change of the regulation could be beneficial for the contracting authority as it can conclude the contract faster, since it is not necessary to wait for the decision of the DPPC. There are only difficulties if a non-supportive certificate is issued.

3.5 Other controls

In the view of the authors, the most significant control processes that have an effect on the public procurement procedure are those described in sections 3.3 and 3.4 above. Nevertheless it must be highlighted that other control procedures also exist and they too have some potential of impacting the public procurement procedure. For public supply and public service contracts above the EU thresholds and public works contracts above HUF 300 million *ex ante* control is also carried out for the modification of contracts. Control is first carried out within 5 working days by the Managing Authority on eligibility, accountability and technical aspects, and then the public procurement law aspects of the modification are checked by the DPPC within 13 working days from the receipt of the documents. In all cases the contracting authority has 5 working days for sending the revised documents (if revision is necessary) to the DPPC. Any further comments by the DPPC must be sent to the contracting authority within 7 working days. Once the contract is amended, the amendment also has to be sent to the Managing Authority who may initiate irregularity proceedings or a procedure for remedies if it thinks that the modification is not in conformity with the relevant rules. Therefore extra care must also be taken when the contracting authority decides to modify an existing public procurement contract.

Contracts below the above mentioned thresholds are also subject to control, but that other process is much simpler. In that case the Managing Authority must be notified of the conclusion of the contract amendment and must be provided with the written summary of the procedure and all other procurement documents. The Managing Authority checks these within 7 working days. If any irregularities are found an irregularity procedure, or in case of a breach of the public procurement rules, a procedure for remedies may be initiated.

It must be mentioned that in addition to the above, general controls also exist for all public procurement procedures. Contract notices are controlled by the Public Procurement Authority to see if they conform to formal requirements and public procurement law aspects. However the Authority may only call upon the contracting authority to correct any deemed irregularities, but does not have to power to block the launch of procedures or the coming into force of the contracts. Furthermore the Authority carries out checks on the performance of contracts as well. If irregularities are found, review proceedings may be initiated by the Authority. While these are considered to be less significant and less rigorous than the controls carried out for EU funded procurements, these may also affect the way in which contracting authorities act and the decisions they make during the procedure.

4 Analysis of Data

As part of the research, data has been requested from the DPPC on the issuing of the relevant certificates. Besides the types of certificates, the DPPC

also collected data on the number of cases where the contracting authority issued a non-supportive certificate (i.e. did not allow the procedure to go ahead or continue), but following the revision of documents, a supportive certificate was issued with respect to the same procedure. This latter case means that some decision(s) had to be changed during the procedure, in order to have the possibility to complete it and sign the contract. Furthermore data has been obtained from the Public Procurement Authority on the duration of public procurement procedures from the year 2013 until mid-2017. The changes in the length of procedures can therefore be contrasted with the issuing of certificates and the number of EU funded public procurements.

4.1 Data selection methodology

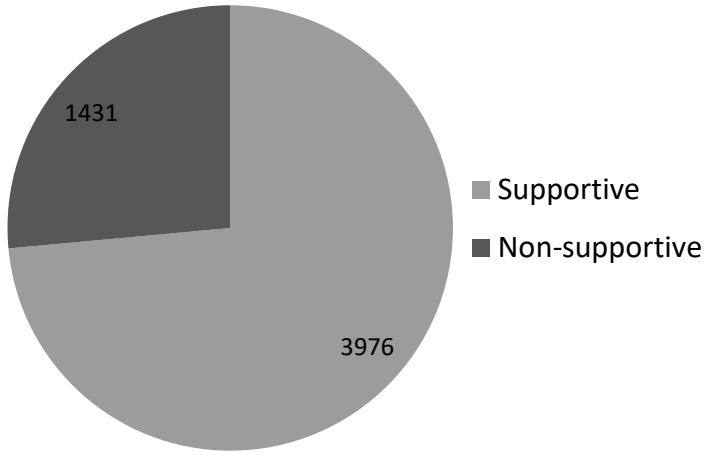
When selecting the data it was important to see quantitative figures on the issuing of certificates to see the volume of the work done by the DPPC and how many public procurement procedures might be affected by its decisions. The split between supportive and non-supportive decisions was also important since it is the latter which has a truly significant effect on the purchases, as in this case the procedure has to be abandoned or re-started. The distinction between the quality control certificates and regularity certificates was also important, since the former has more of a preventive nature in that a procedure containing some irregularity is stopped before it is launched (or before the tenders are evaluated), while the number of regularity certificates indicate the opinion of the DPPC on the whole conduct of the procedure. In the latter case errors are more difficult to be corrected. However in order to see the link between the issuing of certificates and the changing of the behaviour of public authorities, data was requested on the number of cases where there was a change in the process having an effect of regularizing the procedure (i.e. making the public procurement procedure lawful). The number of opinions on contract amendments was also requested in order to see the possible difficulties faced by public authorities after the tendering phase, in case they had to modify the concluded contract for some reason. Finally, to put the issuing of certificated into the wider context, data was used from the Public Procurement Authority on the ratio of EU funded and nationally funded public procurements.

The data selection process was limited, however, by the data that is actually collected and recorded by the DPPC. As regards the time span, data on the issuing of certificates was available from 2012, while data on the changing of certificates was only available for 2015 and 2016. It would have also been useful to obtain figures on the actual length of time it took for the DPPC to issue certificates, however such data could not be provided by the DPPC. Therefore the analysis has to be restricted to any conclusions that could be drawn from the limited amount of data available.

4.2 Number of quality control certificates issued

In the 2012-2016 period the distribution of supportive and non-supportive certificates with respect to the quality control phase (*ex ante*) were the following:

Figure 1: Number of Quality Control Certificates 2012-2016



Source: data received from the DPPC.

Table 1: Annual breakdown of Quality Control Certificates sent out

Year	Type of quality control certificate	Number
2012	supportive	837
	non-supportive	416
2013	supportive	1452
	non-supportive	287
2014	supportive	768
	non-supportive	488
2015	supportive	628
	non-supportive	166
2016	supportive	291
	non-supportive	74

Source: data received from the DPPC.

The data shows that when public procurement documents were subjected to *ex ante* controls (the quality control phase), the majority of contracting authorities received a green light from the DPPC. It was only in 1431 cases within the 4-year period examined where the launch of the procedure was

denied due to non-compliance with the relevant legislation and principles. In these cases the contracting authority had to change its mind in what to include in the contract documents or in extreme cases decide not to go ahead with the procurement. While there is no data on what change each of these procedures entailed, the errors could relate for example to discriminatory selection criteria, award criteria or technical specifications. These then have to be re-thought by the contracting authority.

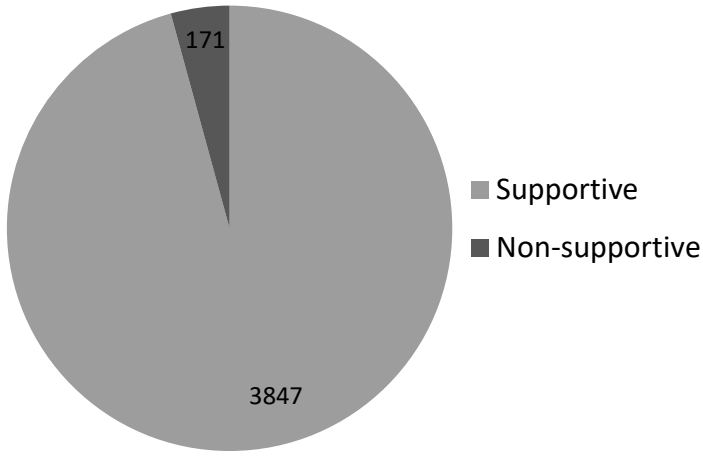
Non-supportive certificates amounted to approximately 26% of all certificates issued. This does not mean that errors were found in such a proportion of cases, since the figure concerning supportive certificates also includes those cases where a non-supportive certificate was later changed to a supportive certificate following an amendment of documents (see below). Therefore the actual rate of errors could in fact be higher. In any case it can be observed from the data that the DPPC has filtered out a significant number of errors in the control process and in many cases the existence of the controls had a direct impact on the conduct of public authorities. In addition it can be supposed that the strict control process also impacted on the conduct of those public authorities that received a supportive certificate. First of all the existence of the control system might have an effect in "regularizing" procedures in the first place. Secondly in many of the procedures the DPPC provides comments on the procurement documents and issues the supportive certificates on the basis of conditions that have to be fulfilled by the contracting authority (e.g. amending or completing certain parts of the documents). Therefore even in many of the 3976 cases when the supportive certificate was issued, decisions had to take into account the opinion (or potential opinion) of the control body.

It must be remembered that prior to 2017, it was unlawful to start the procedure before the supportive quality control certificate was issued, therefore it is possible that contracting authorities relied more on the decision of the DPPC to correct any mistakes and were less careful in their decision on what they included in the procurement documents. It is submitted that in the current regime, described above in section 3, contracting authorities need to take extra care if they decide to launch the procedure before being in possession of a supportive certificates. Otherwise they have to go through the inconvenience of having to modify the procurement documents and possibly even the conditions for participating in the tender, which in certain cases even leads to an obligation to prolong the time limit to submit tenders.

4.3 Number of regularity certificates issued

In the 2012-2016 periods the distribution of supportive and non-supportive certificates with respect to the regularity phase (integrated into the process) was the following:

Figure 2: Number of Regularity Certificates 2012-2016



Source: data received from the DPPC.

Table 2: Annual breakdown of Regularity Certificates sent out

Year	Type of regularity certificate	Number
2012	supportive	813
	non-supportive	27
2013	supportive	1065
	non-supportive	28
2014	supportive	916
	non-supportive	57
2015	supportive	862
	non-supportive	51
2016	supportive	191
	non-supportive	8

Source: data received from the DPPC.

It can be seen from the data that in the 2012-2016 period compliance with the law during the conduct of the procedure was much higher than during the quality control phase. In the five-year period only 171 non-supportive regularity certificates were issued, which is a relatively low proportion, compared to the total number of certificates, which was 4018. This means that only just over 4% of the certificates were non-supportive. Here again there can be a significant overlap between the two categories as in many cases supportive certificates might have been issued later on for procedures which initially received a non-supportive certificate. However, even if we supposed that in all 171 cases the issuing of the non-supportive certificate was followed by a sup-

portive certificate, the rate of procedures with a non-supportive certificate first time round would still be only just below 4.5%.

From the above it is evident that the direct impact of the non-supportive certificates has been much less in the regulatory phase, as there were relatively few cases which resulted in a need for the contracting authority to change its decisions. There can be various explanations for this phenomenon. One possible argument is that any irregularities had already been dealt with in the quality control phase and once all the documents were correct, the likelihood of the contracting authority committing errors was reduced. Furthermore, as mentioned in section 3, the DPPC must delegate an observer to each procedure. Normally the observer only controls the documents submitted and only takes part in the actual procedure in exceptional circumstances. Nevertheless the observer has the possibility to comment on the actions of the contracting authority so it is likely that any potential unlawful decisions are settled before the issuing of certificates, so in practice very few non-supportive certificates are issued. Still, it can be said that the control process itself has an actual impact on the way that decisions are made during the procurement procedure.

As discussed in section 3, until the end of 2016, the award of the contract could not be made until the regularity certificate was issued. However, as from 1 January 2017, the contracting authority may decide to award and even conclude the contract, provided that it comes into force only when the supportive certificate by the DPPC is issued. This creates a new dilemma for contracting authorities and it will be interesting to see in the future how this impacts on the decision-making process.

4.4 Opinions and comments on contract amendments

The DPPC has also been active in controlling the proposed amendment of contracts. The following table shows the number of such controls and their distribution:

Table 3: Opinions on contract amendments and further comments 2012-2016

Lawful	2502
Not lawful	519
Partially lawful	304
Total	**3325**

Source: data received from the DPPC.

It can be seen from the data that compared to the number of non-supportive regularity certificates; the proportion of contract amendments deemed “not lawful” by the DPPC has been quite high (around 15%). If we add the “not lawful” and “partially lawful” opinions, then the figure is almost 25%. This is similar to the proportion of non-supportive quality control certificates. This shows

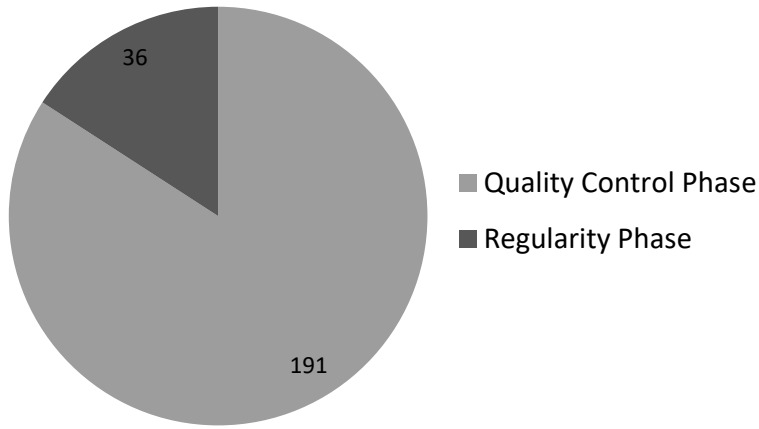
that while public authorities seem to take extra care during the conduct of the procedure, compared to the preparatory stages, at the stage of contract amendments they again become less aware of the legal requirements. Therefore the direct impact of the control process is also quite significant at this stage of the process.

4.5 The "regularization" of documents and decisions

An interesting dimension of the control process involves looking at the number of cases which actually led to contracting authorities taking actions to correct any errors in their documents or the decisions affecting the procedure (i.e. "regularize" documents and decisions). The main purpose of the control process of course is not to punish the contracting authorities for any irregularities, but to help them carry out their procurements in a lawful way, thus avoiding any negative consequences later on both for the contracting authority itself (e.g. having to pay damages) and the Member State (e.g. financial corrections).

The number of cases where errors were corrected, so that a supportive certificate was issued in 2015-2016 was distributed between the types of certificate, as follows:

Figure 3: Amendment of documents in a way to change a non-supportive certificate to a supportive certificate 2015-2016



Source: data received from the DPPC.

Table 4: Number of quality control certificates

Year	2015	2016
Supportive	628	291
Non-supportive	166	74

Source: data received from the DPPC.

Table 5: Number of regularity control certificates

Year	2015	2016
Supportive	862	191
Non-supportive	51	8

Source: data received from the DPPC.

In addition there was a change in the DPPC's position from irregular/combined to regular in case of contract amendments in 2015-2016 in a total of 69 cases.[5] It is unfortunate that no data is available for procedures prior to 2015.

Using the data our findings discussed in sections 4.2 and 4.3 can be confirmed, namely that the control process had much more direct impact on contracting authorities' conduct in the quality control phase than in the regularity phase. There were only 36 occasions in the regularity phase where decisions were "regularized", which is only 16% of the total number of cases when this happened. The 191 cases of changing to a supportive certificate seem reasonable in the light that in 2015-2016 there were 240 non-supportive certificates. The explanation for the difference is that some contracting authorities might have abandoned their procurement procedures as a result of the non-supportive certificate. Nevertheless it can be seen that in the vast majority of cases errors have been subsequently rectified. The ratio of rectification of errors for the regulatory phase is slightly lower, which shows that controls caused that contracting authorities not to complete the procedure in more cases than in the quality control phase.

The relatively low numbers may also be the result of contracting authorities being more careful about the regularity of their procurements and now they have more experience about the DPPC's approach, i.e. the types of errors which lead to issuing a non-supportive certificate. Therefore in 2015-2016 the direct impact of controls were less significant than the possible indirect impact resulting from a "fear" of controls and the possible issuing of non-supportive certificates.

4.6 Average duration of public procurement procedures

It is also interesting to consider the average duration of public procurement procedures as the control system might have impacted on this. Unfortunately the data obtained from the Public Procurement Authority does not separate procedures funded from EU funds and those funded from purely national funds. However the trend in the speed of conducting procedures between 2013 and the first half of 2017 can be seen from the following table:

5 Source: data received from the DPPC

Table 6: Average duration of public procurement procedures in Hungary[6]

Year	Average duration of procedures (days)
2013	113.15
2014	138.71
2015	156.31
2016	204.85
2017 (Q1-Q2)	212.11

Source: Public Procurement Authority.

The table shows that the duration of procedures has increased quite significantly, in fact the average public procurement procedure took almost twice as long in 2017 than in 2013. However if we look at decision speed (the time between the deadline for receiving tenders and the award of the contract), Hungary is still deemed acceptable by the European Commission's 2017 Single Market Scoreboard (2017), as the length of decision-making was below 120 days. In this indicator Hungary did better than the data for the Czech Republic, Ireland, Greece, Italy and Slovakia.

Together with this data the changes in the proportion of EU funded procedures can also be contrasted. It is clear that changes in the proportion of different funding sources in the procurements do not affect the speed at which procurement decisions are made. While for example in 2016 there has been a sharp drop in the percentage of procedures financed from EU funds, the duration of procedures showed a significant increase.

In addition, as shown above, the number of quality control and regularity certificates has also decreased significantly in 2016 in line with the reduction of the number of EU funded procedures. This also suggests that the time taken for public procurement procedures must have also been affected by other factors.

Table 7: Proportion of public procurement procedures connected to EU funds in Hungary

Year	Value of procurements	Number of procedures
2012	54.1%	43.2%
2013	61.1%	50.8%
2014	49.2%	50.2%
2015	38.1%	45.9%
2016	29.9%	16.2%

Source: Public Procurement Authority.

6 Data includes all procedures with a contract notice both above and below the public procurement thresholds. Data is based on the dates provided by contracting authorities in the relevant notices.

Unfortunately there is no data available on the actual duration of control procedures carried out by the DPPC. Therefore it cannot be concluded that any of the increase in the duration of the procedures would be due to an increase in the length of the control process. However it can be said that with the process of purchasing taking longer and longer, strict controls lasting several weeks definitely do not help those contracting authorities who wish to carry out EU funded public procurements quickly and effectively. One must remember that the data on the duration only includes potentially the controls integrated in the process, as *ex ante* controls (at least until 2016) take place prior to the launch of the procedures. This means that the actual process for higher value procedures funded from EU funds is even longer.

4.7 Discussion of findings and recommendations

From the above it is clear that the Hungarian control system has a direct effect on some public procurement procedures co-financed by EU funds. Direct influence occurs when the result of the control process leads to an actual change in the public procurement documents, potentially affecting even the final outcome of procedures, i.e. to whom the contract is awarded in the end. It can also be supposed that decisions of contracting authorities are also being influenced indirectly by making them more aware of the correct interpretation of the rules and making them more careful in applying the rules correctly.

It has been found that most influence throughout the procedure occurs in the initial stages of the process, when the procurement documents are submitted to the DPPC. In the controls integrated in the process (regularity phase) much less errors have been found, therefore the direct influence on the decisions of contracting authorities have been much less. This means that the biggest effect on the conduct of public authorities occurs, when they are putting the procurement documents together and setting the subject matter and the conditions of the procurement process.

However the data also shows that in fact the majority of procurements receive a supportive certificate, meaning that no significant errors are found that would preclude permission to go ahead with the procedure. Conditions can of course be set by the DPPC in its decision, but the largest influence occurs when the public procurement is "blocked" by the DPPC and fundamental changes have to be made to the contracting authority's decisions.

It is also interesting to look at how the number of non-supportive certificates compare to the total number of EU funded public procurements in Hungary. The data on the latter category is the following:

Table 8: Number of public procurement procedures connected to EU funds in Hungary

2012	3647
2013	6038
2014	7121
2015	6482
2016	1398

Source: Public Procurement Authority.

If we consider that from 2012 until 2016 there have been 24248 procedures and in the 2012-2016 period in "only" 1431 cases was a non-supportive quality control certificate and in 171 cases a non-supportive regularity certificate issued, then one might conclude that the direct influence of the control procedure only affects an insignificant number of public procurements. However it must be remembered that the DPPC's control only concerns higher value procurements and the data from the Public Procurement Authority includes all public procurements regardless of their value. Therefore it can be concluded that the control of the DPPC is directly affecting a smaller proportion of procurement procedures, but these belong to the higher value categories, therefore has a more significant effect on the correct use of EU funds than would appear from the data.

Despite the seemingly positive impact on the decision-making, one must not forget that the *ex ante* control system causes the public procurement procedures to be significantly delayed compared to a situation that if no such control existed. It is notable that checking of notices by the Public Procurement Authority (required also for nationally funded procurements), was already thought to delay the launch of the procedures (Tátrai 2011), even though that is a much simpler procedure than the mandatory controls for EU funded procurements. Therefore it is not surprising that contracting authorities in Hungary often complain about the control procedures being too slow and constituting an excessive burden for them when carrying out their public procurements.[7] The average duration of all public procurement procedures has increased in recent years. Although, as mentioned above, there is insufficient data to prove that this trend has been affected by the control process, a faster and more efficient control system could make the job of contracting authorities somewhat easier. Further, it can be seen that even if all the deadlines set out in the legislation were fully observed by the control body (which might not always be the case) it still adds a significant amount of time for the procedures to be completed where both *ex ante* control and control integrated in the process are used. In the light of this and the data discussed above, it is questionable whether such a complex procedure is really necessary, especially if errors are found only in a small proportion of procedures. It is also

7 The system applicable as from 1 January 2017 has the aim of lessening the delays caused by the controls, however as discussed above, launching the procedure before controls are finished leads to less legal certainty and possible problems later on in the process.

questionable whether it is really necessary to check all of the procedures, as this causes a burden and increases the time of the procedures for every single contracting authority engaged in EU funded public procurement.

In light of the number of errors occurring it is evident that putting a strong system of control for EU funded public procurements is inevitable in Hungary. Nevertheless the additional time taken by the existence of the control system is not proportionate to the necessary interference in the decision-making of contracting authorities. Therefore it would be better to have a control system, which takes into account more the necessity of speed and efficiency when conducting public procurements.

In the view of the authors the Government should re-think the necessity of the current system and take steps to streamline the control process. The starting point should be a more in-depth analysis of the behavioural patterns of contracting authorities as a result of the control process. In a policy context, it could be made sure that policy-makers rely on evidence, not assumptions, as suggested by Bavel et al. (2013) in their policy paper written for the European Commission.

Then alternative options should be explored such as controls based on samples in the way that EU projects are audited in general. The relatively small amount of errors found in the control integrated into the process (regularity phase) also questions calls its necessity into question, since it seems that the vast majority of contracting authorities comply with the rules, once the procurement documents are in order. Higher value projects could be subjected to mandatory controls, however it is proposed that the thresholds above which this is done are increased considerably. This would allow the DPPC or any another competent body to focus on the most important cases only where the financial risk is larger.

A concentrating of resources on the most risky procedures or contracting authorities with a poor record of compliance with the rules could also be a viable option. This would also be an incentive for authorities to comply, since then they would not be in the focus of control bodies, resulting in a reduction of administrative burden for them. In parallel the proportion of procedures subject to *ex post* control could be increased, which does not have an effect of slowing down procedures so much. It is submitted that by switching to a higher proportion of *ex post* controls the dissuasive effect of the system would not go away, since the possibility of irregularity procedures and the withdrawal of funding would still remain. However contracting authorities could be incentivised to focus more on ensuring the legality of procedures as they would not be able to rely on certificates of the DPPC to ensure prior to or during the procedure that what they are doing is lawful. The DPPC already provides significant guidance for contracting authorities on what aspects should be taken into account when preparing and conducting public procurement, highlighting also the most common errors that are found when preparing procedures (Deputy State Secretariat for Public Procurement Supervision

2017a and 2017b). Therefore there is already significant help available from the control body that contracting authorities can rely on.

5 Conclusion

Hungary has established a very strong control system for public procurements funded from EU-funds. This strict system is used for higher value procurements, while for procedures with a lower estimated value a lighter regime is used. It has been found that *ex ante* controls carried out by the DPPC has an appreciable impact on the decisions of public authorities when designing their procedures. The controls also seem to have a similar direct impact on the decisions relating to the amendment of contracts. In the phase of conducting the procedure public authorities tend to have a lower error rate as seen from the data on the number of non-supportive certificates, however informal contacts with the DPPC's observer is also liable to influence procedures considerably. Due to insufficient data it cannot be proven that the increasing duration of procedures is caused by delays in the control process, however in the opinion of the authors more efficient controls could be a useful step in improving the situation. Even if the deadlines set out in the legislation had been duly kept by the DPPC the additional time for launching and completing the procedures could be quite significant.

On the positive side, the data shows that in 2015-2016 the majority of errors found by the DPPC have been corrected, so an initial non-supportive certificate was "turned into" a supportive certificate later on. While it can be established that strict controls are necessary in order to avoid the potential loss of EU funds, it is the view of the authors that the actual and potential delays caused by the procedures do not necessarily outweigh the reduction of risks caused by the strong influence contracting authorities' decisions. The revised system, which has been in place since 1 January 2017, is a step in the right direction, but has the problem of the lack of legal certainty. So it is hoped that further revisions will be made to lessen the possible negative impact of controls even further.

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Analysis of Taxation of Property in Bosnia and Herzegovina

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ABSTRACT

The purpose of this paper is fill in the literature gap and to analyse taxation of property in Bosnia and Herzegovina (BIH). By using IMF and OECD methodology defined under taxes on property, our research tries to compare taxes on property in two BIH entities to the international practice. The results are twofold: firstly, inconsistencies to international classification of taxes on property in BIH are identified and secondly, the taxation of property differs in two BIH entities (RS and FBIH). We find that three different types of property taxes are applied –tax on immovable property in RS and real estate transfer tax and so called tax on property in FBIH. We also find that identified differences have an effect on the size and share of revenues from property taxes in both entities which affect local communities and their revenues. Hence, we focus on property taxes in FBIH since they are under cantonal jurisdiction. The research shows that most revenues from property taxes in FBIH are collected in Sarajevo Canton. In fact, most property tax revenues in Sarajevo Canton come from real estate transfer tax revenues and are collected in four municipalities forming the City of Sarajevo. Bearing in mind lack of reliable long term data in both BIH entities related to taxation of property, we conclude with a few policy recommendations and suggestions for future FBIH property related reforms which should in turn simplify the process of property taxation in FBIH and improve the position of local communities in FBIH.

Keywords: *Bosnia and Herzegovina, local government units, property taxes, real estate transfer tax*

JEL: H71

1 Introduction

Even though issues related to taxation of property are gaining prominence in the European Union (EU) member states in the last few years (Garnier et al., 2014; the European Commission, 2015), different types of taxation of prop-

erty are still an unexplored area of taxation in BIH. Since revenues from property taxes usually belong to local government units (LGUs) – municipalities and cities, property taxes are usually evaluated through their significance to local revenues. The position of LGUs and the importance of property taxes is mostly used in the analysis of the level of fiscal decentralisation in a country. Early papers related to property taxes in BIH are scarce except from a few ones such as Fox and Wallich (1997), Zorn et al. (2000), Jokay (2001) or Werner et al. (2006). Most papers do not focus solely on property taxes in BIH but relate to overall tax system in BIH, the position of LGUs or concepts of fiscal federalism in BIH (for example, Davey, 2011; Antić, 2013).

Unlike BIH case, the research dealing with taxation of property is relatively comprehensive for other transition countries especially in cross-country comparisons. Most papers deal with definition, status and undertaken property tax reforms in transition countries especially Central and Eastern European countries (for example, The World Bank, 1999; Almy, 2001; Malme & Youngman, 2001; McCluskey and Plimmer, 2007; 2011 or Bahl, 2009; 2013; Puleri & Kripa, 2016; Grdinić et al., 2017; Grover et al, 2017). The results of such research usually focus on identifying major obstacles, common for all Central and Eastern European countries, which evolve around underdeveloped property markets, aspects of decentralisation and privatisation processes in these countries. BIH is mostly excluded from any these analyses as well as other Western Balkan countries.

The aim of this paper is to provide legal and fiscal analysis of taxation of property in BIH[1]. Due to complex constitutional organisation of BIH, the taxation of property differs in two BIH entities which in turn puts LGUs in two entities into unequal position in terms of the size of revenues from property taxes. Different constitutional organisation of Federation of Bosnia and Herzegovina (FBIH) and Republika Srpska (RS) might give some explanation to the existing inter-entity difference but other reasons also exist – such as different approaches to taxing property so intra-entity differences also exist especially in FBIH.

We begin our analysis with the definition of taxes on property as defined by international financial institutions such as OECD (2017) and IMF (under GFS[2], 2014). Taxes on property are "taxes payable on the use, ownership or transfer of wealth" which are levied regularly (usually annually) or irregularly (IMF, 2014, p. 93). Hence, OECD and IMF together with EC similarly classify taxes on property as recurrent (and non-recurrent) taxes on immovable property or net wealth, taxes on the change of ownership of property through estate, inheritance or gift and taxes on financial and capital transactions (OECD, 2017). Hence, we start our analysis with the definition of taxes on property in BIH in comparison to aforementioned international classifications. By identifying the differences in BIH classification to the international classification, our aim was to contribute towards improvements in the definition, comprehensive-

1 Brčko district will not be analysed due to the scope of the paper.

2 Similar classification can also be found in European Commission (EC) related documents.

ness and classification of taxes on property in BIH and related property taxes statistics in BIH. So, the research will be divided into four main parts: the first part will give a brief relevant literature review of property taxation in two BIH entities. The second part focuses on methodology and legal framework of taxing property in BIH and provides an analysis of taxes on property in BIH under IMF and OECD methodology. Hence, the third part provides a comparative analysis of taxation of property in two BIH entities with a special focus on complex FBIH case. Since property taxes are under cantonal jurisdiction in FBIH, we will analyse the share of property tax revenues to total revenues in each Canton. We then focus on the case of Sarajevo Canton since it collects most revenues from property taxes in FBIH (in both absolute and relative terms). We also evaluate the position of inner and outer city municipalities in this canton. Under definition and methodology provided in McCluskey and Plimmer (2011), Central and Eastern European countries and hence BIH could have an option of taking advantage of greater fiscal space created under taxes on property which could bring several benefits to entire tax system and especially for LGUs revenues. Bearing in mind lack of reliable long term data in both BIH entities related to taxation of property and based upon our analysis, in the final part, we propose a set of policy suggestions and recommendations for future successful property tax reform in (F)BIH. Also, in the discussion, we provide research limitations and future empirical research in property taxation in BIH which should enhance the system of taxation of property in FBIH and BIH. We conclude that in FBIH future property tax reforms should aim at simplifying taxation of property by replacing the existing models of property taxation with recurrent taxes on immovable property.

2 Literature Review of Taxation of Property

After the outbreak of global financial crisis (GFC) in 2008, the interest and significance of taxation of property increased in the EU member states. In the Annual Growth Survey (2013), the European Commission (EC) recommended to its member states to undertake tax reforms and to shift away from taxation of labour to taxation of, inter alia, property taxes (Garnier et al., 2014). A shift towards a less distortive and a broader-tax-base taxes such as property taxes is significant and in the EU, most member states have undertaken property tax reforms or have been fine-tuning existing taxation of property in accordance with the EU suggestions and recommendations (Gayer and Mourre, 2012; Slack and Bird, 2014; the EC, 2015). These reforms are being monitored by the EC and published in most recent publications related to tax reforms (for example, The EC, 2015; The EC, 2017). In the OECD member states, there is traditionally long-term evaluation of the size of property taxes and their importance to LGUs. Recent OECD publications have dealt with good practices and solutions regarding different aspects of property taxes, such as valuation and assessment of immovable property in OECD countries and its partner countries (Almy, 2014), the impact of property and land taxes on

environment (Brandt, 2014) or the political economy of property tax reforms (Bird and Slack, 2014). Countries such as United Kingdom, Ireland, Italy and Greece have most recently undertaken property tax reforms (Slack and Bird, 2014). Status and progress in the property tax reforms as a part of overall tax reforms are available annually in the EU publications (the EC, 2017). Similar to developed EU member states, transition countries that are EU members have mostly undergone property tax reforms even though they come last in the tax reform process. Significance of property tax reforms can be seen in recent research which indicates that property taxes are the least detrimental to GDP growth (Arnold, 2008., Arnold et al., 2011., Johansson et al., 2008 according to Rašić-Bakarić, 2014 and Grdinić et al., 2017) since they are implemented mostly through taxation of immovable property with broad tax base and traditionally low rates (Blöchlinger, 2015).

Analysis of different aspects of property tax reforms mostly include EU member states and new EU members from Central and Eastern Europe (CEE). By using a method of comparative analysis, authors such as Blažić and Grdinić (2012), Norregaard (2013), Rašić-Bakarić (2014) or Blažić et al. (2016) have summarised the status of property tax reforms in the EU member states and highlighted the differences in the taxation of property in EU member states with a special focus on CEE countries. Under works of these and other authors (for example, Bird & Slack, 2002; Bahl & Martinez- Vasquez, 2007; McCluskey and Plimmer, 2007; 2011; Norregaard, 2013; Ahmad et al., 2014; Blažić et al., 2016; Grover et al., 2017) a set of proposed suggestions and recommendations for successful property tax reforms is always provided and in this paper, we build on such experiences and try to adopt them to BIH case. Hence, most CEE countries have undergone property tax reforms and have implemented recurrent tax on immovable property. The differences that still exist between EU members relate to implementation of either area-based or value-based taxes on immovable property (real estate, Grover et al., 2017). EU 15 countries mostly apply "value-based taxes whereas new EU member countries apply area-based taxes" (Blažić et al., 2016, p.41). Unlike EU practice, research and evaluation of property taxes in Western Balkan countries and BIH is scarce. Individual country analyses of property taxation or planned property tax reforms in Central and Eastern European countries and Western Balkans were most recently re-initiated (for example the case of Croatia and prior Slovenian experiences in Kukić & Švaljek, 2012; Blažić et al., 2016), but this is not the case of BIH. Research related to CEE countries and property tax reforms indexed in the Web of Science database (for period 1945-2018) cites some twenty papers out of which only seven are from the area of economics and only four directly relate to only property taxes and CEE countries already cited in this paper. However, none of these include any research related to property taxes in BIH. Hence this paper analyses the status and property tax reforms undertaken in BIH in the past fifteen years. Papers from Fox and Wallich (1997), Zorn et al. (2000), Jokay (2001) or Werner et al. (2006) dealt with the status of property tax reforms in BIH in the late 1990s together with

other fiscal or tax reforms. Most of the papers analysed property taxes in BIH together with other sources of revenues in the fiscal federalism model applied in BIH except Zorn et al. (2000) who elaborated why BIH should apply area-based property taxes. However, since 2000, very little research has been done in the area of property taxes in BIH except a most recent research from Tadić (2016) who focuses on property tax reform conducted in RS entity and the economic effects of such reforms. So, we wish to fill in the literature gap and hence provide a brief legal and fiscal analysis of all property tax reforms in both BIH entities in the past fifteen years.

3 Methods and Legal Framework of Taxing Property in BIH

Theory (Jelčić & Jelčić, 1998) and practice (ESA, 2010; IMF-GFS, 2014) identifies several types of property taxes. They are usually classified in accordance to OECD, EC or IMF classification (OECD, 2017; ESA, 2010; IMF-GFS, 2014) so taxation of property in all classifications includes taxation of immovable property, taxation of net wealth, estate, inheritance and gifts taxes and, most recently, taxes on financial and capital transactions (Raičević, 2008).

The primary purpose of this paper is to fill in the literature gap related to taxation of property for BIH as a Western Balkan country. In that sense, three research questions will be asked:

1. What types of taxation of property are applied in BIH (both entities) and to what extent are they in line with classification of property taxation in international practice?
2. Is there a difference in types and means of taxation of property in two BIH entities? Is the possible difference reflected in the size of revenues from property taxes to total taxes in two BIH entities?
3. Are property taxes a significant source of revenues and especially for LGUs in FBIH? Do LGUs in FBIH have a potential of creating a greater fiscal space for property taxes?

In order to answer the three research questions, we have to define the scope of taxes on property under international methodology. The international financial institutions (IMF and the OECD) define taxes on property under methodological notes in their publications (IFM-GFS, 2014 and OECD Revenue statistics, 2017). All definitions have a few peculiarities in the comprehensiveness and definition of types of taxes on property. Hence, as an answer to the first research question, we will compare the classifications of types of property taxes under IMF-GFS definition and OECD to BIH practice in both entities. Such analysis has not been previously done for the case of BIH and has caused several practical inconsistencies which are still applied in the BIH legislation. As an answer to the second question, we will use IMF-GFS data for the last fifteen years in order to determine the significance and the size of property tax revenues to total revenues and LGUs total revenues in both BIH entities. In or-

der to answer the third research question we will focus on FBIH entity where most revenues for property taxes are collected in BIH. By using definition of fiscal space and methodology provided in McCluskey and Plimmer (2011), we wish to evaluate the size of property taxes in LGUs in Sarajevo Canton which collect most revenues from property taxes in entire FBIH. In the case study of Sarajevo Canton, we want to examine the possibility for creating a greater fiscal space for property taxes especially in the outer-city municipalities in comparison to inner-city municipalities since this pattern could then serve as an example for the entire FBIH.

In terms of limitations of this paper and possible future research, in the discussions and recommendations section, we will briefly analyse current state of poor and unreliable long term statistics related to property taxation in (F)BIH. Furthermore, we will provide possible future research activities in the area of property taxation that have begun in 2018 in FBIH, so first results comparable to international practice and research could be expected in the coming years. Hence, this paper is the first of such kind that provides comparable legal and theoretical analysis of the taxation of property in BIH since 2003 until today.

3.1 International classifications of taxation of property and BIH case

We have previously stated that international financial organisations such as the IMF or the OECD provide a clear classification of taxes on property under methodological notes in two documents: IMF-GFS manual which is used to collect comparable cross-country data on government finances, and the OECD Revenue statistics for the same purposes comparable for the OECD members[3]. In the IMF-GFS manual (2014, p. 93), taxes on property are defined under group 113 and divided into five categories: (i) recurrent taxes on immovable property; (ii) recurrent taxes on net wealth; (iii), estate, inheritance and gift taxes; (iv) capital levies and (v) other recurrent taxes on property. Each group is then defined, explained and placed into broader picture of SNA methodology. Similarly, the OECD (2017) provides a somewhat more detailed classification of taxes on property which are defined under group 4000, and arranged as recurrent and non-recurrent taxes on property and divided into six categories: (i) recurrent taxes on immovable property; (ii) recurrent taxes on net wealth; (iii) estate, inheritance and gift taxes; (iv) taxes on financial and capital transactions; (v) other non-recurrent taxes on property and (vi) other recurrent taxes on property. Again, each group is defined and explained. We will follow the two definitions and provide a comparison to BIH case (both entities).

In BIH, due to its peculiar constitutional organisation, property taxes are under entity's jurisdiction –RS and FBIH. In RS, property taxes are regulated by law brought at the level of RS entity and revenues from property taxes usually belong to LGUs. Since 2003, there have been a few legal changes and amend-

3 Similar classification could also be found in the annual EC publication – Taxation trends in the EU.

ments. From 2002 until legal changes in 2008, RS applied both area-based property tax depending on the type of immovable property and real estate transfer tax as a type of tax on capital transfers. Tax rate was determined per m^2 depending on the type of immovable property whereas real estate transfer tax rate was set at 3 per cent. In 2008, RS brought a new law as a part of comprehensive property tax reform – tax on immovable property. According to Antić (2013), the comprehensive property tax reform in RS began in 2012 but some legal changes occurred in 2008 and were implemented in 2009 with the introduction of synthetic personal income tax. This especially relates to sources of income coming from property such as income from rent or property rights which are classified under comprehensive or broad definition of income according to Schanz-Haig- Simons (SHS) definition of income (Blažić, 2006; OECD, 2006). RS does not apply inheritance and gifts tax.

The application of the new tax on immovable property in RS was legally set to year of 2010, but it became operational in 2012 as set of other property related factors were established – such as fiscal register and mass valuation of immovable property. This law went through a few legal changes from 2012 until 2017. The tax rates were set from minimum 0.05 per cent up to 0.5 per cent of the estimated market value. Current rate of up to 0.2 per cent of the estimated market value was set in 2016 with the new law. Rate of up to 0.1 per cent can only be applied for the production facilities. Since all revenues from property taxes belong to municipalities and cities in RS, municipal assemblies are obliged to inform the tax administration of RS of the value of the real estate by zones within the municipality/city as well as the size of the tax rate not exceeding 0.2 per cent. There are more than 60 LGUs in RS, so tracking the methodology applied for determining the tax base and tax rates is a time consuming and relatively expensive process in RS Tax administration (Tadić, 2016).

Unlike RS, in FBIH, property taxes are not regulated at the level of FBIH, but rather at the intermediate sub national level of government- Cantons. In ten cantons of Federation there are twenty laws which regulate property taxes – a law on taxes on property and real estate transfer tax in each of ten cantons. Taxation of inheritance and gifts is usually included in one of the two laws in each canton. Similar to the case of RS, in FBIH with the introduction of synthetic personal income tax in 2009, cantonal 'laws on taxes' had to be modified as some sources of property income, such as income from rent or property rights were included in the personal income tax base. Both legal changes and inclusion of specific sources of property income to personal income tax are in line with both IMF-GFS and OECD methodology classified under Taxes on payroll and workforce (OECD, 2017; IMF, 2014). In the period 2003-2017, a few legal changes and amendments occurred in ten FBIH cantons, but were generally insignificant modifications to a property taxation model established in late 1990s.

In terms of comparison of BIH legislation in two entities to international practice, table 1 provides a comparable summary.

Table 1: Comparison between international classifications of taxes on property and BIH classification, 2018

Taxes on property	RS	FBIH
Recurrent taxes on immovable property (IMF+OECD)	+	-
Recurrent taxes on net wealth (IMF+OECD)	-	-
Estate, inheritance and gift taxes (IMF+OECD)	-	+ (some cantons)
Capital levies (IMF)	-	-
Other recurrent taxes on property (IMF)	-	-
Taxes on financial and capital transactions* (OECD)	-	+
Other non-recurrent taxes on property (OECD)	-	-
Other recurrent taxes on property (OECD)	-	-

* IMF-GFS (2014) classifies these taxes under Taxes on goods and services, namely, under sub-group of value-added taxes (11414) but the name of the category is the same in OECD and IMF classification (Taxes on financial and capital transactions).

Source: IMF, 2014 & OECD, 2017, own interpretation.

From table 1, we can determine that very few types of taxes on property classified under international classifications exist in BIH under BIH entity's classification of property taxes. However, when we try to interpret the information provided in table 1 and compare it to BIH case (both entities), we have to be very careful especially due to myriad of property related tax laws in BIH. For the RS case, most recent property tax reform and the introduction of taxes on immovable property in RS moved property taxation into right direction due to base broadening and very low property tax rates. RS abolished several types of property taxes (real estate transfer tax, inheritance and gift taxes). However, some types of property, such as movable property (for example motor vehicles) are not included in this classification of property taxes. In RS, motor vehicles are taxed by different law that regulates, inter alia, the *use* of motor vehicles and the tax is paid depending on the engine volume. Under such explanation, this type of tax would mostly suit IMF classification of 'motor vehicle taxes' classified under Taxes on Use of Goods and on Permission to Use Goods or Perform Activities (11451, or 5200 under OECD classification).

From table 1 we could determine that FBIH is lagging behind in the BIH property tax reforms as the situation in FBIH property taxes is very complex since it includes twenty cantonal laws with several types of property tax. As noted before, in FBIH since 2003, all cantons define two tax property related laws: tax on property including both movable and immovable property and real estate transfer tax which includes transfer of immovable property but in some cantons it also defines segments of inheritance and gift taxes. Tax on prop-

erty includes both movable (for example cars) and immovable property (for example houses or flats for recreation) but excludes financial property. Since 2003 until 2017, very few legal changes occurred in this area. Table 2 tries to summarise the main inter-canton comparable categories of immovable and movable property defined under ten cantonal laws. The categories under both movable and immovable property in most cantons are charged for the *ownership* of property rather than *use* of property and would be classified under taxes on property rather than taxes on use of goods and on permission to use goods or perform activities, according to IMF (2014, p. 98). Still, we need to be careful as in all FBIH cantons, this type of property tax is area-based for immovable property and determined per m^2, whereas movable property-motor vehicles are determined per engine volume for motor vehicles and not by the value of assets or as percentage of the assessed property value which is defined under IMF (2014). Hence, there is a difference in definition and classification of taxes on movable property (here motor vehicles) in RS and FBIH since in RS motor vehicles are taxed based upon the use of motor vehicles and in FBIH based upon the ownership of motor vehicles. Obvious inter-entity differences in types of taxes on immovable property are already explained.

As shown in table 2, FBIH also applies real estate transfer tax which under OECD would be classified under Taxes on financial and capital transactions (4400). Difference between OECD and IMF classification under this category exists and is provided in table 1. Some cantons in FBIH under real estate transfer tax also define the status of inheritance and gift taxes which under international practice should be classified separately. Overview of cantonal real estate transfer taxes is provided in table 2. Prior to 2009, real estate transfer tax rates differed from 5 per cent up to 8[4] per cent but since then they were mostly harmonised at the level of up to 5 per cent. Hence, most cantons set the tax rate at exactly 5 per cent, but some set the tax rate of up to 5 per cent (for example Herzegovina-Neretva Canton) giving LGUs and local assemblies an option to determine their own tax rates. Cantonal laws also define the revenue sharing mechanism. Both types of property taxes are mostly shared between cantons and LGUs. Current situation regarding characteristics of both types of taxes and revenue sharing mechanism for each canton is summarised in table 2. Results in table 2 might indicate unequal treatment between LGUs in terms of revenue sharing between cantons in FBIH. This affects local revenues on one side and on the other, the provision of local public goods, for example communal services, which are traditionally provided at the local level. FBIH or RS do not apply any additional types of user charges related to ownership of the real estate.

Based upon our prior analysis, we can determine that there are significant inter-entity differences in the classification of taxes on property in BIH and little comparability with international practice. The provided examples of taxation

4 Zenica-Doboj Canton applied a rate of 8 per cent until 2009.

of types of movable property (i.e. motor vehicles) is different in two entities and not in accordance with the classification under taxes on property.

Table 2: Property taxes in FBIH, 2018

Canton	Tax on property –building or a flat for recreation (BAM per m²[a])	Tax on property – passenger motor vehicle (in BAM[b])	Tax on property revenue sharing mechanism –C vs. L[c]; in %		Real estate transfer tax - tax rate	Real estate transfer tax revenue sharing mechanism	
			C	L		C	L
Una-Sana Canton	2	10-70	0	100	up to 5%	0	100
Posavina Canton	1	25-100	50	50	5%	50	50
Tuzla Canton	1	20-300	0	100	5%	0	100
Zenica-Doboj Canton	1	10-100	0	100	5%	0	100
Bosnian-Podrinje Canton Goražde	2	100-200	50	50	5%	50	50
Central Bosnia Canton	1	30-300	20	80	5%	5	95
Hercegovina-Neretva Canton	1,5	10-250	50	50	up to 5%	0	100
West-Hercegovina Canton	2	20-100	0	100	5%	50	50
Sarajevo Canton	3	50-250	60	40	5%	0	100
Canton 10	2	10-250	75	25	5%	30	70

[a] an example of immovable property.
[b] an example of movable property. Limits within each canton are different and they depend on the engine volume (m^3) and the age of motor vehicle.
[c] C – canton, and L – municipality or city (local community).

Source: own interpretation based upon Todorović, 2017.

4 Comparative Analysis of Taxation of Property in BIH

Regarding taxation of property in BIH, we also wish to determine the size and significance of taxes on property in both entities and to evaluate whether there is a possibility of taking advantage of greater fiscal space in property taxation. Hence, we firstly evaluate the size and share of property tax rev-

enues to total revenues and to total local revenues in RS. Bearing in mind aforementioned legal changes, table 3 shows the share of the property tax revenues to total and local revenues in RS for 2005-2017. We use standard OECD/EC measure of the share of property tax revenues to total revenues and total local revenues over 2005-2017 period.

Table 3: The share of property tax revenues to total and local revenues in RS, 2005[5]-2017, in per cent

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Share of property tax revenues to total revenues in RS	1.6	0.8	0.8	1.0	0.7	0.6	0.5	0.4	0.7	0.6	0.6	0.6	0.6
Share of property tax revenues to total local revenues in RS	8.3	4.1	4.0	5.0	3.6	3.8	3.4	2.8	4.6	4.3	4.0	3.9	4.1

Source: Central bank of BIH, 2018, own calculation.

For the overall period 2005-2017, we can generally determine a downward trend in revenues from property taxes in RS. However, if the intention of legislator was to conduct a revenue-neutral reform with the implementation of taxes on immovable property as of 2012, then this trend (after 2012) could be assessed as positive. This could also be confirmed in the share of property tax revenues to total local revenues since 2012. Furthermore, it is reasonable to assume that now revenues from property taxes are more easily predictable and stable which are two (out of three) major advantages of property taxes (McCluskey and Plimmer, 2011). Third possible advantage related to increased simplicity in RS was not fully met by now and is explained in Tadić (2016). However, with the introduction of taxes on immovable property in RS, RS broadened the tax base and on several occasions since 2012 lowered the tax rates which could bring multiple positive effects to property markets in RS and hence creation of greater fiscal space. McCluskey and Plimmer (2011) also argue that this could lead to a possible increase in market value of property in RS and expansion of property market in RS. Until today, publicly available data for a more comprehensive empirical research of such effects is scarce but is expected in the future research.

From table 3 we can also determine that revenues from property taxes to total revenues in RS in the pre-crisis period of 2005-2008 were unstable. However, they can be explained by prior legal changes that occurred in RS until 2008. Since 2009 until 2016, revenues from property taxes have been increasing except 2012 when recurrent tax on immovable property became opera-

5 Official data is not available for years 2003-2004 and 2016 is the latest available data.

tional and when real estate transfer tax was abolished. Overall, the share of revenues from property taxes to total revenues is very low and amounts to on average (2005-2017) to 0.7[6] per cent. In the total local revenues, the share is somewhat different. The volatile trend in the share of property tax revenues to total local revenues in RS could be explained by other tax revenues taking predominance in the revenue structure. This relates to the introduction of VAT in 2006 in BIH which increased overall tax revenues, hence the share of property tax revenues was lower in comparison to 2005. Again, the abolishment of real estate transfer tax in 2012 caused a significant fall in the share of revenues from property taxes to total local revenues.

During this period, the position of LGUs in RS in terms of revenues from property taxes differed. With the application of new recurrent tax on immovable property, LGUs were given greater responsibilities and autonomy as they could set the tax rates on their own not exceeding the upper legal limit. With the increase in local autonomy, aspects of fiscal decentralisation in RS increased and might be considered as positive. However, relatively inexperienced LGUs which did not perform any in-depth analysis of possible effects of newly gained responsibilities have, in turn, created a property tax jungle with a spectrum of tax rates brought and adopted by local assemblies. Tadić (2016, p. 145-146) argues that local tax collectors entered the process "unprepared and understaffed" especially since there was a lack of coordination from RS level to the local level. Additionally, the estimated value of immovable property differed substantially between LGUs and citizens filed many complaints which postponed the tax collection process and caused a fall in tax revenues. Tadić (2016) further argues that LGUs had set the tax rates inadequately as some developed LGUs and undeveloped LGUs had the same tax rates. So, even though fiscal decentralisation improved with the transfer of authority to LGUs, fiscal equalisation between developed and undeveloped LGUs was considered as unsuccessful in practice.

Since FBIH still applies two types of property taxes, we would expect revenues from property taxes to have a higher share in total revenues. This can be confirmed from data given in table 4 for the entire observed period 2003-2017. In the pre-crisis period there is an instability in the share of property tax revenues to total revenues. Similar can be determined after 2008. However, if we look at the revenues from property taxes in both FBIH and RS in absolute terms they have been mostly increasing in the pre-crisis period, were volatile in the 2008-2012 period and more or less stable after 2013. The share of property tax revenues to total revenues in FBIH (2003-2017) is somewhat higher than in RS and on average amounts to 1.2 per cent. The share of property tax revenues to total local revenues in FBIH is higher than in RS. The reason for high share in the pre-2006 period in FBIH is the same as in RS case – with the introduction of VAT in 2006, indirect tax revenues took predominance

6 This percentage is even lower in comparison to GDP which undermines the creation of greater fiscal space under property taxes in RS even in comparison to CEE countries.

in the revenue structure at local level. However, the share of property tax revenues to total local revenues in FBIH amounts to 9.7 per cent on average (2008-2017) which is more than two times higher than the same ratio in RS (average is 4 per cent, 2008-2017). Hence, we can confirm that property tax revenues to total or local revenues are higher in FBIH than in RS and are the result of more types of property tax applied in FBIH. However, unlike FBIH which has done very little in the property tax reforms unlike RS, it is reasonable to expect that property tax revenues should increase in future in RS especially since they now they are more predictable and stable. In that sense, property tax reforms in cantons in FBIH should be set as a priority tax policy.

Table 4: The share of property tax revenues to total and local revenues in FBIH, 2003-2017, in per cent

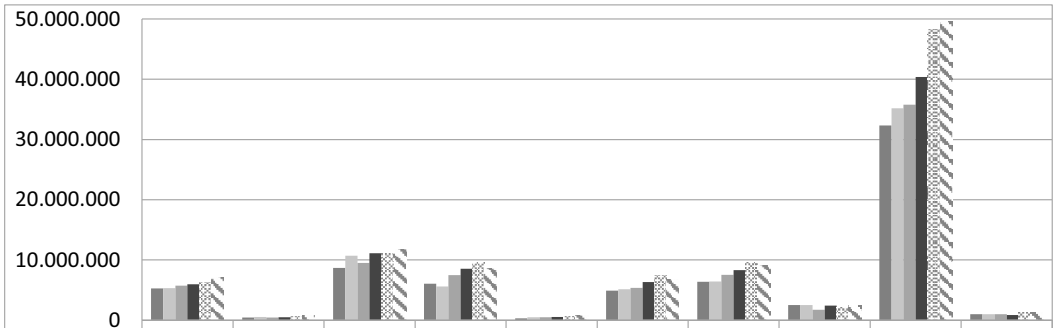
	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Share of property tax revenues to total revenues in FBIH	1.5	1.2	1.4	1.2	1.4	1.4	1.2	1.0	1.0	1.0	1.1	1.1	1.1	1.3	1.1
Share of property taxes to total local revenues in FBIH	15.2	11.0	12.3	9.9	10.7	10.4	10.1	8.3	8.8	9.2	10.5	9.1	9.5	11.3	9.9

Source: Central bank of BIH, 2018, own calculation.

4.1 Taxation of property in FBIH with a special focus of Sarajevo Canton

The relatively high share of property tax revenues to total or local revenues in FBIH needs to be further analysed. Hence, this section provides answers to two questions: *what* is the most significant type of property tax that ensures high property tax revenues in FBIH and *where* is that type of property tax mostly collected? Evidence in figure 1 indicates that in whole of FBIH, the highest revenue collection from property taxes – both property and real estate transfer tax is collected in Sarajevo Canton. Over the past six years in absolute and in relative terms, Sarajevo Canton has collected the highest revenues from property taxes compared to all other cantons and it has recorded a growth in revenues from property taxes in each year in the observed period. Furthermore, it has collected twice as more revenues from property taxes (in absolute terms, 2012-2017) than all LGUs in RS. This is an expected result and was highlighted in the works of Zorn et al. (2000).

Figure 1: Revenues from property taxes in ten cantons in the period 2012-2017



	Una Sana Canton	Posavina Canton	Tuzla Canton	Zenica-Doboj Canton	Bosnian Podrinje Canton	Central Bosnia Canton	Herzegovina-Neretva Canton	West Herzegovina Canton	Canton Sarajevo	Canton 10
2012	5.307.799	438.950	8.696.033	6.053.457	338.474	4.895.069	6.369.249	2.526.470	32.334.326	991.746
2013	5.341.893	533.625	10.704.711	5.617.912	486.900	5.153.663	6.454.471	2.532.933	35.158.527	988.023
2014	5.763.348	464.435	9.538.488	7.494.759	493.832	5.362.336	7.542.781	1.765.652	35.752.417	1.008.029
2015	5.969.739	523.691	11.147.440	8.560.870	554.284	6.342.449	8.342.912	2.418.528	40.371.248	879.979
2016	6.356.093	562.176	11.015.797	9.597.086	552.770	7.399.294	9.654.244	2.150.333	48.247.409	1.217.886
2017	7.182.237	743.112	11.830.062	8.600.232	799.726	6.787.218	9.090.110	2.448.139	49.665.550	1.271.141

Source: Federal Ministry of Finance, 2017.

The share of revenues from property taxes to total revenues in ten FBIH cantons varied in the observed period. In fact, in nine cantons (excluding Sarajevo Canton) in 2017, the share of revenues from property taxes to total revenues was between 1.4 per cent in Canton 10 and Posavina Canton to 3 per cent in Herzegovina-Neretva Canton. Table 5 provides a summary of the share of revenues from property taxes to total revenues, 2012-2017. In most cantons, revenues were stable or had an increasing trend especially in the last three years.

Table 5: Share of revenues from property taxes to total revenues in ten cantons in FBIH, 2012-2017

Canton/Year	2012	2013	2014	2015	2016	2017
Una Sana Canton	2.3	2.4	2.4	2.4	2.4	2.7
Posavina Canton	1.1	1.6	1.0	1.1	1.0	1.4
Tuzla Canton	2.0	2.7	2.2	2.4	2.4	2.4
Zenica-Doboj Canton	1.8	1.7	2.1	2.2	2.5	2.1
Bosnian Podrinje Canton	0.8	1.3	1.0	1.2	1.3	1.9
Central Bosnia Canton	2.4	2.5	2.5	2.8	3.0	2.6
Herzegovina-Neretva Canton	2.6	2.6	2.8	2.8	3.3	3.0
West Herzegovina Canton	2.9	2.9	1.9	2.5	2.0	2.1
Canton Sarajevo	4.4	4.9	4.7	4.9	5.7	5.3
Canton 10	1.3	1.3	1.2	1.0	1.3	1.4

Source: Federal Ministry of Finance, 2017, own calculation.

In comparison to other cantons in FBIH which mostly include several smaller cities, Sarajevo Canton has a special position of a canton-city. In comparison to pre-war territory and number of municipalities forming a City of Sarajevo, both have decreased under new BIH constitution. Currently, Sarajevo Canton includes nine municipalities. Four inner city municipalities form a City of Sarajevo[7]. Most population in Sarajevo Canton live in City of Sarajevo which, in comparison to pre-war expenditure assignments has now transferred its responsibilities to cantonal level. This causes several issues especially in the provision of communal services due to the fact that most of pre-war communal infrastructure changed very little. In addition, Sarajevo Canton unlike most other cantons in FBIH has not yet adopted Law on Local Self-Government which further complicates the expenditure assignment as well as revenue allocation and hence the sharing mechanism between Sarajevo canton and LGUs (table 2).

In terms of revenue sharing mechanism, Sarajevo Canton is in a unique position as a city-canton since most revenues belong to Sarajevo Canton. This is not only the case with property tax revenues (table 2), but also with other revenues (for example, personal income tax revenues). As an answer to the question – what is the most significant type of property tax that ensures high property tax revenues in FBIH, the answer is that most revenues from property taxes come from real estate transfer tax which, on average (2014-2016) amounted to over 72 per cent of all revenues from property taxes (Sarajevo Canton Ministry of Finance, 2017, own calculation). Due to lack of officially available data, it is reasonable to assume that the highest share of property tax revenues in all ten cantons in FBIH also comes from real estate transfer tax revenues. The allocation of revenues from real estate transfer tax is different in inner and outer city LGUs in Sarajevo Canton. Inner city LGUs share revenues with City of Sarajevo so that 30 per cent of revenues from real estate transfer tax belongs to City of Sarajevo and the remaining 70 per cent to inner city LGU. All revenues from real estate transfer tax in the outer-city municipalities fully belong to local communities in which they were collected (table 2). Di Bella et al. (2017, p.15) argue that „the large cross-regional dispersion of per capita own revenues may have contributed to economic and population concentration, which creates negative spillovers for regions with population outflows". However, Sarajevo Canton through the allocation of real estate transfer tax attempts to support the development of outer–city municipalities and the share of property taxes to total revenues of these municipalities is higher than in inner-city municipalities.

7 Four inner city municipalities are: Centar, Stari Grad, Novi Grad and Novo Sarajevo. Five outer-city municipalities are: Vogošća, Ilijaš, Ilidža, Trnovo and Hadžići.

Table 6: Share of property tax revenues to total LGUs revenues in Sarajevo Canton in 2017

	Municipality	Total current revenues	Tax revenues	Property taxes	Property tax	Real estate transfer tax	% share of property taxes in total municipal revenues	% share of property taxes in tax revenues of municipalities	% share of real estate transfer tax in property taxes
		1	2	3 (4+5)	4	5	6 (3/1)	7 (3/2)	8 (5/3)
1	Centar	29.850.000	10.400.000	5.250.000	1.600.000	3.650.000	17.59	50.48	69.52
2	Star Grad	16.625.030	5.511.500	2.195.000	500.000	1.695.000	13.20	39.83	77.22
3	Novi Grad	37.011.300	19.180.000	8.100.000	1.600.000	6.500.000	21.89	42.23	80.25
4	Novo Sarajevo	17.147.346	9.673.100	3.710.000	1.160.000	2.550.000	21.64	38.35	68.73
	1-4 Inner-city m.	100.633.676	44.764.600	19.255.000	4.860.000	14.395.000	19.13	43.01	74.76
5	Vogošća	11.555.262	4.703.823	1.568.200	240.000	1.328.200	13.57	33.34	84.7
6	Ilidža	24.000.000	12.656.594	5.910.000	1.100.000	4.810.000	24.63	46.7	81.39
7	Hadžići	11.980.800	5.662.200	2.418.405	273.000	2.145.405	11,08	42.71	88.71
8	Ilijaš	12.922.000	5.436.500	1.432.000	200.000	1.232.000	3,67	26.34	86.03
9	Trnovo	13.607.886	1.412.450	500.000	95.000	405.000	20.19	35.4	81
	5-9 Outer -city m.	74.065.948,91	29.871.567	11.828.605	1.908.000	9.920.605	15.97	39.6	83.87

Source: Sarajevo Canton Ministry of Finance, 2017, own calculation.

The higher share of revenues from real estate transfer tax to total local revenues confirms that property tax revenues should be allocated at local level since they are more easily predictable and stable source of revenues (McCluskey and Plimmer, 2011). Furthermore, this corresponds to ideas presented in the first and second theory of fiscal federalism (Oates, 1999; Weingast, 2005). Although inner–city municipalities have been collecting more revenues from real estate transfer taxes than outer–city municipalities in absolute terms, in relative terms, the percentage share of the real estate transfer tax in total local revenues from property taxes is higher in outer–city municipalities.

There are a few reasons that might explain this issue. The first one relates to revenue sharing mechanism from real estate transfer tax so that outer-city municipalities collect all revenues whereas inner-city municipalities are entitled to 70 per cent of collected revenues. Secondly, Sarajevo Canton does not tax land through tax on property which causes lower revenues from property taxes in outer-city municipalities in comparison to inner-city municipalities. Total area of Sarajevo Canton is 1.276.9 km^2. The share of territory of four inner city municipalities amounts to only 11.1 per cent and the rest (88.9 per cent) belongs to five outer-city municipalities. Hence, five-outer city municipalities have a significant potential in terms of creation of greater fiscal space for property taxation in the future. Finally, our results show that in 2014-2016 period there have been significant land-related real estate transfers and therefore paid taxes in outer-city municipalities. In fact, two year (2014-2016) average of all real-estate transfers in outer-city municipalities related to land transfers amounted to 62.5 per cent in comparison to 37.5 per cent in inner-city municipalities (Sarajevo Canton Tax Administration, 2016, own calculation). However, due to lack of official data on ownership, market value or the size of traded property (in m^2) further empirical analysis is limited. It is reasonable to assume that the value of taxed land in inner-city municipalities in comparison to outer-city municipalities is much higher which again is shown through the size of collected revenues (table 6).

5 Recommendations and Conclusion

Due to a complex constitutional organisation of BIH of a two entity state, the taxation of property in two BIH entities is organised differently. Additional reasons for inter-entity disparities also exist such as different constitutional organisation of entities itself and more importantly, different approaches to taxing property. We have determined that BIH currently applies three types of property taxes and that BIH classification of types of property differs to international classifications of IMF or OECD. In entity RS, property is taxed through recurrent tax on immovable property whereas in FBIH, property taxes are under cantonal jurisdiction and include taxes on property and real estate transfer taxes which in some cantons also include inheritance and gift taxes. Legal differences in two entities show their effects on the size of collected revenues from property taxes whereas in FBIH the share of revenues

from property taxes to total revenues is higher than in RS. More importantly, the revenues from property taxes to total local revenues are higher in FBIH than in RS even though they are not the main source of local revenues in either entity (indirect tax revenues take the highest share). The analysis showed that the highest share of revenues from property taxes in FBIH is collected in Sarajevo Canton. Hence, we have analysed the position of Sarajevo Canton in more detail. More than seventy percent of property tax revenues are generated from real estate transfer tax revenues in both inner and outer-city municipalities. Due to lack of official data, similar situation could be assumed in other nine cantons in terms of the share of real estate transfer tax revenues to total property tax revenues. In addition, the importance of revenues from property taxes in inner and outer-city municipalities in Sarajevo Canton are different. Revenues from property taxes to total local revenues are more significant in the outer-city municipalities.

Due to its significance to local revenues, in terms of set of recommendations and suggestions, any future property related tax reforms should be carefully tailored in BIH and especially in FBIH.

In BIH, types of taxes on property should firstly be classified in accordance with international classifications. This especially relates to classification of taxation of movable property in both BIH entities. Our analysis showed that property tax reforms in RS are more advanced than in FBIH which faces several problems. Even though most property tax revenues are collected in FBIH, with an adequate property tax reform in FBIH, all advantages of property taxes related to simplicity, predictability and stability of revenues could be fulfilled. Similar is expected in RS in the coming years. Additionally, adequate property tax reform is very important to economic growth. Most recent research from Grdinić et al. (2017) proved that property taxes out of all direct taxes have the least detrimental impact to economic growth in CEE countries. Secondly, all ten FBIH cantons need legislative changes and abolishment of current 'taxes on property' and real estate transfer taxes in the future. FBIH property tax reforms should focus on introducing recurrent taxes on immovable property similar to RS case. However, this reform needs to be carefully planned bearing in mind lessons learned from CEE practice (Grover et al, 2017; Puleri &Kripa, 2017). Thirdly, some activities as a precondition to property tax reforms have already begun in late 2016. Similar to Slovenian case in the late 1990s, the World Bank has initiated an international project for modernizing the records of real estate transactions as of fiscal year 2017. All current transactions from real estate transfer tax in FBIH are being recorded with all necessary data (ownership, market value, contract value, the size of traded property) which could in turn speed up the process of the development of a model for mass valuation of property. Additionally, the World Bank also initiated a project of harmonisation of Land registries in FBIH which could in turn result in a reliable land register and can lead to the establishment of fiscal cadastre. Hence, Grover et al. (2017) have already provided the results of a similar World Bank

activities conducted in eight ECA countries which face similar property related issues (in comparison to Dutch case). Thirdly, long-term property tax reform in FBIH should include property-tax base broadening for categories that are currently left untaxed such as land. This way, LGUs could take advantage of greater fiscal space created under property taxes. Fourthly, in terms of lessons learned from RS experience, in order to successfully implement property tax reform in FBIH, FBIH should improve institutional cooperation and communication (for example, improved cooperation between Cantonal Ministries of Finance and Cantonal Tax administrations or Cantonal Ministries of Finance with Federal Ministry of Finance/Federal Administration for Geodetic and Real Property Affairs). Better coordination should also be expanded to cooperation between cantonal ministries of finance and cantonal tax administration on one side and Land Registries and Municipal Cadastres on the other. Finally, during this process, a set of other legal changes should follow property tax reform in FBIH giving more fiscal autonomy to LGUs which is in line with first and second generation of fiscal federalism. We have determined that revenues from property taxes are becoming more predictable, stable and important source of revenues for LGUs in RS and in FBIH, so the possible switch from current two types of property taxes in FBIH to one more comprehensive recurrent tax on immovable property could be more easily achieved bringing aspects of tax simplification into FBIH property tax system.

Bearing in mind the limitations of this paper primarily related to lack of official long term data, once the official data from current property-related activities in both RS and FBIH becomes publicly available, we expect to expand our analysis to more quantitative and empirical measures of the impact that property taxes and property tax reforms have had on economic growth, evaluation of implementation of property tax reforms in FBIH and the impact of property tax reforms on LGUs and the level of fiscal decentralisation in BIH.

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Can Top Down Participatory Budgeting Work? The Case of Polish Community Fund

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ABSTRACT

The article addresses the participatory budgeting (PB), which is one of the most recognised governance innovations of recent decades. This global phenomenon represents in practice a shift towards participatory and collaborative management of public resources at the local level. The purpose of this article is to determine when top down approach to PB might be welcomed, taking into account the characteristics of PB schemes all around the world that they emerged as local initiatives, instigated either by civil society groups or local governments. The analysis is based on the description of the PB example as introduced via country-wide legislation, exhaustively regulating PB procedure. The article examines Polish experience in the field of functioning top down approach to PB. It demonstrates that top down PB can effectively work, if it is accompanied with significant incentives and grants, as well as the extensive autonomy and flexibility of local communities. Polish experience suggests that such an initiative might be relatively successful, yet there is a number of conditions that has to be met in order to ensure the dissemination of legislative model of participatory budgeting. The results have practical implications to central government institutions that consider introduction of some legislative framework for participatory budgeting at the local level. The originality of the research is in the analysis of one of successful stories of the PB introduced via country-wide legislation, and determining when this approach can work, also in other countries

Keywords: *community fund, participatory budgeting, participatory governance, local government, local budget, civil society, citizen participation, Poland*

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1 Introduction

Participatory budgeting (PB) is an umbrella term for wide array of governance experiments characterized by greater and more direct involvement of citizens in budgets formulation, setting spending priorities, expenditure monitoring and evaluation (Allegretti and Herzberg, 2004; Cabannes, 2004; Wampler, 2007). Numerous technical and institutional arrangements could be applied in PB processes, including public hearings, citizen surveys, advisory boards, forums, workshops, voting (budget referenda), citizen panels and focus groups (Zhang and Liao, 2011; Kim and Schachter, 2013).

Since Porto Alegre experiment in late 80s' PB became a global phenomenon in local governance and one of the most tangible signs of shift „from local government to local governance" and expansion of participatory governance, co-governance or collaborative governance (Bevir, 2012; Hordijk, 2012; Donaghy, 2013). It develops in polycentric manner (Dias 2014), yet we could distinguish some common denominator for most of its forms - PBs are local initiatives launched and elaborated by local governments, grass-roots activists and civil society groups. Only few countries (Peru, Bolivia, Dominican Republic) introduced top down PB, i.e. PB imposed by national legislation as mandatory arrangement for local governments (McNulty, 2004). Only Peruvian experience has been evaluated by Mc Nulty (2004) who provided rather mixed picture regarding the outcomes of this approach.

The article presents Polish experience connected with the introduction of top-down PB and the functioning of this mechanism, which is the community fund. This is to determine if the example of a community fund is a successful story, and if so, what data is the basis for the claim. In addition, the aim of the research is to determine the recommendation to be used in this approach to PB.

2 Methods

This article aims at general assessment of the top down PB introduced by national legislation in Poland, known as community fund for rural areas. Key element of this model is empowering the residents of rural areas (villages) to directly and conclusively decide on distribution of the part of communal budget, calculated according to national legislation and according to the procedure specified in this law.

The effectiveness of PB depends on various factors, which in the literature of the subject are divided into the governmental environment, the design of the process, the mechanisms used for elicit participation (Memeti and Kreci, 2016). In this article, the community fund's legal regulations will be analyzed in terms of factors that contribute to the development of PB, such as the governmental environment, the design of the process, the mechanisms used for elicit participation.

The first step in the evaluation of the PB is to determine whether it is an instrument that is willingly used by citizens and public authorities, especially in case of top down PB. Introduction of community fund requires autonomous of each communal council, yet national legislation provides some financial incentives for that. Review of this arrangement is conducted with the use of statistical data regarding primarily the share of communal councils that introduced community fund and the total expenditure distributed according to this mechanism. Those quantitative indicators are complemented with literature review providing broader context of the reception of top down approach to PB in Poland.

3 Results

3.1 Global expansion of participatory budgeting

The idea of PB originated in Porto Alegre in late 80s', where advanced model of participation in budgetary process has been developed by the local government and over years became a global reference model (Ganuza and Baiocchi, 2014). Recommendations made by citizens in PB process are not formally binding, but there is strong pressure to include them, without modifications, into budgets adopted by appropriate local government bodies (Souza, 2001; Novy and Leubolt, 2005). Porto Alegre model offers direct and meaningful participation, yet PB covers also arrangements where local authorities save unrestricted and exclusive decision-making powers and citizens are only consulted (Sintomer, Herzberg and Röcke, 2008).

All models aim at enabling citizens to influence the allocation of public resources and educating them, enhancing transparency and accountability (Shah, 2007). However, the evaluation of efficiency and effectiveness of public resources allocation via PB is extremely difficult. One reason is lack of uniformed and homogenous model of PB. Another challenge is lack of agreement on the set of indicators for measuring success of PB. Outcomes and impacts of PB are reviewed most extensively in case of Porto Alegre, where PB is associated with improving access to public services for disadvantaged groups and reducing corruption in local government (World Bank, 2003; Baiocchi and Lerner, 2007; Cabannes, 2004; Sintomer Herzberg and Röcke, 2008).

PB is not by definition reserved only to local (municipal) budgets. However, both theoretical discourse and the practice of PB implementation focus on local government, including cities of all sizes, from small communes (below 20,000 inhabitants) to mega-cities (Cabannes, 2004). There are only few examples from higher level of government considered in the literature, including the state of Rio Grande do Sul, Brazil (Goldfrank and Schneider, 2006) or in the provinces of Chucampas, Celendín or Moropon Chulucanas, Peru (Cabannes, 2004).

Participatory budgeting is now global phenomenon, yet the scale of its diffusion is difficult to estimate. Sintomer et al. roughly calculated that there were

between 1,269 and 2,778 participatory budgets in 2013 (Sintomer, Herzberg and Röcke, 2014). However, those estimations needs to be considered with special reservations, not only because of huge variety of models interpreted as PB. As PB emerges usually as local initiative, country-wide statistics are not always available.

3.2 Participatory budgeting in Poland. Between bottom up and top down approach

Participatory budgeting arrived to Poland only few years ago, yet it evolved rapidly into one of the most popular innovations in local governance. It has developed in two, parallel forms: 1) as bottom-up initiative promoted by civil society groups that managed to disseminate this concept among local authorities; and 2) as uniform, country-wide model established by national legislation. In 2018, from the new term of local self-government, come in force new legislation of PB in municipalities. PB will be mandatory in large local government units.

The former model is applied primarily in urban communes that are not allowed to apply the legislative arrangement („urban PB"). Urban PB until 2018 was not regulated in the national legislation at all and all procedures are established by local councils and mayors. National legislation does not require any public participation in planning public spending, both in a one-year perspective (annual budgets) and long-term planning (multi-year financial prognosis). Despite lack of uniform model, urban PB in vast majority of the Polish municipalities is implemented in very similar version, characterized by citizens' engagement restricted to a very minor part of local budget (less then 2% of planned expenditure), poor range of deliberation tools for engaging citizens in a dialogue on local budget, and procedure resembling local referendum (Sześciło, 2015). Urban PB is distributed via popular vote on the projects previously submitted by individual residents or civil society organizations. Vote is not formally binding to local council, yet it is usually reflected in the councils' decisions. This form of PB has been already implemented in over 80 municipalities (Kębłowski, 2014), while in 2011 there was only city (Sopot) experimenting with this method (Kębłowski, 2013). One of the Polish non-governmental organizations gathered in 2018 data on examples of 186 PB in Polish municipalities (Pracownia Badań i Innowacji Społecznych "Stocznia" 2018).

The provisions of the Act of 11 January 2018 on amending certain laws to increase the participation of citizens in the process of selecting, operating and controlling certain public bodies, introduced the concept of a PB at every level of self-government units. These provisions will come into force in the autumn of 2018, when the next, 5-year term of the local self-government authorities will start. The PB instrument has been included in the existing provisions regarding public consultations.

According to the new regulations, a PB is understood as a special form of public consultations, deciding on a part of budget expenditures in direct vot-

ing. In the case of large local self-government units the obligation to separate the PB was introduced. PBs established in large cities in accordance with this obligation can not be less than 0.5% of the commune's expenditure included in the last report on the implementation of the budget.

The tasks of the council of the local government unit include defining, in the resolution, the requirements that the proposals for the PB should meet. This applies in particular: formal requirements that the submitted projects should respond to, the required number of signatures of residents supporting the project, rules for the assessment of submitted projects as to their compliance with the law, technical feasibility, formal requirements they meet and the procedure of appeal against the decision not to allow the proposal for voting, the rules governing the voting, determining the results and making them public.

Top down, legislative model of PB in the form of community fund has been adopted in February 2009 with the effect to local budgets for 2010. Law on the Community Fund[1] has limited scope of application. Community funds might be introduced only in rural or urban-rural communes[2] that created special auxiliary units for rural areas, called communities or villages (*sołectwa*). Communities does not enjoy any formal autonomy from communal authorities and do not have their own budgets and functions to be performed independently. They have no capacity to get into contractual relations. Decision on establishment of communities and specifying scope of their tasks is under exclusive competence of communal council. Typical functions delegated to communities includes organization of cultural or sports events, local roads improvement or flood protection. Traditionally, the elected representatives of communities supported communal administration in collecting local taxes (Kulesza and Sześciło, 2012). Currently, there are over 40,000 of communities in 2173 rural and urban-rural communes (Central Statistical Office of Poland, 2015).

Communities are managed according to the bylaws adopted by communal councils, yet the national legislation established community gathering of all residents as decision-making body for community and community mayor (*sołtys*) as executive organ appointed by the gathering. Hence, communities might be perceived as a form of traditional direct democracy. It is feasible thanks to the size and population of communities that predominantly cover single village area.

Taking into account the formal status of community, community fund cannot be regarded as separate budget of this unit (Paczocha, 2009; Augustyniak, 2010). Extracting community fund from the communal budget is not mandatory. However, if the communal council once decided on establishing the fund for a given year, this decision remains valid also for subsequent years, until it

1 Law of 20 February 2009 on the Community Fund, Journal of Laws, No. 52, pos. 420. This law has been replaced by the Law of the Community Fund, Journal of Laws, pos. 301 that entered into force on 20 March 2014.

2 Rural communes covers only rural areas (villages), while urban-rural communes consists of town and surrounding rural areas (villages).

is repealed by special resolution of the council. On the other hand, the resolution on the non-separation of the community fund may cover only one year. This means that in the next year local authorities will have to reconsider the creation of the community fund. This contributes to greater stability of this arrangement and minimizes the risk of its abandoning.

If the community was created, it must be implemented in accordance with the standards and procedures specified in the Law on the Community Fund. First of all, the minimal amount of the fund needs to be calculated according to statutory formula. This amount might be increased by the communal council. This formula takes into account two variables relating to population and income capacity of the commune: 1) number of residents of each community; and 2) communal budget income per capita.

Although community fund is covered entirely from communal budget, the Law on the Community Fund contains partial refund scheme addressed to the communes. They are entitled to receive from the state budget reimbursement of up to 40% of their expenditure on the community fund. The highest refund might be granted to the communes with the budget income per capita below the national average. This mechanism plays crucial role in incentivizing communes to introduction of the community fund.

The decision-making process on distribution of already calculated amount of community fund is set out in the Law on the Community Fund. It includes four main stages described below.

Figure 1. Management of the community fund

APPLICATION
• Community gathering, open to all residents of the community, adopts the list of the projects to be implemented within the community fund. The projects need to be compatible with the scope of communal tasks and contribute to improving the quality of life of residents • The application should describe each project, explain their rationale and estimate their costs. Estimation of total costs of all projects cannot exceed the amount established by the communal council as community fund for a given community • Full list of projects adopted by the community gathering is submitted to the mayor of the commune

REVIEW
• The mayor may reject the application solely on formal grounds, e.g. incomplete or adopted with procedural errors • In case of rejection, the community mayor may uphold the resolution of the gathering and submit it directly to the communal council • Alternatively, the community gathering may rectify its resolution and resubmit it to the mayor
DECISION
• The mayor includes the projects submitted by the communities into communal budget proposal • Communal council, while considering budgetary proposal, has to accept the communities' application • The application might be rejected by the communal council only in case of incompatibility with the local development strategy, does not fit into catalogue of communal tasks or does not contribute to improving the quality of life of the residents
IMPLEMENTATION
• The projects are implemented as typical communal initiatives (investments), i.e. by the communal administrative apparatus. No funds are transferred directly to the community and community representatives does not have direct competences in the process of projects' implementation • There are no legislative guarantees of community's participation in projects' implementation or evaluation • However, during the budgetary year the community gathering may apply for modifications and alterations of the list of projects or detailed content of each project

Source: based on 2014 Law on the Community Fund.

In practice, the community funds are allocated primarily to the investments in local transport and communication infrastructure (36% of total allocation in 2014), culture, e.g. running community cultural centers (25,7% in 2014) and maintenance of public utilities (13,9% in 2014), including parks, streets, squares and green areas (Council of Ministries of the Republic of Poland, 2015). For comparison, in 2017 expenditures made under the community fund were mainly related to transport and communication (32.6%, and especially to municipal roads), culture and protection of national heritage (24.6% and especially for houses and cultural centers), municipal economy and environmental protection (17.2%, and in this mainly for lighting of streets, squares and roads, and maintenance of greenery), or finally physical culture (9.6%, and mainly on sports facilities; Council of Ministries of the Republic of Poland, 2018).

4 Discussion

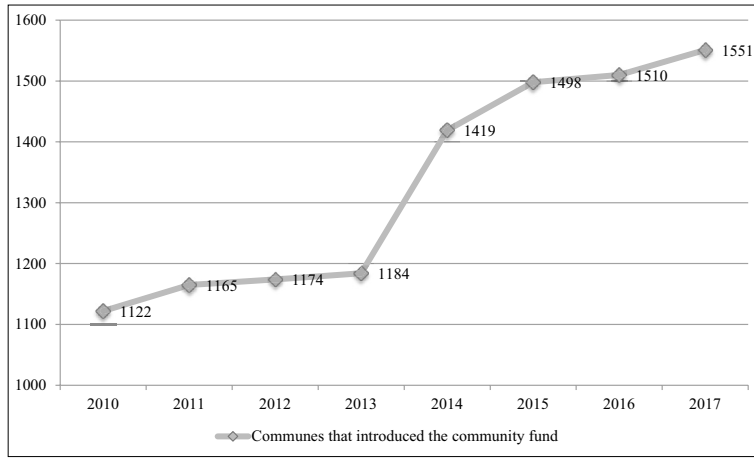
Introducing PB as top down initiative, driven by national legislation was a risky endeavor, taking into account the dominant approach to PB as locally, bottom up instigated governance innovation. The main question is, therefore, if the local communities approved and absorbed this uniform and regulated in detail scheme. Considering the key elements of the model set by the Law on the Community Fund, the following indicators might be used in order to assess the reception of the community fund at the local level:

– The number (share) of communes that adopted the community fund;
– The total expenditure on the community fund that was realized (not only planned).

Data for this research has been provided by the Ministry of Public Administration, Council of Ministers of the Republic of Poland, Central Statistical Office of Poland, National Community Mayors' Association and Watchdog Polska (non-governmental organization monitoring the implementation of community funds across the country).

The number (share) of communes that - via resolutions of communal councils - decided to introduce community fund is the main indicator of the reception of this mechanism among local communities. As the decision in this matter is absolutely voluntary, this indicator explicitly reflects the level of acceptance and legitimacy of top down PB in the form of community fund. The figure below illustrates the dissemination of community fund among rural and urban rural communes since the introduction of this mechanism in the local budgets for 2010.

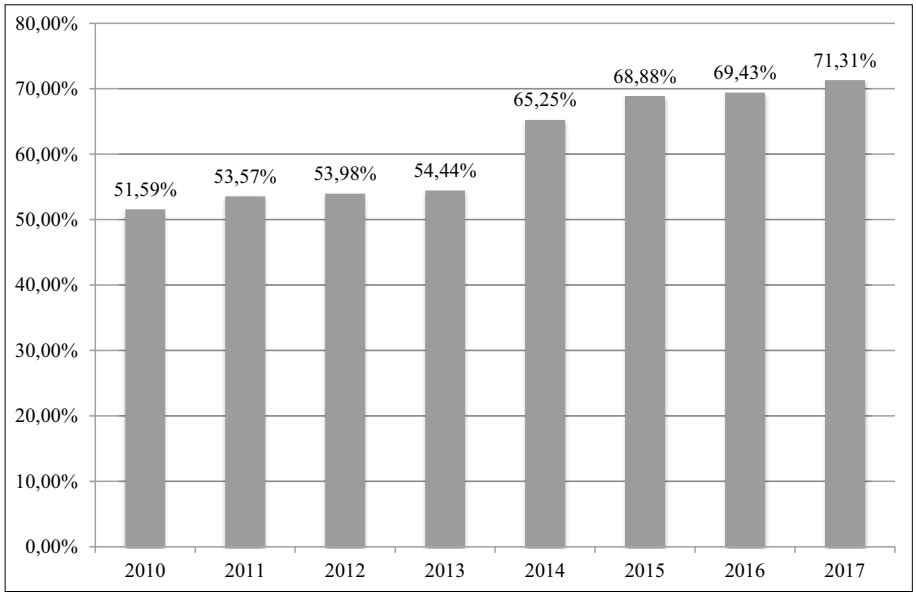
Figure 2. The number of communes that introduced the community fund (total number of rural and urban-rural communes: 2173)



Source: Ministry of the Interior and Administration 2018, <http://administracja.mswia.gov.pl/adm/fundusz-solecki/statystyka/10370,Fundusz-solecki-w-liczbach.html>.

Broad dissemination the community fund over the years is evident. In 2015 it functioned in 64% of the communes, and in 2017 - 71,31%. Rapid expansion of this instrument occurred in 2014 when the new Law on the Community Fund entered into force, providing some technical arrangements facilitating implementation and management of the funds[3]. Six years' experience is long enough to conclude that the community fund gained stable and noticeable position in the local landscape of Poland. In terms of number (share) of communes that implemented PB, community fund appeared to be much more popular than urban PB adopted according to rules and procedures set out entirely by local government. Community fund was not rejected as a formula contradictory to the idea of local governments' autonomy and inconsistent with the global trends in PB's development. Top down, essentially bureaucratic approach has been approved the majority of the local government and the level of acceptance remained high over the years.

Figure 3. Share of communes in which the community fund was established, to the number of all communes in which there are auxiliary units for rural areas (*sołectwa*)



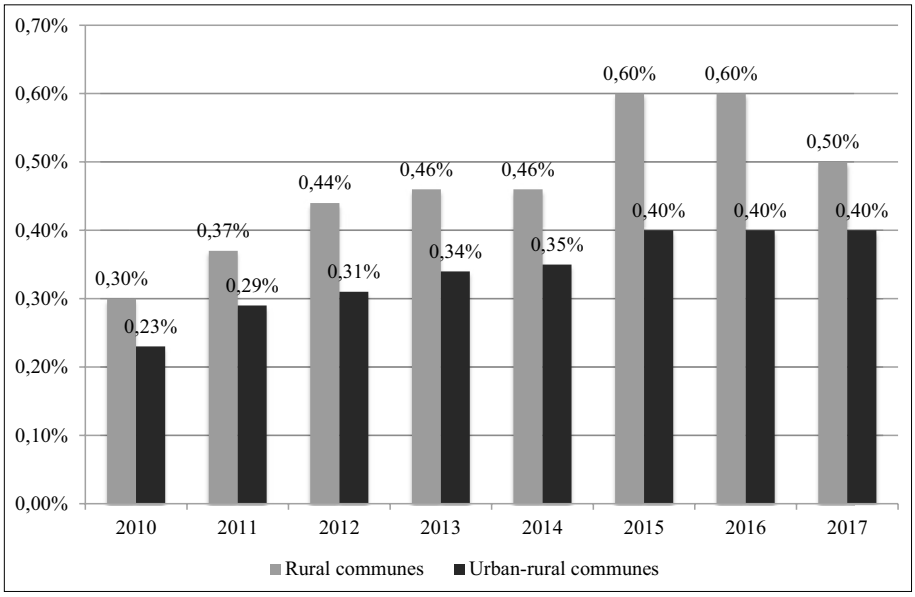
Source: Reply of the deputy Minister of the Interior and Administration to interpellation No. 24306 on the scope of dissemination of the community fund.

What is more, the total share of community fund in the budgets of rural and urban-rural communes increases faster than the number of communes using this mechanism (figure 3). While the number of communes applying community fund increased by 4% between 2010 and 2014, the share of budgets allocated to the community fund grew by 53% in case of rural communes and

3 For instance, the available refund from central budget was increased and joint applications from more communities were allowed.

by 52% in case of urban-rural communes. This means that increasing number of communes decided to set allocations for community funds above statutory minimum. However, there are no comprehensive statistics on the share of communes, where the extra allocation has been provided.

Figure 4. Share of budgets of rural and urban-rural communes allocated to the community fund



Source: Council of Ministers of the Republic of Poland, 2015, 2016, 2017, 2018, Central Statistical Office of Poland, 2014.

This effect cannot be linked only with the financial incentive for community fund's implementation. Firstly, the refund scheme activates ex post. This means for the municipality that the refund will take place in the next budget year in relation to the year in which the expenditure was made.. Furthermore, the amount of available refund is strictly limited, as mentioned above. What are the other factors that contributed to high reception of the community fund among local governments? First of all, it is crucial to take into account the historical context. Law on the Community Fund did not introduce completely new instrument, yet institutionalize and developed the mechanism that has been already applied in some communes. It needs to be reminded, the Communal Government Act contained (and still contains) provisions enabling local governments to empower communities to manage specified share in communal budget (Trykozko, 2014). Detailed procedures for setting this share and disposing it should be established in the commune's bylaws. Traditionally, one of the most popular instruments adopted locally were so called "community deductions" - mechanism very similar to the community fund, i.e. based on authorizing the community to dispose the share of local budget cal-

culated primarily with reference to community population. Sobiesiak-Penszko (2012) claim that the community fund has been introduced most extensively in the regions where the practice of community deductions or other similar instruments was most disseminated.

It is clear, therefore, why the Law on the Community Fund has been contested by the Polish Association of Rural Governments as limiting the communal autonomy (Swianiewcz, 2011). The introduction of uniform legislative model interfered with well established and developed locally practices. On the other hand, this law secures wide scope of autonomy for communal councils in determining key elements of community funds on their territory. What is essential, the communal councils are allowed not to introduce community fund in the formula imposed by the legislation and may continue to use their own scheme. Obviously, financial incentives made the legislative model of community fund more attractive, yet regulatory approach reflected in the Law on the Community Fund is relatively flexible and general. It focuses on setting minimum standards and protecting communities against arbitrary decisions of the communal councils or mayors. Communal councils are still authorized to make final decision on the allocation of funds to the communities and under circumstances that are broadly defined (see: figure 1) it may reject the community's proposal. The mayor has supervisory powers over the activities of community bodies and is entirely responsible for implementation of the projects selected by the communities.

Hence the communal autonomy is not undermined by the Law on the Community Fund. The major drawback of this law is rather lack of sufficient guarantees for empowerment of communities, primarily in the phase of projects implementation. The role of the communities ends up when the list of projects is submitted to the communal authorities. They are not provided with any rights to participate in the final decision-making and or realization of the projects. The same disadvantages have also introduced in 2018 PB and mentioned above regulation of PB, based on the mechanism of public consultations. As they do not enjoy judicial capacity, they cannot challenge in the administrative courts any decisions and actions undertaken by the commune with regard to the community fund. They need to rely on, in this matter, central government's bodies performing supervision over local governments. Therefore, introduction of the community fund might be perceived as an important, yet cautious step towards communities' empowerment.

As previously mentioned, in 2018, from the new term of local self-government, come in force in Poland new legislation of PB in municipalities. PB will be mandatory in large local government units. These regulations are questionable, because the legislator did not react to raised doubts about the organization of the former PB in the construction of public consultations (consultations do not constitute a decision). In addition, the adopted regulations do not correspond to new trends, in which votes are changed to discuss the best solutions in small groups (this is also characteristic for community fund).

Next years will show the functioning of this type of top down PB, presented different approach than in the case of community fund.

5 Conclusion

The case of Polish community fund proves that participatory budgeting might be effectively introduced via national legislation, yet specific conditions needs to be met in order to ensure acceptance of this approach among local communities. Firstly, the final decision on applying the legislative model of PB should be reserved to the competence of local governments. Autonomy of local governments needs to be combined with stimulants and incentives encouraging communities to follow the model set out in the legislation, primarily incentives of financial nature. What is also crucial, is to limit the legislative framework to setting minimum standards for the PB's procedure and leaving enough room for local governments to control detailed elements of the process. Finally, the historical context also matters. Success of the community fund was enhanced by the past experience with similar arrangements initiated and applied at local level. Law on the Community Fund institutionalized and disseminated those practices.

Important reservations need to be made to the general claim of the success of the community fund. Although the community fund became significant element of local governance and got absorbed „internalized" by the communities, more in-depth analysis is required in order to assess its impact on the quality of life and public services in rural areas or efficiency of the allocation of public resources via this mechanism.

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The Analysis of E-Government Services Adoption and Use in Slovenian Information Society between 2014 and 2017

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ABSTRACT

With the increasing role of information and communication technology (ICT) in the society, ICT's role is gaining importance in the aspect of provision and use of the public-sector services for the citizens. Especially in the European Union different activities have been conducted through the years to promote ICT use in the society. It has been mainly based on the Digital Agenda for Europe (DAE), which underlines the key role of ICT in the efforts to achieve its strategic objectives. Slovenia as an EU member state follows these directions but positions itself among less successful states in the EU. The well-known European Digital Economy and Society Index ranks Slovenia to the lower half of member states indicating possibilities for improvement. Although much can be said and done about the service-providers side this paper focuses on the users' side and especially on their digital inequality. The lack of studies in the area of digital inequality and online government services adoption and use is the main motivation for this research. The research uses the data provided by Slovenian annual survey Use of Information and Communication Technology in Households and by Individuals of the last four years. The analysis of this data, presented in the paper, exhibits that changes for the better are detected in Slovenian society, but the situation in public-sector services is not optima. The results demonstrate the existence of digital inequality considering the income level of households and education level of individual users. The synthesis of the data demonstrates that the Slovenian government and its ministries should consider adding tangible actions to the already set strategies if the country wants to catch up with the leading countries of the EU and achieve goals, set by the DAE.

Keywords: *digital inequality, digital divide, e-government, e-services use, information society, Slovenia*

JEL: O33

1 Introduction

Globally, as well as in Slovenia, the importance of information and communication technology (ICT) in society is increasing; furthermore, the technology performance, the scope of use, and the number of jobs that require its application, and consequently the relevant digital skills and knowledge, are also growing. Hüsing et al. (2015) estimate that by 2020 the European Union will have 750,000 jobs related to the information and communication technology available. Furthermore, studies of the United States, Japan, and nine European countries carried out between 1980 and 2004 revealed that fast-growing tech economies shift the education requirement from medium-skilled workers towards highly educated workers with appropriate ICT polarisation (Michaels, Natraj, and Van Reenen, 2014).

Digital skills and knowledge are important parameters of digital services adoption and use, being in private or public sector. In public sector technology has long been present with a goal to increase the efficiency and effectiveness of internal operations between public sector organisations (G2G) and the private sector (G2B) and citizens (G2C) (Weerakkody, El-Haddadeh, Sabol, Ghoneim, and Dzupka, 2012). With the use of ICT and thus faster and more efficient services, countries can make important savings. For example, following the successful introduction and use of e-procurement, the European Commission assessed annual savings of EUR 100 billion on the EU level (Davies, 2015). Merely with the opening of public sector data and offering this data to the public and the private sector via the Internet, the European Union estimates the creation of a market with an annual turnover of EUR 32 billion (Gascó-Hernández, 2014, p. 172). The government in Dubai, the first to exploit "blockchain technology", foresees that this technology will make savings of USD 3 billion in document management (Hughes, Graham, Rowley, and Lowe, 2018). On the other hand, ICT, in which the Internet certainly takes the lead, can also be successfully used by citizens. With technology-supported means, they can gain more relevant information faster and more effectively, improve and speed up communication with public sector institutions or their employees and perform various procedures at the level of transactional services without changing their physical location or being limited by official hours. Research shows that this saves time (Carter, Schaupp, Hobbs, and Campbell, 2012), costs (Wang and Liao, 2008), and raises the quality of administrative services (Sharma, 2015).

The key challenge is that the offer has to meet demand and use. Digital services require digitally equipped citizens, both in terms of technology and knowledge. Digital inequality, which sets out differences in society with regard to the use of ICT, has been present since the very beginning of information society. Tilly (1998) defines it in terms of inequality in the distribution of information resources in society, as a result of competitions between pairs of social categories, such as men - women, educated - uneducated, elderly - young, rich - poor, etc. Inequalities, which are often based on gender, education, income,

place of residence, and other parameters, indicate that for the full use of ICT in information society the first step must be the full familiarisation with the situation and users, followed by strategies, action plans, and concrete projects to finally reduce digital inequality and establish successful information society for all. Such society is the basis for the good use of e-government.

To our knowledge there exists a lack of studies in the area of digital inequality and online government services adoption and use. This was therefore the main motivation for our research. The article focuses on the state of information society in Slovenia, more specifically, on the scope of public administration e-service, even though all members of the European Union face similar challenges (Chipeva, Cruz-Jesus, Oliveira, and Irani, 2018; Cruz-Jesus, Vicente, Bacao, and Oliveira, 2016). Through the data analysis of the survey questionnaire Use of Information and Communication Technology in Households and by Individuals, which has been carried out by the Statistical Office of the Republic of Slovenia since 2008, we have determined and defined two research hypotheses.

In the second section, we define information society and digital inequality, the state of information society in Slovenia, which we then link with the development of Slovenian e-government. Through an overview of strategies we analyse the situation in today's society and identify the challenges that the Slovenian public sector and its e-government are facing. In the third section, we present a comparison of the situation over four years and the progress in individual areas or indicators of information society through a detailed analysis of the data between 2014 and 2017. Through the prism of influential factors of an individual's education and household income, we identify critical parameters for unsuitable conditions in the field of information society and e-government. In the last section, we provide a set of proposals through the synthesis and discussion and conclude with the guidelines for better development of this area in the future. This article contributes to the literature on digital divide by detecting and exploring the importance of main digital inequality factors in Slovenian society. At the same time the results can help Slovenian government to detect and improve the conditions in the society and react by conducting adequate activities in the future. Similar factors might be detected in other EU countries using the same statistical resources and similar or different actions might be conducted in those countries as well. The methodology and the results might be also used to extend the researched period to previous or future years to improve the longitudinal analysis in different EU states.

2 Theoretical Background

2.1 Information society and e-government

Information society began to develop in the nineties when information technology and the emerging Internet penetrated the wider social environment and simultaneously coincided with some other social, economic, and cultural

transformations (Castells, 2011). Misuraca et al. (2013) state that information society, the focus of which is on socioeconomic effects, emerged from the use of IT in the private sector, which expanded into general society. Nath (2017), similar to Webster (2014, p. 10), distinguishes five characteristics of information society: technological, economic, sociological, spatial, and cultural, the essential element being the technology that is or is not available to the individual in it its own private or business environment. Regardless of the above mentioned characteristics, differences between individuals or households are defined as digital inequality or digital divide. The OECD (2001) defines the digital divide as the difference between individuals, households, organisations, or geographical units with different socio-economic levels in terms of access to ICT and the use of the Internet for a wide range of activities. In the first surveys in this field, this gap was defined primarily from the perspective of unequal access opportunities to technology (DiMaggio, Hargittai, Celeste, and Shafer, 2004). Later, the digital divide was upgraded into digital inequality, adding two more aspects – inadequate knowledge and skills, and psychological and cultural constraints and differences (J. van Dijk and Hacker, 2003).

Thus, information society, with the help of ICT, improves the social situation of each individual and intervenes in business, private, and public-administrative spheres. A special branch of administrative science has developed through the increasing role of technology in the public sector, i.e. e-government. According to some definitions, the concept of e-government means the intensive use of the Internet for dealings with the administration – between administrative bodies within the administration, externally with citizens, companies, and other organisations. Most of the e-government definitions emphasise the importance of technology and the ability to transform and improve public administration processes. E-government is a common product of information technology and new principles of public administration, which have been a key element of the renewal of public services implemented by many countries in the 21st century (Yuan, Xi and Xiaoyi, 2012). The main concept of e-government is focused on empowering public institutions with electronic means and the introduction of e-governance as a vision of changing the nature of the state and its functioning (Garson, 2006, p. 19). Recent surveys in this area distinguish between the term e-government and e-governance. E-governance defines the framework for organising, planning, coordinating, managing, and monitoring strategies and activities with the support of ICT and especially the Internet (Palvia and Sharma, 2007). In this respect, UNESCO further highlights the involvement of citizens and wider society in decision-making processes with the aim of increasing the efficiency, transparency, and accountability of the state.

One of the key focuses of e-government services are the citizens. In the so-called Government to Citizen (G2C) area of e-government the public administration offers most different information and online services using various electronic channels. In this regard the European Commission adopted the Eu-

rope 2020 strategy (European Commission, 2010b), which aims to bring the EU economy out of crisis and prepare for the challenges of the next decade. One of the main objectives of the strategy is to promote the Internet and its use by all EU citizens, especially activities to increase digital literacy and accessibility. The strategy includes seven flagship initiatives, including the Digital Agenda for Europe (DAE), which underlines the key role of ICT in the efforts to achieve its strategic objectives (European Commission, 2010a). The chapter on digital literacy thus indicates that in 2010 as many as 30% of the EU population had never used the Internet (which is 150 million people), most often because they feel that they do not need it or because it is too expensive which is unacceptable from the view of information society progress. This group is mostly composed of population aged 65 to 74, those with low incomes, the unemployed, and less educated. In such a way digital illiteracy also influences the low level of e-government use and diminishes investments in it.

2.2 E-government and information society of Slovenia

Within the frames of the Digital Agenda for Europe, Slovenia has adopted the Digital Slovenia 2020 - Development strategy for the information society until 2020 (Ministry of Education, Science and Sport, 2016a) and associated strategic documents for the Next Generation Broadband Network Development Plan to 2020 (Ministry of Education, Science and Sport, 2016b) and the Cyber Security Strategy (Government of the Republic of Slovenia, 2016). In its analytical part, the Digital Slovenia 2020 strategy identifies unsuitable conditions of Slovenian society in this field and the lagging behind many EU countries indicating, inter alia, as reason the low level of investment in the development of information society and insufficient general awareness of the importance of ICT and the Internet for the development of the economy, state, and the entire society. Digital Slovenia 2020 foresees the following measures to eliminate the major digital gaps in the field of digital society: faster development of digital entrepreneurship, greater competitiveness of the ICT industry, general digitisation, the development of digital infrastructure, the construction of broadband infrastructure, the improvement of cyber security, and the development of an inclusive information society. These actions also coincide with the OECD Bridging the digital divide report (OECD, 2018). In terms of improving information society, the objectives of the strategy are:

- Raising general awareness of the importance of ICT and the Internet for the development of society;
- Sustainable, systematic, and focused investment in the development of a digital society;
- General digitisation according to the digital by default principle;
- Intensive and innovative use of ICT and the Internet in all segments of society;
- High-speed access to open Internet for all;

- An inclusive digital society,
- Safe cyberspace;
- Confidence in cyberspace and protection of human rights (MIZŠ, 2016).

In view of the development of e-government, Slovenia has established and implemented a number of strategies and action plans. The latest strategy, the Public Administration Development Strategy from 2015 to 2020 (Ministry of Public Administration, 2015), includes a special chapter entitled Effective informatics, increased use of e-services and interoperability of information solutions. These steps are necessary, as Slovenia is lagging behind in the use of public administration websites (18th place), in obtaining forms (14th place), and electronic submission of forms to public sector institutions (17th place) according to the European Digital Economy and Society Index (DESI) (European Commission, 2018). The strategy defines the following objectives:

- Unification and modernisation of entry points for citizens and the economy, portal integration;
- Establishment of a single contact centre of the government administration;
- Increased offer of more comprehensive life events coverage (expansion of the one-stop-shop concept, a single point of access, digitalisation of the entire process from start to finish, compliance with actual user needs, and active involvement of end users in all phases of development and implementation);
- Simplified use of electronic services and digital channels for end-users;
- Improvement of technical mechanisms for publishing useful and up-to-date open public sector data;
- Promotion of the improvement of the coverage of broadband communication channels;
- Inform users of electronic services and the advantages of digital communication, cooperation in promoting information society development, continuous education and promotion.

Based on decades of Slovenia's activities in the development of the information society and e-government, the adopted strategies that Slovenia has been carrying out for several years and the successful economic growth of the country in the recent past, we can set up the following hypotheses:

- In the period under review, Slovenia has advanced in terms of the level of use of public sector e-services;
- The differences in terms of digital inequality are decreasing, in particular with regard to education and socio-economic status.

3 Methods

3.1 Participants

The target group is the population of the Republic of Slovenia aged between 16 and 74 and their households. Respondents are selected randomly, whereby adequate representativeness of all demographic parameters, such as age, education, income class, and others is ensured in the sampling. Data on citizens and households is weighted accordingly, thus representing the representativeness of results over the entire Slovenian population. In order to ensure comparison of survey results during the years, representative samples are provided by Statistical Office of the Republic of Slovenia (SORS), and although respondents are not the same each year, the sample representation guarantees a sufficiently high level of reliability of results for longitudinal research (SORS, 2018).

3.2 Instrument

Data was collected in cooperation with the SORS and is based on the annual survey Use of Information and Communication Technology in Households and by Individuals (SORS, 2018). The data was obtained for 2014, 2015, 2016, and 2017. Since the questionnaires have structurally and substantively changed over the years, we had to determine the variables (questions) that remained the same over the years, which consequently reduced the set of indicators suitable for longitudinal analysis. At the same time, due to the minimum possible scope of the questionnaire used by SORS at the annual level, certain questions are exchanged every two years, often also due to the demands of European or other international institutions (e.g. Eurostat, the United Nations International Telecommunication Agency, etc.) causing another decrease of possible variables. Although the number of questions and consequently variables has increased over the years (from 139 in 2014 to 199 in 2017), we have ultimately determined 73 questions that remain the same over the years.

The questionnaire is primarily aimed at addressing regular Internet users, i.e. those who have used the Internet in the last 3 months; however, certain questions aim to address those who have used the Internet in the last 12 months. Some questions are aimed at addressing all respondents, regardless of whether they use the Internet or not. These are, in particular, questions about the state of the household information technology equipment or Internet access, regardless of which household member uses it. In addition to the set of questions about the state in the household, through the years the use of the Internet by the respondent is addressed by a series of questions about:

Means of accessing the Internet (technologies);

– Internet activities;
– Use of the Internet in connection with the public sector;

– Use of the Internet for shopping;
– Digital skills of the respondent.

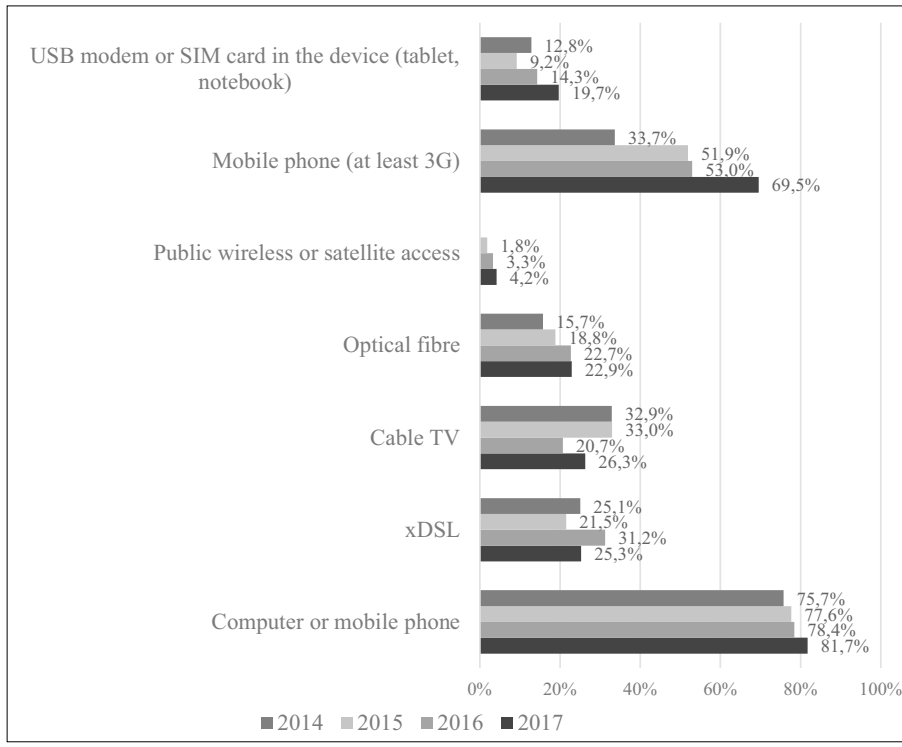
3.3 Procedure

Before the analysis, we prepared a database containing data on 1611 respondents in 2014, 1648 respondents in 2015, 1568 respondents in 2016, and 1670 respondents in 2017. We used Microsoft Excel and SPSS 25 software to analyse the data. The chi-square test for homogeneity was used for advanced analysis of the dependence of the level of education and the income group on individual measurable values. The conditions of this test are met, as we operate with dichotomous dependent variables, categorical independent variables with more than three values; the independence of observation and a sufficiently large sample ($N > 1600$) are ensured, and so is the condition of minimum frequency 5 per processing cell. Upon detailed analysis of the use of public administration services over the years and exploration of the impact of education and monthly income, we can determine the statistically significant effects of both independent variables. At the same time, Z-test for comparison of proportions (post-hoc test) with a significance level of at least $p < .05$ and Bonferon correction can help us determine groups or categories among which there are statistically significant differences (Agresti, 2007).

4 Results and Analysis

The first prerequisite for an empowered citizen in an information society, i.e. a digital citizen is the access to computer hardware (computer, smartphone, tablet, etc.) and the Internet (J. van Dijk and Hacker, 2003). The latter does not depend solely on an individual, but rather on the situation in the household, as not everyone needs his own device and access (a shared computer or a tablet in the household), although with today's ubiquitous smartphones and inexpensive data packets it is becoming more common that each individual owns a device. The results show (Figure 1) that in 2017 almost 82% of Slovenian households had access to the Internet, whereby there was also a significant increase in mobile access (in 2017, 69.5% of households), while the share of households with broadband (xDSL) or cable access remains between 25 and 30%. The detailed results examination shows an alarming difference in terms of income disparities, as there is 51 percent share of households with Internet access within the lowest tax class (household monthly net income up to EUR 700), and 100 percent share within the highest tax class (household monthly net income exceeding EUR 2100).

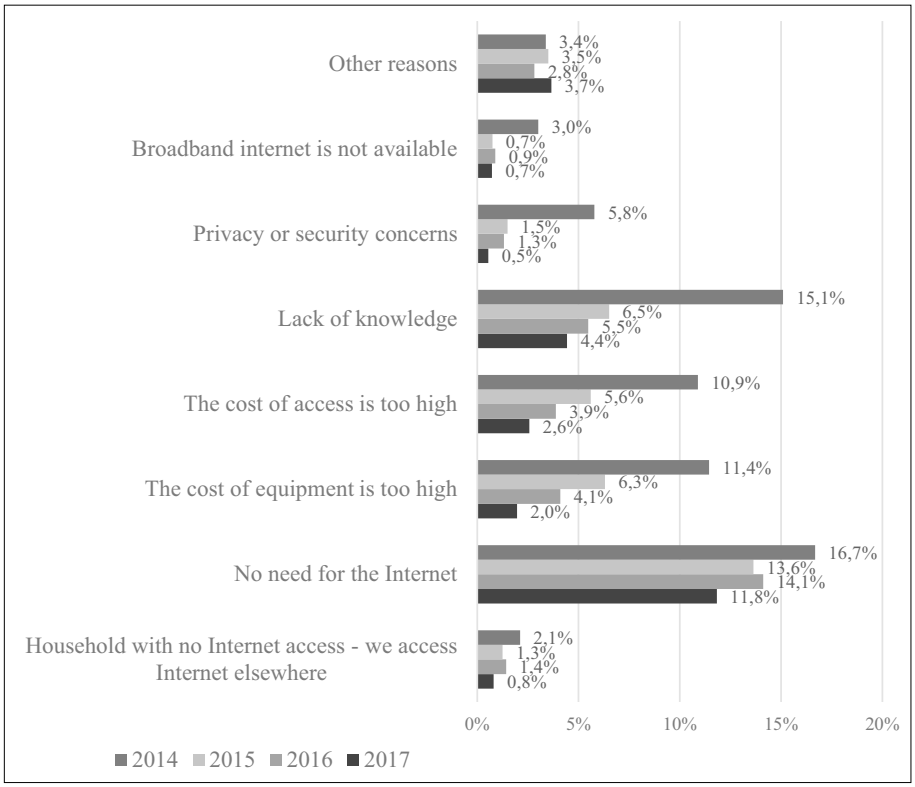
Figure 1: Share of households with access to the Internet



Source: own.

Over the years, the lack of need remains one of the main reasons why households do not have access to the Internet (Figure 2); however, the impact of equipment and access costs, inadequate knowledge and the inaccessibility of broadband have decreased as the reason for Internet inaccessibility.

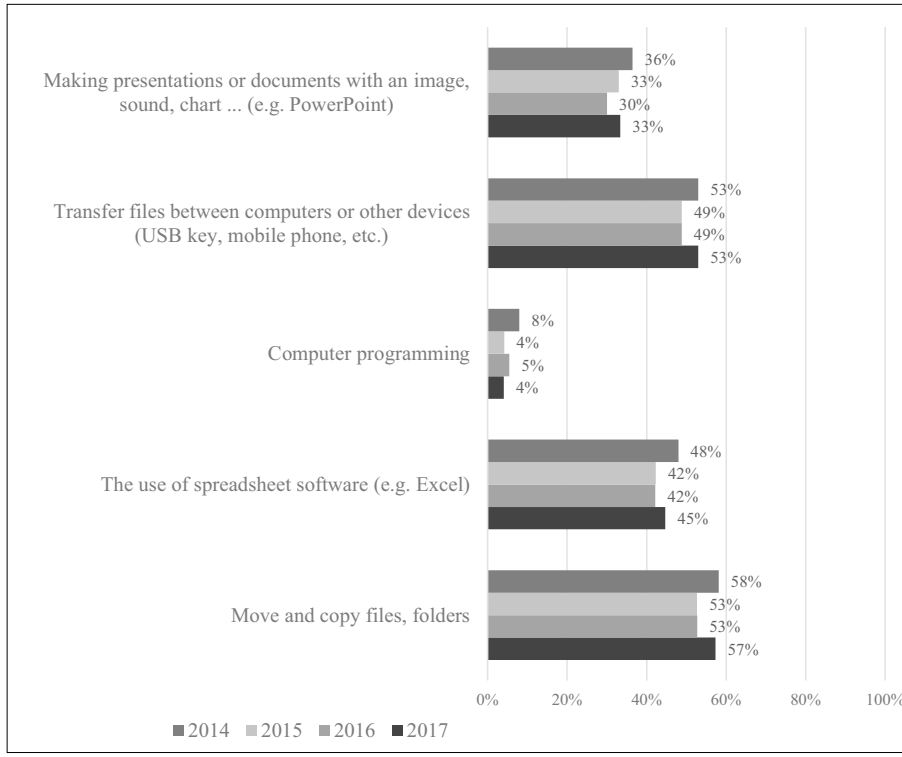
Figure 2: Share of households that do not have access to the Internet for various reasons



Source: own.

Once a user has access to technology and the Internet, he can start to take advantage of all the benefits in this respect; however, he is required to have at least some basic knowledge. The higher the level of knowledge, the more demanding technology and solutions, and the larger range thereof, may the user apply and exploit. The questionnaire itself does not include questions about basic knowledge, such as the use of browser or search engine, but focuses on more demanding processes, such as creating and calculating spreadsheets, managing files, creating and moving multimedia documents and programming. As shown in the figure below (Figure 3, data includes only those respondents who used the Internet in the last 12 months), the least users know how to write computer programs – although in recent years the EU has invested a lot in education and training providing this type of knowledge. In almost all indicators of knowledge, the share does not change drastically through the year and shows some type of stagnation of Slovenian society in this field.

Figure 3: Share of individuals with certain computer knowledge and skills



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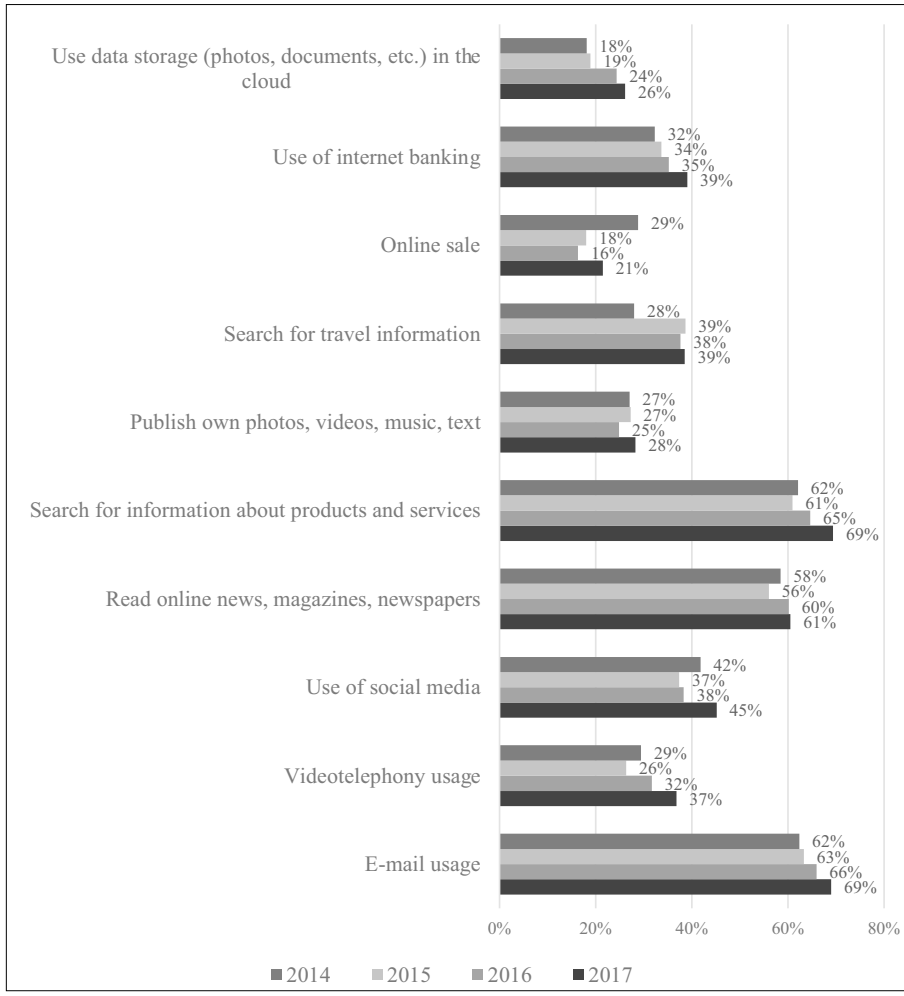
Based on relevant knowledge, the user can start to exploit everything that the Internet offers. Some of the most commonly used services are e-mail, reading of online news, magazines, and newspapers, and search of information on products and services (Figure 4). Slovenian citizens least use video telephony, online sales, and sharing of own photos, videos, music, and text online. Although the latter can be associated with concern about the disclosure of personal data, these activities require, above all, a higher level of knowledge (e.g., video preparation and editing, image graphic processing, etc.). We also detected three groups of activities: increasing (data storage, internet banking, travel information searching, product and service information search, videotelephony), stable (publishing of photos, reading news/magazines/newspapers, social media) and stagnating (online sale). In all activities, with the exception of online sales, an increase in the proportion of citizens who use individual activity can be observed over the years.

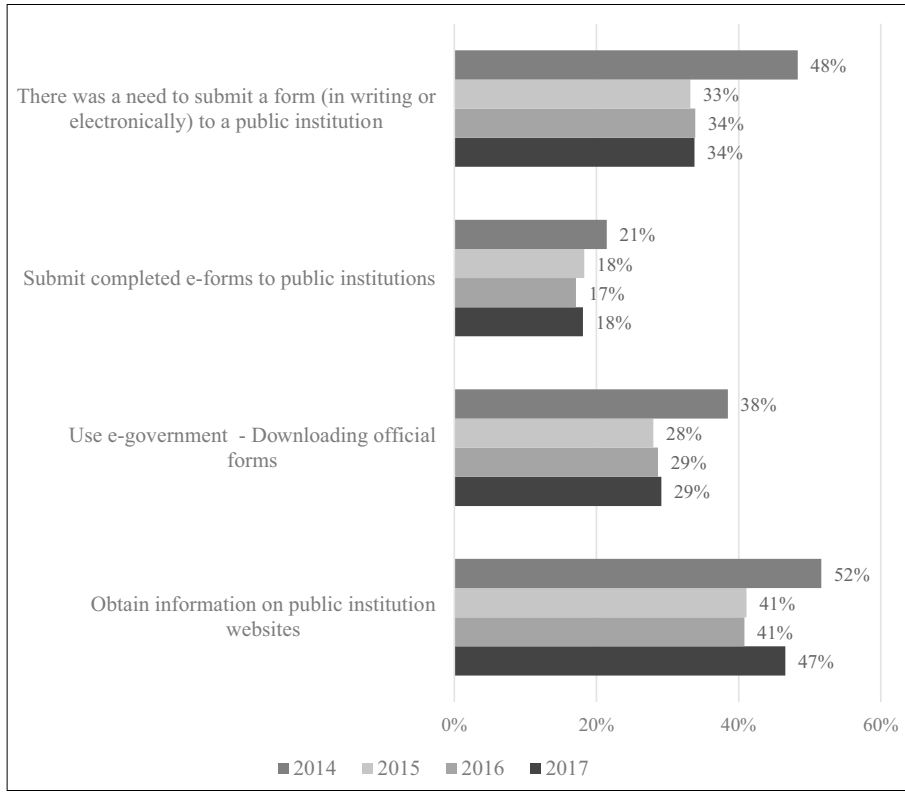
Figure 4: Share of citizens who use individual services on the Internet



Source: own.

The government can also offer a lot of benefits to citizens by providing online content and services on the Internet. On the one hand, such offer brings advantages and benefits for users, and on the other hand also for the government. For more than a decade, Slovenia has more or less successfully been developing and offering various government websites and portals, most often in accordance with its strategies and action plans. Nevertheless, the results are alarming. Although an increasing number of citizens use the Internet and carry out various activities in this respect, the level of use within the public sector is decreasing and remains at a low level (Figure 5). The differences between the years are statistically significant, which was confirmed by the chi-square test ($p < .05$).

Figure 5: Share of citizens who are regular Internet users and use individual public administration services



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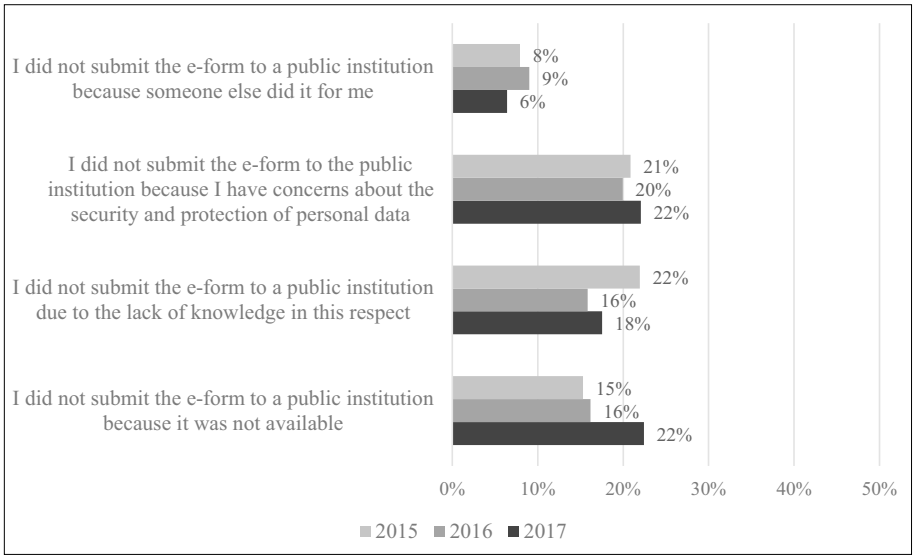
In particular, the transactional level of services, such as e-form submission over the Internet, is quite low. Data analysis summary shows that only about half of the people who had the need to submit any kind of form in the past months have submitted it electronically. The main reasons for this behaviour (Figure 6) were the lack of knowledge and concern about the safety and protection of personal data. From the fact that the proportion of those who have failed to submit the form because it was not available increases and the proportion of those who have failed to submit the form due to of the lack of knowledge decreases, we can conclude that the knowledge of the users is improving and that people increasingly look for online services and already perceive a lack of what they need, in this case electronic submission of forms.

Figure 6: The share of citizens who had to submit a form to a public institution physically or electronically but failed to do so electronically. The year 2014 is not indicated due to inaccurate data that was the result of incorrect interpretation of questions by the participants



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The results show that based on the monthly income of the respondents, there are statistically significant differences between the income groups in terms of certain categories (Table 1). Similar results are shown by other researchers.

The results also show that, according to the education of the respondent, there are statistically significant differences between the education groups in terms of some categories (Table 2). Regarding the services of obtaining information and forms, in all four years the first two categories (basic education or less and short or secondary vocational education) significantly differ from general or technical secondary education group, and the latter from the highest group. In some years, there is twice the difference between the lowest and the highest group. Regarding the most demanding services (submission of completed e-forms to public institutions), we can notice a triple difference between the first and the last group, which indicates that knowledge is of key importance for this type of services. Similar impacts of education on digital inequality were also determined by other authors (Sharma, 2015; Weiss, Yates, and Gulati, 2016).

Table 1: Share of users of individual service within a certain income group, expressed on monthly income per household (in euros). If the superscripted letters of two cells differ, the difference between the corresponding groups is statistically significant

	Obtaining information on public institution websites				Obtaining forms on public institution websites				Submission of completed e-forms to public institutions				
	< 700	700 - 1100	1100-1500	1500-2100	>2100	< 700	700 - 1100	1100-1500	1500-2100	>2100	< 700	700 - 1100	1100-1500	1500-2100	>2100
2014	60.2^{a}	56.1^{a}	67.7^{ab}	74.9^{bc}	83.0^{c}	29.1^{a}	38.4^{ab}	51.9^{bc}	55.3^{c}	73.5^{d}	16.0^{ab}	17.7^{b}	24.1^{ab}	31.4^{a}	49.9^{c}
2015	40.2^{ab}	43.2^{b}	49.2^{ab}	60.7^{a}	73.5^{c}	29.4^{ab}	23.8^{b}	30.4^{ab}	41.1^{a}	55.7^{c}	14.9^{a}	16.0^{a}	16.4^{a}	26.9^{a}	37.2^{b}
2016	40.5^{a}	43.4^{a}	46.8^{a}	53.6^{a}	73.1^{b}	15.1^{a}	24.5^{ab}	36.7^{b}	37.2^{b}	58.4^{c}	2.4^{a}	10.8^{ab}	19.0^{b}	20.7^{b}	42.1^{c}
2017	40.1^{a}	46.2^{a}	47.1^{a}	62.5^{b}	75.0^{c}	20.9^{a}	23.2^{a}	28.0^{a}	43.4^{b}	51.5^{b}	12.8^{ab}	14.0^{b}	14.8^{ab}	26.9^{ac}	34.3^{c}

Table 2: Share of users of individual service within a particular education group. If the superscripted letters of two cells differ, the difference between the corresponding groups is statistically significant

	Obtaining information on public institution websites				Obtaining forms on public institution websites				Submission of completed e-forms to public institutions			
	Basic educ. or less	Short or sec. vocational educ.	General or technical sec. educ.	Post-sec., short cycle higher, HE or more	Basic educ. or less	Short or sec. vocational educ.	General or technical sec. educ.	Post-sec., short cycle higher, HE or more	Basic educ. or less	Short or sec. vocational educ.	General or technical sec. educ.	Post-sec., short cycle higher, HE or more
2014	47.7[a]	55.5[a]	72.8[b]	86.9[c]	25.2[a]	34.5[a]	53.1[b]	76.2[c]	10.5[a]	15.4[a]	29.9[b]	46.3[c]
2015	37.2[a]	36.2[a]	54.3[b]	76.9[c]	19.8[a]	16.8[a]	36.6[b]	61.5[c]	15.5[ab]	9.5[b]	22.0[a]	42.2[c]
2016	38.2[a]	36.2[a]	56.1[b]	68.6[c]	19.6[a]	20.7[a]	37.5[b]	57.2[c]	13.6[ab]	9.7[b]	22.8[a]	34.3[c]
2017	39.0[a]	40.6[a]	60.1[b]	77.6[c]	14.9[a]	18.9[a]	39.0[b]	56.3[c]	12.1[ab]	13.5[b]	21.1[a]	36.2[c]

* HE – higher education

5 Discussion

The results show that Slovenian society, like the rest of the EU, is developing quite successfully in the field of ICT. Despite the less favourable results or the lagging behind the best in the EU, we can observe an increase in most indicators of individuals and households with Internet access. The biggest jump is observed in the mobile phone Internet access indicator (34% of users in 2014, 70% of users in 2017). This increase might be largely due to increased offer of mobile data transmission by various domestic and foreign providers and in lower prices. Increased competition on the part of providers, the entry of some new foreign providers into the Slovenian market, and the popularisation of the use of smartphones and applications have certainly contributed to improvements. A major step, indirectly linked to these indicators, is certainly also a change in roaming charges in the EU and the so called Roaming Like at Home initiative (European Commission, 2015; European Commission, 2016), which convinced many to start using mobile Internet abroad; however, there is still a low level of broadband Internet access in households, which can be slightly compensated with rapid mobile data transmission (4G); nevertheless, Slovenia still needs to carry out considerable work in this field in the coming years. The steps are defined in the Next-Generation Broadband Network Development Plan to 2020 (Ministry of Education, Science and Sport, 2016b), under which Slovenia, as a member of the EU, is to pursue the goal of the Digital Agenda for Europe, that is to enable all citizens access to broadband connections above 30 Mb/s, and ensure that at least half of households are subscribe to internet connections above 100 Mb/s by 2020. Research has showed that the higher the broadband speed the higher the chance of an increased household income (Rohman and Bohlin, 2013).

According to data from 2017, around 130,000 Slovenian households still do not have an Internet connection. The reason, aligned with the research results of others (van Dijk and Hacker, 2003; Chetty et al., 2017), given by most of them is that they do not need the Internet (almost all the respondents have no children). Among these are more than 100,000 households with respondents over the age of 55, the group that distinguishes Slovenia most from the developed European countries in terms of internet users (European Commission, 2018). To decrease the influence of age within the digital inequality, the government should put more effort into simplifying e-services and training elderly people, especially at the level of safe use, which will also increase trust in the Internet and e-services (Alzahrani, Al-Karaghouli, and Weerakkody, 2017).

The knowledge of those who have used the Internet in the last 12 months is worse than the European average. It is a cause for concern because in the last four years the situation in this area has not changed much and also the level of users' computer programming knowledge, especially young people, has not increased. Given the needs of the market and the trend towards new, digitally oriented jobs, Slovenia should consider appropriate upgrades of the

school curriculum in the context of formal education and encourage young people to develop digital skills and knowledge since this knowledge is becoming critical for generating new knowledge (Fluck et al., 2016). At the same time, schools should consider differences in socioeconomic status of students since it effects their digital skills capability (Aesaert and van Braak, 2015). Furthermore, researchers have found that better digital skills of adolescents enable better online opportunities and decrease online risk (Rodríguez-de-Dios, van Oosten, and Igartua, 2018).

Although changes are taking place in connection with the increasing presence and number of services of public institutions on the Internet over the years, the level of use is not increasing. The renovated government portal eUprava, new services on the Slovenian business point portal and eTax portal, the COBISS library system with its mobile application, the eHealth portal and mandatory e-invoices for operations with public sector are just some of the novelties of the past years; however there seems to be no breakthrough. On the one hand, the reason behind it could be in the complexity of the use of technology, especially the digital certificates, which presents many problems to technically less capable citizens. On the other hand, only less than half of the Internet users browse the websites of public institutions. Although researchers found that in more developed countries the use of complex government services online is not corelated to the digital skills level (Ebbers, Jansen, and van Deursen, 2016) we evaluate that situation in Slovenia is different. The first opportunity to change the situation we are faced with is an opportunity in connection with new trust services, such as smsPASS, which enable citizens to simply identify and use services through smartphones without any specific software or digital skills and with the use of mobile technology. But the government will have to increase its investment in promotional activities, stressed as crucial awareness and adoption factor (Yang, 2016), as citizens are poorly familiar or not familiar with different possible uses of the Internet regarding the provision of services or simply the availability of information. At the same time, public sector service providers, in cooperation with experts in this field and especially with end users, will need to put a lot of effort into the analysis of the user experience. Only then will users be eager to use online services and even increase the existing use, as explored by Kumar, Sachan, and Mukherjee (2017).

Furthermore, the results of our research show a significant influence of the level of education and income group on all three measured indicators of public institution service use. Similarly, the analysis of 146 countries by Weiss, Yates, and Gulati (2016) showed that higher levels of income and education enhance broadband affordability. According to our analysis by income groups, the top income group (more than EUR 2,100 monthly income per household), with statistically significant better results than other groups, clearly stands out. In 2017, this distinctive difference was lost in comparison with a slightly lower income group (between EUR 1,500 and EUR 2,100 monthly income per

household), which is a positive indicator of change. However, the first three lower income groups show a lower level of use (the same significance class), which proves that the financial level of the household affects the level of use of the public-sector web services, and that EUR 1,500 monthly income per household is the line between one and the other. If the public sector wants to encourage citizens to use developed, established websites and services, it will have to look for ways to enable them to those with lower income.

The analysis of the differences between classes shows that online services of public institutions are mainly used by well-educated people. In some cases, the difference between the lowest (basic education or less) and the highest classes (post-secondary, short cycle higher, higher education or more) is more than double (e.g. obtaining information on the websites of public institutions). The difference has been decreasing over the years, but by a maximum of 10 percentage points. However, for technically more demanding services, which also require more knowledge (submission of completed e-forms to public institutions), the statistically significant differences between the lowest and the highest classes are even greater (from 20 to 35 percentage points). Other EU member states, even the most developed (Cruz-Jesus et al., 2016) face similar differences. Government's activity aimed at increasing the use of online services by public institutions is seen in promoting the offer and simplifying services, especially those that are more demanding. Above all, the offer must ensure the usability and efficiency of e-services (Chipeva et al., 2018). Based on the analysis, we can refute our first hypothesis that Slovenia has progressed regarding the level of the use of public sector e-services in the period under consideration. Despite the fact that in 2014 the results were high, which suggests the influence of a slightly different methodology, the indicators of other years indicate stagnation and virtually no visible progress in this area. Therefore, based on the analysis we can refute our second hypothesis. The results show that according to the monthly income of the respondent, there are statistically significant differences for certain categories between the income groups, which means that the differences do not decrease from the point of view of digital inequality. The statistically significant differences between income and education classes remain and are detected by other researchers as well (Aesaert and van Braak, 2015).

6 Limitations

This research used an established survey Use of Information and Communication Technology in Households and by Individuals, defined by EUROSTAT. For a more thorough future research we suggest that the questionnaire should be upgraded to a level where the dichotomous variables would be replaced by ordinal ones, thus enabling better statistical testing but at the same time preserve backward compatibility with previous surveys.

Additionally, the survey data used in our research is based on the answers and opinions of the respondents and is therefore subjective. Especially with the questions of self-evaluation (like digital skills) some research shows that people tend to evaluate their knowledge better than it actually is.

Using the univariate analysis of the impact of digital inequality factors on the use of e-government services we could not asses the relative impact of individual factors.

We also detected a higher deviation of the results from the year 2014. We acknowledged this in our analysis but would suggest skipping that year in the future research.

7 Conclusion

In information society the use of information technology by citizens depends on the availability, reliability, security, and efficiency of the services offered (Sharma, 2015). In terms of information society and e-government development indicators, Slovenia is within the European average, which is a poor result for a country that started with the development of information society and e-business in public administration two decades ago. At the level of the use of online services by public institutions, the results could be better, as the computerised databases and registers in Slovenia enable the development of services that follow the main principles of e-government development, such as the provision of distance services, one-stop-shop concept and once-only-principle including the compulsory electronic exchange of data between the organisations of public administration.

To evaluate the development of the filed in the last years the analysis was carried out on a representative sample of Slovenian citizens and reflects the situation in the entire Slovenian society. The results show a lack of progress in many areas and warn about the present economic and education divide of the society. To overcome the obstacles and improve the situation Slovenian government must transform the already established and well written strategies in concrete actions with a focus on deprived groups. The only thing that counts is what ultimately reflects in society and leads it to a better future, for which concrete steps are needed.

Future research could focus on comparison of all EU countries which are similar to Slovenia, especially those that made a better progress in the field under consideration. Such results could increase the identification of best possible actions for better development of information society and its e-government. Using the accessible data from EURSOTAT we also suggest the use of multivariate analysis as a venue for future research.

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Povzetki (Summaries in Slovenian Language)

1. Uporaba družbenega omrežja Facebook v slovenski lokalni samoupravi: empirični dokazi

Tina Jukić, Blaž Svete

Članek predstavlja prispevek k hitro rastočemu področju uporabe družbenih omrežij v organizacijah javne uprave. Kljub naraščajočemu obsegu raziskav na tem področju, še vedno primanjkuje podrobnih empiričnih podatkov. Zaradi tega sva si zadala cilj opraviti celovito empirično analizo uporabe Facebooka, kot najbolj priljubljenega družbenega omrežja med slovenskimi občinami. Metodološko raziskava temelji na 21 kazalnikih, ki merijo uporabo, vključevanje, multikanalne značilnosti, multimedijske vsebine in obstoj strategij glede same uporabe družbenih omrežij. Meritve so potekale v vseh 212 slovenskih občinah. Opazovanje interakcij občin na Facebooku je trajalo šest mesecev, od novembra 2015 do maja 2016. Rezultati analize kažejo, da je bilo v letu 2016 na Facebooku zastopanih le 36 % občin, pri čemer je bila v opazovanem šestmesečnem obdobju stopnja interakcij skoraj četrtine občin ničelna. Sicer pa so bile na občinskih Facebook straneh zabeležene predvsem enostranske interakcije, kar pušča glede na Facebook kot družbeno omrežje z največ potenciala glede dosega in vključevanja uporabnikov še veliko prostora za izboljšave. Rezultati analize so uporabni kot vir informacij in za primerjave za vodstva slovenskih in tujih občin.

Ključne besede: *vključevanje državljanov, e-participacija, e-upravljanje, občine, lokalna samouprava, Slovenija, družbeni mediji, družbena omrežja, Facebook*

2. Odprta uprava in družbeni mediji v državah zahodnega Balkana

Mirela Mabić, Dražena Gašpar

Članek analizira prisotnost in aktivnosti na področju družbenih medijev v državah, ki so bile v preteklosti del iste države, torej v Bosni in Hercegovini (BIH), na Kosovem, v Črni Gori, Srbiji in Makedoniji (države zahodnega Balkana, DZB), in v Sloveniji ter na Hrvaškem, ki sta članici EU. Avtorici sta analizirali uradne profile omenjenih držav na družbenih omrežjih in izračunali indeks za oceno uporabe Facebooka (FAI, *Facebook Assessment Index*) za DZB ter Slovenijo in Hrvaško za primerjavo. Rezultati so pokazali, da sta Twitter in Facebook najpogosteje uporabljeni družbeni omrežji. Znotraj skupine DZB indeksa FAI ni bilo mogoče izračunati za BIH in Srbijo, vrednosti indeksa za drugi dve državi pa sta bili visoki. Državi, ki sta služili kot merilo za primerjavo, imata nižje vrednosti, a

pri njiju znatno izstopajo posamezni podkazalniki. Vlade držav, ki so bile predmet raziskave, večinoma objavljajo promocijske podatke o svojem delu. Posledično imajo na svojih družbenih medijih sorazmerno majhno število prijateljev/sledilcev/naročnikov in komentarjev/delitev/všečkov. Iz tega izhaja, da te države ne izkoriščajo polnega potenciala družbenih medijev, da bi povečale vidnost in preglednost svojega dela ter zagotovile komunikacijsko sredstvo za izmenjavo idej in informacij med vlado in državljani. Na ta način bi bilo mogoče vzpostaviti bolj vključujoče oblikovanje javnih politik in povečati zaupanje med vlado in državljani. Ugotovitve omogočajo vpogled v naravo aktivnosti na družbenih medijih v DZB. Čeprav sodeč po vrednostih FAI ni izkazano, da bi DZB znatno zaostajale v uveljavljenih primerjavah, rezultati dokazujejo, da so nekateri poudarki, ki jih literatura predlaga in ki sva jih uporabili pri izračunu FAI, preveč poenostavljeni, da bi lahko na njihovi osnovi ustrezno ovrednotili objave na Facebook straneh. Zato ta članek prispeva predvsem k ozaveščanju o potencialu za naprej ter o interdisciplinarnih vidikih uporabe državnih družbenih medijev, tako v teoriji kot praksi.

Ključne besede: odprta uprava, e-participacija, družbeni mediji, Facebook, Twitter, zahodni Balkan, primerjave

3. Spletno reševanje potrošniških sporov (ODR) – mehanizem za inovativno e-upravljanje v EU

Urša Jeretina

Spletno reševanje sporov (ODR, *Online Dispute Resolution*) bi lahko predstavljalo prvi pomemben korak k prilagajanju javne uprave zahtevam digitalne dobe, ki je prinesla nov pojav e-sporov. V tem kontekstu članek preučuje pomen sistemov pojavnosti potrošniškega ODR znotraj EU kot novega mehanizma za reševanje sporov, vključno s spletnimi spori in njihovim reševanjem. Za oceno narave in obsega razvoja ODR na nastajajočem polju e-upravljanja je potreben teoretičen raziskovalni pristop, skupaj s primerjalno analizo podatkov, ki bo omogočila identifikacijo ključnih pozitivnih in negativnih izzivov uporabe ODR. Nekatere države članice EU so že sprejele ODR kot orodje digitalnega e-upravljanja, pri drugih je implementacija še v teku. ODR se je že izkazalo kot učinkovit način reševanja vsaj določenih vrst sporov (npr. čezmejnih), na žalost pa ta način reševanja sporov še ni izkoristil svojega polnega potenciala. Pomanjkanje ustrezne sodne prakse na področju ODR je dodaten razlog za le postopen porast uporabe sistemov ODR in njihove učinkovitosti. Ključne ugotovitve so oblikovane kot seznam izzivov, s katerimi se bo EU morala soočiti, da bi ODR v prihodnosti lahko postalo pomemben sestavni del inovativnega evropskega e-upravljanja.

Ključne besede: reševanje sporov, varstvo potrošnikov, spletno reševanje sporov (ODR), e-spori, upravljanje v digitalni dobi, inovativno e-upravljanje, Evropska unija

4. Uveljaviti učinkovito transparentnost: izkušnje iz evalvacije hamburškega zakona

Christoph E. Mueller, Bettina Engewald

Zakoni o transparentnosti oziroma dostopu do informacij (FOIA, *Freeedom of Information Acts*) stremijo k izboljšanju javne dostopnosti informacij javnih oblasti in s tem k zvišanju ravni preglednosti. Zato je pomembno, da ugotovimo, ali so bili nameravani učinki FOIA doseženi oziroma v kolikšni meri ter kako bi lahko izboljšali njihovo izvrševanje. Ta članek prinaša vrednostno oceno hamburškega zakona o transparentnosti (HmbZT), prvega nemškega FOIA, ki oblasti zavezuje, da proaktivno razkrivajo podatke iz vladnega sektorja. Namen tega članka je predočiti uporaben primer, kako lahko evalvacija FOIA služi kot vir koristnih informacij za oblikovalce politik in javne oblasti. Rezultati analize, ki temelji na kombinaciji metod (to so standardizirane ankete, sekundarni statistični podatki, kvalitativni strokovni intervjuji in analiza dokumentov), so pripeljali do zaključka, da je HmbZT zelo uspešen, kar se tiče omogočanja neposrednega dostopa. Po drugi stran je bilo ugotovljeno, da se strategije uveljavljanja tega zakona pri različnih tipih oblasti znatno razlikujejo, vendar je proaktivno razkrivanje podatkov povsod učinkovito uveljavljeno. Poleg tega zakon izkazuje določene pomanjkljivosti, ki bi jih bilo potrebno v prihodnosti odpraviti. Evalvacija HmbZT tako prinaša poleg koristnega vpogleda v možen način implementacije tega zakona za praktike tudi ideje za raziskovalce, kako izvesti celovito evalvacijo FOIA.

Ključne besede: dostop do informacij, proaktivna transparentnost, FOIA, hamburški zakon o transparentnosti, evalvacija

5. Evropska listina o skupnih dobrinah (osnutek) – med priložnostmi in izzivi

Anna Simonati

Koncept lastništva, ki (v Italiji in podobno tudi znotraj drugih evropskih sistemov) še vedno v osnovi temelji na pravilih zasebnega prava, danes ne zadostuje več za zagotavljanje splošnega interesa za vedno bolj odprt dostop do omejenih virov z vidika enakosti in pravičnosti. Hkrati se pojavljajo močne kritike pogostega pojava privatizacije izvirno javnih sredstev in virov. Z grožnjami, ki jih privatizacija predstavlja za uveljavljanje javne koristi, se je moč spopasti s pomočjo vzpostavitve novega pravnega okvirja za zaščito pravice prebivalcev do udeležbe ne le pri koriščenju, ampak tudi pri upravljanju skupnih dobrin. Izraz te zamisli je osnutek Evropske listine o skupnih dobrinah, ki je nastala kot rezultat nizanja idej skupine strokovnjakov, torej ne gre za pravni vir. Dejstvo, da narava tega dokumenta ni normativna, je avtorjem omogočilo izraziti svoja stališča na nekoliko bolj 'drzen' način. Članek se osredotoča na Listino kot izhodišče za razpravo o določenih odprtih vprašanjih. Glavni predlog se nanaša na morebitno uporabo novih participativnih modelov za vključevanje skupnosti uporabnikov v strateške odločitve upravljanja s skupnimi dobrinami. S tega

vidika je strnjeno opisana tudi italijanska pravna ureditev. V Italiji ni nikakršnih sistemskih pravil o skupnih dobrinah, vendar pa so bili poskusno uvedeni določeni postopki vključevanja zainteresiranih lokalnih skupnosti v strateške odločitve, kar lahko služi kot ilustracija tudi za druge države članice EU.

Ključne besede: Evropska listina o skupnih dobrinah, inovacija, participacija, javna korist, Italija

6. Vročanje dokumentov v upravnem procesnem pravu – primerjalna analiza

Ines Golob

Članek vsebuje primerjalno in empirično analizo vročanja dokumentov v postopkih, kot ključnega procesnega dejanja, ki ustvarja pravne učinke v pravnih razmerjih. V Sloveniji je vročanje urejeno v treh glavnih postopkovnih zakonih – v Zakonu o splošnem upravnem postopku, Zakonu o kazenskem postopku in Zakonu o pravdnem postopku. Navedeni zakoni se nanašajo na različne tipe razmerji in njihove značilnosti, na primer v upravnih postopkih prevladuje javni interes nad zasebnim. Namen te raziskave, ki temelji predvsem na normativnih in primerjalnih metodah ter analizi sodne prakse, je pokazati, kako pomembno je določno urejanje različnih področji in pravil vročanja v posameznih tipih postopkov. Rezultati raziskave kažejo na to, da bi moralo biti vročanje v določenih primerih urejeno na poenoten način. Hkrati pa specifične značilnosti različnih vrst pravnih razmerji terjajo posamične rešitve. Članek tako odpira vrata za nadaljnje primerjalno raziskovanje in izboljšanje regulacije v praksi.

Ključne besede: upravno procesno pravo, sodna praksa, vročanje dokumentov, vročitev, primerjalna analiza, Slovenija

7. Učinek sistema nadzora na področju javnega naročanja na madžarsko javno upravo

György Nyikos, Gábor Soós

Kompleksnost javnega naročanja in s tem povezanega nadzora je pomembno vprašanje, s katerim se soočajo javne oblasti na Madžarskem. Odločanje v postopkih javnega naročanja je pod vplivom ‚strahu' pred nadzorom državnih organov in revizorjev EU. Raziskav o učinkih delovanja takšnega sistema pa v veliki meri primanjkuje. Namen tega članka je raziskati delovanje nadzornega sistema na področju javnih naročil, financiranih s strani EU, in preučiti njihov dejanski in potencialni vpliv na nabave javnih oblasti. Metodološko članek najprej vključuje uvodno predstavitev značilnosti nadzornega sistema in nato analizo podatkov zadevnih organov, da bi ugotovili, kakšen je učinek nadzora in katere so morebitne težave pri delovanju sistema. Rezultati kažejo, da so kljub na videz pozitivnemu učinku glede postopkovne pravilnosti posegi v odločitve javnih oblasti in na ta način povzročene zamude problematični. Zato se

predlaga, da bi madžarska vlada preučila problematiko racionalizacije nadzornih postopkov, na primer prek vzorčnega preverjanja ali osredotočanja na najbolj tvegane postopke. Raziskava prinaša prvo akademsko analizo podatkov v zvezi z nadzorom javnega naročanja na Madžarskem. Hkrati želi spodbuditi madžarsko in druge vlade k preverjanju učinkovitosti tovrstnih postopkov in čim večji odpravi administrativnih bremen, s katerimi se soočajo javne oblasti.

Ključne besede: javna naročila, administrativno breme, revizija, ex ante nadzor, sredstva EU, Madžarska

8. Analiza obdavčitve nepremičnin v Bosni in Hercegovini

Lejla Lazović-Pita, Amina Močević

Namen tega članka je zapolniti vrzel pomanjkanja literature na področju analize obdavčitve nepremičnin v Bosni in Hercegovini (BIH) in rezultate kot študijo primera dati na razpolago podobnim državam. Na temelju metodologije IMF in OECD za davke na nepremičnine najina raziskava vključuje primerjavo davka na nepremičnine v dveh entitetah BIH, upoštevaje mednarodno prakso na tem področju. Rezultati kažejo, da je v BIH najti nedoslednosti, kar se tiče mednarodne klasifikacije davkov na nepremičnine in da se obdavčitev nepremičnin v dveh entitetah BIH (RS in FBIH) razlikuje. Uveljavljene so tri vrste nepremičninskega davka, to so davek na nepremičnine v RS, davek na promet z nepremičninami in davek na nepremičnine v FBIH. Ugotovljene razlike vplivajo na obseg in delež prihodkov iz obdavčitve nepremičnin v obeh entitetah, kar vpliva na lokalne skupnosti in njihove prihodke. Zato sva se osredotočili na davke na nepremičnine v FBIH, ki so v pristojnosti kantonov. Raziskava je pokazala, da večina prihodkov iz naslova nepremičninske obdavčitve izvira iz kantona Sarajevo in obdavčitve prometa z nepremičninami v štirih občinah, ki sodijo pod Sarajevo kot mesto. Ob upoštevanju pomanjkanja dolgoročnih zanesljivih podatkov v obeh entitetah BIH sva zaključili z nekaj priporočili glede reform politike na področju nepremičnin v FBIH v prihodnosti.

Ključne besede: obdavčitev, lokalne skupnosti, nepremičninski davek, davek na promet z nepremičninami, BIH, mednarodna primerjava

9. Je lahko participativna priprava proračuna od zgoraj navzdol učinkovita? Primer poljskega skupnostnega sklada

Dawid Sześciło, Bartosz Wilk

Članek vsebuje priporočila glede participativnega proračuna (PP), kar je ena od najbolj priznanih upravljavskih inovacij v zadnjih desetletjih. Ta globalni pojav v praksi predstavlja premik v smeri participativnega in sodelovalnega managementa javnih sredstev na lokalni ravni. Namen članka je določiti, kdaj je lahko pristop od zgoraj navzdol k PP dobrodošel, kajti za PP sheme po svetu je značilno, da se pojavljajo v obliki lokalnih iniciativ, ki jih sprožajo bodisi

civilne iniciative bodisi lokalne oblasti. Analiza temelji na opisu primera PP, ki ga uvajajo predpisi na ravni države in ki podrobno ureja postopke PP. Članek preučuje poljske izkušnje na področju učinkovitosti pristopa od zgoraj navzdol pri PP. Dokazuje, da ta pristop lahko učinkovito deluje, če PP spremljajo občutne spodbude in lokalnim skupnostim nudi široko polje avtonomije in fleksibilnosti. Poljska izkušnja kaže, da takšna iniciativa lahko postane razmeroma uspešna, pri čemer pa mora biti izpolnjena cela vrsta pogojev, da lahko pride do širše uporabe zakonodajnega modela participativne priprave proračuna. Rezultati so v praksi uporabni za osrednje vladne institucije, ki razmišljajo o uvedbi določenega normativnega okvirja za participativno upravljanje na lokalni ravni. Izvirnost raziskave je v tem, da analizira zgodbo o uspehu na področju PP, ki je bila uvedena s pomočjo državnih predpisov, in ugotavlja, kdaj je lahko takšen pristop učinkovit.

Ključne besede: skupnostni sklad, participativni proračun, participativno upravljanje, lokalna uprava, lokalni proračun, civilna družba, participacija državljanov, Poljska

10. Analiza prilagoditve storitev e-uprave in njihove uporabe v slovenski informacijski družbi med 2014 in 2017

Mitja Dečman

Ob naraščajoči družbeni vlogi informacijsko-komunikacijske tehnologije (IKT), IKT pridobiva pomen tudi z vidika zagotavljanja in uporabe spletnih storitev javnega sektorja za državljane. V teku let je bilo izvedenih veliko aktivnosti z namenom promocije IKT, še posebej znotraj EU, zlasti na temelju Evropske digitalne agende (EDA). Ta poudarja ključno vlogo IKT pri prizadevanjih za doseganje njenih strateških ciljev. Slovenija kot država članica EU sledi tem usmeritvam, vendar se uvršča v manj uspešne države v EU. Na osnovi znanega evropskega kazalnika digitalnega gospodarstva in družbe (*European Digital Economy and Society Index*) se Slovenija uvršča v spodnjo polovico držav članic, kar kaže na možnosti za napredek. Čeprav odmislimo ponudnike storitev kot akterje, se ta članek osredotoča na uporabnike, še posebej pa na digitalno neenakost med njimi. V raziskavi so uporabljeni podatki iz slovenskega letnega poročila Uporaba IKT v gospodinjstvih in pri posameznikih za zadnja štiri leta. Analiza podatkov, ki so predstavljeni v tej raziskavi, izpostavlja, da je v slovenski družbi moč opaziti spremembe na bolje, kar pa na področju storitev javnega sektorja velja le v omejenem obsegu. Rezultati prav tako kažejo, da je prisotna digitalna neenakost, ki je pri gospodinjstvih povezana z ravnijo njihovih prihodkov, pri posameznih uporabnikih pa s stopnjo njihove izobrazbe. Sinteza podatkov prikaže, da morajo slovenska vlada in posamezna ministrstva zastavljenim strategijam dodati oprijemljive ukrepe, če želi Slovenija dohiteti vodilne države članice EU in uresničiti cilje v okviru digitalne agende kot enega od sedmih stebrov Strategije Evropa 2020.

Ključne besede: digitalna neenakost, digitalni razkorak, e-upravljanje, uporaba e-storitev, informacijska družba, Slovenija

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