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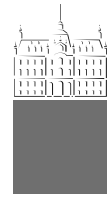

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Some Thoughts on the Administration of the Regional Development in the Member States of the EU – In the Light of the Role of the Municipal Bodies[1]

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ABSTRACT

Municipalities are traditionally responsible for several regional planning and development tasks even if different systems have evolved in the Member States of the European Union. The administration of regional planning has been strongly influenced by the European integration. The allocation of the European Structural and Investment Funds was a major task of the recipients. The regional approach of the structural funds was a catalyst for the territorial reforms in several EU Member States. Although originally the regional reforms were based on the NPM-related reforms the changes were supported by the post-NPM paradigms (especially by the Good Governance paradigm) as well. In several countries the Crisis caused centralisation and the concentration of the structures. Thus three major models could be distinguished: centralised regional development systems, decentralised systems and federal systems. The characteristics of these systems are reviewed in the article focusing on their major differences and similarities.

Keywords: *centralisation, decentralisation, European Structural and Investment Funds, federalism, municipalities, regional development*

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1 Introduction

The significance of the public administration increased in the field of the regional development in the last decades. Not only the nation states but the supranational integrations had important competencies in the regional development. In Europe the European Union became an outstanding actor of the regional policies (see Table 1).

1 *This article was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences. This article is part of the research project „New tendencies of regulating the Single Market and their effects on the organization and functioning of public administration" No. OTKA K 112550 (leader of the project: Prof. Dr. Marianna Nagy).*

Table 1 Resources for economic, social and territorial cohesion in the EU (2014-2020)

Aim	Resource (in 2011 prices)
Resources for economic, social and territorial cohesion (2014-2020) in the EU	EUR 325 145 694 739
– from this allocated to the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund	EUR 322 145 694 739
– from this allocated for Youth Employment Initiative (YEI)	EUR 3 000 000 000

Source: Art. 91(1) of Regulation (EU) No 1303/2013

Because of the prominent role of the public administration the administrative structures of the management of the regional development is an important topic. The phenomenon of the regionalism,[2] the role of the EU and its regional development strategies[3] and the political economy of the regionalism[4] are recent topics of the analysis as well as the structure and characteristics of the different regional development bodies and agencies.[5]The local governance and the local policy making procedures have been analysed by several volumes and articles. These analyses focused on the economic and policy-making ('governance') issues of the topic and has only been reviewed by the jurisprudence partly.

Therefore the comparison of the legal regulations on the role of the local governments in the field of the regional development can offer a different view on a topic which is analysed in detail. The impact of the legal system of the given countries and the influence of the legislation of the European Union can be observed by this approach, as well. In the new Member States and in the Mediterranean countries this influence is more significant, because their regional units are mainly less developed and transition regions. These regions are the main primary recipients of the EU funds (see Table 2).

2 The regional reforms and the post-regionalisation is analysed in detail in several articles, see for example Sharpe, 1993, Borras-Alomar et al., Jeffrey, 1997., Martin, 1999., Magone, 2003. On the post-regionalisation see for example Schrijver, 2006.

3 See for example Marks, 1992, Loughlin, 1997, and McCann 2015.

4 See for example Keating & Loughlin, 1997.

5 See for example Halkier et al., 1998.

Table 2 Allocations of the resources for the Investment for growth and jobs goal (2014-2020)

Regions	Allocation of the resources
Less developed regions	52,45 % (EUR 164 279 015 916)
Transition regions	10,24% (EUR 32 084 931 311)
More developed regions	15,67% (EUR 49 084 308 755)
Cohesion Fund (for the given Member States)	21, 19% (EUR 66 362 384 703)
Additional funding for the outermost regions identified in Article 349 TFEU	0,44 % (EUR 1 386 794 724)
Total	100% (EUR 313 197 435 409)

Source: Art 92(1) of Regulation (EU) No 1303/2013

2 Methods and Hypothesis

The analysis is focused on the legal regulations on the organisation and the powers and duties of the local and regional governments. Therefore the main question of the analysis is the *centralised* and *decentralised* approach of the national systems. A preliminary question is the approach of the *centralisation*. The definition of centralisation is contradictory. In classical administrative jurisprudence *centralisation* is interpreted as a concept by which the unity of the administration is ensured (Kuhlmann and Wollmann, 2014, pp. 119–121). In the traditional jurisprudential approach the centralisation is closely linked to the tasks of the central administration. This legal approach is problematic in the *federal states*, where the federal units are interpreted as units with statehood. Therefore legally the federal states could have a *centralised systems*, because in these countries the most important actors in the field of regional development are the member states of the federations (Bäumer & Kroës, 2016, pp. 63–64). These entities – for example the Austrian *Länder* – are interpreted as subnational units by the approach of the comparative governance. The subnational and therefore regional-like status is emphasized by the comparative governance however these units have legally central administration because they have statehood. Therefore – legally – these systems can be interpreted as *centralised systems* from the point of view of the municipal tasks.

Three main models will be distinguished by the analysis: firstly the *centralised model*, secondly the *decentralised model* and thirdly the *federal model*.

Table 3 Overview of the main models of the administration of the regional development

Centralised model	Decentralised model	Federal model
Centralised systems (Slovenia, Greece, Lithuania, Estonia)	Regional development administration based on regional (3rd tier) governments (France, Italy, Poland, Bavaria)	Regional planning centralised by the member states of the federation (Austria, smaller German provinces)
Centralised hybrid systems: – Centralised regulation with regional development councils (Czech Republic, Latvia) – Transition to the decentralised systems: inter-municipal associations as managing authorities (Ireland before 2000)	Between federalism and decentralisation: – A "quasi" or "de-facto" federation and the regional development (Spain) – An asymmetrical federation (?) (United Kingdom)	Federal models with shared competences between state and local government (majority of the German provinces, Belgium)
Transition to the decentralised systems: inter-municipal associations as managing authorities (Ireland, Portugal)		
Centralised systems with partial competences of the regional (2nd tier local) governments (Sweden, Slovakia, Hungary)		

3 Results and Discussions: Regulation on the Organisation of the Regional Development in Europe

3.1 Centralised Model (In Small Countries)

The centralised model is based on the determinative role of the *central government* and its agencies. In this model the local and regional governments have several competencies in the field of regional development and planning. Although the municipalities can have important tasks in the field of planning the majority of the policy-making responsibilities – especially the preparation and approval of the major plans and the management of the allocation of the development funds – are centralised.

Firstly in several countries hybrid bodies have evolved which mainly belong to the central administration but the inclusion of the local and regional govern-

ments in the decision-making process is enabled by this regulation. *Secondly* the major planning and the resource allocation duties and responsibilities – typically in the field of the management of the EU development funds – are centralised, but the regional governments of these countries have important planning competencies.

3.1.1 Centralised Systems

The centralised systems are based on the determinative tasks and powers of the central government and its agencies.

This model is followed by the small Member States of the European Union, especially by the countries which have a one-tier local government system. This type of centralised model has evolved in *Slovenia*. The country is divided into 212 municipalities which are classified as LAU-2 units, therefore they could not perform regional development tasks independently. Although these municipalities take part in the decision-making of the regional development (Deželan et al., 2014, pp. 547–573.), the regional development policy belongs to the competences of the central government (Ravšelj & Aristovnik, 2017, p. 80). In Slovenia, regional and subregional development agencies have been organised. These agencies have professional staffs, and they assist the municipalities in fulfilling their development goals. However, these bodies could be considered as the special agencies of the central government (Ploštajner, 2005, p. 227).

Similarly, *Lithuania* and *Estonia* have a one-tier system and thus their regional development administration is strongly centralised. In Estonia and Lithuania these tasks are performed primarily by the ministries responsible for regional development and local government (Adams, 2006. p. 162, Hooghe et al, 2016, pp. 438–440).

Although the Greek 2nd tier local governments have several planning competences the *Greek* regional development administration is strongly centralised, especially the allocation of the EU funds belongs to the central government and its agencies (Christopoulos, 1999, pp. 158–159 and Hooghe et al, 2016, pp. 468–472).

3.1.2 Centralised Hybrid Systems

The centralised hybrid models have evolved in the late 1990s. This model is based on a centralised national system combined with a bottom-up planning model.

3.1.2.1 Centralised Regulation with Regional Development Councils

In this model the planning is centralised, the major decisions are made by the central government. Although the first and the second tier local governments have some planning tasks and responsibilities, but in the NUTS-2 level special hybrid bodies are organised.

This model was applied by *Hungary* formerly. In 1996/1997 when the Act XXI of 1996 on the Regional Development and Spatial Planning was passed the regional development tasks were delegated to special hybrid bodies, to the County Development Councils (*megyei területfejlesztési tanács*). These bodies were originally tripartite bodies: the local and the central government and the social partners in the counties could delegate the members of the councils. In 2001 the former tripartite nature of the County Development Councils changed: the members of these councils were the delegates of the central government and the local governments. By this reform – regarding to the pre-accession procedure and the Agenda 2000 reforms of the EU funds – 7 NUTS-2 level Regional Development Councils were established, because the 19 Hungarian counties were NUTS-3 units (Pálné Kovács, 2014, pp. 97–100). These bodies were bipartite bodies, like the County Development Councils. The tasks of the managing authorities were fulfilled by the ministries and the agencies of the central government (Szalai, 2004, pp. 230–233). After the municipal reforms in 2011/12 this model was changed and a centralised system with developing 2nd tier local governments evolved.

The *Czech* model is a transition to the inter-municipal one: in 2002 8 NUTS-2 level Regional Council was established. The members of the Regional Councils are the delegates of the 14 second tier local government, the NUTS-3 level county governments (*kraje*). The Regional Councils could be considered as special inter-municipal cooperation and the managing authorities are the bodies of these regional organisations. The hybrid element of the Czech system is the centralised planning procedure and the supervisory competences of the central government (Piattoni, 2008, 174–175).

A similar model has evolved in *Latvia* – which has a one-tier municipal system – where the Regional Development Law of 2002 established special, hybrid bodies in the planning regions (Tatham, 2016, p. 261).

3.1.2.2 Transition to the Decentralised Systems: Inter-Municipal Associations as Managing Authorities

One of the most typical examples is the model of *Ireland*. Ireland was in the 1970s one of the poorest states in Western Europe. After 1973, after the Accession of Ireland to the European Economic Community and the expansion of the European cohesion policy, this country received significant European development funds. First of all, the administration and management of the planning and the allocation of the European funds has been centralised, the managing authorities were practically the agencies of the central government. The New Public Management paradigm and later the Good Governance paradigm impacted the Irish regional development model (MacCarthaigh, 2017, pp. 6–7): the reforms in the 1990s aimed to decentralise the system. Firstly, the municipalities were obliged to establish Local Development Boards which became the actors of the planning policy. In 2000 the City and County Development Boards were established which are the special committees of the

given county and city local government, but they are guided by a member of the central government's Local Development Liaison Team (Adshead, 2003, pp. 119–122). Thus these boards are practically *hybrid* bodies. In the 1990s – taking into account the regionalisation tendencies – two special bodies were established: the two regional assemblies, which are practically the managing authorities of the operative programs based on the European Regional Development Fund and the European Social Fund. These bodies are not considered as an independent regional tier by the Irish administrative law: the members of the assemblies are not elected but delegated by the municipalities and the county and city councils and they do not have general powers – unlike the Irish local governments (Callanan, 2003, pp. 437–438). Because of these special characteristics, these bodies can be interpreted as special inter-municipal associations of the Irish first and second tier local governments. Although the national planning has remained centralised, the regional development became decentralised, thus a transition model have evolved. This model remained after the transformation of the Irish economy. Now Ireland is a relatively rich Member State of the European Union: in 2016 the Irish GDP per capita is 177% of the average of the EU-28 (Eurostat, 2017) and therefore the Irish regions are classified as more developed regions. Thus the decentralisation tendencies were parallel to the decrease of the significance of the EU funds in the Irish economy. In Ireland the bodies responsible for decision-making and for the executive tasks are mainly companies owned by the public bodies: the *regional development agencies* (Halkier, 2012, p. 47).

A similar model has evolved in *Portugal*: the managing authorities of the regional development are practically inter-municipal associations of the second-tier local governments. Practically, this task was a catalyst of the inter-municipal cooperation in Portugal which has not long tradition in the Southwestern country of the European continent (Teles, 2016, pp. 63–64). For decision making and the policy making tasks companies were established by these inter-municipal associations. The administrative functions are performed by companies owned by the public bodies (Halkier, 2012, p. 49).

3.1.3 Centralised Systems with Partial Competences of the Regional (2nd Tier Local) Governments

In several countries the allocation of the regional development funds – especially the funds which are co-financed by the European Union – is centralised: the central government is responsible for these tasks. Therefore the managing authorities are bodies or agencies of the central government. The regional planning is partly centralised. This model is followed by the countries which have two-tier local government systems and the second tier local governments either are NUTS-3 units or they have limited competences.

This model is followed by the *Republic of Slovakia*. In 1996 eight regions (*kraj*) were established which are local governments and they have wide competences. The *kraje* are NUTS-3 units therefore they could not perform the tasks

of the NUTS-2 units. Thus the Slovakian regions have several competences of the regional planning, but the majority of them belongs to the central government and its agencies (Malíková & Jacko, 2016, pp. 289–290).

Similar model have evolved in Hungary after the municipal reform of 2012/2013. The Regional Development Councils were abolished. The majority of the competences of the regional development councils were transferred to the county governments (Hoffman, 2017, pp. 123–128 and Tosics, 2016, pp. 674–675).[6] In Hungary the structure of the decision-making and executive tasks were transformed as well: until 2016 these tasks were performed by companies owned by the counties (*regionális fejlesztési ügynökségek* – regional development agencies) (Hoffman, 2015, pp. 126–127). The majority of these companies (six out of the seven regional development agencies) were nationalised and their tasks are now performed by the county offices of the Hungarian State Treasury and by the offices of the county governments (Hoffman, 2017, p. 130).

Similarly, the – NUTS-3 level – Swedish counties (län) have wide competences in the field of public services provision, but their tasks are very limited in the field of regional development (Johansson, 2000, p. 138). In the last decades the Swedish regional planning system became more decentralised. This decentralisation was influenced by the concept by the urban government, therefore the in the regional planning the urban-centred inter-municipal bodies have significant role (Giersig, 2008, p. 199).

The centralised model is based on the determinative role of the central government. Although the 1st and 2nd tier local governments have several competences the main policy-making competences belong to the central government and agencies. As a result of the New Public Management Reforms, the executive and decision-making bodies are often companies which are owned by the public bodies.

This model is followed mainly by small countries with one-tier system. Those countries which receive large amount from the EU funds prefer primarily the centralised model (Constantin et al., 2011, pp. 183–185). The system of the countries which were formerly important recipients of EU funding (Ireland, Portugal) have been partly decentralised after the Accession of the Eastern Central European New Member States to the European Union and now they belong to a practically mixed model. The Nordic countries could be interpreted as an exception from the above mentioned tendencies: although their municipalities have wide public service provision competences their regional planning and development structure is relatively centralised.

6 In 2011/12 the competences of the county governments transformed significantly. The former public service provision tasks of the county governments are fulfilled by the central government and its agencies, but the regional planning competences of the counties were strengthened, thus a new paradigm of the county governments, the paradigm of the "development counties" have been evolved (Hoffman, 2014, pp. 411-412).

3.2 Decentralised Model (In Larger Countries)

The administration of the regional development was strongly influenced by the regionalisation and decentralisation tendencies in Europe (Kacziba et al., 2016, pp. 45–47). These tendencies had multiple effects on the structure of the regional development. Firstly, the *administration of the allocation of the development resources and the spatial planning became more decentralised*, secondly the *regional tier of the municipal system was transformed*. The regional development administration systems of the Member States of the European Union have been impacted differently by this tendency (Hughes et al., 2005, p. 128).

The decentralised model of regional planning is based on the determinative role of the regional governments. Obviously, the national (central) governments have the competences of the coordination of the regional planning, but the allocation of the regional development resources and the regional planning tasks belong to the competences of the regional (typically 2nd or 3rd tier local) governments. Therefore this model is closely related to *regionalisation*, because the decentralisation of the central government development tasks or the concentration of the former municipal development tasks was one of the key elements of the regional reforms (Loughlin et al., 2011, p. 12).

These regional reforms were different: in several cases quasi-federal units have evolved. This different type of regionalisation resulted in different levels of the decentralisation of the regional planning systems.

3.2.1 Regional Development Administration Based on Regional (3rd Tier) Governments

The regionalisation tendency was based on the establishment or strengthening of the 3rd tier local governments, the regions. The example of these reforms was the *French regional reform* from the 1960s to present. Although the feudal France was based on the regions, the revolutionary and Napoleonic legislation introduced a centralised state and the regions – as the last resort of the 'ancien régime' – were abolished (Swann, 2012, p. 105). The new territorial units were the *départements*, the French counties, which had limited autonomy, the prefect (*préfet*) had significant supervisory powers.

Although the regions as administrative units were abolished the regional differences remained. Thus the regionalisation became an issue after the World War II. In 1955 22 planning regions (*circonscriptions d'action régionale*) were established, but these regions were part of the top-down planning structure. The next step of the regionalisation was the establishment of the regional prefect (*préfet de region*) in 1964 when the county prefects of the seat of the given regions received regional competences. Thus the territorial agencies of the central government were partly regionalised. These regional bodies had significant competences in the field of regional planning and development (Hooghe et al., 2016, p. 373).

The decentralised model evolved by the reforms of the *Loi Defferre* (1982) when the regional governments as 3rd tier local governments were established. Thus France have a two-tier regional government system: the first, lower tier is the level of the *départements* – which are NUTS-3 units – and the second, higher tier is the level of the regions – which are NUTS-2 units. These regions have a directly elected council. The majority of the competences of the regional *préfet* were transferred to the president of the regional council (Dantonel-Cor, 2007, pp. 35–38). One of the key issues of the French regional reforms was the decentralisation of the planning and development competences. The most important tasks and powers of the regional prefects were the competences on the allocation of the development resources. Although several allocation competences of the regional prefect remained, the major development tasks and powers were decentralised and now they are performed by the regional councils (Booth, 1996, p. 62).

Therefore the regions became the central bodies of the regional development. The regional – spatial – structure was significantly reformed in the last years: the former 21 mainland regions were merged into 12 mainland regions (the independent, special region status of Corsica and the five overseas regions were left unchanged). The powers of the regions have been strengthened by this reform, especially in the field of the public service provision. Because of the wide development competences the transformation has been just partially in this field (Marcou, 2015, pp. 26–30).

The French counties, the *départements* lost the majority of their development tasks, but several planning competences have remained. In the regionalised French system these units are the framework for the coordination of the planning activities of the first tier local governments. The fragmented municipal system has remained: there are more than 36 500 first tier local units (*communes*), but the reform of the *loi Chevènement* in 1999 transformed the local framework significantly. The new inter-municipal associations concentrated the majority of the local planning and development competences (Wollmann & Bouckaert, 2006, p. 11). *Thus a decentralised, region-centred model has evolved in France, where the counties and 1st tier local government have just partial, planning competences.* This French model was an example for the European regional reforms, especially in those countries which have followed the French model of public administration.

In Germany, *Bavaria* has a special status: the Bavarian system can be interpreted as a *decentralised one*, because the Bavarian districts (*Bezirke*) are regional governments, which have are primarily responsible for the regional planning and development (Weber & Köppert, 2015, p. 27).

Although several countries tried to introduce regional reforms in the Eastern Central European countries, the only successful reform was the regionalisation of Poland. The Polish model was based on the French decentralisation pattern, but it was different in some respect. Firstly, the Polish reform was

based on the merge of the former NUTS-3 level units, the Polish counties, the 49 Voivodeships (*województwo*) were merged into 16 large Voivodeships which are interpreted as NUTS-2 level units. These Voivodeships are the third tier local governments with wide powers and tasks (Józsa, 2005, p. 200). Following the French regional planning and development model the councils of the voivodeships and their elected officers are responsible for the regional planning and the allocation of the development funds – including the funds from the European Union. Thus these regional bodies are the managing authorities of the EU structural funds in the regions (Swianiewicz, 2013, pp. 335–336). The second tier local governments, the districts (*powiat*) are smaller units with limited planning competences. The local municipalities, the first tier units (*gmina*) only have local planning tasks. The central government is responsible for the several, national development projects and for the coordination of the regional development policies (Jagielski, 2005, pp. 173–177). The Polish model is a decentralised one, but the central government has relatively significant powers in the field of regional planning. Thus the Polish model could be intepreted as an exceptional one among the Eastern Central European New Member States of the European Union.

A similar model has evolved in *Italy*. In the 19th century it was a strongly centralised, unitary state which was divided into provinces (*provincia/province*). The *provincia* was similar to the French *département*, it had a limited local government which was supervised by the prefect (*prefetto*) who was appointed by the central government (Cassese, 2010, pp. 254–255). The regional development and the planning was centralised, the province and the municipalities (comune) had partial competences only. Although the Italian state was centralised the regional differences and inequalities remained. The unitary nature of the Italian state has remained, the Republic of Italy is "one and indivisible" ("*una e indivisibile*") but the local and regional government system has been transformed after the World War II. Although the provinces (*province*) have been conserved by the administrative law, the regions (*regione*) were established. The regions became responsible for the tasks of regional planning and development and they are responsible for the allocation of the development fund – including the funds co-financed by the European Union. The regions have very wide autonomy, they have legislative powers. Unlike the French model, in Italy an asymmetrical regional system has evolved. Several regions have special status. This special status is related to the ethnic diversity (the German ethnic majority in *Alto-Adige/Südtirol* and the French ethnic majority in *Valle d'Aosta/Vallée d'Aoste*) and the traditional differences in Italy, especially the disparities between Northern and Southern Italy. Thus several regions have special competences – official status of the minority and regional languages or the widened powers of the regional governments in the field of regional development, taxation and public service provision (Franchini & Vesperini, 2012, pp. 108–111). The significance of the regions have been strengthened after 2014 when the competences of the province were weakened, and the direct election of the provincial assemblies and the provincial

councils (*giunta provinciale*) as municipal organs were abolished by the *legge Delrio (legge 7 aprile 2014, n 56)*. The competences and the autonomy of the metropolitan cities have been strengthened by this act, as well (Amorosi & Cinque, 2015, p. 367). Thus the Italian regions have a very strong autonomy: it is highlighted by the literature that Italy is a *regionalised state*, because the regions have more competences than a regional municipality but have less powers than the member states of a federative state (Mangiamelli, 2014, pp. 3–5).

3.2.2 Between Federalism and Decentralisation

The regional reforms in Europe have different outputs. The French and Italian pattern of regionalisation was reviewed in section 2.1. In several countries the transfer from the central to the regional governments were more significant. In these countries several key competences of the central governments were regionalised, as well. Therefore the competences of the regional units are close to the competences of a member states of the federation. Although these units are very similar to the member states, the classification is not obvious. In several cases the concept of the unitary state prevail in the national constitution, and in other cases the state nature is questionable. Thus this model can be interpreted as a *transitional* one.

3.2.2.1 A "Quasi" or "De-Facto" Federation and the Regional Development: Spain

The regional development system of *Spain* can be interpreted as this quasi-federative model. After the Fall of the Franco regime, during the Democratic Transition the Spanish Constitution of 1978 introduced a strongly decentralised model. The model of this constitution was based on an asymmetric devolution model. The autonomy of the regional entities – the *comunidad autonoma* – was recognised by the Constitution, but their exact tasks and powers should be defined by the statutes of these autonomies which are organic laws (*ley Orgánica*). Several *comunidad autonoma* have special status, especially in the field of cultural autonomy and in the field of the official language of the region. Thus Catalonia (*Cataluña/Catalunya*), the Basque Country (*Pais Vasco / Euskadi*) and Galicia have special rights: their regional language is an official language. Formerly these regions had larger autonomy in the field of taxation, public services, regional planning and development (Rodríguez-Arana, 2008, pp. 207-208), but the asymmetry of the Spanish regional system has decreased in the last decades. Now the special autonomy of the policing and the regional language as official language has remained as the major element of the special status of these regions. Thus the Spanish regional reforms were interpreted as a top-down federalisation, and the *Estado de las Autonomías* (literally translate: State of the Autonomies) as a federative system (Moreno, 2001, pp. 2–4).

Although the wide competences of the regions the Spanish administrative system could not be interpreted as a federal one. The concept of the unitary state is declared by the Spanish Constitution. Therefore the regions are inter-

preted as *regional municipalities with wide competences* by the Spanish Constitutional Court – by which the referendum on the independence of Catalonia was declared unconstitutional (Elisenda Casanas & Rocher, 2014, pp. 27–28). The Spanish regions have legislative powers and they are responsible for the regional planning in the *communidad autonoma* and the allocation of the development funds – especially the funds cofinanced by the European Union – belongs to the competences of the regional governments (Viver Pi-Sunyer, 2013, pp. 455–457). The original territorial units of the centralised state, the NUTS-3 level counties (*provincial*) have remained, but their competences are limited and they are focused on the planning issues.

The Spanish model is a strongly decentralised one. The Spanish regions are intepreted legally as local governments, but their tasks and powers are similar to the member states of the federations. Therefore Spain has a *quasi-federative model*.

3.2.2.2 An Asymmetrical Federation (?): The United Kingdom

The regional planning and development model of the United Kingdom can be interpreted as a transitive and special one. Before the reforms of the 90s the United Kingdom was a relatively centralised state. The 2nd tier local governments, the counties have several regional planning and development competences but these tasks belonged mainly to the powers of the central government. After the EU Accession of United Kingdom regional reforms occurred. These regional reforms were based on deconcentrating the central powers: the regional bodies were practically agencies of the central government. Such regional agencies were the Government Offices for the (English) Regions (GOR) which were organised in England in 1994 and they were primarily responsible for regional planning and development – especially for the tasks related to the European regional policies. The tasks of the GORs were supported by the regional development agencies which were mainly companies owned by public bodies (Shutt, 1996, p. 92).

The traditional British system has been transformed by the *devolution* process. The devolution is similar to the concept of the *decentralisation*, but it is partly different (Cole, 2006, pp. 1–3., Copus et al., 2017, pp. 12–13 and Siket, 2017, pp. 133–135). Firstly, the devolution had different meanings. In the first phase of the devolution, several competences were transferred to the constituent nations of the United Kingdom. Thus the establishment of the legislative bodies and governments of Scotland, Wales and Northern Ireland was interpreted as the devolution of the United Kingdom. This devolution was an asymmetric one: the powers and duties of these legislative bodies and governments are different. Such regional legislative bodies and governments have not been established in England, the powers and duties of these bodies are fulfilled by the Parliament and the Government of the United Kingdom. The regional planning and development tasks in Scotland, Wales and Northern Ireland are performed by these bodies. The newly organised legislative

bodies and governments have very wide powers which are very similar to the member states of the federations. But the United Kingdom was considered as a "quasi-federation" because traditionally the statehood of these units were not recognised (Burgess, 2006, p. 131). This approach partly changed when Scotland had the opportunity to hold a referendum on the independence. Thus the Scottish statehood was recognised by the permissive act of the Parliament of the United Kingdom (McHarg, 2016, pp. 102–104).

The transfer of powers to the constituent nations of the United Kingdom and thus the "federalisation" of Great Britain is interpreted as a devolution of the British government system. However the (top-bottom) strengthening of the English municipalities (especially the counties and the unitary councils and partly the districts) is a part of the devolution (Copus et al., 2017, pp. 12–14). the different meanings of the devolution the British system can be considered as a *transitive* one. If Scotland, Wales and Northern Ireland are interpreted as regional entities then it is relatively decentralised, because these units have wide development competences. If the constituent nations could be considered as member states of a federation than the model of the United Kingdom can be interpreted as a centralised, federal system. The counties and unitary authorities have narrow competences in regional development. The majority of the regional development tasks have been centralised, the former atypical – the so called „non-departmental" – bodies responsible for several regional development tasks, the regional development agencies and the regional assemblies (OECD report, 2009, pp. 146–148) were abolished between 2008 and 2012 (firstly the abolition of the regional assemblies begun, then the regional development assemblies were abolished between 2010 and 2012) (Cullingworth et al., 2014, pp. 16–18).

The regional reforms transformed the system of the regional development in several – especially relatively larger – EU Member States. Firstly, the decentralised system is followed by the larger countries of Europe. Regional level municipal bodies became responsible for the major tasks of the regional development in France, Italy and Poland. In Spain and in the United Kingdom a special, quasi-federative system has evolved. The challenges of the economic crisis after 2008 impacted this system strongly: tendencies of recentralisation and concentration could be observed. In France the model was concentrated by the amalgamation of the regions. In Spain the expansion of the regional autonomy has stopped. In England the former non-departmental bodies, the regional development agencies and the regional assemblies were abolished.

3.3 Federal Model

The federal states could be interpreted as an independent model. In these countries there are subnational units which have statehood. These entities have wide responsibilities, and obviously the tasks of regional development belong to the competences of the member states of the federation therefore the federal (central) government has typically limited powers in this field. The

regulation on the municipal system is mainly the competence of the member states, therefore different systems have been evolved. The regional structure of these federation is various.

3.3.1 Regional Planning Centralised by the Member States of the Federation

This model is typical in the *small* federations, especially in Austria (Belgium has a special, more decentralised model, see in point 4.2.). The member states of the Austrian federation, the provinces (*Bundesländer*) are NUTS-2 ("regional") level entities and they have a one-tier municipal system which is relatively fragmented, having more than 2000 municipalities (*Gemeinde*) (Neuhofer, 1998, pp. 22–23). Therefore the planning and development competences of the municipalities is very limited: it focuses on the development of the community. The widespread inter-municipal cooperation in the Austrian *Länder* are mainly common framework for the municipal developments and for the joint application for development aid (Neuhofer, 1998, pp. 567–572).

Therefore the competences of the regional planning and development are centralised by the regional level entities, by the provences. The *Länder* have statehood, they have unicameral state parliaments (*Landtag*) and the state government, the *Landesregierung* which is led by the *Landeshauptmann* ("Chief of the Province" or "Governor"). In the Austrian system the planning belongs to the tasks of the state parliaments, and the state governments are responsible for the decision-making and the execution of the plans, especially the allocation of the development funds (Adamovich et al., 2014., pp. 60–61 and pp. 194–195). As a result of the New Public Management reforms, several governmental development tasks are performed by the regional development agencies, which are mainly companies (Ltd. – *GmbH* – and corporation – *AG*) or legal persons governed by the private law (Halkier, 2012, p. 45).

Similar model evolved in the small *German provinces (Länder)*, especially in the city states of Germany (Berlin, Hamburg, Bremen und Bremerhaven). In these provinces the state parliaments and the state governments are responsible for the regional planning and development. These bodies are not only organs of a federal states but they can interpreted as municipal organs, as well (Musil & Kirchner, 2012, pp. 92–93).

3.3.2 Federal Models with Shared Competences Between State and Local Government

The federal models with shared competences between state and local government is primarily followed by *Germany*. In the German – decentralised – federal system the states (provinces) – which are NUTS-1 level units – are primarily responsible for the tasks of regional planning and development (Chilla et al., 2016, p. 16). These provinces have unicameral parliaments (*Landtag*) and a state government which is responsible to the state parliament. The ma-

jor policy-maker at the state level are the state ministries (Milke & Reutter, 2012, pp. 43–44). The structure of the state government is different, but the tasks of the competences of regional planning and development belong primarily to the portfolio of the state ministries responsible for economics.

Although the main policy makers in the field of regional planning and development are the German states (provinces) the municipal system has significant tasks. Typically the German *Länder* have a two-tier municipal systems, the second tier is the NUTS-3 level, which are the *Landkreise* (counties) and the *kreisfreie Städte* (actually unitary authorities). These municipalities have planning and development competences, as well. In the majority of the German provinces several tasks of the regional planning and development are performed by special inter-municipal associations, by the planning associations (*Planungsverbände*) which are typically obligatory inter-municipal associations, and their members are the counties (*Landkreise*) and the communities (*Gemeinde*) (Erbguth et al., 2015, p. 19. and Brüning, 2013, p. 68). This model has impacted by the New Public Management reforms: regional development agencies (which are mainly companies governed by the private law) were established and the tasks of these inter-municipal associations have been expanded, especially in the field of the organisation of the regional (public) transport (Benz & Meinecke, 2006, pp. 67–70).

Belgium has a similar system. The unitary Belgium became a regionalised state after the constitutional reform of 1970. The regionalised state developed into a federal state after the reforms of 1993 which was strengthened by the amendment of the Belgian Constitution in 2001 (Balázs, 2011, p. 276). The member states of the Belgian federations, especially the governments of the regions (Flanders, the Walloon Region and the Brussels Region) as NUTS-1 level entities are responsible for the tasks of the regional development. The local governments, especially the NUTS-2 level provinces (*province/provincie*) as regional governments have important competences in this field, as well (Wayenberg et al., 2011, pp. 81–83).

The federal states have special structures: the federal units have wide competences in the field of regional planning and development. In Austria the provinces are the major bodies responsible for regional planning and development but in Germany and Belgium these competences are shared between the member states and the second tier municipalities and the inter-municipal associations for performing planning and development tasks. The New Public Management Reforms influenced the model of these countries, as well. During the 1980s and the 1990s regional development agencies have been established which remained after the crisis.

4 Conclusion

The municipalities are responsible for the local development but they are important actors of the regional development policies, as well. Although they

have significant competencies, their roles are different. It depends on the size of the country, the local government system and the general model of the regional development. Thus the centralised, the decentralised and the federal models can be distinguished. In this (review) article the main elements of the administration of the regional planning and development were reviewed.

The administration of regional planning has been strongly influenced by the European integration. Significant resources are provided by the European Structural and Investment Funds and other EU funds. The allocation of these funds was a major task of those countries which have been recipients of these resources. The regional approach of the structural funds was a catalyst of the territorial reforms in several EU Member States. This approach was related to the New Public Management (NPM) paradigm, as well. The decentralisation was one of the major elements of the NPM-influenced reforms during the 1980s and 1990s. Although originally the regional tendencies in Europe were based on the NPM-related reforms these changes were supported by the post-NPM paradigms (especially by the Good Governance paradigm), as well. Thus the cooperation with the stakeholders and with the society has been highlighted by the reforms in the late 1990s and 2000s.

The impact of the European Union funds have been different. In the New Member States the centralised model is the dominant one, because of the smaller size of the countries and the significant role of the EU funds in the regional development of these countries. The allocation of these resources was controlled by the central government and its agencies. In several Member States special hybrid bodies evolved which partly transformed into municipal nature bodies (especially into special inter-municipal associations). Thus the decentralisation was finally stimulated by these funds in these countries (for example in Ireland and Portugal).

After the economic crisis of 2008 new approaches evolved in the administration of regional development. The centralisation and the concentration of the structures was stimulated by the impact of the crisis. This tendency could be observed in the centralised systems, where the former partly decentralised, regional bodies and agencies were abolished (especially in Greece and partly in Hungary), and in regionalised systems where the regional units were merged (in France) or the federal tendencies were stopped (in Spain and partly in Italy). This centralisation was related to the reduced influence of the NPM and to the shifting of paradigm, especially the evolvement of the paradigm of the Neo Weberian State (Pollitt – Bouckaert, 2017, pp. 18–26). Thus the tendencies of "re-municipalisation" and "re-nationalisation" could be observed. In the 90s and in the 2000s the regional development agencies were mainly established as companies owned by public bodies. In the last decade the system of these agencies have been transformed in several countries (for example in the United Kingdom and in Hungary). These agencies have been abolished or their tasks have been transferred to public bodies, therefore a "re-municipalisation" procedure can be observed.

It can be concluded that the differences of centralised, decentralised and federal systems have remained, but several transformations could be observed and in several countries the model of the administration changed in the last decades. A convergence can be observed: the competences of the municipal bodies have been strengthened. Firstly the municipal bodies received new competences, especially in the field of the regional planning. In several countries the former central agencies transformed into inter-municipal bodies. Secondly, in the decentralised countries the coordination competences of the central government have been strengthened. These changes were strongly impacted by the regulation on the EU funds and by the EU cohesion and regional policy.

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Impact of Active Labour Market Policy Programs on Employment in the EU During the Crisis

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ABSTRACT

Due to the financial crisis and the increase in the unemployment rate, active labour market policy (ALMP) inevitably returned to the forefront with its "activation strategy". The research challenge of the article is analysing the effectiveness of ALMP in the period 2007-2013. The methodology of the work is panel regression with fixed effects estimation. The model estimates the effect of the two largest programs of the ALMP, Training and Employment Incentives, on Employment Rate, considering six additional control variables with potential effect on the labour market. The results demonstrate a positive impact of the Training program on the Employment Rate even in the time of crisis. In contrast, the Employment Incentives program had, along with Passive Labour Market Policy (PLMP), a somewhat negative impact on Employment Rate. The findings provide an insight into the nature of ALMP's implementation during the financial crisis. While the training programs keep their active nature, the employment incentives become reactive and to a certain degree act as a measure of PLMP.

Keywords: *effectiveness, Employment Incentives program, employment rate, financial crisis, Training program, unemployment, EU, labour market*

JEL: E240, J480, J080

1 Introduction

The problem of unemployment is one of the biggest issues and one of the major challenges the European Union (EU) is facing. Over the past ten years, when the global economic crisis occurred and widened, the employment indicator reached its historical minimum in all EU countries (Bánociová & Martinková, 2017). It led to sharp increases in unemployment in many countries and a resurgence in the numbers of long-term unemployed (Martin, 2014).

The range of various programs and measures that EU countries directly and selectively intervene in the labour market in order to reduce unemployment and increase employment can be classified as an active labour market policy (Svetlik & Batič in Svetlik et al., 2002). Programs that are designed to help unemployed people also help them acquiring the skills they need and that are desirable in the labour market (Nie & Struby, 2011).

The main goal of the ALMP is to improve the functioning of the labour market for unemployed persons and have them return to work in various ways, therefore a high level of employment would be maintained (Svetlik & Batič in Svetlik et al., 2002). ALMP usually includes training and education programs, employment programs, job creation and others. As a result, it is not only a means of social protection but also a tool for economic policies and businesses that need to be adapted (Sahnoun & Abdennadher, 2018). Due to the financial crisis, ALMP inevitably returned to the forefront with its "activation strategy" in order to help reduce unemployment, especially long-term unemployment, and help find other risk groups jobs (Martin, 2014). Card, Kluve and Weber (2017) found with regard to the state of the labour market that ALMPs tend to have larger impacts in periods of slow growth and higher unemployment.

Active labour market policy is intertwined with various macroeconomic indicators, such as unemployment, inflation and GDP, and therefore assessment and measurement are very complex. Due to the wide use of ALMP in and outside of the EU Member States, the need for measurement and the importance of assessing the achieved performance of its operation is increased. However, there is little recent research (from 2008 on) that has evaluated the major active labour market policy programs.

The aim of our research is to assess the effect of the two biggest ALMP programs, namely Training and Employment Incentives, on the Employment Rate. The time line covers the financial framework of the European Social Fund for the period 2007–2013 in the EU Member States. The methodology used is panel regression, which is estimated by the method of fixed effects.

The second chapter deals with a general overview of previous empirical research. The third chapter presents the methodology of the work and the description of the variables. The research results are presented in the fourth chapter. The last chapter follows up the conclusion with a discussion on the results of the research in light of the results of previous studies.

2 Research on Effects of ALMP Programs

ALMP programs are complex and operate within a variety of contextual conditions, therefore their evaluation is difficult. Often, the target groups encounter large barriers to (re)integration into the labour market. Techniques to improve the employability and employment opportunities of the ALMP participants are difficult to standardise. Labour market interventions cannot

function separately, but only in combination with other policies and programs under different structural and economic conditions. Being so, the results are difficult to measure in the short term (Bredgaard, 2015). Assessments based on microdata show that the effects of the ALMP on employability do not appear or they are small in the short term. The long-term effects in terms of employability are generally more visible or expressed (Boone & Van Ours, 2004). This encourages research in the long run, including monitoring the employability of workers and thus monitoring the performance of individual ALMP policies (European Union, 2016).

Besides, there are few recent macroeconomics studies that analysed the effects of ALMP programs, except the research of Escudero (2018). In his research, Bredgaard (2015) even argues that a database that would support research on how ALMP programs actually work is not yet available. Despite the data accessibility hindrance, a number of researchers studied the impact of ALMP on employment or unemployment rate in the time periods from 1985 until 2008 (Kluve & Weber, 2009; Kluve, 2010; Heckman et al., 1999; Kluve and Schmidt, 2002; Kluve et al., 2002; Card et al., 2010, Nie and Struby, 2011; Laporšek and Dolenc, 2011; Boone and van Ours, 2004; Estevão, 2003; Estevão, 2007). For the last two decades, EUROSTAT and OECD (Eurostat, 2016; OECD, 2016c) have collected and published comparable data about both Active and Passive Labour Market Politics. Surprisingly, there are no macroeconomic studies analysing the period from 2007 to 2013 (seven year long financial framework of the European Union), even though the data are available and insight into the impact of the ALMP in that period is very much needed.

In the rest of the chapter, we present the research framework, methodological approach and major results of the studies that we have drawn from in the definition of our research design. The overview of the main characteristics of the research presented is given in the Table at the end of the chapter.

In their research, Laporšek and Dolenc (2005) studied the relationship between the programs of Active and Passive Labour Market Policy, labour relations legislation and lifelong learning programs relating to the Employment Rate, the rate of unemployment and the long-term unemployment rate. The methodology used in their research was panel regression, and the models they used were evaluated with the fixed and random effects model. The analysis was carried out for twenty EU Member States in the period 1990–2008. The analysis showed that expenditure on an active labour market policy was positively related to the labour market, thus affecting a reduction in the unemployment rate and an increase in the Employment Rate. On the other hand, expenditures dedicated to Passive Labour Market Policy (PLMP) negatively correlated with the transition from unemployment to employment. Their research brought attention to the importance of creating a balanced employment policy for the further development of the European labour market and the economy (Laporšek & Dolenc, 2011).

Boone and van Ours (2004) examined the effectiveness of ALMP at the aggregate level. They analysed (with analysis of time series) the effects of the ALMP (Training and Employment Incentives) programs on the employment-population rate and the unemployment rate in twenty OECD countries for the period 1985–1999. They found that the expenditures for the Training program provide a significant positive impact on the labour market. Furthermore, they observed that the expenditures of public employment services had a certain impact on unemployment but had no effect on the Employment Rate of the entire population, whereas the Employment Incentives programs were not successful at all.

In his research, Estevão (2003) analysed panel data for 15 industrial countries, employing the ordinary least square model. He found that in the 1990s the most successful program was the subsidy for direct job creation. However, that was not the case in the 1980s, when the expenditure for the ALMP was relatively smaller. Training programs had largely proved to be unsuccessful in terms of intended expenditures. In a subsequent study, the same author (Estevão, 2007) analysed data under the same research strategy for the same set of countries in the period from 1985–2000, observing several different periods of years and different set of independent variables used (see Table 1). He concluded that the ALMP as a whole had a statistically significant positive impact on the Employment Rate. The most successful programs were subsidised employments programs, while the Training programs did not show statistically significant influence. Moreover, the Labour market services showed a statistically significant negative impact on the Employment Rate over the whole period.

Nie and Struby (2011) formulated three fixed effects models for the unemployment rate. They used data for 20 OECD countries for the period from 1998 to 2008. They found the common ALMP to be cost-effective in reducing unemployment. Programs were beneficial in the main categories of the ALMP, in the Training program and in labour market services (Job-Search Assistance). Both programs also had an influence on reduction of the unemployment rate. Measures covered by the smallest category of the ALMP (other policies) (see Table 1) also reduced unemployment. Conversely, Direct Job Creation had a negative effect on the unemployment rate and the Supported Employment program did not show a statistically significant difference.

Escudero (2018) examined the effectiveness of ALMPs in improving labour market outcomes, especially of low-skilled individuals, by means of a pooled cross-country and time series database for 31 advanced countries during the period 1985–2010. The analysis included aspects of the delivery system to see how the performance of ALMPs is affected by different implementation characteristics. Among the notable results, the paper finds that ALMPs matter at the aggregate level, but mostly through appropriate management and implementation. In this regard, sufficient allocation of resources to programme administration and policy continuity appeared to be particularly important. Moreover, start-up incentives and measures aimed at vulnerable populations are

more effective than other ALMPs in terms of reducing unemployment and increasing employment. Interestingly, the positive effects of these policies seem to be particularly beneficial for the low skilled. Training, in contrast, seems to be effective for the overall population; however, it also has positive effects for the low skilled through the interaction with implementation variables.

Table 1 on the next page summarises previous research, with the complete data and the impact of independent variables.

Table 1: Overview of the research on the effectiveness of the ALMP

Author	Units	Time period	Method	Independent variables	Impact	Depend. variable
Nie and Struby (2011)	20 OECD countries	1998-2008	Panel regressions (3 Fixed Effects Model)	Labour force participation rate	-	Unemployment Rate
				Union Density	-	
				Employment Protection	0	
				Tax Wedge	- (model_1,3) 0 (model_2)	
				Output Gap	+	
				ALMP	+	
				PLMP	0	
				Initial Unemployment Benefit Replacement Ratio	0	
				Unemployment Benefit Duration	-	
				Job-Search Assistance	+	
				Training	+	
				Employment Incentives	0	
				Supported Employment	0	
				Direct Job creation	-	
				Other policies	+	
Laporšek and Dolenc (2011)	20 EU Member States	1990-2008	Panel regressions (Fixed Effects Model and Random Effects Model)	Employment Protection	- ER	Employment rate, Unemployment rate, Long-term unemployment rate
				Participation in LLPs	0	
				ALMP	+	
				PLMP	+ ER	
				Tax Wedge	-	
				Union Density	+ ER - LTER	
				GDP per capita	+ ER - UR, LTUR	
				GDP growth	- ER	

Author	Units	Time period	Method	Independent variables	Impact	Depend. variable
Boone and van Ours (2004)	20 OECD Countries	1985-1999	Analysis of time series	Union Density	-	Employment-population rate, Unemployment rate
				Unemployment benefits	-	
				Tax rate	0	
				Inflation	- ER	
				Job-Search Assistance	+ UR	
				Training Programs	+ ER + UR	
				Employment Incentives	0	
Estevão (2003)	15 industrial countries	1985-2000	Ordinary least squares	ALMP	+	Share of the working-age population working in the business sector
				PLMP	-	
				Technological growth	-	
				Log GDP Business (per capita)	-	
				Openness	-	
				Replacement Rate	-	
				Union Density	-	
				Share Public Empl.	-	
				Employment protection	-	
				Bargaining coordination	-	
				Central Bank Independence	-	
Estevão (2007)	15 industrial countries	1985-2000	Ordinary least squares	ALMP expenditures/GDP	+	Share of the working-age population working in the business sector
				PLMP expenditures/GDP	+	
				Replacement rate	-	
				Union membership	-	
				Employment protection	+ (1993–2000), - (1985–2000)	
				Bargaining coordination	+	
				Tax wedge	-	

Author	Units	Time period	Method	Independent variables	Impact	Depend. variable
Escudero (2018)	31 advanced countries	1985–2010	OLS, FGLS	Training (policy)	+ UR, +ER, LSUR, LSER - LFPR	Unemployment rate, Low-skilled unemployment rate, Employment rate, Low-skilled employment rate, LFPR, Low-skilled LFPR
				Employment incentives (policy)	+ UR, LSUR –ER, - LSER, LSLFPR	
				Cluster (policy)	+ UR, LSUR –ER, - LSER, LSLFPR +LFPR	
				Start-up incentives (policy)	+ UR, LSUR + ER, + LSER, LSLFPR	
				PES allocation	+ UR, LSUR, + LSER, LSLFPR	
				Continuity in implementation	- ER , + LSER, LSLFPR	
				Correct timing of policies	+ UR –ER, + LFPR	
				Training * PES allocation	+ UR – ER, + LSER, LSLFPR	
				Employment incentives PES allocation	+ UR - ER	
				Population with tertiary	+ ER	
				Union density	- UR, +LFPR, LSLFPR	
				EPL for temporary workers	- UR + LSUR, + LSER, LSLFPR	
				EPL for regular workers	+ LSUR – ER, + LSER, LFPR LSLFPR	
				Gross replacement rate	-UR - LSUR + ER, + LSER, LSLFPR	

Source: Would Active Labour Market Policies Help Combat High U.S. Unemployment? (Nie and Struby, 2011), Do Flexicurity Policies Affect Labour Market Outcomes? An Analysis of EU Countries (Laporšek and Dolenc, 2011), Effective Active Labour Market Policies (Boone and van Ours, 2004), Do Active Labour Market Policies Increase Employment? (Estevão, 2003), Labour Policies to Raise Employment (Estevão, 2007), Are active labour market policies effective in activating and integrating low-skilled individuals? An international comparison (Escudero, 2018)

3 Methods

The research presented covers the financial framework of the European Social Fund for the period 2007–2013 in the EU Member States. The aim of the research is to assess the effect of the two largest ALMP programs, namely Training and the Employment Incentives Program, on the Employment Rate. The methodology used is panel regression with fixed effects estimation, as used in above mentioned previous research (Nie and Struby, 2011). The variables used in the research are recapped in Estevão (2003), Estevão (2007) and Boone and van Ours (2004).

In the following paragraphs, the general characteristics of panel regression modelling and the specific model tailored for the needs of this study, along with the description of variables, are presented.

3.1 Panel Regression

Panel data has two dimensions, namely a cross-sectional and a time dimension. When the cross-sectional units have the same number of observations, this is called a balanced panel data set. In the case of a different numbers of observations, the data set is unbalanced. Panel data provide more informative data, greater variability, more degrees of freedom, less correlation between variables and greater efficiency (Verbeek, 2004).

Panel data analysis can be understood as a combination of regression and time series analysis. It is based on repetitive patterns of variance, since the findings of the units are repeated through the time dimension. By examining the repeated intersection of data observation, the panel detects and measures effects that cannot be detected in a clean section or in a time series of data. Since the panel data is taken into account by the dynamics of the cross-sectional data recurring over time, the effect of the unmodified variables can be controlled. When the cross-sectional observations over a long period of time are examined, the analysis of panel data provides a better explanation of the phenomenon, less collinearity and more efficiency than a cross-sectional or longitudinal analysis. Panel regression therefore provides us with greater patterns and greater flexibility in data processing and offers the possibility of studying heterogeneous phenomena (Verbeek, 2004).

The problem of validity and reliability is an important issue in panel analysis. Since the panel data includes both a cross-sectional view and a time dimension, we are faced with a heteroscedasticity problem with cross-sectional data (which can be a consequence of unsuitable merging of groups) as well as autocorrelation for time series data, where coefficients of variance of coefficients and variance of random errors become biased. There are also some additional problems, such as cross-correlations in individual units at the same time. All of these problems need to be addressed in the analysis (Gujarati, 2004).

For panel regression evaluation in professional literature, two approaches are most frequently used, i.e. the Fixed Effects Model (FEM) and the Random Effects Model (REM). Being assumed that u_i (errors) *and* X_i (independent variables) are related, it is more appropriate to use the FEM model. An example of such a situation is a random sample of a large number of individuals whose salary, earnings of function are modelled. It is assumed that earnings are associated with education, work experience, etc. ε_i presents unexplored effects, such as innate abilities and family background. When modelling earnings, it is therefore likely that errors ε_i will be associated with education (Gujarati, 2004, p. 650).

The term "fixed effects" thus expresses non-coincidental quantities. The Fixed Effects Model is appropriate, especially when a random error related to individual observation can correlate with one or more independent variables. Assuming that the regression coefficient β_1 is constant and β_2 *can* be distinguished between cross-sections, the Fixed Effects Model with two independent variables can be presented in the form of the following formula:

$$Y_{it} = \beta_{1i} + \beta_2 X_{2it} + \beta_3 X_{3it} + u_{it} \quad (1)$$

In the formula (1), Y_{it} is the dependent variable of the state *i* at time *t*, X_{it} is the vector of the independent variables that change over time and across countries. β are unknown coefficients that measure the impact of the explanatory variables on the dependent variable, and *u* presents a random error. The index *i* means the number of repetitions (e.g. countries) and *t* denotes the number of time units (years) (Gujarati, 2004, p. 642).

The Random Effects Model is a hierarchical linear model. It assumes that data in analysis are collected from the hierarchy of different populations whose differences relate to this hierarchy. Therefore, the average of the individual effects is completely independent of the explanatory variables. This is expressed in equation (2) below:

$$\beta_{1i} = \beta_1 + \varepsilon_i \qquad i = 1, 2, \ldots, N \quad (2)$$

The term ε_i means a random error with a mean value of zero and a variance σ_ε^2. If, for example, four countries are included in the sample, it is common for them that each reflects the mean value β_1 and individual differences for each country in the expression of error ε_i.

With the integration of formula (2) into formula (1), we get the formula below:

$$Y_{it} = \beta_1 + \beta_2 X_{2it} + \beta_3 X_{3it} + \varepsilon_i + u_{it} \quad (3)$$
$$= \beta_1 + \beta_2 X_{2it} + \beta_3 X_{3it} + \omega_{it}$$

The error term consists of two components ε_i, which can be either a cross-sectional or individual specific component of error, and u_{it}, which is a combination of the time series and cross-section component of error. The fact that the

composite error term w_{it} consists of two (or more) error components derives the name of the term components model expresses (Gujarati, 2004, p. 647-648).

In case T (the number of time series data) is large and N (the number of cross-sectional units) is small, it is likely that there will be little difference in the values of the parameters that are estimated by the Random Effects Model and the Fixed Effects Model. In the opposite case, i.e. N is large and T is small, the estimates obtained by different models can vary significantly. In the Random Effects Model, $\beta_{1i} = \beta_1 + \varepsilon_i$ and ε_i is a cross sectional random component, whereas in the Fixed Effects Model, β_{1i} is considered to be a fixed component. In the latter case, statistical reasoning is conditional on the observed cross-sectional units in the sample. When the cross-sectional units in the sample are considered to be random variations, then statistical inference is unconditional and the Random Effects Model is more appropriate. When it is believed that there are persistent and over time irregular differences between i, the more appropriate choice for evaluation is the Fixed Effects Model (Gujurati, 2004, p. 650).

In case ε_i and X_i are uncorrelated, the Random Effects Model is more appropriate. The assumption in the Random Effects Model is that ε_i presents a coincidence from the entire population. However, sometimes this is not true. For example – if we want to investigate the level of crime in fifty USA states, it is obvious that in this case the assumption that these fifty countries are a random sample is definitely not true (Gujurati, 2004, p. 650).

3.2 Measuring Model

As previously mentioned, the analysis of the effectiveness of ALMP programs has been carried out using a panel regression model. It is intended for aggregate measuring of effects of the two largest ALMP programs, namely the Training program and the Employment Incentives Program, on the Employment Rate.

As stated in the second paragraph of the next chapter, according to the result of the Hausman test, it is assumed that ε_i (ε the expression for the error and i presents the number of repetition) and X (independent variables) are correlated. Therefore, the Fixed Effects Model is more suitable than the Random Effects Model (Gujurati, 2004, p. 642). The model can be written in the following formula:

$$Y_{it}\,(ER) = \beta_i + \beta_1 X_{1it} + \beta_2 X_{2it} + \beta_3 X_{3it} + \beta_4 X_{4it} + \beta_5 X_{5it} + \beta_6 X_{6it} + \beta_7 X_{7it} + \beta_8 X_{8it} + \varepsilon_{it} \quad (4)$$

where Y (dependent variable) is the Employment Rate, β_i is constant in the number of countries' repetitions, and $\beta_{1,2,3,4,5,6,7,8}$ can vary between cross-sections. X_1 represents the Labour Force Participation Rate, X_2 Union Density, X_3 Employment Protection, X_4 Tax Wedge, X_5 Output Gap, X_6 Training, X_7 Employment Incentives and X_8 Passive Labour Market Policy. ε_l represents term for

error. The index *i* denotes the number of repetitions (countries) and *t* denotes the number of time units (years).

The model is summarised in Nie and Struby (2011) and is adapted to the aim of our research. The difference between model specifications in both studies is that in our research the dependent variable is the level of work activity, while Nie and Struby have used unemployment rate. As could be seen from the Table 1, a number of researchers used a very similar approach to us, with only slightly different definitions of the work activity (Laporšek and Dolenc, 2011, Estevão, 2007, Boone and van Ours, 2004, Estevão, 2003).

At the independent variables side, our model also includes variables from the previous research (Table 1). It considers a selection from the whole list of variables chosen according to the needs of our study. The data was obtained from the OECD and Eurostat websites (Eurostat, 2016; OECD, 2016). The variables forming our measuring model are presented n the next page in Table 2.

Table 2: Description of variables

Model	Variable	Description of variables
Y	Employment Rate	Employment Rate is the percentage of the working population in the working age population.
X	Labour Force Participation Rate	Labour Force Participation Rate is the percentage of the active population in the working age population. The working population consists of active employed persons and unemployed persons. The working age population refers to people aged 15 to 64.
	Union Density	Union Density is the relationship between workers that are members of union density and those who are not.
	Employment Protection	Employment Protection is the measure of the strictness of the rules on individual and collective redundancies in employment contracts. It is expressed as a percentage, namely as the ratio between individual and collective redundancies.
	Tax Wedge	Tax Wedge is defined as the ratio between paid employee taxes (at 100 % average earnings) and the associated costs for the employer. The average tax wedge measures the range from which tax on work income leads to discouraging employment.
	Output Gap	Output Gap is the difference between actual GDP and potential GDP and is expressed as a percentage of potential GDP. It is calculated as shown in the formula: $\frac{(\text{Actual GDP} - \text{potential GDP})}{\text{potential GDP}}$. Potential GDP is higher than actual GDP.
	Training program	Expenditures are intended for the Training program, which falls within the active labour market policy. Those expenditures are public for various programs and measures, such as institutional training, workplace training, interactive training and special support for internships.
	Employment Incentives program	Expenditures are intended for the Employment Incentives program, which falls within the active labour market policy. Those expenditures are public for various programs and measures, such as employment promotion (permanent and temporary employment), incentives that help maintain employment, rotations and work division.
	Passive Labour Market Policy	Passive Labour Market Policy expenditures are public and are intended for Out-of-work income maintenance and support in case of job loss as well as for the Early retirement program. Expenditures are expressed as a percentage of GDP.

Source: Politika trga dela (Jacović, 2010), Labour market policy statistics; Methodology 2013 (European Union, 2013), Aktivno in neaktivno prebivalstvo, Slovenija (Svetin & Osvald, 2016, pp. 2- 3), Employment rate (OECD, 2016), Labour force participation rate (indicator) (OECD, 2016a). Economic Outlook No 100 – November 2016: Output gaps: deviations of actual GDP from potential GDP as % of potential GDP (OECD, 2016b), Public spending on labour markets (OECD, 2016c), Strictness of employment protection – individual and collective dismissals (regular contracts) (OECD, 2016d), Tax wedge (2016e), Trade Union Density (2016f).

The previous studies cover different sets of countries over different time periods (Table 1). Our set of countries is in accordance with Laporšek and Dolenc (2011), who used data for twenty EU Member States. As mentioned before, our study comprises the until now uncovered time period from 2007 to 2013 and presents the financial framework of the European Social Fund, while at the same time the time of the financial crisis is also taken into account.

In conclusion, we present the final formula of the measurement model (5), which includes an independent and eight dependent variables:

$$ER_{it} = \beta_i + \beta_1(LFPR)_{it} + \beta_2(UD)_{it} + \beta_3(EP)_{it} + \beta_4(TW)_{it} + \beta_5(OG)_{it} + \beta_6(Tr)_{it} + \beta_7(EI)_{it} + \beta_8(PLMP)_{it} + \varepsilon_{it} \quad (5)$$

where ER (Employment Rate) is the dependent variable and LFPR (Labour Force Participation Rate), UD (Union Density), EP (Employment Protection), TW (Tax Wedge) OG (Output Gap), Tr (Training), EI (Employment Incentives) and PLMP (Passive Labour Market Policy) are independent variables. The impact of independent variables on the Employment Rate is estimated with the fixed effects panel regression model in the country *i* and year *t*.

4 Results

As presented at the beginning of the article, the aim of the research was to analyse the aggregate effect of ALMP programs Employment Incentives and Training on the Employment Rate. To describe the broader situation on the labour market, we included six additional independent variables that had effect on the labour market: Employment Protection, Union Density, Labour Force Participation Rate, PLMP, Tax Wedge and Output Gap. The panel model comprises data in the time span of seven years (2007–2013) for 20 EU countries with 131 observations.

The software program package used to analyse the data was Stata/SE 14.0 for Windows.

Aggregated effects of two ALMP programs and PLMP on the Employment Rate were examined using the panel regression fixed effects model. As the model showed that independent variables and their residuals are not correlated, we also tested the random effects model. It expressed even stronger effects than the fixed model, but the Hausman test (P = 0.056) caused us to reject the null hypothesis that the appropriate model was random effect. At that point and in all further hypotheses testing, we use α-level 0.05. We tested the data model for heteroscedasticity and autocorrelation using a modified Wald test for group wise heteroscedasticity in fixed effect regression model and a Wooldrige test for autocorrelation. Both null hypotheses that there is no heteroscedasticity and autocorrelation in our model were rejected. According to Hoechle's (2007) suggestion, we used a fixed effect estimation with Driscoll-Kraay standard errors.

As can be seen in Table 3, a significant portion of the variance in the dependent variable Employment Rate is explained by the independent variables (R^2 = 0.837). The goodness-of-fit is confirmed by a statistically significant F test (P = 0.000).

Table 3: Panel regression model characteristics

Fixed-effects regression			Number of jobs		=	131
Group variable:		ID	Number of groups		=	20
R-sq:			F(8, 6)		=	73,44
within	=	0.8375	Prob > F		=	0.0000
ER	Coef.	Drisc/Kraay Std. Err.	t	P>t	[95% Conf. Interval]	
UD	0.0199	0.0864	0.23	0.826	-0.1916	0.23136
LFPR	0.8284	0.0730	11.35	0.000	0.6499	1.00695
EP	3.9463	1.1780	3.35	0.015	1.0639	6.82877
TW	-0.1510	0.0388	-3.89	0.008	-0.2459	-0.05613
OG	0.1555	0.0818	1.90	0.106	-0.0448	0.35575
Tr	3.8032	0.7653	4.97	0.003	1.9304	5.67589
EI	-4.5209	2.3060	-1.96	0.098	-10.1634	1.12157
PLMP	-3.7288	0.5954	-6.26	0.001	-5.1858	-2.27180
_cons	5.5060	5.8171	0.95	0.380	-8.7280	19.73988

Source: Authors' calculations (Statistically significant difference: P |t| < 0.05)

The results indicate a statistically significant effect on Employment Rate for five variables. Three variables demonstrate a positive effect: Labour Force Participation Rate (t = 11.35, P = 0.000), Employment Protection (t = 3.35, P = 0.015) and Training (t = 4.97, P = 0.003). While the two latter variables manifest the expected positive influence on Employment Rate, Labour Force Participation Rate expresses a somewhat unexpected effect. It would be presumed that Labour Force Participation Rate does not change much either over countries or over time. In the absence of regulation changes or significant migration flows of labour force, it would slightly decrease because of demographic or out-migration changes. On the other hand, a reverse trend could be introduced by changes to labour legislation (retirement age, years of service) or by in-migration flow. As the situation in different countries is more or less different, we would expect only a moderate or no effect of Labour Force Participation Rate on Employment Rate. Nevertheless, as the phenomenon is out of the scope of our study, we leave the question to be answered in future studies.

A negative effect is demonstrated by two variables: Tax Wedge (t = -1.99, P = 0.049) and PLMP (t = -7.46, P = 0.000). Along with the expected role of

Tax Wedge and PLMP, in light of the research question, we could determine that the variable Employment Incentives (t = -1.96, P = 0.098) has a negative effect on Employment Rate at α = 0.1. At first glance, the negative impact is somewhat surprising. However, in a time of financial crisis, labour market changes induce changes in labour programs, whereas a significant part of this reaction is simply generated by a higher number of unemployed people. Even though the Employment Incentives program is an active labour market policy program, in a time of financial crisis, it becomes more passive or rather has a reactive role.

Still, as presented above, the variable Training manifests the positive influence of investment in training on the Employment Rate. Consequently, we could conclude that unlike Employment Incentives, which takes up a reactive position in a time of financial crisis, Training programs keep their proactive nature even in a time of crisis.

5 Discussion

The panel regression analysis was carried out on a sample of twenty EU Member states over the period of seven years (2007–2013). Twenty countries were included in the analysis, namely Czech Republic, Denmark, Poland, United Kingdom, the Netherlands, Estonia, Germany, Greece, Portugal, Austria, Belgium, Italy, Ireland, Slovakia, Spain, Sweden, Slovenia, Hungary, Finland and France. The aim of the analysis was to determine the impact of the two largest ALMP programs, Training and Employment Incentives, on Employment Rate. The analysis was carried out using the Fixed Effects Model. The dependent variable in the model was Employment Rate. Eight independent variables were included (see Table 3).

The results showed that the consumption intended for the Training program had a positive impact on Employment Rate. Therefore, the investment in the program would be remunerated, as the Employment Rate could increase. This finding is similar to the studies by Boone and van Ours (2004) and Escudero (2018) (Table 1).

On the other hand, the Employment Incentives program has a negative impact on the Employment Rate, significant at the α-level 0.01. Even at the α-level 0.1, the negative impact of the Employment Incentives Program on Employment Rate is somehow unexpected, as it tied Employment Incentives to lower employment. During a time of crisis, it is intended to cover the costs of unemployment, where the Employment Incentives program, in addition to PLMP, is one of the main financial sources for helping unemployed people.

In contrast to the other studies (Table 1), our research did not provide statistical evidence of the positive impact of ALMP on employment. Because of the different direction of the impact of the programs under consideration; in our study, the impact of ALMP as a whole was not detected. On the other hand,

the analysis of Laporšek and Dolenc (2011) showed that expenditures on an active labour market policy are positively related to the labour market, thus affecting a reduction in unemployment and an increase in the Employment Rate.

However, in different time frames and for different countries, the impact of different programs was found to be different. In two studies, Estevão (2003) and Estevão (2007) showed that the Training Program had no statistically significant effect on employment. Just opposite to our findings in his study as the most effective measures was contended the Employment Incentives program. Nie and Struby (2011) studied the impact of ALMP programs on unemployment rate and found that Training programs, along with Job-Search Assistance, are efficient in reducing the unemployment rate. They reported no impact of Employment Incentives and a negative impact of Direct Job Creation. Similar evidence manifesting inefficiency of the Employment Incentives program is reported by Boone and van Ours (2004). The introduction of the doubt in the efficiency of Employment Incentives program could be understand as a step from the evidence given in before mentioned studies to the results of our study.

The difference in the results of our study in comparison to the previous ones is the negative impact of the Employment Incentives program on Employment Rate. As other studies over different time frames report quite similar results, but opposite to our study, it is highly plausible that the difference is the result of the emergence of the financial crisis.

6 Conclusion

The challenge of the research was to analyse the impact of the ALMP programs on the Employment Rate in the EU Member States during the financial crisis. The aim of the research was to determine whether the expenditures for the pursuance of the ALMP programs had a positive impact on the Employment Rate in the EU Member States. The panel data model included data for twenty EU Member states within the financial framework in the period 2007–2013.

The answer to the research question was provided using the fixed effect panel regression model with Employment Rate as the dependent variable. The model indicated that the Training program had a positive impact on the Employment Rate, which meant that it maintained its role amongst Labour Market Policy measures even in a time of crisis. Supported to a certain extent by weaker statistical evidence, we found a negative impact of Employment Incentives program on Employment rate. Thus, we came to the conclusion that in the period of financial crisis, the investments in the Employment Incentives program were conditioned by the situation on the labour market.

To summarise, the results of our research help in understanding the increase of the ALMP programs and measures and awareness of the impact of ALMP on the level of work activity in the EU. The study therefore provides an insight into the achieved success of the implementation of the ALMP programs in respect of dedicated expenditures during the financial crisis, which is the basis for possible improvements in the further implementation of the ALMP. It also contributes to comparing the performance of the ALMP between various financial frameworks (2004–2006, 2007–2013, 2014–2020) in the EU.

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Competition Authority in a Trap? A Few (Bitter) Words on Making Public Policy by Counteracting an Unfair Use of a Contractual Advantage in Agri-Food Sector in Poland[1]

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ABSTRACT

A problem of counteracting bargaining powers of retailers, specially in agri-food sector, has been recently addressed by regulations in a few European countries but so far it has not been subject to academic considerations. A paper aims at finding rationales of granting administrative bodies with competences of interfering in contractual relationships between market players in reference to an abuse or misuse of bargaining power and to assess a possibility and probability of balancing public and private interests by administrative bodies applying regulations on counteracting an unfair use of a bargaining power. A point of reference for considerations is a Polish regulation dated from December 2016 – Act on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products. In a lack of relevant case law a paper is based on a descriptive method of research as well as a method of conceptual analysis. A paper contests a correctness and rationality of selecting a competition authority as an enforcer of a discussed regulation. A competition authority seems to be caught in a trap of opposite (public and private) interests - an antitrust authority shall undertake an intervention in an interest of a private entity which in many situations may be seen as an intervention against public interest. The paper contributes to an ongoing discussion on EU's proposals for actions on eliminating imbalances between big retailing networks and food suppliers.

Keywords: *agriculture, bargaining power, competition authority, contractual advantage, unfair practices*

JEL: K20, L14, L40

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1 Introduction

Competition policy is crucial for a proper functioning of a free market. Competition law as one of key instruments for enforcing competition policy. This area of law is featured with mixed public and private nature - antitrust law is considered as public (administrative) law whereas regulations on combating unfair practices belong to private (civil) law. Even if such a division of competition law in a broad sense has been well-established for many years in a great number of European countries, in recent years a few countries (among them Poland) decided to introduce a new type of regulation - the one on counteracting unfair use of bargaining power[2] that in fact allows an administrative body (usually competition/antitrust and/or consumer authorities) to intervene into contractual relationships between private entities. The core of these regulations are conditions and prerequisites of a very civil nature that are not enforced, however, by civil courts, but by an administrative body. A peculiarity of these regulations lies in a fact that on their basis antitrust authority shall undertake an intervention in an interest of a private entity which in many situations may be seen as an intervention against public interest, what can be considered as "being trapped".

This new type of regulations brings a question on a reasonableness of public administration's interventions in individual relationships of entrepreneurs active on a market. This paper tries to find rationales of granting administrative bodies with competences of interfering in contractual relationships between market players in reference to an abuse or misuse of bargaining power. Providing that administrative authorities should still act only if a public interest is concerned, kind of natural is a question upon a necessity and a possibility of balancing properly public and private interests in a process of administrative proceedings based upon these new regulations. Because a main point of reference for considerations contained in this paper is a Polish regulation dated from 15 December 2016 - Act on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products[3], appointing a national competition authority (having a status of an administrative body) as an enforcer of this regulation, a paper focuses on weaknesses of introducing competences for counteracting unfair use of bargaining power by an administrative body responsible for an enforcement of competition policy.

A paper consists of five sections. The first one presents introductory remarks to the topic and thesis laying behind the article. The second section summarizes a methodology. The third section deals with a mixed nature of competition law, describes main ideas lying behind antitrust law, law against unfair competition and a new regulation on unfair use of bargaining power and presents rationalities for public interventions in case of antitrust law and a

2 Bargaining power is an economic rather than legal term, although it is used in the paper in order to describe imbalances between suppliers and purchasers that may result in a worse contractual position of one party. Other terms used to described this situation (also in this paper) are: contractual advantage (used in the official translation of the Polish regulation analyzed in this paper) or economic dependence (used e.g. in Portuguese Competition Act).

3 Polish Journal of Laws 2017, item 67.

law on unfair use of a bargaining power. The forth section tries to prove that granting a competition authority with competences to interfere with contractual relationships means putting public administration in a trap that can influence negatively on a social reception of administrative law and functioning of public administration. Finally, conclusions based on previous considerations are presented.

2 Methods

The paper is based mainly on a descriptive method of research as well as a method of conceptual analysis. Because of a lack of relevant case law, the analysis focus mainly on legal texts and accompanying acts such as a draft proposal of a legal act and its justification and policy papers, with only few references to jurisprudence. References to foreign jurisdictions and literature are limited because of a very narrow scope of relevant sources containing analysis of the topic.

3 Rationality for a Public Intervention By Competition Authority: Key Findings

3.1 Public and Private Regulations for Competition

A term "competition law" covers legal regulations aimed at guaranteeing an existence of sound and fair competition which is a core of free market economy. A system of legal regulations dedicated to a protection of competition as a market mechanism is commonly established in a majority of European countries as a two-fold system consisting of public competition law, known as antitrust law, and private competition law, recognized as law against unfair competition. Both these areas constitute competition law in a broad sense, whereas antitrust law is usually considered as a competition law in a narrow sense. A demarcation line between public and private competition law lies in an interest protected by each of these regulations: antitrust law is oriented for securing competition as a market mechanism whereas private competition law aims at protecting an individual entrepreneur from anticompetitive (and thus unfair) behaviour of other market participants. Surely these regulations are not totally set apart because to a certain degree combating unfair practices somehow sustains a well-functioning and well-being of competition, but still an orientation for varied goals requires a totally different mechanisms, tools and institutional framework for enforcement of both types of regulations concerning a protection of competition and thus shaping a competition policy.

Antitrust law in Europe (not only in the EU Member States) patterns substantive competition rules concerning competition restricting practices settled in Art. 101 and Art. 102 TFEU. The Treaty provisions on restrictive practices are applied as long as a prohibited anticompetitive behaviour has an impact on a pattern of trade among EU Member States. Art. 101 on a prohibition of anti-

competitive agreements and Art. 102 on a prohibition of an abuse of a dominant position can be enforced either by the European Commission (acting as the EU competition authority) or by national competition authorities (if the Treaty rules are applied simultaneously with national antitrust law). Even if there is no formal obligation of a harmonization of competition rules, national substantive competition rules in EU Member States (as well as countries in a process of an application for a membership) do not differ from their EU prototype, also procedural rules in antitrust proceedings are approximated to a high degree. Regarding state aid rules, Art. 107 TEU and its followers are applied directly in EU Member States and there are no national rules in this area (except for certain technical provision concerning mainly monitoring and reporting duties on state aid). Due to such a system of a protection of competition throughout EU is pretty concise, based on a (possible) parallel application of the EU and national competition rules by public competition authorities. EU law does not settle any requirements upon a status of competition bodies, but in the absolute majority of EU Member States these bodies belong to a system of public administration (van de Gronden and de Vries, 2006, p. 32; Alves et al., 2015, p. 13; Zimmer, 2015, p. 255) and antitrust law is considered as a part of administrative law, sometimes also called: administrative economic law or public economic law). Sanctions for violating prohibitions of anticompetitive practices formally are administrative fines,but because of their potential big amount, they are treated as criminal sanctions due to standards of Art. 6(1) of the European Convention of Human Rights[4] (Perroud, 2008; Błachnio-Parzych, 2012, p. 35).

Unlike in the US, public enforcement of antitrust law is dominant either in the EU or in its Member States, but it is complemented by private enforcement of antitrust law. The latter means that violations of antitrust rules (precisely: prohibitions of anticompetitive practices) can be sources of damages granted by civil courts on an individual demand after conducting a full "traditional" court proceeding[5]. In this dual system of an enforcement of antitrust law, a division of tasks is very clear: competition authorities protect public interest whereas courts provide measures protecting individual (justified) interests.

The characteristics of antitrust law should be supplemented by a concise, somehow juxtaposed, description of private competition law. Antitrust law concentrates on prohibiting market practices that can eliminate, distort or prevent competition as a necessary mechanism of a free market economy. Regulations on combating practices of unfair competition aim at eliminating market practices that do not have an impact on a whole market but they deteriorate a market position of competitors due to unfair behaviour, defined e.g. in Art. 3(1) of the Polish Act on Combating Unfair Competition[6] as "an ac-

4 See e.g. a judgment of ECtHR in case *A. Menarini Diagnostics srl v. Italy*, second section, 27 September 2011.

5 Private enforcement of antitrust law was much facilitated by an implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

6 Act of 16 April 1993 on Combating Unfair Competition (consolidated text: Polish Journal of Laws 2003, No 153, item 1503, as amended).

tion contrary to law and good practices, if it endangers or infringes interests of another entrepreneur or client". Unfair competition practices are, among others, constituted by misleading advertising[7], unjustified discovering of business secrets or counterfeiting products. Only in regard to misleading (and comparative) advertising a national law on combating unfair competition implement EU directive, the biggest part of these regulations are just a result of domestic decisions (and legal traditions). Regulations on combating unfair competition stipulates measures of intervention typical for civil law - e.g. claims for repairing a damage, for discontinuation of unfair practice, claims in a case of unjustified enrichment (see Art. 18(1) the Polish Act on Combating Unfair Competition). Enforcers of these kinds of regulations are civil courts. Even if Art. 1 of the relevant Polish Act settles that the Act regulates issues of preventing and combating unfair competition "in public interest and in interests of entrepreneurs and clients", there is no doubt - in the context of the whole act - that this is an individual (private) interest that is predominantly protected by this regulation.

3.2 Rationality of a Public Intervention on the Basis of Antitrust Law (With References to the Polish Act on Competition and Consumer Protection, 2007)

A question on why public authorities intervene when competition is prevented, distorted or eliminated can be responded with a reference to economic and legal reasons. The doctrine of free market economy sees a competition as a necessary market mechanism, although competition is not an absolute value anymore - acceptability of state aid is the best example of this shift. What lies behind antitrust law that creates a legal and institutional framework for protecting competition is a public interest in preserving competition as a natural market force working for a total welfare. Certainly, public interest in antitrust law shall not be treated as a good way for a delivery of budget incomes from antitrust fines (even if because of a ceiling for fines at a level of 10% of total turnover or incomes, it is quite tempting) or a great measure to protect domestic entrepreneurs (specially national champions) from foreign competition or to protect state-owned companies from any external competitors. Public interest cannot be understood in this manner. Because of limited resources of competition authorities public interest in protecting competition as a market mechanism cannot be practically found in every single case of a distortion of competition - antitrust authorities have to select cases to intervene. Main goals of public bodies' activities are usually hardcore cartels which in fact are the most devastative for competition. Priorities of intervention are announced by antitrust authorities in multiannual programmes of competition policy.

7 In this regard the Polish Act on Combating Unfair Competition implements Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250 , 19.9.1984, p. 17 - 20) and Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L 290 , 23.10.1997, p. 18 - 23).

Public interest as a precondition for antitrust intervention exists in an enforcement of antitrust law either in direct or indirect manner. According to Art. 1(1) of the Polish Act on Competition and Consumer Protection[8] it "(...) lays down the framework for development and protection of competition, and sets out the principles of actions to be undertaken, in the public interest, in order to protect the interests of undertakings and consumers". This provision directly mentions public interest as a sort of "metacondition" for applying substantive competition rules - if there is no public interest in antitrust intervention, the Act should not be applied. In further parts of the Competition and Consumer Protection Act a legislator identifies situations where a necessity for intervention - assessed from a perspective of a public interest - disappears. A lawmaker decided that public interest does not cover so called *de minimis* agreements (agreements of a minor importance) - Art. 7 of the Polish Competition Act exempts from a prohibition of anticompetitive restrictive practices agreements that do not include any hardcore restrictions of competition and which are concluded between entrepreneurs whose market shares are below certain thresholds[9]. In case of *de minimis* agreements a competition authority is released from a duty to conduct antitrust proceeding (de *minimis* rule is common in antitrust legislations, it is also applied by the European Commission[10]). A reason for a public intervention also disappears when limitation periods (of 5 years) for initiating an antitrust proceeding passes (Art. 93 of the Polish Competition Law).

Apart from these unique provisions, the Polish competition authority enjoys a very broad competence to shape a meaning of a metacondition of public interests, because according to Art. 47 of the Polish Competition Law antitrust proceedings are initiated solely on the own motion of a public enforcer, applications for starting an antitrust proceeding are not binding. What should be highly appreciated is a fact that the Polish competition authority in every antitrust decision refers to a prerequisite of public interest and explains in what way a particular case meets this condition. But still, if it gets a piece of information on a potential violation of law, the competition authority is not in any way obliged to provide explanations why a case is beyond public interest.

An interpretation of a concept (a notion) of public interest has a great impact upon a level and intensity of competition on relevant markets. A meaning of public interest can be delivered and shaped not only by an antitrust authority itself, but also by appealing bodies (in Poland, as in many other legislations: courts). A case law reflecting judges' positions on a public interest is vast. Over

8 Act of 16 February 2007 on Competition and Consumer Protection (consolidated text: Polish Journal of Laws 2017, items 229, 1089, 1132, as amended).

9 Agreements between entrepreneurs are exempted from a prohibition of anticompetitive agreements if market shares of parties to an agreement does not exceed 5% in case of horizontal agreements and 10% of vertical agreements. An agreement can benefit from an exemption only if it does not contain hardcore restrictions of competition.

10 Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (OJ C 291, 30.08.2014).

more than 25 years of an application of antitrust law in Poland[11] courts shifted from a quantitative to a qualitative concept of public interest. Treating a public interest in a quantitative dimension meant guaranteeing market conditions for an operation of as many competitors as possible. Public interest in a qualitative sense presumes that competition must be effective from a point of view of consumer (total) welfare, regardless a number of competitors (a welfare may not necessarily be provided by the highest possible number of entrepreneurs active on a market). A settled interpretation of public interest as a reason for antitrust intervention by public authorities is concisely described in the following statement of the Warsaw Court of Appeals dated from 17.12.2010 (VI Aca 427/10): "(...) Preventing a common economic damage caused to consumer (or increasing its size) shall be treated as a value constituting a public interest. (...) A violation of a interest of any individual is even not necessary to apply instruments of intervention regulated in the Act". Indeed, sometimes an activity of a public enforcer brings some benefits to individuals (because of a public intervention an entrepreneur whose interest was touched by anticompetitive practices does not need to stand up to a court with a claim for giving up a prohibited practice).

3.3 Regulations Against Unfair Use of a Contractual Advantage

An economic development resulted in a growing number of chains of hyper- and supermarkets and their great buying power in many European countries. Big retailing networks became very powerful market players who could have abuse their economic positions in relationships with their suppliers, especially with SMEs. Undoubtedly, unfair treatment of suppliers happened and these practices could not have been caught by Art. 102 TFEU (a prohibition of an abuse of a dominant position) or its national counterparts, because retailing networks do not have a dominant position on a relevant (European or domestic) market (Stefanelli and Marsden, 2012, p. 3). Therefore the European Commission prepared the thorough analysis of a distribution chains of food products which showed that some practices of traders should be eliminated (DG Internal Market, 2014; OECD, 2014). However, the European Commission itself so far has not decided to introduce any binding law (regulations or directives) against unfair use of a bargaining power of purchasers, but it adopted in 2014 the Communication on tackling unfair trading practices (UTPs) in the business-to-business food supply chain[12] and in 2016 addressed the report on unfair business-to-business trading practices in the food supply chain to the European Parliament and the Council[13]. But a debate on EU legal framework

11 The first antitrust regulation designed for a market economy was adopted in Poland in February 1990.

12 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Tackling unfair trading practices in the business-to-business food supply chain, Strasbourg, 15.7.2014, COM(2014) 472 final.

13 Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, Brussels, 29.1.2016, COM(2016) 32 final.

for unfair practices in food retaining is still on, heated up by the European Parliament[14] and supported by the European Council[15].

In a few countries national traders decided to adopt a national code of conduct and thus grounds for lawmakers' intervention disappeared. In other countries, indeed, sales networks did not succeed in cooperating so legislators decided to act. Certainly, there was a problem with abusing a bargaining power by some market players - because of the fact that usually none of hyper- or supermarkets chain has a dominant position on a national market, practices against suppliers could not have been caught by a prohibition of an abuse of a dominant position (which is included in "traditional" antitrust law). Despite some minor differences in conditions or sanctions, a philosophy of legislator's intervention remains the same: an administrative body is provided with a competence to stop or to amend contracts between individual entrepreneurs if circumstances show that a bargaining power was unfairly used by a chain. An expiry or a change of a contract is not the only measure of an intervention, an enforcer is usually in charge to impose a fine on an infringer. It must be added here that usually all these abusive, unfair practices were undertaken in relations with food suppliers so regulations are often limited to an agricultural and food sector.

Regulations of this kind were adopted e.g. in Poland, Italy, Hungary and Romania.

3.4 Rationality of a Public Intervention on the Basis of Law Against Unfair Use of Bargaining Power (With References to the Polish Act on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products, 2016)

Equality of parties in civil law-based relations, guaranteed as one of fundamental values in civil codes, in reality is strongly modified by market (economic) and social conditions. Entities holding a certain level of market power - which can result from e.g. a volume of purchase/sales or localization - they enjoy a total discretion in selecting contractors (from a great number of) and therefore they may be tempted to abuse their bargaining power. As pointed above such a situation may occur specially in a retail sector, in relations between hyper- and supermarkets chains and their suppliers, mainly suppliers of food products. This inequality of market positions and a bargaining advantage of retail chains (quite often companies of foreign origins) versus a "handicapped" position of suppliers (usually domestic companies, farmers or their associations) created a promising political (even populist in some cases) potential.

Regulations on combating unfair practices resulting from a bargaining position are generally based on a prerequisite of a public interest - an interven-

14 See European Parliament Resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)).

15 Council conclusions of 12 December 2016, *Strengthening farmers' position in the food supply chain and tackling unfair trading practices*.

tion of an administrative body is initiated if a public interest is somehow damaged. Art. 1 of the Polish Act on Counteracting the Unfair Use of Contractual Advantage bears a resemblance to Art. 1 of the Competition and Consumer Protection Act claiming that "Act establishes rules and procedures for counteracting, in order to protect public interest, practices that unfairly use a contractual advantage (....)". Both provisions calls a public interest as a condition for an administrative interference, both regulations are enforced by the same specialized administrative authority which is the President of Office of Competition and Consumer Protection. But does a public interest mean the same in both regulations? A coherence of a legal system and a coherence of a system of public administration would require the same interpretation of this concept. If a lawmaker grants a competition authority with competences to enforce the new regulation on an unfair abuse of a contractual advantage, it is reasonable to expect that the idea behind it was an implementation of the same goal, i.e. protecting a public interest in the same dimension (as it is clear that an interpretation of a public interest can vary depending on the content of a certain regulation and its enforcement system). However, a meaning of a concept of a public interest - that must be protected by the Polish competition authority - is totally different in the context of the Competition and Consumer Protection Act (where public interest means protecting competition as a mechanism of market economy) and the Act on Counteracting the Unfair Use of Contractual Advantage. The latter refers to a public interest but, as it can be read in a governmental preface to the draft Act, mainly in a context of food safety. In the preface we can read that "the draft proposal aims at eliminating unfair practices from a distribution chain of supplies of agricultural and food products. This area of economic activity is linked to a food safety of the state so it has also a social dimension"[16]. Then a government claims that food safety is a part of a national safety so it is "significantly important" to prevent a negative influence of contractual relations on a food safety of Poland. A danger for a food safety is reflected in by a fact that purchasers' pressure on a level of prices imposed by suppliers can result in a limitation of production or its absolute abolishment or in a deterioration of a quality of food. Additionally, the government affirms that because of unfair practices in trading agricultural and food products a financial situation of food producers is weakened what results in decreasing food quality and investing resources as well as in limiting their innovativeness. What appears as a final justification of an administrative intervention into a freedom of contract is a particular interest of a particular group: food producers. Even if the Act theoretically refers to unfair practices that can be undertaken by both parties - purchasers and suppliers, the justification for the Act tells almost exclusively about unfairness of purchasers, identifying them mostly as chains of hyper- or supermarkets, even if a distribution chain of food (potential "unfair practitioners") is much more complex[17]. In the context of a competition authority's activities public inter-

16 Draft Proposal, p. 1. At: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=790> (accessed 25 July 2017).

17 Four organisations of distributors and retailers (Polish Chamber of Commerce, Main Council of Associations of Commerce and Services, Polish Organization of Commerce and Distribution, Forum of Polish Trade) consider the Act on Counteracting the Unfair Use of Contractual

est can be easily associated with consumers' interest. Astonishingly, consumers were mentioned in a preface to the draft proposal only twice, certainly, the regulation is not consumer-oriented at all. The draft proposal did not say a word about a possible increase of food prices for consumers as a result of a public interference with contractual relationships.

4 Administrative Body Responsible for Counteracting an Unfair Use of a Contractual Advantage – In a Trap of Contrary Interests

In the Polish case where a competition authority was selected as an enforcer of the Act on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products it needs to be observed that an administrative body was caught in a trap of interests (Chauve at al., 2014, p. 304). And this trap is even double-level.

The first level covers to a contradiction within a sole concept of a public interest on the basis of the Competition and Consumer Protection Act and on the grounds of the Act on Counteracting the Unfair Use of Contractual Advantage. In the first case a public interest means protecting competition (market rivalry), in the second - a public interest is condensed to a food safety. A problem arises when competition authority's intervention for a sake of a food safety is... anticompetitive. Let us imagine that a supermarket chain gave a notice on an expiry of a multiannual contract to a producer of apples. A notice was given in a total accordance with rules prescribed in a contract, an expiry of a contract will be completed in an appropriate period. A reason for finishing a cooperation is a lower price of apples offered by a new contractor. A decision of a supermarket chain seems rational. This is generally how a competition works: if you are offered a cheaper product that you can sell at the same price as a product bought at a bigger price or you can sell more products of this kind because you can offer a lower price to consumers, you probably go for it. It needs to be underlined, however, that in contractual relationships a price is not the only factor considered in business decisions. Does the competition authority start a proceeding against a supermarket chain from this example on the basis of the Act on Counteracting the Unfair Use of Contractual Advantage? It is highly probable - formal prerequisites for starting such a proceeding, prescribed in the Act, do allow for it. Does the competition authority impose a fine on a supermarket chain? Again, it is highly probable (a fine up to 3% of a total turnover of an infringer gained in a previous year). Initiating the proceeding and adopting a decision will be totally correct in the light of the Act on Counteracting the Unfair Use of the Contractual Advantage, but it may be considered as a decision stopping a development of competition what in fact is contrary to a competition authority's task in the light of Competition and Consumer Protection Act. Isn't it a real trap leading to a schizophrenia of this administrative body? A similar problem can be met in all countries who

Advantage as "asymmetric". <http://biznes.onet.pl/wiadomosci/handel/wspolny-glos-handlu-ustawa-o-nieuczciwych-praktykach-jest-asymetryczna/eg7trc> (accessed 25 July 2017).

have made competition authorities (instead of e.g. Ministry of Agriculture) responsible for an implementation of this aspect of public policy, e.g. Czech Republic (P. Frischmann, V. Šmejkal , 2016, p. 227).

The second dimension of a trap is much connected with considerations presented in the section III above, a public interest in the Act on Counteracting the Unfair Use of Contractual Advantage have only a little in common with public interest as a reason for administrative intervention in antitrust cases, even if a public interest is expressed literally in Art. 1 of the Act and even if in the preface to draft proposal guaranteeing of a food safety is declared as a foreground goal. It is even not an public intervention in consumers' interests. The administrative authority intervenes for a sake of private interests. This "privatization" of activities of public administration in a process of an enforcement of the Act on Counteracting the Unfair Use of Contractual Advantage is indirectly confirmed by a legal definition of an unfair use of a contractual advantage. Due to Art. 7(2) of the regulation "Using a contractual advantage is unfair if it is contrary to good practices and it endangers a significant interest of the other party or if it infringes such an interest". In the context of this definition a precondition for a competition authority's intervention is a real or potential damage caused to an individual entrepreneur. Here a question arises if the competition authority has to intervene in all situations when private interests are violated or - at least - endangered. By an analogy with the Competition and Consumer Protection Act it shall be pointed that a public interest mentioned in Art. 1 of the Act is a selection criteria, but does it work in this manner in a case of the Act on Counteracting the Unfair Use of Contractual Advantage? I profoundly doubt. In antitrust law public interest means protecting a competition in danger, regardless individual damages, whereas on the basis of the Act on Counteracting the Unfair Use of Contractual Advantage a violation of an individual (particular) interest is a necessary element of a violation of law, so an entrepreneur whose interests were infringed can reasonably expect an intervention of the President of Competition and Consumer Protection. This expectation is justified because by introducing a threshold of 50,000 PLN (ca. 11,900 EUR) of a combined turnover of parties to a contested contract as an entrance condition for an intervention of an administrative organ. Establishing such a threshold in Art. 2 point 1 allows for a presumption that in cases where this quantitative condition is met and a practice meets qualitative conditions from a definition of an unfair use of a contractual advantage, the public administration intervenes. It is rather doubtful if a food safety - declared as a goal of the regulation - can be endangered by a single case of abusing bargaining (contractual) power. The public intervention for a sake of public interest would be justified if violations of a prohibition of an unfair use of a bargaining power were numerous. But the Act on Counteracting the Unfair Use of Contractual Advantage does not contain any condition like that for administrative activities. The Act leaves a room for a discretion of the competition authority to intervene, however if prerequisites of a prohibition are described in such an individualized manner entrepreneurs has all the right to expect that they will be supported by public administration, especially if a public intervention has a direct and immediate effect on their market posi-

tion. According to Art. 26(2) of the Act an administrative body is obliged to impose a duty on an infringer to discontinue a prohibited practice (what in reality means e.g. a continuance of a contractual relationship or a change in a contract, regardless a negative business result for one party). On the grounds of Art. 27(1) of the Act an infringer can be also obliged to implement commitments defined by the competition authority - if an infringer agrees for imposing the duties (e.g. a change in a contract), it can avoid a decision declaring an infringement and it can avoid a fine. No matter what decision (a commitment decision or an "infringement decision") is taken, an individual entrepreneur benefits from it. However, the regulation lacks any procedures allowing for contesting an administrative body's decision on a non-initiation of a proceeding so individuals' demands for a public intervention are prevented. A (potential) victim of an unfair practice is entitled to make a notice to the competition authority in case of a suspicion of an unfair practice (Art. 11(1) and (2)), the administrative organ is only obliged to provide information on its respond to this notice, in fact to inform if a proceeding is initiated or not (Art. 11(3)). Summing up, the administrative body's discretion within a decision on initiating (or not) an administrative proceeding seems to be the only mechanism for balancing public and private interests in an administrative intervention. Administrative discretion seems to be a very weak instrument regarding a fact that a public intervention on the basis of the Polish Act on Counteracting the Unfair Use of Contractual Advantage goes deeply in a sphere of fundamental values such as economic freedom and freedom of contract.

5 Conclusions

By the Polish Act on Counteracting the Unfair Use of Contractual Advantage a lawmaker obliged a public administration to interfere with contractual relations (or even wider: with economic freedom), justifying it by a public interest, even if in reality effects of this interference are visible foremostly in an area of private legal and economic interests (presumingly, in a scheme: benefits for one party, costs for the other), with no significant benefit for a public interest. Administrative body is just granted with competences that are normally reserved for civil courts (what in my personal view is worth criticizing).

The analyzed regulation lacks any instruments allowing the administrative body for balancing private and public interests in order to assess a necessity and effectiveness of public intervention in a particular case. Even if the administrative body is not obliged to initiate an administrative proceeding in any case, a room for a broad discretion was left here, a definition of a violation of a prohibition of an unfair use of contractual advantage, referring to a real or potential damage to a particular entrepreneur in fact requires an intervention in very individualized cases. On the other hand there is no mechanism to demand an intervention from an administrative body. The lawmaker seems to have stopped half-way. Such an approach puts the administrative organ in a very difficult situation - interventions in all particular cases probably will be not useful from a perspective of protecting public interest (food safety), but a lack of intervention in individual cases where qualitative and quantitative con-

ditions are met will certainly dramatically decrease citizens' trust in public administration (which belongs to fundamental principles of administrative law, also according to the Art. 8 of the Polish Code of Administrative Conduct[18]).

Even if an intervention of a competition authority into contractual relationships of entrepreneurs may be considered as justified, reasons for this intervention are linked to food safety rather than to sustaining and developing competition. If so, this is not a competition authority that should be obliged to enforce the new Act - it should be done by an organ of public administration in charge of food and agricultural sector. Otherwise, competition authority seems to face schizophrenia when some of its proceedings are aimed at developing competition, whereas the others are oriented for interfering with legally-shaped market relationships often stemmed from a sound competition. This must have a (rather negative) impact upon effectiveness of public administration within its task in protecting market mechanisms. A solution of this dilemma is to move regulations on a contractual advantage in food supply chains out of (public) competition law (antitrust law) and transfer it into agricultural law - it would guarantee at least a cohesion of a concept of public interest in applying a certain branch of administrative law - protecting farmers' interest on the grounds of agricultural law seems to be much more understandable than "indirect" protection of these interests in antitrust law[19].

The Polish Act on Counteracting the Unfair Use of Contractual Advantage proves a growing impact of private interests in a process of making administrative law and applying administrative (at least formally) regulations by administrative bodies. This is not solely a case of Poland, but also of other countries that decided to adopt law on counteracting/combating a bargaining power (contractual advantages) in agricultural and food sector. Some countries, like Germany[20] and Portugal, used to combat an abuse of bargaining power (economic dependency) in general, regardless a sector, straight on the basis of their antitrust provisions (although enforcement of the provisions of German *Gesetz gegen Wettbewerbsbeschränkungen* in agri-food sector so far has not been successful (Künstner, 2015, p. 1093; Łyszczarz, 2017, p. 141). A specific case is Great Britain (probably the most successful in counteracting unfair practices in food sector) that in 2009 - under auspices of the Department of Business, Energy and Industrial Strategy - adopted Groceries Supply Code of Practice that since 2013 has been implemented by a specialized body: Grocery Code Adjudicator. A few countries (e.g. Belgium, Finland, the Netherlands), however, did not decide for such an intervention - in this countries code of conducts took a place of hard regulations. Self-regulation may be the best way to avoid a trap of interests, however, the EU

18 Art. 8 of the Polish Code of Administrative Procedure: "Public administration bodies are required to conduct proceedings in such a way as to increase the trust of citizens in the State bodies and public awareness and appreciation of the law".

19 Currently (January 2018), works upon EU-wide legislative framework upon a functioning of food supply chains are headed at the European Commission by DG Agriculture (in cooperation with DG Comp).

20 § 20(2) in connection to § 19(2)(5) of *Gesetz gegen Wettbewerbsbeschränkungen.*

debate on unfair practices in food supply chains seems to go in a completely opposite direction - a tension for adopting hard law seems to be very strong, predominantly from the European Parliament, although a scope and a type of regulations are still under discussion the EU level[21].

National laws on the basis of which (as in Poland) competition authorities are responsible for combating unfair practices in an agri-food sector, acting to some extant against a fundamental value that must be protected by competition authority, surely constitute a "conflictual" administrative law (Napolitano, 2014, p. 357), it also belongs to a "new administrative law" (Cassese, 2012, p. 603), but is it a proper direction of a development of administrative law as such and this particular area of regulation? A problem of imbalanced relations between food suppliers and purchasers is of great importance although it surely requires a more strategic approach than adopting a regulation that uses public law instruments to protect individual interest, with no future vision on an impact on this regulation upon counteracting a problem (food safety) in the bigger scale.

21 On 25 July 2017 the European Commission published "policy options" for tackling unfair practices in agri-food sector: *Inception Impact Assessment. Initiative to improve the food supply chain*. Ref. Ares(2017)3735471 - 25.7.2017. <http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735471_en> (accessed 28 July 2017).

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Legal Remedies in Asylum and Immigration Law: The Balance Between Effectiveness and Procedural Autonomy?[1]

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ABSTRACT

The paper tackles a widely discussed but still rather under-researched area of asylum and immigration law, more precisely its procedural aspects and its interactions within the public administration and administrative judiciary. It contributes to the debate about the Europeanization of public administration within the specific context of asylum and immigration law.

The purpose of the paper is to examine the influence of European Union law on the legal regulation of administrative and judicial review of decisions rendered in asylum and immigration procedures. The research is based on an in-depth analysis of the dynamics of amendments and the motivation of national legislation while adopting new procedural rules in the above-mentioned areas on the case of the Czech Republic (based on the description and analysis of the legal regulation, explanatory memoranda and the case law, supplemented with certain comparative aspects). The procedural autonomy principle gets increasingly limited by other principles, namely the effectiveness principle and the principle of effective judicial protection. The paper therefore focuses on the margin of appreciation left to the national legislator: it determines whether the principle of procedural autonomy keeps the real relevancy while harmonising the asylum and immigration law and what is the influence of tensions between the aforementioned principles. The research shows that the legislator still maintains quite a wide degree of margin of appreciation in the administrative and judicial review of asylum and immigration decisions (apart from the visa procedures). However, a broadening of the interpretation of the effective judicial protection principle as provided by Article 47 of the Charter of Fundamental Rights of the EU decreases the scope of procedural autonomy and has the potential to influence not only individual legal remedy, but also the system of administrative or judicial remedies as such. Besides the overall findings related to the influence of European Union law on the review in asylum and immigration procedures, the article tackles numerous practical implications of amendments based in European Union law and practical challenges for the administrative and judicial review in concerned area of law. The paper provides a reaction to tensions coming from the need to find the balance between the obliga-

1 *This article is a revised version of the paper entitled 'Legal remedies in asylum and immigration law: the balance between effectiveness and procedural autonomy?`, presented at the EGPA conference, Toulouse, 26–28 August 2015. The EGPA contributions are not publicly available.*

tion to provide an effective remedy and between the autonomy of Member States and their attempts to preserve national procedural traditions and specificities within the system of administrative and judicial review. It is original by its overall view on the problematic of remedies in asylum and immigration law and by a new perspective of interactions between national legislation and European Union law. Although the research is limited to the case study of the Czech Republic, certain aspects apply to other Member States with similarities within their system of administrative and judicial review.

Keywords: *asylum procedures, effective remedy, immigration procedures, procedural autonomy, judicial review*

JEL: K37

1 Introduction

Procedural regulation is traditionally perceived as an area influenced by European Union law only to a limited extent. The principle of procedural autonomy, in general, leaves the procedures and remedies before the national courts to the national legal regulation. However, the need to guarantee the effectiveness of legal remedies causes tendencies leading to a stronger harmonisation not only for the substantive law but also for the procedural rules. These tendencies are also present in the area of asylum and immigration law, therefore more and more institutes of asylum and immigration procedure change due to European Union law and due to the fact that the definition of the effectiveness of the remedies becomes more specific and more uniform.

Recent developments, influenced mostly by the interpretation of Article 47 of the Charter of Fundamental Rights of the EU, show that European Union law affects not only the extent of the judicial review, but it also has the potential to influence the architecture of the administrative judiciary. In the Czech Republic, this is the case of debates regarding meeting the requirements laid down in the recast of Procedures Directive[2] (or Procedures Regulation, if adopted[3]), especially the implementation of a full and ex nunc judicial review in asylum cases. Another example is the long-lasting debate about the necessity of a judicial review in visa procedures.

The above-mentioned development raises numerous questions regarding the motivation of amendments of domestic remedies in asylum and immigration law, regarding the relation of the the national legislator and European Union law, the balance between the implementation of the principle of effectiveness of judicial protection and the principle of procedural autonomy, which seems to be more and more limited. The main research question is therefore to what extent the European Union law influences the legal regulation of

2 Directive 2013/32/EU, OJ L 180, 29. 6. 2013, p. 60–95.

3 See proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM(2016) 467 final.

remedies in asylum and immigration procedures. This research question is followed by more specific questions: what motivates the legislator to amend the legal regulation of remedies in asylum and immigration law, what is the extent of margin of appreciation given to the national legislator, which amendments are related to the principle of effective judicial protection and what is the impact of such amendments on the system of administrative review and on the administrative judiciary. The research tries to answer these questions on the case of the Czech Republic by means of an in-depth analysis of national legislation and of the motivation of legislative changes (based mainly on explanatory memoranda) and the related case law, using also limited comparative aspects. Apart from the existing state of legislation, we must deal with the potential changes of remedial measures in asylum and immigration law, their impact on the administrative judiciary (not only in the Czech Republic) and the possible limitation of such changes with regard to the procedural autonomy principle. The research focuses on remedies in asylum procedures, visa procedures, adminstrative expulsion and administrative detention procedures, i. e. the key types of procedures that are in some extent harmonised by European Union law and for which there is a specific remedy available in national legal order[4].

We are aware of the fact that the asylum and immigration law are now facing enormous systemic challenges. Focusing on the aforementioned, rather technical aspects of asylum and immigration procedures without solving (or at least trying to solve) the crucial problems resulting from migration flows may seem pointless. However, the question of balance between the need to guarantee an effective remedy and the need to respect the national procedural specifics is more relevant than ever as we are getting closer to not only "harmonised", but to truly "common" asylum procedures.[5]

2 Principle of Procedural Autonomy and Its Limitations

The principle of procedural autonomy was defined, as many other European Union law principles, in the case law of the Court of Justice of the European Union ("CJEU")[6] in the following manner:

4 The paper does not discuss, for example, the remedy against a transfer decision set out in Article 27 of the Regulation No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III) as the review of such decision makes an integral part of a review against the decision on inadmissibility of an application for international protection (i. e. there is no specific remedy for a transfer decision). Although the CJEU decided several interesting cases related to the need to provide an effective remedy against a transfer decision (for example judgments of 7 June 2016 C-63/15 Ghezelbash and C-155/15, Karim), they related more to the material scope of review (not to procedural aspects that could influence legal regulation in the Czech Republic) and they were reflected in the decision-making of the courts (see for example the judgment of Supreme Administrative Court of 12 September 2016, no. 5 Azs 195/2016).

5 Proposed Asylum Procedures Regulation aims, by choosing the form of a Regulation, which is directly applicable in all Member States, and by removing elements of discretion, at achieving a truly common asylum procedures across all Member States.

6 The reference to the „Court of Justice of the European Union" is used for both the European Court of Justice, as well as for the "Court of Justice of the European Union".

> "Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature."[7]

The emphasis on the principle of procedural autonomy in the above-cited Rewe judgment was immediately complemented by important limitations defined by the principle of equivalence requiring not to discriminate between claims based on national law and claims arising out of EU law and the principle of effectiveness preventing the situation in which the national rules would make EU law enforcement impossible[8] or excessively difficult[9].

It is the principle of judicial protection, formulated once again in the case of the Court of Justice of the EU that provides even more intensive scrutiny of national procedural rules. In Johnson[10], the Court of Justice stated:

> "The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms […]and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law."

The Court of Justice of the EU, therefore, formulated a crucial principle which incorporated the principle of effective remedy and effective judicial protection stipulated by the European Convention for the Protection of Human Rights and Fundamental Freedoms into European Union law. Even though the Court of Justice recalled the importance of effective judicial protection on many occasions, including the cases in asylum and immigration matters,[11] the principle became even more apparent and resonant after its "codification" by the Charter of Fundamental Rights of the EU in Article 47 and the reference to the principle in Article 19 of Treaty on European Union.

Despite the fact that both the principle of effectiveness from Rewe test and the principle of effective judicial protection (or effective remedy) work with the term "effectiveness", they are not interchangeable as their scope is different, although the opinions on their mutual relationship may differ. The principle of effective judicial protection may be seen as much wider, as it covers not only the access to European Union law enforcement but many different

7 Judgment of CJEU of 16 December 1976, C-33/76, Rewe v. Landwirtschaftskammer für das Saarland.

8 Ibid.

9 Judgment of CJEU of 5 March 1996, C-46/93 and C-48/93, Joined Cases C-46/93 and C-48/93, Brasserie du pêcheur v. Bundesrepublik Deutschland a The Queen / Secretary of State for Transport, ex parte Factortame and others, par. 83.

10 Judgment of CJEU of 15 May 1986, 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, par. 18.

11 See for example the judgment of the CJEU (Grand Chamber) of 16 November 2004, C-327/02, Panayotova and Others, the Court of Justice reminded the need of effective judicial scrutiny in the context of residence permit proceedings (see also Brouwer, 2007, pp. 75–76).

aspects of fair trial, such as legal assistance, fair and public hearing, independent and impartial tribunal, etc. However, this does not necessarily mean that the principle of effectiveness is the subset of effective judicial protection. As pointed out by Sacha Prechal, both principles are driven by different rationales: while the effectiveness principle primarily aims to guarantee an effective application of substantive European Union law, the principle of effective judicial protection is linked to the fundamental access to the court and the idea of "Rechtstaat" (Prechal, 2011, p. 50). Their purposes may even seem to be contrasting as the effective judicial protection may sometimes limit the effectiveness of the protection provided by European Union law, instead of strengthening it (Safjan, 2014). The case law does not provide a completely clear answer on the mutual relation of the principles yet, the CJEU, however, seems to be testing the national procedural and remedial provisions against both principles in parallel.[12]

The limitations of the procedural autonomy principle could indicate a decreasing importance of autonomy and an increasing emphasis on the effectiveness as such or the effectiveness of judicial protection. However, opinions differ: while for example Sacha Prechal notes that despite the standardisation, the substance of judicial protection and the enforcement of Union law in the Member State, the national procedural autonomy remains the leading principle governing the application of Union law in national courts (Prechal, 2011, p. 31), Michal Bobek claims that there is no such thing as „procedural autonomy" of Member States because there are no areas that are „free" from any European Union law constraints uncontrolled by the Court of Justice (Bobek, 2011, p. 316).[13] Which of these statements seems to be more relevant for the legal remedies in asylum and immigration law in the Czech Republic?

3 Legal Remedies in Czech Asylum Law and Their Development

The review of the decisions on international protection is entrusted to the administrative courts n the Czech Republic. There are therefore no specialised tribunals or courts for asylum matters. An action against the decision of the Ministry of Interior on a matter of international protection is the first remedy available, there is no review by administrative organs themselves. To answer the question of how European Union law influences the procedural rules of an appeal system and to what extent the procedural autonomy of the national legislator is guaranteed, we need to focus on the legislative development of remedies in the asylum procedure and the motivation of the legislator which led him to the amendments. We have to look at the overview of the relevant provisions of Act No. 325/1999 Coll., the Asylum Act and Act No. 150/2002 Coll., Code of Administrative Justice, affecting the effectiveness of legal pro-

12 See also recent judgment of CJEU of 13 December 2017, C-403/16, El Hassani.

13 There is of course much wider spectrum of opinions on the interpretation and content of the procedural autonomy principle, a nice overview provides for example an article of Baghrizabehi (Baghrizabehi, 2016).

tection in asylum matters, along with the explanation of the amendments (based on the explanatory memorandum of the amendment acts).

The first important amendment of the review of asylum decisions was related to the repeal of remonstrance and to the introducing of a direct access to the judicial protection (Act No. 2/2002 Coll., in force since 2002). Even though there was no reason indicated in the explanatory memorandum, there was an indisputable indirect effect of Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures (see Pipková, 2011). Most of other amendments were related to the time-limits for bringing and action: firstly shortening of a time-limit for bringing an action to 30 days (Act No. 325/1999 Coll., in force since 2000), shortening of the time limit to 15 or 7 days (Act No. 217/2002 Coll.), shortening of time limits together with the deprivation of automatic suspensory effect of an appeal for few types of decisions (inadmissible applications) (Act No. 350/2005 Coll., in force since 2005), repeal of the 7-day time limit to lodge an action in case of manifestly unfounded application (decision of Constitutional Court Pl. ÚS 17/09 with no reference to EU law) and repeal of the 7-day time limit for actions brought in detention facilities and for inadmissible applications and time limits for a decision in the case of concurrence of asylum and expulsion proceedings (Act No. 303/2011 Coll., in force since 2012). Out of these amendments, only the changes made in 2005, i. e. shortening of time limits and changes related to the suspensory effect of an appeal, were directly motivated by the Procedures Directive 2005/85/ES. In case of other amendments, the legislator did not mention the reason or referred to a general need for a more effective and faster procedure. Other important amendments were related to the overload of courts. Firstly, there were changes of territorial jurisdiction justified by the need to decrease the number of cases before the High Court of Prague, which was the only competent court at that time (Act No. 519/2002 Coll., in force since 2003). Secondly, the filter of inadmissible cassation complaints in asylum matters was introduced in 2005 in order to increase the effectiveness of procedure and decrease the overload of the Supreme Administrative Court in asylum matters (Act No. 350/2005 Coll., in force since 2005). Lastly, in 2015, there were a few changes related to the Act No. 314/2015 Coll., widening the list of decisions against which the appeal is deprived of the suspensory effect. This change was directly linked to a transposition of the recast of the Procedures Directive.

The overview indicates that most of the amendments linked to the review of asylum decisions were motivated by internal factors: the need to shorten the proceedings and to increase the effectiveness of proceedings for example on the grounds of an overload of a particular court (in case of territorial jurisdiction changes or in case of inadmissibility of the cassation complaint) that was not directly based in European Union law. In fact, the amendments linked directly to European Union law were the changes resulting from the need to transpose and implement the Procedures Directive and its recast (the influence of European Union law while introducing the direct access to the court in 2002 was rather indirect). This could lead us to the conclusion that the sys-

tem of review in asylum law in the Czech Republic is influenced by European Union law only to a limited extent and the Member States maintain, while respecting the rather general obligation to provide an effective remedy, quite a large degree of autonomy without stronger interventions to the institutional architecture of administrative or judicial review.

Nonetheless, the latest development, i. e. the revised Procedures Directive and the proposal for Procedures Regulation, must be considered. The main amendment vis-à-vis the previous regulation of effective remedy is the requirement of a full and ex nunc examination of both facts and points of law and an examination of the international protection needs at least before a court or tribunal of first instance[14]. This was (and still is) the challenge also for the Czech legislator who opted not to amend the Asylum Act and maintained the judicial review based on the cassation principle as it complied (according to the rapporteur's opinion) to the procedural directive requirements.[15] But even the explanatory memorandum mentions that the amendment of judicial review in asylum matters would be a legitimate and more appropriate option.[16] Accordingly, a more radical change of the judicial review should be considered, because, despite the fact that the rapporteur claims full compliance with European Union legislation, such a conclusion is questionable.

The Czech judicial review in administrative matters is based on the principle of cassation, which means that the court cannot as a matter of a rule amend the administrative decision; it can only revoke the decision of the administrative authority[17], as the administrative judicial review is limited to the revision in iure (revision of the lawfulness), therefore the court should not standardly review the factual findings[18] of an administrative authority. The administrative judiciary, based on the principle of cassation, is not prepared and is not suitable for a full and ex nunc review. This is even more relevant for the area of asylum matters because providing a "full" review of both legal and factual findings requires extensive knowledge and language skills in order to search for the relevant, up-to-date and accurate country of origin information. Moreover, the need to examine the international protection needs might be interpreted as the need to grant international protection directly by the court (even if there are also opposite conclusions, see Reneman, 2015, p. 290), which is again not compatible with the cassation principle. This also poses a problem for other states, for example, the Slovak Republic that decided to refer the preliminary question to the Court of Justice. The Slovak Supreme Court asked whether Article 46 par. 3 must be interpreted to the effect that a national court deciding on the merits of an applicant's need for in-

14 See explanatory memorandum to the Directive 2013/32/EU that mentions in this respect the need to guarantee safeguards from article 47 of the Charter and the developing case law of the Court of Justice of the European Union and the European Court of Human Rights, especially concerning the right to an effective remedy. The reference to case-law is without any doubt the reference to the judgement of CJEU of 28 July 2011, C-69/10, Samba Diouf.

15 Governmental proposal of act, which amends asylum act, act on the residence of foreign nationals and several other acts, p. 105.

16 Ibid.

17 See Article 78 of Act. 150/2002 Coll., Code of Administrative Justice.

18 See also judgment of the Supreme Administrative Court of 12 July 2007, No. 7 As 12/2007.

ternational protection may, on the grounds that a negative decision has been repeatedly set aside and the case referred back to an administrative body on the basis of a repeatedly successful appeal, which has thus been shown to be ineffective, decide itself to grant such protection to the applicant, even if it does not have such competence under national law (C-133/17). The preliminary question related to the possibility (or obligation) of the court to directly grant the international protection was referred also by Bulgaria (C-585/16), Hungary (C-556/17) and the Netherlands (C-586/17), so the problems related to the different competitions of courts are evident not only in the Czech Republic. Until now, there are no answers from the Court of Justice, but the rulings should definitely be very interesting not only for the outcome, which will be crucial for the appeal system of the Czech Republic (and other affected Member States). The way the Court of Justice will try to balance the need to secure the existence of a truly effective remedy and the need to respect the procedural autonomy principle (and tradition of administrative procedures in different Member States) will be definitely of great interest as well.

The above-mentioned development reopens the debate about the possibility to establish a specialised asylum tribunal in the Czech Republic, whose creation has repeatedly been proposed instead of the review by general administrative courts[19]. This would make it possible to fulfil the requirement of a full and ex nunc review in asylum matters. Any other solution would be very problematic and incompatible with the overall systemic scheme of the administrative judiciary. Therefore, the creation of a specialised authority seems to be the most appropriate and effective solution. But even supposing the legislator would not come up with the systemic amendment, the interpretation of the current regulation in a way that would enable meeting the requirement of a full and ex nunc review would be an important interference to procedural rules currently in force. The need of a full and ex nunc review, as interpreted by Court of Justice so far, may not seem that revolutionary at first sight, however, it is definitely a very important interference to the system of judicial review of administrative decisions, although the full extent of such interference is not apparent yet. We cannot conclude that the wording of Article 46 par. 3 itself is a restriction to the procedural autonomy principle, because it is a result of the consensus of the Member States and it leaves upon the Member States how to reach the compliance with the obligation to provide the full and ex nunc review including the obligation to examine the international protection needs, however, its further interpretation could limit the scope of the procedural autonomy of the Member States.

4 Legal Remedies in Czech Immigration Law

European Union law influences not only the asylum procedures but also various aspects of other immigration procedures. Nonetheless, the scope of harmonisation differs and European Union law, in general, does not cover so many procedural aspects as in the asylum procedures. The move towards a

19 See for example Větrovský, 2006; Jurníková, Králová, 2016; Kryska 2016; Navrátil 2016.

common procedure in the longer term was pronounced only in relation to the asylum procedure, not to immigration procedures in general.[20] We will, therefore, focus on the type of procedures that are to some extent harmonised by European Union law, i. e. the visa procedures, the administrative expulsion, and the administrative detention procedures.

We can summarise the key amendments of Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic, related to the legal remedies as follows. Firstly, with respect to the visa procedures, there were three major changes (1) introduction of a specific appeal procedure for family members of EU nationals (Act No. 379/2007 Coll., in force since the end of 2007, a transposition of Directive 2004/38/EC in line with the interpretation given in the judgment of the CJEU C-503/03), (2) amendment of the appeal procedure and establishing of a partly independent Commission for decision-making in matters of residence of foreigners (Act No. 427/2010 Coll., in force since 2011, transposition of Art. 32 par. 3 of Regulation 4/2009 that requires to guarantee the right to appeal) and (3) introduction of a judicial review of visa decisions in case of family members of EU nationals (Act No. 427/2010 Coll., in force since 2011, transposition of Art. 31 par. 1 of Directive 2004/38/EC).

For administrative expulsion procedures, there were three major amendments: (1) repeal of an exclusion from the judicial review (made by Constitutional Court by decision from 9 December 2008, No Pl. ÚS 26/07 with no reference to EU law or CEJU case-law), (2) change of territorial jurisdiction and introduction of time limits to render the decision (Act No. 427/2010 Coll., in force since 2011, justified by the need to increase the efficiency, related to the requirements of Directive 2008/115/EC) and (3) introducing a longer time limit (10 days) to lodge an appeal against the administrative expulsion decision (Act No. 222/2017 Coll., in force since August 2017, no reason indicated).

Lastly, there were three important amendments related to the administrative detention procedures: (1) introducing the judicial review of lawfulness of detention and possibility to introduce a request for release to civil courts (Act No. 326/1999 Coll., in force since 2000, no reason indicated), (2) change of territorial jurisdiction and introducing time limits to render the decision (Act No. 427/2010 Coll, in force since 2011, justified by the need to increase the efficiency, related to the requirements of Directive 2008/115/EC) and (3) entrusting the judicial review of ongoing administrative decision to the administrative courts with stricter limits to render the decision (Act No. 303/2013, in force since 2014, amendment related to a private law reform – an opportunity to unify the administrative detention review).

The overview of the key amendments of appeal procedures for the aforementioned types of immigration procedures shows that the amendments are generally rarer than in case of asylum procedures (even if the amendments of Act No. 326/1999 Coll. are very frequent). It could also be concluded that the legislator remains rather autonomous as most of the amendments are not di-

20 See the presidency conclusions of Tampere European Council of 15–16 October 1999.

rectly based in European Union law. The changes of appeal procedures in case of administrative expulsion and detention are influenced rather indirectly; the legislator uses the reference to European Union law as a supportive argument. The only exception is the visa procedure whose review was introduced as a direct consequence of an obligation stipulated by the visa code. Also in this case, we could argue that the procedural autonomy of state is maintained because European Union law regulates only the obligation to provide an effective remedy and the choice of particular procedural institutes stays within the discretion of the Member State, in compliance with the procedural autonomy principle. However, this does not seem to be completely accurate in the context of the interpretation of the effective judicial protection principle as provided by Article 47 of the Charter of Fundamental Rights of the EU.

European Commission in its Report on the Application of the EU Charter of Fundamental Rights for 2013 came to the conclusion that "the right to an effective remedy, enshrined in Article 47 of the Charter, requires that an appeal against a visa refusal, annulment or revocation, includes access to a judicial body, as only or last instance of appeal" (European Commission, 2013, p. 8). Subsequently, the European Commission sent formal letters to the Member States concerned (the Czech Republic, Estonia, Poland and Slovakia) urging them to take the necessary actions to ensure that appeals against a decision to refuse, annul or revoke a visa include an access to a judicial body (European Commission, 2014). Those infringement cases are still active, and until now the Commission decided to refer the Slovakia to the CJEU for not allowing judicial appeal against a decision to refuse, annul or revoke a visa.[21] The example of a restriction to the procedural autonomy principle is quite striking as the Commission's interpretation of the "right to appeal" goes far beyond the consensus reached by the Member States who opted for a possibility of a non-judicial review. Martin Smolek even concluded that an extensive interpretation of Article 47 of the Charter serves in this case as a political tool in a battle for competence between the Member States and the European Union (Smolek, 2015). This opinion can, of course, be questioned, but the fact that such an interpretation represents an important restriction to the procedural autonomy principle of the Member State, even if it is motivated by a more effective legal protection, is indisputable.

In light of the above, recent judgment of the Court of Justice of 13 December 2017, C-403/16, El Hassani provides interesting (although limited) answers to the conflict between the procedural autonomy principle and the right to an effective remedy. The Court provided that Article 32(3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as requiring Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules which are a matter for the legal order of each Member State in accordance with the principles of equivalence and effectiveness. These proceedings must, at a certain stage of the proceedings, guarantee a judicial appeal. The Court stressed that the European Union legislature left

21 See the database of infringement decisions available at <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en>.

to the Member States the task of deciding the nature and specific conditions of the remedies available to visa applicants and that according to the settled case law, in the absence of European Union rules on the matter, it is up to the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on the condition of respecting the principle of equivalence and effectiveness. And it is up to the referring court, which alone has the jurisdiction to interpret its national law, to determine whether and to what extent the review system at issue in the main proceedings satisfies those requirements (par. 25,26 and 31 of the judgment). However, Article 47 of the Charter requires the Member States to guarantee, at a certain stage of the proceedings, the possibility to bring the case concerning a final decision refusing a visa before a court (par. 41). By this judgment, the Court tried to have the cake and eat it too – the „right to appeal" does not equal the right to judicial review and it is up to the Member States (with respect to the principle of autonomy) how they will arrange the nature of appeal within their remedial systems. However, the Member States must still provide access to judicial review at some stage of the proceedings. This is the solution which will require amendments of the review of visa decisions in the Member States concerned; the outcome stays similar to the request of the Commission, but the Court used argumentation that does not give you the impression that the procedural autonomy of the Member States was ignored.

5 Conclusions

An overview of legislative amendments related to legal remedies in asylum and immigration law shows that the legislator maintains a certain degree of procedural autonomy while transposing and applying European Union law, even though the extent of European Union law constraints importantly differs for each subarea of asylum and immigration law. This can be seen mainly in the overview of amendments related to remedy in asylum procedures, with an exception of the newest development based on the recast of the Procedures Directive. It must be stressed that the procedural autonomy in this sense does not mean that the Member State is completely free from any European Union law constrains uncontrolled by the Court of Justice (Bobek, 2011, p. 316). On the contrary, the margin of appreciation for the national legislator becomes narrower. As general advocate Villanon stated in the context of the asylum case of Samba Diouf, the Member States are obliged to organise the procedures in such a way that the procedural autonomy of the Member States does not create an obstacle to the effectiveness of the right to an effective remedy,[22] whose interpretation broadens. This can be seen in the case of the "new" Asylum Procedures Directive and its approach to the scope of judicial review that must be "full and ex nunc" and on the interpretation of rights to an effective remedy in the context of visa procedures. Step by step, the principle of effective judicial protection starts to prevail upon the principle of procedural autonomy and the European Union Member States

22 Opinion of general advocate of 1 March 2011, C-69/11, Samba Diouf, par. 46–47.

must adapt to an increasingly extensive interpretation of the effectiveness in the context of judicial protection. This new development could, therefore, question the conclusion of judge Prechal, that the procedural autonomy principle remains the leading principle governing the application of European Union law (Prechal, 2011, p. 31). Moreover, we should consider the fact that European Union law influences not only the remedy itself but also a lot of other procedural aspects determining the final form of the appellate procedure. Returning to the main research question, to what extent the European Union law influences the legal regulation of remedies in asylum and immigration law, we could very briefly summarize that the extent differs for each subarea of asylum and immigration law but in general, the scope of influence is widening (very often through the case law) and sometimes it comes as a surprise for the Member State (and not always as a pleasant one).

Even if the efforts of the European Union to provide the most effective legal protection possible should be appreciated, it is doubtful whether it is really possible to guarantee the effectiveness of legal protection by means of "forcing" the State to adopt solutions that do not have sufficient legal background in the national legislation and can therefore be isolated vis-à-vis national procedural rules. While opinions on the benefits and drawbacks of a more extensive interference with national procedural rules may differ, the national legislator should get used to broader restrictions to his margin of appreciation or "autonomy", because European Union is gradually approaching not only harmonised but also uniform asylum and visa procedures. And the same development can probably be expected also for other types of immigration law procedures.

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An Examination and Evaluation of Multi-Level Governance During Migration Crisis: The Case of Slovenia[1]

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ABSTRACT

Paper presents the value added to the analysis of the functioning of multi-level governance in the context of EU. Furthermore, it contributes to the small state studies, as the mitigation of crisis from the perspective of small state is analysed. The aim of the research was to determine whether the multi-level governance during the large-scale crisis was successful and what factors affected the level of success. The analysis utilizes of the case study method, where the crisis responses during the peak of Western Balkan migration route and Slovenia as a small state on Schengen border serve as examples of examination and evaluation. Results show unsuccessfulness of multi-level governance during the crisis, with mostly top-down direction of decision-making, and particularly the sub-national level being poorly involved into the process. In addition, also layering of policy creation and implementation can be observed. The results of the analysis also pointed out that the multi-level governance in the case of migration crisis on the Western Balkans Route can be positioned as the type 1 governance, if we follow the outline of Hooghe and Marks (2003). The results indicate that unsuccessful multi-level governance had negative impacts on managing the crisis, as well as on perceptions about EU and Schengen Zone. This study is novel in its content, as it represents the first examination and evaluation of multi-level governance during the EU migration crisis, where Western Balkan route and Slovenia as small state on the outer Schengen zone border serve as a case study for the evaluation.

Keywords: *crisis management, migration crisis, multi-level governance, evaluation, small state, Slovenia.*

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1 Introduction

During the last decade, the European Union is exposed to one the biggest migration crisis since the World War II. Migrants enter EU through several routes, some of them are difficult and extremely dangerous ones. The entry points are Member States, which are geographically close to the Mediterranean Sea, but the target destinations are richer European countries such as e.g. Germany and Sweden. Frontex (2017) lists eight main migration routes to the target points counties, which mostly extend along the southern and south-eastern part of the EU. This research will focus on the Western Balkans route, which was particularly active for one year in the period from 2015 to 2016 and extends through the countries of Turkey, Greece, Macedonia, Serbia, Hungary, Slovenia, Austria and Germany (BBC News, 2015).

Slovenia was directly affected by the migrant crisis in October 2015, right after the closure of the Hungarian border, when migrants immediately started to enter in order to pass another transit country and to reach out their final destination. The first registrations of migrants in Slovenia took place on October 16, 2015 (Republika Slovenija, Ministrstvo za notranje zadeve, 2017b and Republika Slovenija, Ministrstvo za notranje zadeve, 2017c), and then the country coped with the group of transit migrants until the beginning of March of 2016, when the western Balkan route officially closed.

Since the interest in staying and integrating in the system was not indicated by migrants, Slovenian authorities tried to direct them as quickly and efficiently as possible to Austria. Slovenia thus accepted migrants on the border with Croatia, carried out the registration process, offered them health and other necessary care, and then handed them over at the northern border to Austrian authorities. During the half year period, Slovenia allowed entrance to approximately half of million migrants, which accounts for a quarter of its own population (Republika Slovenija, Ministrstvo za notranje zadeve, Policija, 2015 and Republika Slovenija, Ministrstvo za notranje zadeve, Policija, 2016a).

Slovenia adopted the EU solidarity answer from the very beginning on, but still in addressing migrant issues, Slovenia is committed to respect and implement supranational and national legislation and the rules and procedures for protecting external Schengen border. It was clear that the situation could not be handled only by the national level, but it required a diverse range of organizations to work closely together at many different operational and decision-making actions. Namely, tackling this crisis required efficient multi-level governance, which represents also the backbone of administrative structure of the EU.

The aim of the paper is to examine and evaluate the multilevel governance in tackling migration crisis of 2015-16 with specific focus on Slovenia. The research shows many shortcomings of it and the core research question of the paper is, why and what factors contributed to the collapse of multi-level governance. Paper uses predominantly qualitative approach, which is also prevalent in the literature (Zincone and Caponio, 2004). This approach is based on

the analysis of various official documents and notes, media interviews and participant observations, the analysis of newspaper proceedings and opinion pools, but it also incorporates relevant data and indicators, where applicable and available.

The paper is organized as follows. First, it introduces fundamental theoretical considerations and brief literature review. Second, it introduces the methodology used to reach the results of the research. Then, results of the research are presented. Subsequently, in the discussion part the analysis of the results will take place. Finally, the article draw conclusion regarding the multi-level governance of the migrant influx in Slovenia with addressing the shortcoming and suggestions for improvements.

2 Theoretical Considerations and Literature Review

The first references of the model of multi-level governance date back to 1993, when Marks (1993, p. 401-402) presented his model as a result of the centrifugal process in which the decision-making processes are directed away from the national level in two possible directions – up to supranational or down to subnational level. Power strives away from the national level, mainly as a result of the contemporaneous process of European integration and regionalism (Hooghe, 1996). Later on, Hooghe and Marks (2003, p. 234) strived for radical changes in governance by jointly defining multi-level governance as a permanent system of negotiations between nested actors through different levels. Over the years, the definition has been complemented by many authors and led to defining it as a strongly interconnected network, involving several different actors. Networking and co-operation is based on a strong and transparent dialogue, on which external factors rarely affect and is not marked by differences in space or geographical distance. The most important achievement of the model is that no decision-making level or no actor is overriding to another, the model therefore creates a common interdependence in decision-making and mutual equivalence (Stephenson, 2013). Decision-making should be more bottom-up oriented in order to provide more flexibility at the local level and boosting the creation of local policies (Tasan-Kok and Vranken, 2011).

The administrative functioning of the EU is based on the multi-level governance principles, and the stability of the union is based on the tight cooperation (Moussis, 1999). In the same line as the tight cooperation helps to solve the day-to-day issues, it should also address solving issues of a large-scale. Crisis of a large-scale often immerge very fast and can leave long-term consequences if handling the situation is not adequate. In particular, multi-level governance can be challenged by large-scale crisis issues, and literature review can provide numerous evidence. The sensitivity in this case can be tackled since management of the situation depends on many actors on different levels and for so no clear command is pre-established on the actor's responsibility boundaries or on the directions of the crisis management. The possibility for emerging social, political and economic conflict is hardly avoidable. By

the uniqueness of every large-scale crisis maintaining the situational awareness and the ability to effectively improvise on the recognised novelty has an important role for the integrated execution in real time by potentially same inclusion of the levels (Howitt and Leonard, 2006).

Large-scale crisis management has been discussed by many scientists and the topic entered the public discourse. Examples as by the authors Howitt and Leonard (2006) on improving disaster response capabilities caused by the Hurricane Katrina, by Tanimura and Yoshikawa (2014) on using the standardization to improve crisis management essential developed on the example of the Great East Japan Earthquake, by the template for leading crisis operations named National Incident Management System (NIMS) launched in 2001 by the Department of Homeland Security of the United States of America and many others scholars are of a great help to governments in order to properly prepare and predict unnecessary negative situations. All three models named above examine different situation and for so, different perspective and solution on preparing and solving the large-scale crisis is addressed. Generally looking they all share the concluding idea presented by Tanimura and Yoshikawa (2014): observe, orient, decide and act. Their conceptual framework is beneficial for including actors on many levels to identify the chaotic situation in an early stage and clarify the strategic and operational management of the crisis. A prompt response of the actors leads to an effective and efficient crisis respond and prevent unexpected event to deepen the confusion and later on the potential damage.

Recently, a modest stream of literature on the multi-level governance of migration and integration policies within EU has emerged, although mainly policies are discussed, and not crisis situation. Interestingly, the research points out that in particular immigration policy-making is characterized by struggle among supranational and national level on the amount of discretion national level has in interpreting EU directives, and this field has been earmarked with resulting complex relations among all levels of governance. In addition, substantial fragmentation of policy-making and implementation has been observed in this area, where different levels and layers of government develop often structurally unconnected policies (Scholten and Penninx, 2016). This might suggest so-called decoupled relations between government levels, where policies are dissociated and even contradictory between levels, finally leading to inevitable conflicts (Jørgensen, 2012).

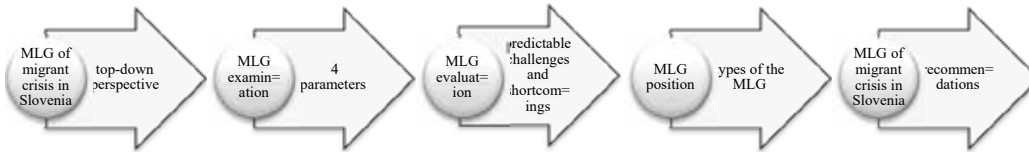
The examination and evaluation of multi-level governance has been addressed also from the perspective of new member states and small states, and several different pattern have evolved. For instance, Kluvankova-Oravska and Chobotova (2010) argue that multi-level governance from the perspective of Central and Eastern European countries is characterized by a prevailing hierarchical structure, and there is a mismatch between old hierarchical structures and new institutions developed during and after the period of transition, causing often vertical coordination problems. Similarly, the evaluation from the perspective of small states also reveals some interesting find-

ings. The review of existing research points out that in the small EU countries hardly any involvement of subnational actors in policy-making processes or in networking can be observed and in those countries subnational actors are rather weak partners to the national level (Kull and Tatar, 2015). Consequently, there is a clear need to add case studies on the evaluation of multi-level governance, targeting these two above mentioned specific context, which this paper is aiming for.

3 Data and Methodology

The research is based on the qualitative methodology, and case study analysis serves as basic approach. The methodology of the paper uses different techniques while assessing the efficiency and effectiveness of the multi-level governance: first, the research adopts the top-down perspective to analyse the relations; second, multi-level governance is examined on the basis of four most tackled issues at the time of migration crisis in Slovenia, which are assembled in four parameters; third, the situation is evaluated by the model of predictable challenges of multi-level governance (Tasan-Kok and Vranken, 2011) and by the model of shortcomings of the multi-level governance (Hurrelmann and DeBardeleben, 2009). Moreover, paper positions the specific situation into one of the two types of multi-level governance, and finally, paper presents recommendations for potential future improvements. Each technique is further elaborated hereinafter. For a lucid overview, the methodology of the paper is graphically presented below.

Figure 1: Graphical illustration of methodology



Source: The authors' elaboration

The concept of multi-level governance is examined on the basis of the migrant influx occurred on the Western Balkans Route during the period 2015-16. The context of the analysis is based on Slovenian perspective, and success in tackling the migration crisis is examined from the multi-level governance perspective. That is, the conceptual framework of the multi-level governance serves as the basis for the case study analysis on the crisis responses and management at all three levels that actively participated in managing the migrant influx in Slovenia; supranational (EU), national and subnational level. Furthermore, when analysing the relations between the levels, the top-down perspective was considered, specifically, the focus was given to the analysis of policy implementation and the evaluation of outcomes, as already previously introduced by Zincone and Caponio (2004). As the clear-cut system of command and control of the supranational and national elites is established

within the European Union, the subnational governments and street-level officials clearly depart from both when creating the policies. This specific case study analyses the relations among various actors from the perspective, how the extent of subnational level's decision-making complies with that at the national and supranational level.

The involvement in managing the migration crisis is examined at each level of governance through the following parameters: solidarity response, registration and accommodation centres, additional technical controls at the internal Schengen border, and building the technical barriers at the external Schengen border (that is, on the border with Croatia). The parameters are selected on the basis of most challenging issues in Slovenia during the crisis. The examination reflects four issues that most notably impacted the migration crisis, therefore efficient and effective multi-level governance should be of vital importance. For each one of the four parameters, the main activities are presented with the emphasis on the dialogue among different levels of governance and the problems in cooperation. Additionally, the direction of decision-making was taken into account, with the presentation of the options for inclusion of the subnational level into the decision-making process. Although subnational level forms a part of the multi-level governance model, its inclusion into creating policies is not self-evident and in most cases rather difficult. Data for examination are gathered by the study of the available primary and secondary literature, and accordingly, the vast majority of data represent action plans of the stakeholders involved, press releases and conferences, media interviews and other information obtained from media.

The results are discussed on the basis of the overall assessment based on the theoretical model of predictable challenges of the multi-level governance (Tasan-Kok and Vranken, 2011) and by the shortcomings of the multi-level governance presented by the authors Hurrelmann and DeBardeleben (2009). Tasan-Kok and Vranken (2011) predict applicable challenges first, by including different actors and searching for compromises and balance between them; second, by scrutinizing the hierarchy of the organizations and the need for coordination; third, by screening institutional complexity and the tendency of institutional innovation; and finally, by inspecting the change of aims and objectives of the actors. In contrast, Hurrelmann and DeBardeleben (2009) present the shortcomings of the model itself based on the fundaments of the democratic union. The shortcomings are presented via four sections: congruence dilemma, institutional linkage, participation-deliberation dilemma and effectiveness-accountability dilemma. Through these sections authors expose problems, taking the perspective of the multi-level governance and cooperation when tackling migration crisis.

Furthermore, the research also positions the cooperation among actors when managing migration crisis in one of the two types of multi-level governance introduced by Hooghe and Marks (2003). Type 1 directs responsibility from general to specific with a fixed and long-term authority, while type 2 focuses on specific tasks and flexibility. It should be noted that type 1 is more tra-

ditional and builds upon the so-called general-purpose governments at different levels, where interactions between these levels and sharing of competences is examined. In the context of EU policy making, this type would actually foresee subnational public actors cooperating with the higher levels in a variety of policy areas. In contrast, type 2 is characterised by task-specific governments, intersecting memberships and a flexible design that is responsive to any emerging temporary needs. In the context of EU policy making, this type would foresee that decision-making and implementation networks take over tasks which are not primarily defined as being important part of EU legislation and politics. Generally, the majority of the cooperation seems to be entrapped with the type 1, but the actors should still seek the governance and cooperation based on the type 2, since it is a flexible network made out of diverse decision-making bodies to address the issues and tasks of governance at the national and other levels of management with a specialized authority with narrowly defined tasks (Jørgensen and Rosamond, 2001).

In most of the cases, the type 2 is generally integrated into the type 1, but their mode of operation is quite different. The mode of operation entirely depends on the functioning and willingness of the actors involved, and also on the willingness of community to participate in achieving common goals. Positioning of the multi-level governance of the migration crisis situation into one of two types thus enables the elaboration on how mature and advanced the cooperation among the levels is. On the one hand, by defining multi-level governance as a permanent system of negotiations between nested actors through different levels based on a strong and transparent dialogue, on which external factors rarely affect and the differences in space or geographical distance cannot be marked upon, and on the other hand, by positioning this specific case in one of the two types presented above, enables connecting the two stated theories. Furthermore, this serves as the basis for consideration on possible improvements in the future.

As already noted, mainly qualitative approach is utilised, supplemented with available data and indicators to support the statements, where applicable. In particular, the study is concerned with intergovernmental relations within the policy making process of managing the migrations crisis, although it is slightly biased towards preferring top down perspective, since the analysis of policy implementation and the evaluation of the outcomes of the crisis management represent the main focus of the study. It is worth noting, however, that study focuses solely on the management and policy making during the migration crisis, and it does not specifically address the social and economic consequences of the influx. This is mainly due to the fact that Slovenia is at the focus of the case study, and Slovenia served mainly as a transit country for migrants. This is supported by the data of OECD (2017a), where the data show that it does not serve as a destination country. Namely, if in 2015 there were total 280 asylum seekers in Slovenia, this figure was 890 in 2016 (data for the period 1-9/2016), which indicates that a very tiny share of migrants stopped in Slovenia, even at the peak of the influx.

4 Results

This chapter presents the results of involvement of different levels of government in managing migration crisis. As already noted, Slovenia took a great part in managing the migrant influx on the West Balkan route and by doing so, the national level was exposed to several challenges. In this context, Slovenia has had a great interest to retain its credibility in the international sphere and therefore justify its EU and Schengen zone membership. The migration crisis was basically European problem, and the dialogue between all involved actors was therefore even more important. Furthermore, Slovenia was aware that failure to comply with EU laws and the rules of the Schengen Agreement, as well as non-cooperation, would not be good for solving migration crisis and would hurt the advancement of other Slovenia's interests within the EU. Simultaneously, Slovenia needed also to advance the interests and aspirations of its citizens.

4.1 Cooperation between supranational and national level

Supranational level was a target for many complaints for its reactive response from the very beginning on, when it did not focus on providing safe routes to other European countries perceived as destinations for migrants, and in addressing the roots of migration crisis. When Member States independently confronted an unmanageable number of migrants, EU focused on the European migration agenda and on settling operational actions that ought to be settled before. Generally, the operational activities on the national level have been directed towards right direction and proven by numerous endorsements of the EU. Slovenia received support for implementing solutions and was seen as a stable country able to protect the Schengen border and, as such, justified the expectations of the EU (Žnidar, Šefic and But, 2015).

Since the onset of the migration crisis, the supranational level has leveraged solidarity response. National level accepted this policy and performed in accordance with the needs of the arriving migrants, while at the same time ensuring safety and providing normal conditions for its citizens. According to the solidarity response, national level has been preparing for the possible influx through number of activities, including the preparation of the contingency plans. Despite assurances that Slovenia is well prepared for potential upcoming events, it found itself in a chaotic situation and with the inability of a sound management of the migrant influx. A prompt response and support from the supranational level would be expected, however, national level only gradually received financial and human support, more or less only as a result of the request for international assistance. Support arrived from various sources, including other national governments of member states. The supranational level mainly provided the financial assistance in the form of grants aimed towards assisting logistical issues (Republika Slovenija, Vlada RS, 2017), however financial support was not sufficient.

As reception of migrants and registration centres are in the domain of the national level, the supranational level did not interfere in the logistical man-

agement of the migration crisis. It provided supportive assistance in the form of financial resources, which were also used for the purpose of establishing registration and accommodation centres. The exchange of information and dialogue among supranational and national level focused mostly on the exchange of data on the magnitude of migration and on the solving applications of migrants for international protection.

When the national level started to intensify control at the internal Schengen border with Hungary and started setting up technical barriers on the external Schengen border with Croatia, the supranational level did not interfere and gave the national level basically free possibilities on this issue. All the initiatives and actions were based on understanding of the situation. The border control was firstly adopted for a 10-day period, but afterwards prolonged as the situation did not change and posed a threat to the national security. On the basis of justifiable grounds Slovenia extended its border control for another 20 days, until Hungary closed its borders and the entire migrant wave was redirected to Slovenia (Evropska komisija, 2015). Afterwards, Slovenia followed the idea of other Member States, and started building technical barriers on the external Schengen border with Croatia. Slovenia justified the fence as being a tool to facilitate the direction of the migrant flow and to prevent the uncontrolled passage, meaning that Slovenia actually never closed up its borders.

Furthermore, since the national level obviously did not expect any coordination of the policies regarding the migrant influx, the separate policies were created at the national level to manage crisis situations, that is the current one and potential future ones. Central government passed subsequently in 2016 the so-called International Protection Act, which set the conditions for granting the protection of people entering in Slovenia, and the main purpose of this law was to prepare the country if conditions of migrations are altered, thus causing the security threats to the state and its citizens. Subsequently, even new governmental office was established to deal with migration issues, taking the responsibility from the Ministry of Interior (see OECD, 2017a). Notwithstanding, this indicates problems of multi-level governance within this context, as clear national policies were layered out.

4.2 Cooperation between national and subnational level

The most complex issue was actually the cooperation among national and subnational level in Slovenia when managing migration crisis. Namely, there were a lot of problems related to this cooperation. While the national level strived to achieve the EU's expectations and wanted to create normal conditions, the subnational level opinion on the migrant influx and the management of the crisis at the national level was mainly divided, and some dissatisfied social groups gave rise to a public discourse on this issue (Radiotelevizija Slovenija, 2016b).

The lack of dialogue between two levels has been stressed out significantly. The subnational level complained that they didn't have basic information, as

on which groups of migrants and for how long they would be settled in their municipalities and what is expected from municipalities to do in this situation (Dnevnik, 2016a and Radiotelevizija Slovenija, 2016a). In contrast, the national level rejected the allegations of non-cooperation with the subnational level and creation of inappropriate policies. Additionally, the national level believed that they did inform the subnational level sufficiently and did provide assistance to all municipalities, but it was the decision of municipalities if they accepted this assistance or not (24ur, 2016).

The adoption of a solidarity response at the national level caused divided opinions at the subnational level. Simultaneously, the notion "not in my back yard" gained ground, as citizens of Slovenia would mostly help migrants, but for a limited period and with limited amount of assistance, which was particularly observed in the case of establishment of accommodation centres.

Divided public opinions on the migration crisis were mostly created and shared via social networks. One group demanded from government to change policies, so to open the borders for migrants. In addition, this group disagreed with the return policy, temporary technical barriers at the border, giving additional powers to the Slovenian Armed Forces and the participation of the Slovenian police in Macedonia (Radiotelevizija Slovenija, 2016c). In a sign of disagreement with government decisions, also a petition was formed, which received almost two thousand signatures in total. The petitioners agreed that the government contributes to the fall of humanity through its actions, by raising its dictatorship with non-transparent and non-participatory decision-making, while at the same time allowing the use of public media to create fear and hostility among citizens (Avaaz Community Petitions, 2015). Other group also disagreed with governmental policies, but from a different perspective, also forming petitions. This group was pushing for policies that would try to divert the migrant flows, as this flow was perceived as danger to the border, country and its citizens. Opponents wanted to give a clear signal to the national level that they do not agree with the amount of support that should be allocated to migrants. Additionally, they disagreed with the planning and constructing the accommodation centres in the affected municipalities (Dnevnik, 2016b, Radiotelevizija Slovenija, 2016b, 24ur, 2016, STA, 2016). In essence, media support on this group had more powerful stronger impact on the general public.

Furthermore, several protest rallies were organized at the local level. Most of them took place during February 2016, when the discussion of accommodation centres was at its peak and the resistance against them at the local level was the largest, since the citizens were trying to avoid possibility that accommodation centres would be built in their proximity (Dnevnik, 2016b, Radiotelevizija Slovenija, 2016b, 24ur, 2016, STA, 2016). Interestingly, disagreement was also on establishing technical barriers on the external Schengen border with Croatia, as citizens initiated protest rallies to clearly demonstrate disagreement with the national government decision – mainly, the major problem that was exposed was the negative environmental exter-

nality of barriers. Namely, technical barriers (i.e., wires etc.) would cause loss of wildlife and would hurt tourism among others (Krope, 2015, E-utrip, 2015, Prava peticija, 2015).

In essence, national government clearly by-passed local governments and residents when creating policies. This was indicated also by the decreasing confidence in central government. Namely, according to the OECD (2017) and Eurobarometer (2017) indicators, Slovenia is one of the countries, where the confidence in central government decreased the most from 2007 onwards. Specifically, public confidence decreased from 48 % in 2007 to 18 % in 2014, and even further decreased to 17 % in 2017, which is more than 30 percentage points decrease in the period of one decade. Interestingly, although the initial fall from 2007 to 2014 may be attributed mostly to the inefficient economic and fiscal crisis management, it is surprising that confidence remained low and even slightly felt from 2014 to 2017, when at the same time profound economic and fiscal recovery in Slovenia was observed. This suggests that low trust predominantly reflects central government policy making during the migration crisis, as the data for 2017 are gathered mostly in 2016, if we outline basics of both methodologies. Similarly, Freedom House (2017) indicators reveal that National Democratic Score for Slovenia even fell in 2016 (from 2.00 to 2.25) explicitly due to the 2016 migration crisis instability, which served as a main factor contributing to the fall, as the central government was obviously not in control of situation.

4.3 Cooperation between supranational and subnational level

There was no direct cooperation between the supranational and subnational level. Actually, supranational level only expected top-down decision making from national level, thereby not perceiving any need to deal with subnational level of government. In contrast, subnational level obviously expected also bottom-up approach when managing migration crisis, and the lack of this approach could be observed through petitions and protests (Dnevnik, 2016b, Radiotelevizija Slovenija, 2016b, 24ur, 2016, STA, 2016).

Interestingly, larger solidarity with migrants was observed at the subnational level, mostly observed through large participation in humanitarian activities (Amnesty International, 2015). Moreover, according to the opinion pool implemented by the Delo newspaper, even during the harshest period of crisis, more than half of the survey respondents were appreciative for the help to migrants and also for accepting them (see Potič, 2016). Similarly, Štrok (2016) has even pointed out that at the street level, the attitudes towards migrants were pretty much the same as to those migrating to and through Slovenia in the early 1990's during the Balkan wars, although the last wave involved mostly persons from other continents and different cultural backgrounds.

Therefore and foremost, the subnational level mostly adopted the European solidarity guidelines, but in the course of its work, it was the only activity where cooperation with national and supranational level was observed. Namely, practically no cooperation could be observed when organizing regis-

tration and accommodation centres, when establishing additional control at internal borders and when establishing technical barriers on the border with Croatia. It was only expected from subnational level to provide technical support for resolving these issues (Žnidar, Šefic, But, 2015).

5 Discussion

As suggested above, the results of the case study analysis indicate that Slovenia has not been properly prepared for managing large-scale crisis. Initially, the real possibility of redirection of the migrant influx towards the territory of Slovenia has not been taken into account by actors, and only later on contingency plan has been prepared at the national level and hands-on management of the crisis has been implemented. The actual occurrence of large migrant wave, combined with the realisation that Slovenia serves only as a transit country for the migrants targeting western and northern European countries, demanded a different approach in managing the crisis. Subsequently, mainly logistical support and coordination of the reception and accommodation centres was required, but their management was mainly marked by time constraints and previously made mistakes.

According to the principles of Tasan-Kok and Vranken (2011), common goals and clear action objectives should be defined and oriented towards the key issues in advance, together with the active participation of the local level, and later on communicated with the other relevant levels. The case study showed mainly unsuccessfulness of the multi-level governance, since it did not contain clear common paths, no clear action plans and no efficient cooperation. For instance, one example of a common goal could be reached by the solidarity response, but it was in practice not established in cooperation with all levels, but only adopted at the national level. Similarly, even the operational activities indicated limited exposure to some common directions. Institutional disconnection caused that the national level created its own response to the crisis. With the subsequent action plans, the EU has logistically cooperated with Slovenia, but consultations were still insufficient, which confirmed the theory of the authors Hurrelmann and DeBardeleben (2009). Institutional disconnection at the subnational level led to the lack of transparency and communication.

Furthermore, the main inconsistency was also observed in the decision-making, which was mostly top-down. This left limited possibility for the involvement of the national and subnational level in decision-making processes in strategical issues. Consequently, it made it difficult for the proper multi-level governance and flexibility at the local level (Tasan-Kok and Vranken, 2011). In this context, potential solution for the greater involvement of the national level in the decision-making process at the supranational level was the initiative of Slovenia, which proposed stopping irregular migration already at the Greek-Macedonian border. This proposal was later on approved and directed by the EU. As far as wider operational cooperation is concerned, we can emphasize a good example of cooperation and integration of the Member

States on the Western Balkan route, which have created a joint action plan to manage the migration crisis, have co-created the dialogue among them and built additional cooperation on the emerging day-to-day issues. From the operational perspective, the national level experienced managerial flexibility, since the supranational level decided not to interfere. Subnational level did not participate in policy-making processes, since the only domain that local level had was related to logistics management of registration and accommodation centres.

Democratic governance at EU level, which constantly strives for sound decision-making, finds it difficult to achieve coherence in cooperation with actors at the national level. This problem has two ends, and thus no simple solution exists. Namely, the increase of power at the national levels would lead to a differentiating perceptions of the solidarity response and to the variating performance of each Member State, leading to even greater divergence of responses to the migration crisis. In addition, increasing power at the national level would lead to even greater differences between the levels, which would deter the process of multi-level governance from its basic idea. Solution is thus based on creating a compromise among the levels (Hurrelmann and DeBardeleben, 2009).

General principles of the multi-level governance also envisage tight cooperation, well-established communication, shared responsibilities and, not to miss, citizen participation in decision-making (Tasan-Kok and Vranken, 2011). However, the presented results do not support those premises. The problems in cooperation were mainly caused by the lack of dialogue and by the lack of transparency among actors in terms of functioning and decision-making. E.g., in Slovenia, which followed the decisions set out at the supranational level, the level of dissatisfaction of its citizens with national level of government increased, and therefore national level won many criticisms. Many criticisms were based on the lack of cooperation and mutuality. These issues can be attached to the participation-deliberation dilemma, which is already developed within the congruence dilemma. The problem is thus that we have privileged actors who are more easily involved in solving crisis issues, and, on the other hand, actors who cannot be so easily involved or might be even excluded (Hurrelmann and DeBardeleben, 2009).

According to presented results of the case study, multi-level governance in the case of migration crisis on the Western Balkans Route can be positioned as the type 1, if we follow the outline of Marks and Hooghe (2011). The EU's, that is supranational, decision-making architecture is wide and long-term (strategically) oriented. Such architecture is rigid, and the changes are only foreseen with involved actors if necessary, so it is not easy to reach flexible network with all actors, who have mostly narrowly defined tasks, to address the issues and tasks of governance at the national and all other levels.

During the crisis, multi-level governance was not successful, and there was a lack of common response to manage the crisis. This had negative effects on managing the crisis itself, and additionally on the status of the union as a

whole. Namely, it led to tensions among actors, and the fundaments of union and Schengen area existence were challenged. The lack of cooperation and transparent dialogue has led to the creation of smaller clusters of countries with similar policy positions and interests, which is contradictory to the idea of EU integration. To conclude, the supranational level did call for a more common solution and cooperation, but the guidelines were not integrated in the day-to-day operations (Situation in the Union 2015: Time for Sincerity, Unity and Solidarity, 2015).

What possible recommendations could be delivered from this case study? First, it is evident that the key success factor for managing this kind of situations is government coordination of policies and activities, at all levels. Second, although beyond of the scope of this study, harmonisation of migration policy at the EU (supranational) level is needed, and this involves utilizing proactive approach. This means that both push and pull factors contributing to migrations needed to be taken into the consideration. That is, not just political instability, war situations or climate changes are contributing to migrations as push factors, but we need to address also pull factors that contribute to migrations, such as for example openness of societies in Europe and (national) governmental policies on migrations (i.e., preferring either open or closed "borders"). As PwC (2017) report suggests, we have a matrix of pull factors, that is open/closed borders and open/closed societies nexus. So, in order to prevent future situations like this, it should be uniformly decided, at the supranational level, whether we have open or closed borders, and this should not be subjected to policy-making of particular country.[2] Furthermore, also our societies need to be prepared for these policies, as open borders with closed societies mean limited approval of migrations and increased social tensions.

6 Conclusion

The paper presented the factors of unsuccessfulness of the multi-level governance during the large-scale crisis, as migration crisis on Western Balkan route of 2015-16 can be positioned. As results of the research are based on three parameters, the solidarity response shows among all the highest cooperation among levels. The solidarity response was accepted on the supranational level and the implementation of it was anticipated at all levels. The national level promptly adopted it, but there were some opponents at the local level, who made it harder to properly integrate it. Cooperation on the two parameters of registration and accommodation centres, and on the additional technical controls on the internal Schengen border and building the technical barrier on the external Schengen border, was only observed between national and subnational level via the logistic activities. The cooperation among them presents the major problem as there were many complaints and protest rallies initiated at the local level. The supranational level did not interfere in the logistical decisions of Slovenia and, at the same time, the subnational level was only

2 This has namely contributed to the triggering of the 2015/16 migration crisis.

involved in operational management, consequently the decision-making was mostly top down. We might even argue, that relations between government levels were decoupled, and to large extend fragmented, which has caused the problem of "layering" of policy creation and implementation.

The research puts forward suggestions for improvement in solving similar large-scale crises in the future. The response to this specific migration crisis was not adequate. The paper reveals several challenges that we can put forward according to Howitt in Leonard (2006), the core ones are recognizing novelty and effectively improvising necessary responses, enabling scalability and surge capacity, maintaining situational awareness, establishing integrated execution in real time, ensuring operational rather than political leadership etc. Improving crisis management in the future would, by authors, involve consolidating four sections: capabilities, structures and systems, people, and coordination.

The research has several limitations when assessing the performance of multi-level governance more generally. First, there is lack of transparency and public accessibility of data on the functioning and decision-making of actors. Second, the functioning of national level differentiates among member states, and in some countries, there is larger role of subnational levels in the decision-making process due to the constitutional provisions. Third, even if the multi-level governance in the case of the migrant crisis was not successful, it does not mean that multi-level governance is unsuccessful in managing other issues, therefore, additional case studies and evaluations are highly warranted.

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Tax Secrecy and its Limitations: Is There a Balance?[1]

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ABSTRACT

Economic development in the past decades and the increase of cross-border business by the multinationals coupled with recent financial crisis have brought many questions about whether the taxpayers are paying their fair share. In order to assess the equitable amount of taxes due, revenue authorities often rely on information provided to them by taxpayers. In conducting their procedures, revenue authorities are in principle bound by tax secrecy. However, recently, the tax systems have introduced tax policy instruments with opposing effects, intended to provide full insight in taxpayers' revenues worldwide and affect the taxpayers' behaviour towards greater tax compliance. Two such instruments are particularly worth noting, public shaming lists, used primarily nationally, and international exchange of information, as a cross-border procedure. Through comparative legal approach we provide an analysis of legal instruments balancing tax confidentiality and tax transparency. As the research will show, the optimal level of tax secrecy, while preserving international standards of tax transparency, is very difficult, if not impossible, to accomplish. Legal tradition of secrecy, implementation of international standards and the evaluation on the adequacy of such measures should all be taken into account before jumping to any conclusions about the perfect balance. The goal of accomplishing fair and equitable tax system must not be disregarded as well.

Keywords: tax secrecy, tax transparency, public shaming lists, exchange of information

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1 Introduction

The concepts of secrecy, privacy and transparency are more topical and pertinent in contemporary societies than ever before. In taxation, they are related to two crucial questions – how revenue authorities administrate taxes and whether taxpayers fulfil their tax obligations. While conducting tax procedures, revenue authorities are in principle bound by tax secrecy, a principle designed to protect "glass taxpayers" and, consequently, result in greater tax revenues by encouraging tax compliance. Recently, tax systems have introduced tax policy instruments with opposing effects, calling for more tax transparency, meant to provide full insight in taxpayers' revenues worldwide and affect taxpayers' behaviour towards greater (voluntary) tax compliance. Therefore, the main issue is whether and to what extent should tax information and related documents be public or confidential.

Despite the current lively debate on the prevailing concept of gathering and disclosing tax information, there is insufficient empirical and theoretical research in this area. There is preliminary evidence that a loss of confidentiality increases compliance (Laury & Wallace 2005). Blaufus, Bob and Otto (2014) concluded that general public disclosure could result in more, instead of less, evasion leading to two possible effects of tax publicity – the shame effect and the contagion effect. Perez – Truglia and Troiano (2015) analysed shaming policies as a tool to improve tax debt collection. They demonstrated that the optimal policy might be a combination of financial and shaming penalties. Schenk-Geers (2009) examines international exchange of information from a taxpayers' viewpoint. Hambre (2015) deals with comparative analysis of tax transparency and assesses impacts of tax compliance, administrative costs and taxpayer privacy.

Public shaming is in line with the new theories about tax regulation and tax compliance which take into account social and personal standards as factors influencing a specific type of behaviour. This instrument is used as means of deterring aggressive tax planning as well as preventing tax enforcement and raising awareness of (voluntary) tax compliance. The comparative analysis of countries with the tradition of tax privacy and those strongly adhering to tax transparency may lead to opposing conclusions about the usefulness and adequacy of this instrument. The international exchange of information has been the headline of tax policy debates, and recently the automatic exchange of information was introduced as the new global standard. Its main purpose is to provide tax administrations with sufficient information to fully meet the standard of worldwide taxation and to leave no income untaxed, while avoiding double taxation. Also, the two instruments have been chosen to provide insight into national as well as international measures.

The principle method used in this paper is a comparative legal analysis of different approaches to balancing tax confidentiality and tax transparency, trying to identify certain divergences and convergences in the systems selected. In this regard, the U.S., Croatian, French, German and Swedish systems were selected for the purpose of this paper. Additional factors were taken into

consideration when choosing the systems mentioned. One of the factors was affiliation with different tax-law families. U.S., French and German systems were chosen as leaders influencing tax law in other countries.

The analysis will focus on two main research objectives. Firstly, it aims at defining the key components of tax secrecy model, its development and provide examples of best practices of its implementation in selected countries. However, as lately the use of some tax policy instruments have infringed tax secrecy, we examine the influence of shaming lists and exchange of information as its opposing tax policy instruments in the aspiration of achieving the ultimate goal: the equitable and balanced tax system efficiently providing the highest possible level of tax revenues.

2 Tax Secrecy – Main Features and Issues

Tax secrecy is cited as one of the main general tax principles and basic taxpayers' rights although its meaning, content and wording is not uniformly defined (e.g. European Commission 2016; OECD 2003; Bentley 2007). Traditionally, the principle of tax secrecy was introduced to encourage taxpayers' participation in tax procedures. It was believed that taxpayers would be more comfortable with the idea of cooperation and disclosure of all facts if they believe in the discretion of tax officials, i.e. this would foster (voluntary) tax compliance and serve as a sort of counterbalance to tax administrations' (broader and broader) powers in collecting tax information. Generally, the concept of tax secrecy confronts often opposite interests of taxpayers on the one side and revenue authorities on the other.

When we summarise its various definitions, three common elements could be identified: (i) tax administrations[2] should protect taxpayers' private information, as well as all other information about a particular taxpayer that becomes available to them during tax procedures, from unauthorised use and disclosure; (ii) exceptions from tax secrecy (i.e. cases which do not constitute violation of the tax secrecy principle) should be specified in tax regulations; and (iii) disciplinary accountability and/or criminal liability is held against those (tax) officials who breach tax secrecy and misuse protected information.

Over the past few decades the area of tax secrecy has been very dynamic. Undoubtedly, main challenges faced by contemporary tax administrations – voluntary tax compliance, fighting tax avoidance among others – prompted some sort of review of the role and meaning of tax secrecy in contemporary tax systems. Keeping that in mind, tax secrecy has become an issue in national as well as in international tax law. In a national environment, the question of the influence of tax secrecy on (voluntary) tax compliance was (partly) provoked by the emergence of the concept of paying taxes as a "civic virtue" that particularly gained importance towards the end of the 20th century, also in

2 And all other official persons involved in tax procedures, e.g. different experts engaged by revenue authorities.

the context of ensuing theoretical (r)evolution.[3] Questions have been raised as to whether (at all) and if so, to what extent tax secrecy could be used in ways "that do not only evoke deterrence but rather create trust and promote social norms" (Hambre 2015, p. 63) or whether it is time to replace it with the opposite concept of tax transparency.

Another challenge for revenue authorities has emerged recently through rapid development of tax information exchange instrument. Although the exchange of information has been in used since 19th century (Oberson 2015, p. 4), and it has been a standard part of tax treaties worldwide, in the past decade this instrument has been much discussed by the tax law community. In tackling aggressive tax planning, harmful tax regimes and tax evasion, often caused by lack of information, countries can engage in tighter cooperation to increase the amount of information at their disposal (Remeur 2015, p. 16). The development of the exchange of information, and in particular, recent rapid acceptance of automatic exchange of information as the new global standard has brought about the issues of breaches of confidentiality, privacy, secrecy and abuse of data exchanged to the highlight of global tax policy agenda (Oberson 2015, p. 209).

Recently, in 2016, the EU General Data Protection Regulation (GDPR) has been adopted and will come into effect on 25 May 2018, replacing the EU Data Protection Directive. The GDPR is a regulation, binding in its entirety and directly applicable in the EU member states. Briefly, GDPR represents a major change in the protection of (taxpayers') personal data as it provides for a stronger protection of individuals' privacy, imposes increased obligations on legal entities regarding collection and processing of personal data and introduces significant penalties for breaking the rules. GDPR considers protection of personal data as legislative objective, a part of fundamental freedoms and rights, unlike the Directive which only refers to the right to privacy instead (Huang, 2018, p. 237). This development has put the matters of data protection high on the public policy agenda, especially as it relates to the sensitive taxpayer information and revenue authorities among other institutions are subject to its provisions. In a more general sense it seems that this normative development could be seen as a way of balancing current trends towards tax transparency with the protection of "glass" taxpayers.

2.1 Comparative Models

Based on the comparative analysis, heterogeneity of the models can be observed when it comes to a legal approach to disclosing taxpayers' information. In general, three models regarding its main rule and starting point can be identified: (i) an "unlimited" model of tax secrecy; (ii) a hybrid or limited model of tax secrecy; and (iii) a tax transparency model.

(i) The most prominent representative of the first model is the German one. It is described as a model strongly adhering to tax secrecy – unlike other mod-

3 New theories of (tax) regulation and tax compliance have been emerging. They primarily seek to understand, explain and even predict taxpayers' behaviour in relation to government.

els, tax secrecy has a constitutional origin and base (see also Valta 2013).[4] According to the Fiscal Code of Germany (*Abgabenordnung*, hereinafter AO), all information and circumstances of a third person which have become known to tax officials (and other persons of equivalent status to public officials) in tax-related procedures are protected by the institute of tax secrecy. It does not matter whether this information is tax relevant - tax secrecy refers to all personal, economic, public or private relationships of a certain, legal or natural, person.

(ii) The second model is considered a hybrid or rather a limited model of tax secrecy. The secrecy principle prevails, however, it implies a certain degree of "tax publicity." The French, U.S. and Croatian models could be included in this group. In the French model, tax secrecy is, similar to the German model, seen as a mechanism of taxpayers' privacy protection, however with certain limitations. Therefore, unlike Germany, tax secrecy in this model has no constitutional origin although it is declared by the Taxpayers' Charter as a value. It is understood as "professional" secrecy (sections L. 103. – L. 167. A LPF[5]) and the obligation to keep it, under the provisions of the Criminal Code[6], applies to all persons involved in various procedures related to taxes and other public duties[7] and concerns all information collected in the course of these procedures. However, it seems that the professional secrecy obligation for tax officials is understood and regulated more stringently than for other public officials (Dubut 2013, p. 417). The professional secrecy obligation and protection of taxpayers' private lives are especially emphasised in the tax audit procedure (section L. 103 subsection 2 LPF). The rules on professional secrecy also include rules for the delivery of documents to taxpayers (section L. 104 - L. 111 LPF). Regarding tax secrecy "limitations", two such groups of cases can be identified. The first one is covered by the term "public interest" and the second group of "limitations" concerns "tax publicity" (section L. 111 LPF).

When it comes to the principle of tax secrecy in the United States, a number of main issues could be mentioned. First of all, the question of confidentiality in tax matters includes the question of tax return publicity and public access to those documents. American history has known alternations of different periods of legal regulation of this matter that were followed or preceded by lively (public) debates between advocates of tax privacy, on the one hand, and advocates of tax transparency, on the other hand. One of the main reasons for the mentioned debate, as well as for different regulation of tax confidentiality through history, is its influence on voluntary tax compliance. Both sides have been using the same argument, i.e. that the prevailing concept of tax privacy or tax transparency would have a significant role in encouraging voluntary tax compliance and preventing tax evasion, however supporting it with different explanations. Advocates of tax privacy highlighted that tax returns contain a large quantity of private and sensitive information. There-

4 The base is a constitutional right to informational self-determination.

5 Livre des procédures fiscales (The Law on Tax Procedures).

6 It sanctions all violations of professional secrecy. The sanctions provided are monetary fines and one-year imprisonment.

7 Meaning tax assessment, tax audit, tax collection etc.

fore, taxpayers would be (more) compliant if they believed in the revenue authorities' honesty and discretion. Advocates of tax transparency emphasise a possible influence of tax transparency on the change of otherwise private and/or hidden behaviour as the main argument, using this concept as a kind of supervision. They believe that, among others, public access to tax returns and tax information "would shame the affluent into heightened compliance with their tax obligations" (Harrison in Schwartz, 2008, p. 891). As new theories on tax compliance and tax regulation have been emerging, the debate has been continuing especially "when government seeks innovative ways to address tax gap" (Blank 2013, p. 1).

The year 1976 was somewhat of a milestone in legal regulation since the Tax Reform Act, for the first time, "enacted a comprehensive statutory scheme regulating the use and disclosure of tax returns and tax return information" (Department of the Treasury 2000, p. 22). The four main rules established then have remained in force until today. The general rule is that returns and return information are confidential and, except as authorised in the Code, may not be disclosed by an officer or employee of the United States, or an officer or employee or any State or other person who has had access to returns or return information (s. 26 United States Code, section 6103).[8] Exceptions from general tax confidentiality, although thoroughly prescribed, are actually numerous and, for the most part, could be justified on the grounds of public interest as well as potential new threats (e.g. terrorism).

The role model for the Croatian tax secrecy regime was the German model,[9] which is especially visible in the fact that it has a constitutional origin. However, unlike Germany, certain features of the Croatian model were regulated very vaguely from the beginning. This refers to the exact meaning of "unauthorised use or disclosure" (as opposed to a very detailed explanation of the concept in German tax law) or the definition of what type of information is covered by tax secrecy (e.g. tax relevant or not). With time, the main legal scheme has changed in two directions: (1) expanding cases that do not constitute a violation of tax secrecy and (2) introducing tax publicity, namely shaming lists, which brought the Croatian model into this group. Although cases where the obligation of tax secrecy is not violated are not numerous and mainly include standard solutions (a written consent of the persons concerned) or could be justified on the grounds of administrative efficiency (e.g. cooperation with other public bodies, or administrative cooperation in the field of taxes), some of these cases are prescribed very generally.[10]

(iii) Probably the most "open" system among the systems analysed here is the Swedish model since its "starting point" is considerably different. The law governing the Swedish tax secrecy model is the Public Access to Information

8 The taxpayer's right to confidentiality is also guaranteed by the Taxpayer Bill of Rights, adopted in 2014.

9 The same holds true for tax law in general, bearing in mind that the Croatian tax system is quite young due to the socialist system existing until 1990.

10 E.g. if the data are disclosed for the purpose of tax enforcement procedures (section 8 subsection 5 number 5 General Tax Code), which might actually be a number of cases.

and Secrecy Act (hereinafter PAISA) enacted in 2009. The principle of public access to information means that the public and mass media are entitled to receive information on state and municipal activities. It comprises, among others, access to official documents; freedom of expression for officials and others; right to communicate and publish information (Ministry of Justice 2009, p. 7). The Act also includes provisions on secrecy which entail "restrictions both on the right of the public to obtain official documents (…) and on the right of public functionaries to freedom of expression" (Ministry of Justice 2009, p. 7), hence it regulates tax secrecy (Chapter 27). The basis for those rules is constitutional law, the Freedom of the Press Act (FPA), which provides for the right of public access to official documents and its possible restrictions (Hambre 2015, p. 165). The main rule in PAISA is that "full secrecy applies to all work within the tax authority that relates to establishing taxes to be paid by individuals and companies while the tax decisions are normally public" (Nergelius 2017, p. 3). In other words, secrecy does not protect the tax return as a document but protects from disclosing the information within (Hambre 2015, p. 166). As tax secrecy provisions do not lay down any special requirements for the applicability of secrecy, we talk about "absolute" secrecy. However, decisions of tax courts and public decisions are another case characterised by "high level of transparency" (Hambre 2015, p. 166). When it comes to tax court proceedings, the secrecy provision here will apply under certain conditions known as the "requirement of damage" which, in general, could be straight or reverse. Therefore, when it comes to taxpayer information in court proceedings, transparency is presumed but the information may be kept secret if it is concluded that disclosure would cause damage to the individual in question (Hambre 2015, p. 166). Even a higher level of transparency is provided for in relation to tax decisions since tax decisions are normally public, according to the PAISA (Chapter 27, Article 6), (Kristofferson, Persson, Nergelius, Valguarnera, Hambre, Larsson, 2013, p. 1079). The law enumerates decisions that are considered to be secret (e.g. decisions on dismissal, advance rulings). Kristoffersson et al. (2013) emphasise that not only tax decisions are public but also the grounds for the decisions, which leaves room for public insight and some sort of public "surveillance" of the revenue authorities' work and performance. Although tax secrecy (or transparency) in Sweden is not directly related to tax compliance, as is the case in the U.S., such a model of "targeted tax transparency" (or better to say "tax secrecy") might have benefits for voluntary tax compliance, especially in terms of enhancing the procedural and retributional fairness of the tax system. On the other hand, it is admitted that it raises serious questions concerning the protection of the taxpayer's privacy (Hambre, 2015; Nergelius, 2017), which also might hinder voluntary tax compliance. However, in this regard, Nergelius (2017, p. 3) conclusion may be very illustrative: "Perhaps this kind of publicity does not exist in so many other countries, but so far, Swedish people have been able to live with it". Moreover, this observation might also explain the small number of individual complaints related to this issue.

3 Tax Secrecy Limitations

Analysis in the previous paragraphs has revealed certain exceptions from the tax secrecy rule. Three such exceptions could be identified. First, a number of derogations could be gathered under the umbrella term of "public interest." The second one covers tax publicity. The third one concerns exchange of information – one of the vehicles of combatting tax evasion.

3.1 Public Interest

Public interest is generally considered the "Achilles' heel" of the tax secrecy model (Lang in: Tipke, Lang 2010) creating a kind of a "gap" between the declarative and real meaning of the institute. In the German model, the Code stipulates cases in which disclosure (but not use) of obtained information is permissible (section 30, subsection 4 AO). One of the most controversial provisions here is "compelling public interest for such disclosure" (subsection 4 number 5 AO). Analysing the legal wording, it seems that "compelling public interest" is a rather imprecise and vague legal term leaving room for theological and "case by case" interpretation as well as "prone to disproportionate use" (Valta 2013, p. 457). It should also be added that revenue authorities in the cases specified in subsection 4 are (generally) authorised, but not obliged to disclose relevant information. Thus, they can use discretion in cases where they should primarily take into account the purpose of the given authorisation and (existing) statutory restrictions (section 5 AO). However, in certain cases, revenue authorities are obliged to disclose relevant information (section 31, 31a, 31b AO). Those cases concern, for instance, disclosure to public-law entities, statutory social insurance institutions, disclosure for the purpose of countering unlawful employment or money laundering; in other words, there is (again) a strong public interest and "common good" behind them, giving prominence to the "fiscal role" of revenue authorities. The term "common good" is also used as 'justification' for sections 93 (subsections 7 and 8) and 93b AO, which regulate automated access to the data. Although those provisions raise a number of issues, the Federal Constitutional Court has declared that they are in conformity with the Constitution, on the grounds of serving the "common good." However, the Court held that these provisions need to be more precise and clear. It seems that (higher) nomotechnical standards are the only possible way for increasing legal certainty and protecting taxpayers. Very similar situation is in other countries. In the French model, the term "public interest" also serves as a justification for a number of derogations from the professional secrecy rule regulated in sections L. 113 - L. 167. A LPF. The law itself divides these derogations into seven groups on the grounds of main beneficiaries, e.g. derogations in cases of international fiscal assistance; derogations in cases of benefit for certain administrative bodies, public authorities, local authorities, public bodies; derogations in cases of benefits for various commissions etc. In Croatia, cases where the obligation of tax secrecy is not violated are not numerous and mainly include standard solutions (a written consent of the persons concerned) or could be justified on the grounds of administrative efficiency (e.g. cooperation with other public bodies, or ad-

ministrative cooperation in the field of taxes). However, some of these cases are prescribed very generally.[11]

3.2 Tax Publicity

For the purposes of this article, tax publicity could be defined as a framework in which tax authorities disclose and publicise tax information, (mainly) with the purpose of improving fiscal "discipline," reinforcing (social) values and thus supporting and increasing (voluntary) tax compliance. Such a framework aims to provoke shame in (delinquent) taxpayers as well as to strengthen public disapproval of and pressure on non-compliant behaviour. In that context, it is used primarily in two areas: as an additional tool in tax enforcement area and/or as a measure of fight against tax avoidance and tax evasion. This includes various stigma policies, e.g. publicising tax debtors' names. Therefore, they are also called "shaming penalties". However, little is known, especially in terms of empirical evidence, about the real effect of these shaming lists on reducing tax delinquency (Perez-Truglia, 2015). It could even have an opposite, contagious effect, due to possibility of taxpayers´ conditional cooperation, i.e. they will not comply with their obligations if they perceive that other taxpayers do not comply too (Blaufus, Bob, Otto, 2014). Another issue is what kind of (delinquent) taxpayers would actually be the best target for the tax publicity model? It is hard(er) to believe that shame and paying-taxes-as-civic-virtue policies would have influence on those taxpayers who are generally more prone to (aggressive) avoidance of their tax obligations (Rogić Lugarić 2015; Perez Truglia & Torano 2015).

The concept of tax publicity is applied in three systems analysed here – the U.S., Croatian and French – however, as we will see, the concept has different meanings in these systems. In France, tax publicity, introduced in 1984, means that there are lists of taxpayers of income and corporate tax, which are kept by the local administration. These lists are, under certain conditions, accessible to all taxpayers residing in the municipality (CGI, section L. 111). For taxpayers of income tax, it contains information on the number of family members, taxable income and the amount of income tax. These lists also contain information about persons who are not taxpayers but are resident in the municipality. Disclosure of any information contained in the lists is forbidden and punishable with a fine equal to the amount of taxes divulged (CGI, article 1762). Introduction of the lists was harshly criticised; the main argument being the possibility of their misuse and that they do not comply with the principle of protecting individual privacy and security. However, as Sid Ahmed (2007, p. 233) put it, the State Council did not respond precisely to that issue and therefore a chance for a debate on the real meaning and place of tax secrecy in French law has been missed. In Croatia, tax publicity in the form of making public a list of tax debtors or a shaming list was introduced in 2012 (General Tax Act, Article 8, Subsections 7-9). The shaming list comprises a list of taxpayers who owe the state specific amounts of unpaid taxes specified

11 E.g. if the data are disclosed for the purpose of tax enforcement procedures (section 8 subsection 5 number 5 General Tax Code), which might actually be a number of cases.

by law[12]; the threshold of tax debt determining the place on the list varies depending on whether the taxpayer is a natural or a legal person.[13] The list can be found on the revenue authority's website and includes the taxpayer's name and surname, year of birth, place of residence and the amount of his tax debt. If a person requesting information proves his legal interest, revenue authorities may add other information necessary for establishing the taxpayer's identity as well as disclose information on measures taken for tax recovery procedure. However, it does not contain information on the taxpayers whose tax debts are deferred or the taxpayers who reached an agreement on tax payment with revenue authorities. The list was supposed to be updated every three months. According to preparatory work, the main goal of the tax debtor list was to promote financial discipline, improve revenue authorities' efficiency in the area of tax enforcement, and raise society's awareness about the importance of voluntary tax compliance. It is worth noting that the introduction of the shaming list in the Croatian system in 2012 represents a significant shift considering tax confidentiality legislation in force before this amendment. The severity of the legislative changes is visible in the fact that a tax debtor listed was not notified, prior to publication, of the revenue authorities' intention to include their name on the list (or at least there is no such legal obligation or practice). However, the Croatian solution seemed too "ambitious" from the beginning, bearing in mind its main features and goals. Actually, this fact might be one of the main reasons for its "failure" (s. Rogić Lugarić 2015). It was not quite clear whether tax secrecy should be more in the service of reinforcing social norms or a deterrent instrument preventing tax avoidance. And if we analyse the legal wording of the concept of tax secrecy on the whole (especially its above mentioned exception), the latter solution seems more probable. However, the question is whether this sole instrument is sufficient, especially bearing in mind a lack of other, complementary tax law instruments in the Croatian system that would "send out the same message" (e.g. general anti-avoidance rule). The latest data indicate a questionable success of the shaming list – interest in tax publicity has fallen sharply over the past few years (measured by the number of "clicks").

In the U.S. system, as mentioned, the use of shaming lists is generally not recommended as its (unwarranted) consequences may undermine taxpayers' confidence in the tax system. However, there is a practice of publicising tax debtors' names at the state level. Almost half of the states use this policy (Perez-Truglia, 2015; Blank, 2013) namely Maryland, Vermont[14] New York[15], Colorado[16], South Carolina, Oregon[17], New Jersey, North Carolina.[18] When it

12 E.g. value added tax, income tax, corporate tax etc. Local taxes are not included.

13 For legal persons, tax debts should exceed 300,000 Croatian Kuna (approximately 40,000 Euros); for natural persons pursing self-employed activity tax debts should exceed 100,000 Kuna (approximately 10,000 Euros) and for all the other taxpayers tax debts should exceed 15,000 Kuna (approximately 2,000 Euros).

14 <http://tax.vermont.gov/research-and-reports/reports/delinquent-taxpayer-report>.

15 <https://www.tax.ny.gov/enforcement/warrants.htm>.

16 <https://www.colorado.gov/pacific/tax/delinquent-taxpayers-lists>.

17 <http://gov.oregonlive.com/taxes/delinquents/>.

18 <http://www.dor.state.nc.us/collect/QryMostWanted.pdf>.

comes to these lists, certain common features can be observed. Most of them contain basic data – name and surname, the amount of the tax debt, the type of taxes. Furthermore, as a rule, tax debtors included on the list are notified by revenue authorities in advance about the intention to include their name in the list and are given the opportunity to settle their debt or resolve outstanding debts prior to listing. This policy is fully in line with theoretical suggestions (Posner, 2000). Perez-Truglia & Torano´s field experiment in three US states showed that shaming penalties can increase tax revenues, but their desirability remained unclear from a social welfare perspective (Perez-Truglia, 2015). Other interesting findings are related to the limits of peer pressure – the effect of the shaming penalty was significant for individuals who owed smaller amounts than for those with higher debts.

3.3 Exchange of Information

The "big bang" of 2009 (Oberson 2015, p. 8) has marked the beginning of the new era in the notion of tax information secrecy and the start of the shift towards tax transparency of taxpayers' cross-border income. In tackling aggressive tax planning, harmful tax regimes and tax evasion, often caused by lack of information, countries can engage in tighter cooperation to increase the amount of information at their disposal. (Remeur 2015, p. 16) The increased flow of information brings some challenges regarding the protection of taxpayers' rights. (Debelva & Mosquera 2017, p. 362) During the tax procedure, taxpayers are obliged to report, determine, compute and pay taxes. The globalization, and its consequence in tax procedure – the exchange of information, caused additional increase of their duties. As antipode to their obligations, taxpayers are also protected by rights, either through domestic legislation or internationally. Taxpayers' rights guarantee fair process in the exchange of information, privacy protection in the transfer of data and procedural rights. However, the scope of these rights differs dependant on the legal instruments on which the information exchange is based as well as the national legislation. The development of the exchange of information, and in particular, recent rapid acceptance of automatic exchange of information as the new global standard has brought about the issues of breaches of confidentiality, privacy, secrecy and abuse of data exchanged to the highlight of global tax policy agenda. (Oberson 2015, p. 209)

Transparency, according to Remeur (2015, p. 10) undermines tax avoidance schemes used by multinational companies via tax planning strategies, hence avoiding paying their fair share in taxes. Zucman (2015, p. 47) estimates that losses in fiscal revenues due to the existence of tax havens amount to about USD 200 billion each year. The assessment that 10%-20% of national tax revenues in developing countries comes from international tax transaction only adds to the significance of greater transparency (Campbell & Comer Jones 2014, p.37). However, does this affect the tax secrecy? Is tax secrecy incompatible with tax transparency from a policy perspective (Barrios Altafulla, 2014, p. 425)?

Tax transparency and confidentiality are not mutually excluding (Remeur 2015, p. 1). The main question is how to achieve the balance between the right to know and the limits to this right. The good example, according to the author, is French Tax Procedure Act, which justifies exceptions with the public interest and stipulates international exchange of information as exception to the rule of secrecy. Another example can be found in Croatian legislation, where the General Tax Act stipulates international cooperation (i.e. exchange of information) as the case where tax secrecy remains unharmed. Taking into account all issues mentioned above, it might be more appropriate to address the issue of tax secrecy in information exchange procedures by analysing the achieved level of tax transparency, as in fact the two represent two sides of the same coin.

Exchange of information mostly occurs in three main forms: spontaneous, on request or automatic (Oberson 2015, p. 27). Information is exchanged on the basis of the legal instrument which provides legal basis for the exchange. Although there are many instruments based on which the tax relevant information is exchanged, the secrecy and transparency provisions of OECD Model, FATCA and CRS will be analysed in more details below. However, it is noteworthy to mention that international agreements do not offer specific protection of taxpayers' rights in that regard, so it remains on the domestic law to deal with this issue (Barrios Altafulla 2014, p. 426).

3.3.1 OECD Model and Confidentiality Provisions

The provisions on the exchange of information are set out by the Article 26 of the OECD Model and contain conditions and safeguards regarding secrecy and the use of data. According to the 2014 Model[19] the foreseeably relevant information which is exchanged must be treated as secret, applying the same rules as for the information obtained under domestic laws of the receiving state. The information may be disclosed only to persons or authorities dealing with the collection of taxes and prosecution in respect of taxes and those persons may use the information only for such purposes (OECD 2014a, p. 40). Such provision on confidentiality represents only relative duty of secrecy. The information should only be secret as is the information obtained under domestic laws of the requesting state (Debelva & Mosquera 2017, p. 369). Schenk-Geers (2009, p. 134) finds that states in fighting tax fraud must be able to exchange confidential documents and still recognize tax secrecy as an essential determinant of constitutional state in relation to taxpayers. After transmitting information to requesting state, the supplying state is no longer in the position to fulfil its constitutional obligation – hence the obligation of secrecy is transferred to the receiving state.

The original OECD Model concept contained an absolute duty of confidentiality, requiring that the information exchanged to be treated secretly and not be disclosed to any person or authority other than those concerned with the assessment or collection of taxes which are subject to the Convention (De-

19 The 2017 amendments to the OECD Model did not relate to the Article 26.

belva & Mosquera 2017, p. 369). The 1977 and 2005 versions of OECD Model Convention brought further amendments to Article 26. The article refers to the secrecy legislation of the receiving state, it extends the persons and authorities entitled to access information. The information use was widened and it became possible to disclose them in court hearings, case law and criminal proceedings (Oberson 2015, p. 26). Schenk-Geers (2009, p. 140) emphasizes the supremacy of treaty provisions over domestic tax secrecy provisions. Therefore, even if so provided by national legislation, the disclosure of information to other persons than those listed in Article 26 is forbidden. However, the maintenance of secrecy and sanctions for not abiding to those rules is a matter of domestic law of the receiving state (Oberson 2015, p. 25).

A similar secrecy clause is contained in the Tax Information Exchange Agreements (TIEA), developed by the OECD Global Forum on Transparency and Exchange of Information with the purpose of exchanging information between OECD and other countries with tax havens regarding their residents' offshore activities. The information exchanged must be treated as confidential and disclosed only to persons or authorities dealing with the assessment or collection of taxes, enforcement, prosecution or appeals in relation to taxes covered by agreement. Confidentiality is an autonomous concept as it does not refer to the law of the requesting state. Additionally, the information may only be exchanged regarding taxes covered by the agreement and it does not include supervision authorities (Oberson 2015, p. 63).

3.3.2 FATCA and CRS – New Standards of Automatic Exchange of Information

The recent developments in tax transparency have brought about the supremacy of automatic exchange of information over other forms of exchange. Firstly, the specific system was developed by the US with the intention to leave no US taxpayers untaxed. The OECD's work followed, and lead to the broadly accepted new standard in automatic exchange of information – the Common Reporting Standard.

The US have a taxing system based on both citizenship and residence as grounds for imposing income tax. The citizenship-based taxation regime allows the US tax authorities to tax all US citizens and US resident aliens on worldwide income, not taking into account their residence. (Holm 2014, p. 454) The Foreign Account Tax Compliance Act (FATCA), passed in 2010, represents the framework for reciprocal financial information exchange between the United States and other countries. Its aim is to supress offshore tax evasion and increase federal tax revenues. In the FATCA system, the taxpayers are required to report their international bank accounts (i.e. balances, receipts and withdrawals). Foreign financial institutions are obliged to report information about their U.S. clients (about taxpayer accounts and foreign entities in which U.S. taxpayers hold substantial ownership) to the Internal Revenue Service (IRS). As direct reporting to the IRS has raised legal issues for

some countries, IGAs (intergovernmental agreements) have been developed (Campbell & Comer Jones 2014, p. 33).[20]

FATCA requires US withholding agents to withhold tax on certain payments to foreign financial institutions (FFIs) which do not comply with the reporting obligation to the IRS about their US accounts and payments to non-financial foreign entities (NFFEs) which do not provide information about their US owners to withholding agents (Gupta 2013, p. 226). FATCA's extraterritorial effect consists of the obligation of FFIs to enter into agreement with the IRS and to report either to the US IRS or tax authorities in their respective countries, in case that the country has signed an IGA with the US, about the US investors and account holders and non-financial foreign entity investors with substantial US owners (Gupta 2013, pp. 227–228). In case that the FFI does not report, any US payer must withhold 30% of payment made to FFI (Holm 2014, p. 462).

Both IGA and Competent Authority Agreement (CAA), the documents necessary for the implementation of FATCA, draw upon the 1988 Convention on Mutual Administrative Assistance in Tax Matters, allowing automatic exchange of information. The IGA[21] and CAA[22] contain provisions on confidentiality, data safeguards and limits to the use of the data. They refer to the corresponding provisions of the Convention and provide for no specific rules in that regard.

The Article 22 of the Convention sets out that information obtained under the Convention must be treated as secret and protected in the same manner as information obtained under the domestic law of requesting state, ensuring the protection of personal data, in accordance with the safeguards specified by the domestic law of supplying state. Such information may be disclosed only to persons or authorities conducting the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that state, or the oversight of those processes.

After the introduction of FATCA, the OECD and G20 worked on developing a single global standard of automatic financial information exchange which resulted in Model Competent Authority Agreement and the Common Reporting Standard. (Hey & Heilmeier 2016, p. 242)

The OECD's Global Standard is based on two components – the Model Competent Authority Agreement (CAA), a legal instrument providing for the automatic exchange of information between countries, and the Common Reporting Standard (CRS), which sets out requirements for reporting and due diligence regarding specific categories of financial accounts. CAA links CRS

20 Model 1 IGA is the only reciprocal model and it has been used as a template for the OECD's global standard for exchange of information. Model 2 was drafted for countries with strong tradition of privacy and banking secrecy (Somare & Wöhrer 2014, pp. 396–397).

21 E.g. Agreement between the Government of the Republic of Croatia and the Government of the United States of America to improve international tax compliance and to implement FATCA, Official gazette No. 5/2016.

22 E.g. CAA between the competent authorities of the United States of America and the Republic of Croatia, available at <https://www.porezna-uprava.hr/Dokumenti vijesti/FATCA Agreement_20032015.pdf>.

with the legal basis for exchange of information between countries (Gadžo & Klemenčić 2017, p. 215). The CRS provides financial firms with the template for due diligence, definitions, identification of foreign account holders and foreign controlling persons, to enable preparation for the exchange. On the other hand, Model CAA provides the governments with the legal basis, i.e. the framework for competent authority agreements. (McGill 2016, p. 2)

The obligation of participating jurisdictions is to annually exchange information they obtained from financial institutions with other competent authorities on an automatic basis. Unlike FATCA, there are no withholding sanctions for non-participating entities, but on the other hand, there is a monitoring mechanism entrusted with the Global Forum (Radcliffe 2014, p. 162; Oberson 2015, pp. 199–201). OECD (2014c, p. 13) suggested establishing automatic exchange relationship based on a multilateral instrument, such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The CRS requirements need to be implemented into the national legislations of participating jurisdictions. (Gadžo & Klemenčić 2017, p. 217)

In accordance with the Model Competent Agreement, rules on confidentiality and the proper use of information will be based on a corresponding instrument which allows automatic exchange of information (Multilateral Convention or a bilateral tax treaty) containing provisions on the confidentiality of information exchanged and limiting the scope of persons entitled to access the information as well as the purpose for which the information may be used. (OECD 2014c, p. 13) Prior to entering into automatic information exchange agreement with another jurisdiction, the receiving jurisdiction must have legal framework and administrative capacity and processes in place which ensure confidentiality of information received and the use of information only for specified purposes (OECD 2014b, p. 8).

4 Discussion and Conclusion

The analysis in the article brings several conclusions. The systems analysed have been converging with respect to two facts: special treatment of tax information, and its exceptions. It seems that there is (general) recognition that tax information can be very sensitive and that personal information and its special treatment is secured by the legal institute of tax secrecy. However, the exact position of this institute depends on the overall approach and understanding of the role of (tax) information. It might be (primarily) understood as an essential element of protection of taxpayers' private lives or as means of monitoring the public authorities' work and performance. Therefore, as we have seen, tax secrecy might function as a rule (in the U.S., Croatian, French and German systems) or as an exception (the Swedish system). Where tax secrecy functions as a rule, which is still a prevailing concept, tax information is secret *per se*; exceptions are thoroughly prescribed by law and should be interpreted very strictly. Differences in the extent of tax secrecy can also be observed: while in certain systems tax secrecy concerns the framework for revenue authorities' use and disclosure of tax information when conducting

tax procedures, in other systems it also concerns the secrecy of tax return or is even part of a broader framework that also includes access to public documents. Historical, as well as broader social context, determinants are obvious.

Another common feature is its, direct or indirect, influence on tax compliance. Direct influence is especially emphasised in the U.S. and German systems where tax secrecy is considered an important standard/principle in tax procedures, whose aim is to create a climate of confidence and trust between revenue authorities and taxpayers and thus support and encourage taxpayers' cooperation and voluntary tax compliance. In the Swedish case, a balance between tax secrecy and tax transparency seems to have the same role. Therefore, in the U.S., German and Swedish systems, tax confidentiality (and tax transparency) legislation is rather designed with the purpose of nurturing trust in the system and enhancing communication between the parties and thus it is closer to the so-called norm-based compliance model. In the Croatian system, however, the key role in influencing voluntary tax compliance is given to tax secrecy exceptions, where a deterrent effect is emphasised.

Tax secrecy has a double role – it functions as one of the main taxpayers' rights but also as the revenue authorities' tool when administering taxes, which was actually one of its first roles. The latter feature is especially visible in its exceptions. We identified three main exceptions: public interest (and common welfare); (strategic) tax publicity; exchange of information. As we have seen, a number of derogations in all the systems analysed could be justified on the grounds of public interest. Their primary intention is to facilitate revenue authorities' work and increase their efficiency in tax procedures as well as support their fiscal role. Two other exceptions, however, have additional goals.

Tax publicity is an instrument having a strong behavioural-change dimension and multiple goals. Although its implementation has recently become quite popular, there is no firm empirical evidence about its real effects. As we have seen in our analysis, it has different meanings. In the French system, its role is not quite clear. It is possible that it rather undermines the meaning of tax secrecy within a system promoting certain taxpayers' behaviour or serving as a "monitoring" tool. In the Croatian and U.S. systems, tax publicity is primarily seen as an instrument of deterrence but it might end up producing different results. While empirical research in the U.S. environment shows certain positive effects of this measure, it seems that in the Croatian system this measure has not met desired expectations. It is worth noting that the introduction of the shaming list in the Croatian system in 2012 represents a significant shift considering tax confidentiality legislation in force before this amendment. It would be very interesting to explore whether this measure in Croatia has actually produced the contagion effect.

The international aspect of tax secrecy, or more accurately tax transparency, relates to the exchange of information. To properly determine tax liabilities and achieve equality in taxation countries must rely, apart on national procedures of collecting information, also on international cooperation and assistance. In those procedures, sensitive financial taxpayers' information is no

longer protected by the tax secrecy rules of one country, but is entrusted to other countries under confidentiality framework of international agreements and their own tax legislation. Due to the recent development of automatic information exchange, new concerns have surfaced, stressing the importance of keeping the information secret and prescribing purposes and persons authorized to us it. Although the information leaves the oversight and the protection of one revenue authority, its use by another authority must not jeopardize the confidentiality thereof.

So, to conclude, is there a balance of tax secrecy and its limitations? We would say that there is no perfect balance but obviously every legal system struggles to getting closer to this goal. However, in order to provide a more elaborate response to this question, one must dig deeper and take into consideration specific features of legal instruments and their implementation in countries with various traditions and legal concepts. Even recent normative developments have pointed out the everlasting search for this perfect balance.

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Development of Tax Procedural Law and Sectoral Case Law in Selected Countries[1]

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ABSTRACT

The purpose of this paper is to examine the development of the Slovenian Tax Procedure Act and amendments thereto until 2017, in order to broaden the field knowledge on tax procedures within the administrative system as a whole. The Tax Procedure Act provides the general framework of the procedural tax system in Slovenia. The first version of the Tax Procedure Act (ZDavP) was adopted in 1996 and followed by five amending acts until the adoption of the second version (ZDavP-1) in 2004. The third and currently applicable version of the Tax Procedure Act (ZDavP-2) has been subject to over ten amendments so far. Furthermore, the study aims to compare the development of tax procedure in Slovenia and Sweden. Based on the normative and comparative analyses, review of domestic and foreign literature, and case law analysis, the advantages and disadvantages of the development of tax procedure in Slovenia were identified. The amendments analysed contributed mainly to simplifying the tax procedure, reducing red tape, decreasing costs, improving the efficiency of the tax authorities, and providing greater legal certainty for the taxpayers. Most changes to the Tax Procedure Act involved the personal income tax. An empirical study of the case law of the Administrative, Supreme and Constitutional Courts in selected period further showed that errors were mainly detected in relation to substantial violation of procedural requirements rather than incorrect application of substantive law. The study contributes to administrative and legal science and the tax profession as such. The results can be useful when drafting new tax procedural legislation to improve its effectiveness.

Keywords: *case law, development of tax procedure, legislative amendments, Slovenia, Tax Procedure Act, tax procedural law*

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1 Introduction

One of the acts most often amended in Slovenia is the Tax Procedure Act (hereinafter: the ZDavP). Ever since its adoption, the Act has been amended numerous times and often even subject to constitutional review. The ZDavP regulates the calculation, assessment, payment, repayment, control and execution of taxes, the rights and obligations of taxable persons, state and other bodies collecting taxes in accordance with the law, and other persons in the procedure of tax collection, the protection of data obtained in the procedure of tax collection, and mutual assistance in the collection of taxes and exchange of information with other EU Member States, third countries and territories (Article 1 of ZDavP-2). Tax authorities and bearers of public authority must comply with the ZDavP when collecting taxes.

The ZDavP was adopted by the National Assembly of the Republic of Slovenia on 20 March 1996 and published in the Official Gazette of the Republic of Slovenia on 2 April 1996. Before the adoption of the ZDavP, the procedures relating to tax and other obligations of taxable persons were regulated by various regulations. Considering such variety of legal bases, the tax procedure lacked transparency for both the tax authorities and the taxable persons. The adoption of the ZDavP in 1996 enabled to unify all procedural provisions in the tax area (Šircelj, 2000, p. 31). Before that, Slovenia had no specific law regulating tax procedure at all.

Owing to EU accession, Slovenia was obliged to transpose the substantive provisions of EU directives into its national legislation also in the field of taxation and had to ensure an appropriate legal basis for tax collection procedures and effective mutual assistance in calculating tax and monitoring regularity (DURS, 2004). Hence, a new Tax Procedure Act – the ZDavP-1 (Official Gazette of the Republic of Slovenia, No. 54/04) – was adopted on 23 April 2004. The ZDavP-1 was first amended by the ZDavP-1A, which was adopted on 16 December 2004 and entered into force on 1 January 2005. Later on, it was amended one more time by the ZDavP-1B, which was adopted on 23 November 2005.

Eventually, on 26 October 2006, the National Assembly of the Republic of Slovenia adopted a third Tax Procedure Act – the ZDavP-2. The latter was published in the Official Gazette of the Republic of Slovenia No. 117/06 as one of the acts adopted in the framework of the tax reform. The purpose of the tax reform was to bring the Tax Procedure Act closer to the implementers and the addressees and eliminate the deficiencies of the existing tax system (Višnjevec, 2007, App. pp. II-VI). To date, the ZDavP-2 has been amended by the following: ZDavP-2A, ZDavP-2B, ZDavP-2C, ZDavP-2D, ZDavP-2E, ZDavP-2F, ZDavP-2G, ZDavP-2H, ZDavP-2I, and finally, ZDavP-2J.

The amendments to the ZDavP were generally aimed at simplifying the procedures, especially for the benefit of taxable persons, and making the work of tax authorities easier and simpler. The constant changes, however, make the work of the tax authorities in tax procedures more complicated as they

cause confusion regarding the application of the right substantive regulation, meaning that a substantive regulation might not have been applied at all, might have been misapplied or misinterpreted, or the authority deciding at discretion might have exceeded the purpose and extent of discretion. Therefore, good practices from abroad need to be considered, as they can show the pros and cons of constantly changing tax laws.

The study tested the following statements: 1) whether since 1996 the changes to the Tax Procedure Act have mostly affected the institution of tax execution; 2) whether after such changes the development of tax procedural law in Slovenia is comparable to the one in Sweden; and 3) whether, considering publicly available court cases of the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015, more errors concerned the incorrect application of substantive law rather than violation of procedural requirements.

The reason for choosing Sweden as a comparative country is that Slovenia often takes Sweden as an example and strives to follow its development. Sweden is a highly developed country but has achieved prosperity only in recent decades. In 1991, it experienced a major financial crisis but picked itself up again to become one of the most developed countries, inspiring many EU members (cf. Terra, 2012). Its highly efficient economy ranks Sweden among the ten leading countries of the world by national income per capita. This also means that it hardly suffered from the financial crisis of 2008, while Slovenia recorded a significant downturn. Over the past two decades, Sweden implemented a series of market-oriented economic reforms, becoming the most economically viable country of the EU.

The article first presents the methodology of research, followed by a graphic and descriptive presentation of results. At the end, some general conclusions are drawn and possible further research in this area suggested.

2 Methodology

Several scientific and research methods were applied in the study. The descriptive method served to indicate and describe individual facts and concepts. The analytical method was applied to the content of written and internet sources for analysing legislation, scientific literature, internet articles, and case law. The compilation method was used to summarise the views and conclusions of individual authors. The comparative method allowed to compare similar facts and identify the differences (especially when reviewing and critically comparing the legislation of selected countries). The deductive method was used to confirm or reject the statements made, while the analytical-synthetic method was applied in the analysis of court judgments.

The study analysed all amendments to the Tax Procedure Act since the adoption of the first ZDavP. The amending acts were examined by individual institutions of the tax procedure, namely by the number of articles that had been changed, added or deleted. The analysis covered the most important

and most comprehensive institutions of the tax procedure: data protection, tax liability, tax procedure, legal remedies, fulfilment of tax obligations, tax supervision, tax execution, international cooperation in tax matters, personal income tax, and penal provisions.

The analysis of the judgments of the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015 and concerning the incorrect application of substantive law and procedural violations is based on the judgments of the above courts issued in 2014 and 2015 and relating to decisions in tax matters. In total, 223 Administrative Court judgments of 2014 and 174 of 2015, and 13 Supreme Court judgments of 2014 and 25 of 2015 were examined. The Constitutional Court only dealt with one constitutional complaint in the area of taxes in 2014 and 2015, respectively. As regards the Constitutional Court, only constitutional complaints accepted by the Court for consideration were taken into account.

The judgments of the Administrative and Supreme Courts were obtained from the website www.sodnapraksa.si, which is the website of the Slovenian Judiciary. Its databases contain decisions, positions, principled legal opinions and legal opinions of the Supreme Court, decisions of higher courts, courts of general and special jurisdiction and the Administrative Court, decisions on the assessment of fair financial compensation for non-material damage, and summaries of scientific articles selected by the Supreme Court Records Department. The collection of case law does not contain decisions of the courts of first instance (Sodna praksa, 2013). The judgments of the Constitutional Court were obtained from its website where all decisions issued in matters under the competence of the Constitutional Court since 1991 are available.

3 Results

3.1 Analysis of amendments introduced by ZDavP, ZDavP-1 and ZDavP-2

As far as ZDavP-1 is concerned, most of the articles amended, added or deleted under the amending acts ZDavP-1A and ZDavP-1B related to personal income tax (24 in total). 23 amendments concerned tax liability, while 18 articles were amended, deleted or added in the area of tax execution. Both amending acts introduced changes in the area of personal income tax: the ZDavP-1A added a new article, while the ZDavP-1B introduced as many as 23 amendments to personal income tax. The institution of tax liability was again affected by both amending acts, with the ZDavP-1A introducing 6 changes and the ZDavP-1B bringing about 17. In the area of tax execution, the ZDavP-1A introduced 4 amendments and the ZDavP-1B 14. Most changes were brought about by the ZDavP-1B.

As regards the ZDavP-2, the analysis showed that most changes were again introduced in the field of personal income tax, namely 118. Slightly less, 106, involved international cooperation in tax matters, and 63 concerned tax exe-

cution. As regards personal income tax, most amendments (35) were brought about by the ZDavP-2F. This is followed by the ZDavP-2B (28 amendments) and the most recent amending act, the ZDavP-2J (24 amendments). International cooperation in tax matters was amended the most by the ZDavP-2E, followed by the ZDavP-2B. Tax execution was mostly affected by the ZDavP-2I (20 amendments), while the ZDavP-2B brought about 16 amendments in the area of personal income tax. The analysis also showed that, overall, most amendments were introduced by the ZDavP-2B (the analysis was carried out before the adoption of the ZDavP-2K in December 2017, therefore the latter was not included). On 28 February 2018, the Official Gazette of the Republic of Slovenia No. 13/2018 published the Act Amending the Public Finance Act (ZJF-H), which annulled the sixth paragraph of Article 23 of the ZDavP-2, whereby the reporting on the state and trends in the tax debt of business entities, as defined by the sixth paragraph of Article 23 of the ZDavP-2, was systematically regulated by the Public Finance Act, since it is not a matter of tax procedure but rather an issue to be regulated by the Public Finance Act.

3.2 Analysis of judgements

The analysis of the judgments of the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015 was carried out to investigate the incorrect application of substantive law and violations of procedural provisions. The aim of the analyses was to test the question raised in the introduction of the survey, namely that the publicly available court cases of the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015 suggest that most errors were detected regarding incorrect application of substantive law, rather than violation of procedure.

The table below presents the analysis of the judgments of the Administrative Court in tax matters in 2014 and 2015 regarding the incorrect application of substantive law, violation of procedural provisions, and erroneous and incomplete determination of facts.

Table 1: Judgements of the Administrative Court in tax matters in 2014 and 2015

	Administrative Court judgements in 2014		**Administrative Court judgements in 2015**	
	Action dismissed	***Action upheld***	***Action dismissed***	***Action upheld***
Erroneous or incomplete determination of facts	126	7	66	4
Incorrect application of substantive law	137	20	126	10
Substantial violation of procedural provisions	143	15	86	16

Source: own presentation

Comparatively speaking, the actions brought before the Administrative Court in 2014 and 2015 were more often dismissed than upheld. In 2014 and 2015, the court dismissed 126 and 66 actions, respectively, filed by the plaintiff on grounds of erroneous and incomplete determination of facts. Such actions were upheld only in 7 cases in 2014 and 4 cases in 2015. As regards actions filed for incorrect application of substantive law in the tax procedure, the Administrative Court in 2014 upheld the action in 20 cases and dismissed it in 137 cases: in 2015, it dismissed the action in 126 cases and upheld it in 10 cases, which is less than a year before. In case of substantial violation of procedural provisions, 15 actions were upheld in 2014 (143 dismissed) and 16 were upheld in 2015 (86 dismissed).

In 2014, most actions were filed due to substantial violation of procedural provisions, while in 2015 most cases concerned incorrect application of substantive law. The least actions were filed due to erroneous and incomplete determination of facts, in 2014 and 2015 alike. Most of the actions dismissed in 2014 involved substantial violation of procedural provisions, and the least actions dismissed in 2015 concerned erroneous and incomplete determination of facts. Most of the actions were upheld in 2014 due to incorrect application of substantive law. Most of the actions filed in grounds of substantial violation of procedural provisions were upheld in 2015.

The following table presents an analysis of the judgements of the Supreme Court in tax matters in 2014 and 2015 concerning the incorrect application of substantive law and substantial violation of procedural provisions.

Table 2: Judgements of the Supreme Court in tax matters in 2014 and 2015

	Supreme Court judgements in 2014		**Supreme Court judgements in 2015**	
	Review dismissed	***Review upheld***	***Review dismissed***	***Review upheld***
Incorrect application of substantive law	12	1	21	4
Substantial violations of the provisions governing administrative dispute procedures	11	0	16	4

Source: own presentation

Table 2 shows that in 2014, the Supreme Court dismissed the review requested because of incorrect application of substantive law in 12 cases and upheld it in one case. In 2015, it dismissed the review as unfounded in 21 cases and upheld it in 4 cases. Comparing the two years, more requests for review were lodged in 2015 than in the previous year. As regards the substantial violation of the provisions governing administrative dispute procedures, the Supreme Court dismissed all 11 reviews in 2014. In 2015, the Supreme Court dismissed 16 reviews as unfounded and upheld 4.

In 2015, most dismissals concerned reviews requested because of incorrect application of substantive law. Similarly, in 2015, most reviews were dismissed in case of substantial violation of the provisions governing administrative dispute procedures. In 2014, only one review was upheld, namely for incorrect application of substantive law, while in 2015 review was upheld in 4 cases of violation of procedural provisions and in the same number of cases for incorrect application of substantive law.

Table 3 presents an analysis of the judgements of the Constitutional Court in tax matters in 2014 and 2015 concerning the incorrect application of substantive law and violation of procedural provisions.

Table 3: Judgements of the Constitutional Court in tax matters in 2014 and 2015

	Constitutional Court judgements in 2014		**Constitutional Court judgements in 2015**	
	Constitutional complaint rejected	***Constitutional complaint granted***	***Constitutional complaint rejected***	***Constitutional complaint granted***
Erroneous and incomplete determination of facts	0	0	0	0
Incorrect application of substantive law	0	0	1	0
Substantial violation of procedural provisions	0	1	0	0

Source: own presentation

As shown by Table 3, only one constitutional complaint in the field of tax matters was accepted for consideration in both 2014 and 2015. The constitutional complaint in 2014 (No. U-I-234/12) was granted. This complaint was filed – together with the motion to initiate the procedure for assessing the constitutionality of the sixth paragraph of Article 57 of the ZDavP-2 – in relation to the deprivation of the plaintiff's right to a fair trial, right to legal remedy, and right to judicial protection. The Constitutional Court annulled the challenged judgments of the Supreme and Administrative Courts and returned the case to the Administrative Court for a new decision, since the plaintiff was deprived of the guarantee of equal protection of rights enshrined in Article 22 of the Constitution. He was in fact deprived of the right to be heard in the procedure in which his rights and obligations were decided.

The constitutional complaint of 2015 was not granted. This case actually comprised two constitutional complaints (No. UI-129/13-16 and UI-138/13-16) filed by the same plaintiff together with the motion to initiate the procedure for assessing the constitutionality of the second paragraph of Article 11 of the Motor Vehicle Tax Act (Official Gazette of the RS, No. 52/99). The constitutional complaints were filed for infringement of equality before the law re-

ferred to in the second paragraph of Article 14 of the Constitution, equal protection of rights referred to in Article 22 of the Constitution, free economic initiative referred to in Article 74 of the Constitution, and the principle of the free movement of goods under Article 28 of the Treaty on the Functioning of the European Union (TFEU, consolidated version, OJ C 326, 26 October 2012). The Constitutional Court ruled that the provision of the Motor Vehicle Tax Act was not inconsistent with the alleged infringements of the Constitution, and therefore rejected the challenged decisions on which the constitutional complaint was based.

3.3 Comparison with the development of tax procedure in Sweden

For much of the 19th century, Sweden was one of the poorest countries in Europe. Economic growth was spurred by a wave of free trade reforms. In 1970, Sweden ranked fourth in terms of GDP per capita among the OECD countries. In the 1970s and 1980s, it raised its tax wedge from the European average to one of the highest in Europe. The public sector expanded widely. In 1990, Sweden suffered a major economic crisis that brought it down to the 14th place among the OECD countries. Its successful exit from the crisis in 1991 was due to what is known as the 'tax reform of the century' (more in Lodin, 2011).

At that time, the Swedish tax system was dominated by an increasing number of specific solutions, rules and exceptions. Before that, the tax system had been posing major barriers to work and investment. One of the reasons for this was that individuals with similar income were taxed differently. Similarly, the tax rates on capital gains from interest on savings or dividends were significantly higher than capital gains. The VAT rates also differed greatly, depending on the product and service. This led to a reduction of the tax base and undermined the legality of the entire system. With the tax reform of 1991, Sweden obtained wider tax bases and tax rates were adjusted. The tax collection system became transparent, uniform and legitimate (Forsberg & Brännström, 2010).

The reform of 1991 can also be considered the 'most far-reaching reform of the tax system of a nation for at least 40 years'. Impartiality or neutrality was replaced by social and economic engineering and income distribution as one of the key principles of fiscal policy. This revolution is also reflected in the tax reforms adopted in 1985, 1991 and 1994. Since 1991, several important additional reforms have been adopted with regard to taxation of income from capital. At the beginning of 1992, the tax rate for capital gains was reduced from 30% to 25%. Similarly, at the beginning of 1994, corporate income tax was reduced from 30% to 28%, and the tax deduction on dividends for new shares was abolished (Norman & McLure, 1997, p. 109).

Sweden is known for its extremely high taxes, which its residents nevertheless happily and conscientiously pay. They do not mind the high taxes because they know that these ensure better health and social care. Given that the word

'tax' has such a negative connotation for many people around the world, it is likely to expect that a government agency that takes about a third of the average monthly salary would be the number one enemy in Sweden. Yet this is not the case. The Swedish tax agency – Skatteverket – is, in fact, quite popular among the Swedish population. The Swedes consider it a trusted and respectful agency. As Toivo Sjörén would say, 'you don't have to like taxes, but most people seem confident that things are done fairly' (Willes, 2016). In Sweden, the bodies in charge of the tax system are the Ministry of Finance and the Skatteverket. The proposals for tax legislation and health insurance contributions are prepared by the Ministry of Finance, while the tax agency is responsible for the operational aspect of taxation.

In terms of state organisation, Sweden is a constitutional monarchy. Tax law and other legislation are enacted by the Parliament. The constitutional basis for taxation can be found in the 'Instrument of Government', which is one of the four basic laws that make up the Swedish Constitution. It contains basic political principles governing the state and defines and restricts the powers of the Swedish Government. The principle that all taxes must be in accordance with the law is expressed in Article 3 of Chapter 8 of the Instrument of Government. Additional tax provisions are found in Chapter 2, dealing with fundamental rights and freedoms. The Swedish tax system comprises almost all types of taxes. Each tax is regulated by a special act, while administrative and procedural rules are regulated by further separate laws. The rules governing the assessment, tax return and payment of taxes are set out in three different legal acts: the Tax Assessment Act, the Payments Tax Act, and the Self-Taxation and Reporting of Income Act (more in Lindencrona, 2010).

The comparison between tax systems in Slovenia and Sweden suggests that the two share a similar tax policy. They both have a body that oversees the collection of taxes: the Tax Agency in Sweden and the Financial Administration in Slovenia (hereinafter: FURS). In Sweden, the Agency enjoys considerable public support and trust, while trust in the FURS is low or even negative.

The legal basis for the conditions and methods of collecting taxes in both countries is determined by individual tax laws. The method of fulfilling tax obligations in Slovenia is determined by the ZDavP-2, while in Sweden administrative and procedural rules are determined by three different legal acts: the Tax Assessment Act, which sets out the procedural rules for the assessment of larger taxes, the Self-Taxation and Reporting on Income Act, which sets out the rules for self-taxation of taxable persons and the reporting on income paid by, for example, employers, banks, insurance companies, etc., and the Payments Tax Act, which provides the basis for organisation, advance payments, final payment, and withholding tax.

One of the main differences between Sweden and Slovenia is the population's attitude towards taxes. If in Sweden high taxation is something completely acceptable, it is all but so in Slovenia. The Swedish population is aware that high taxes are needed to ensure prosperity, such as health and social care. In exchange for high taxes, the Swedes receive some sort of equity and the

assurance that their money will not be allocated for unnecessary purposes. Therefore, there is no negative feeling about paying high taxes. One could even say that taxpayers in Sweden are better off than in Slovenia, as Sweden is considered a country with the most optimal tax system in Europe.

4 Discussion

The Tax Procedure Act, the amendments thereto, the relevant amending acts, and the advantages and disadvantages of the amendments were dealt with in numerous articles published in professional journals (Uprava, Pravna praksa, Podjetje in delo) by various authors (Kovač, Jerovšek, Višnjevec, etc.), in some Master's theses, and other sources, especially the internet (the Tax-Fin-Lex portal). In her Master's thesis of 2012, Helena Truden studied the development of the protection of the rights of taxpayers in the Slovenian tax procedure, presenting the tax procedure, its particularities, and whether tax legislation changed over the years to the benefit or to the detriment of taxable persons.

The Master's thesis of Sonja Kutnjak (2015) contained a procedural analysis of the protection of the persons liable to income tax in Slovenia and Croatia, taking into account all amendments. In 2014, Petra Kmetič analysed the fiscal measures and legislation of selected countries, Slovenia included, in 2007-2013. However, the numerous sources relating to the ZDavP only emphasised certain amendments thereto or certain institutions of the tax procedure, as we could not find that a single piece of work presenting a comprehensive chronological development of the ZDavP and analysing the changes introduced by each new Act to the institutions of the tax procedure.

Our analysis showed the advantages and disadvantages of all the changes affecting the ZDavP and the institutions of tax procedure over the years. The analysis also answered the question whether the many changes were positive and contributed to a better development of the tax procedure in Slovenia.

The purpose of the first analysis was to verify whether the development of the ZDavP brought the most changes in the field of tax execution and what these changes were. Tax execution is an extreme measure that the Financial Administration uses if a debtor fails to fulfil their monetary liabilities within the deadlines prescribed for voluntary fulfilment. As a result of the economic crisis, the number of tax receivables and liabilities increased. If the tax liability is not paid within the deadline, the tax authority must initiate tax execution. On the other hand, the state seeks to increase the efficiency of tax collection, therefore, it is in the interest of the state that taxpayers settle their obligations and claims before the authority starts the lengthy procedures of tax execution. Therefore, we assumed that due to the economic crisis and the need for greater profitability or effectiveness of tax collection, the ZDavP experienced the most changes in relation to tax execution (more on this, Lešnik, 2009, pp. 67–75).

The amending acts aim at improving the tax procedure. On the other hand, the excessive number of adopted amendments can confuse the taxable per-

sons as they cannot get acquainted with all the changes in time. Thus, the changes can either be positive for the development of the tax procedure or can slow down the interpretation of the law by taxable persons and tax authorities. It needs to be added that the mere changes to articles or to their number are not necessarily the sole indicator of the scope of the changes, as it is possible to change only one article and have a significant effect on all taxes and all taxable persons.

On the basis of the analysis carried out, we can reject the statement that since 1996 the ZDavP has undergone most changes in the field of tax execution; however, if we observe only the general part of the ZDavP, irrespective of the kind of tax, the statement is confirmed.

The acts amending the ZDavP-1 most significantly affected the personal income tax as a result of the requirement to comply with the Personal Income Tax Act (ZDoh-1) and in order to encourage the taxpayers to voluntarily pay taxes, introduce tax reliefs, and simplify administrative procedures. The acts amending the ZDavP-2, just like those amending the ZDavP-1, also introduced changes in the area of personal income tax with the aim of remedying and preventing the consequences of the financial crisis.

It can be concluded from the above that since 1996 when the first ZDavP was adopted and until the adoption of the ZDavP-2, also taking into account the penultimate amending act ZDavP-J adopted in 2016, the Tax Procedure Act experienced the most changes in the area of personal income tax and not in the area of tax execution.

The purpose of the comparison of the development of tax procedure in Sweden was to determine the similarities and the differences in tax procedure development in Sweden and Slovenia and the reasons that led to different developments in tax procedural law. Another purpose was to determine which country was most significant affected by the changes in tax procedural law. Sweden is a highly developed country that has achieved its prosperity only in recent decades. It suffered a major financial crisis in 1991, but picked itself up again to become one of the most developed countries and an inspiration to many EU members. With a highly efficient economy, it ranks among the ten leading countries of the world in terms of national income per capita. This means that it hardly suffered from the financial crisis of 2008, while Slovenia recorded a significant downturn. Norman and McLure (1997) consider the tax reform of 1991 the most far-reaching tax system reform for at least 40 years, making income distribution one of the most important principles of fiscal policy.

According to Lindencrona, G. (2010), tax legislation may be similar in many countries, but the legal environment can often vary due to differences in the legislative process, in the relations between the legislature and the courts, and consequently due to different methods of interpreting tax laws.

Sweden is taken as a model because of its high standard of living and advanced economy. Its tax regime is similar to the Slovenian. They have a tax collecting agency that, unlike the Slovenian FURS, enjoys the respect and trust of

the Swedish population. The country also adopted specific laws, which form the legal basis for the conditions and methods of collecting taxes. Sweden has already had some tax reforms, raised and reduced tax rates and personal income tax rates, and introduced new taxes with a view to further improving its economic growth.

On the basis of the analysis it can be concluded that Sweden, and Slovenia alike, adopts tax reforms, raises and reduces tax rates and introduces new taxes in order to improve economic growth and increase GDP. Given that both countries are members of the EU (Swede acceded in 1995 but did not introduce the euro), they both need to respect and implement the EU regulations.

Regarding the regulation of tax procedure in Sweden, very few literature and sources were available in English or Slovene, so the comparison of the development of tax procedural law in Sweden was only partial.

The analysis of the judgments of the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015 regarding the incorrect application of substantive law and substantial violation of procedural provisions shows that a large number of actions were dismissed (and hence few actions were granted) as unfounded. In fact, when stating their reasons, the plaintiffs do not substantiate them sufficiently or do not substantiate them at all. Merely stating that the action is based on incorrect application of substantive law or a violation of procedure does not suffice. The fact that a small number of actions in 2014 and 2015 were filed because of erroneous and incomplete determination of facts indicates that the tax authority works well and conducts the procedure in individual cases appropriately.

I believe that the reason why there are far more reviews dismissed by the Supreme Court than granted is that the plaintiffs file unfounded requests, which the Supreme Court dismisses on the basis of Article 92 of the Administrative Dispute Act since no reasons are given for the request and there are no reasons which it needs to take into account ex officio (Article 87 of the Administrative Dispute Act). The parties are likely to request a review although they lack sufficient grounds for the review to get through, as they hope that the Supreme Court will accept their request anyway. By doing so, the parties quite often just fill the court with cases for which it is evident from the outset that they will not be upheld.

The reason why there are not many constitutional complaints filed in tax matters is that a constitutional complaint can be filed only because of a violation of human rights and fundamental freedoms, after all ordinary and extraordinary legal remedies have been exhausted, which means that regular courts perform their work and decide correctly and in accordance with the law, hence the parties have no reason to appeal to the Constitutional Court. In addition, appealing to the Constitutional Court is a lengthy and costly process and many parties refrain from opting for such.

Article 23 of the Constitution of the Republic of Slovenia provides that everyone has the right to have any decision regarding his rights, duties, and any

charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual.

The aim of the study was to analyse the judgments of the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015 regarding the incorrect application of substantive law and procedural violation. Incorrect application of substantive law means that substantive law was not applied at all, that an incorrect substantive regulation was applied, that an authority misinterpreted the substantive regulation, or that an authority deciding at discretion exceeded the purpose and extent of discretion. A procedural violation constitutes a substantial violation of procedural provisions. It was assumed that there were more errors related to incorrect application of substantive law than procedural violations, as the authorities and the courts might often misinterpret new or amended provisions or apply the wrong law (e.g. prohibition of retroactivity).

If, in conference or at the hearing, the court of second instance establishes that, in order to enable the full and correct determination of the state of facts, it is necessary to determine the facts claimed by the party and produce the evidence proposed before the court of first instance, which the court of first instance did not determine, or the facts and evidence stated by the party in the complaint, or that the state of facts was incompletely determined due to the incorrect application of substantive law, the court supplements the procedure or eliminates the aforementioned deficiencies and decides with a judgment in the case. If the state of facts was erroneously or incompletely determined due to incorrect application of substantive law and the court assesses, considering the circumstances of the case, that it cannot supplement the procedure or eliminate the aforementioned deficiencies, it rejects the judgment made at first instance and remands the case to the court of first instance for reconsideration (Article 355 of the Contentious Civil Procedure Act).

The analysis covered 223 Administrative Court judgments of 2014 and 174 judgments of 2015 as well as 13 Supreme Court judgments of 2014 and 25 judgments of 2015. The Constitutional Court dealt with one tax-related constitutional complaint in 2014 and one in 2015. In the case of the Constitutional Court, only the constitutional complaints accepted for consideration were taken into account.

The analysis of judgments of the Administrative Court reveals that in 2014 most actions were brought due to substantial violation of procedural provisions, while in 2015 most cases related to incorrect application of substantive law. In both 2014 and 2015, the least actions were brought on grounds of erroneous and incomplete determination of facts. Most of the actions dismissed in 2014 related to substantial violations of procedural provisions, while the least actions dismissed in 2015 related to erroneous and incomplete determination of facts. Most of the actions upheld in 2014 related to

incorrect application of substantive law. In 2015, most of the actions upheld related to substantial violation of procedural provisions.

The analysis of the judgments of the Supreme Court shows that in 2015, the requests for review due to incorrect application of substantive law were mostly dismissed. Also in 2015, most reviews dismissed related to substantial violations of procedural provisions. In 2014, only one review was upheld, namely in relation to the incorrect application of substantive law. In 2015, review was upheld in four cases related to substantial violation of procedure and incorrect application of substantive law.

In the analysis of the judgments of the Constitutional Court, two judgments were examined, one from 2014 and the other one from 2015. The 2014 judgment was upheld and related to substantial violation of procedural provisions, while the 2015 complaint was rejected because the court did not establish incorrect application of substantive law.

The analysis rejected the claim that, according to publicly available court cases by the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015, most errors related to the incorrect application of substantive law rather than procedural violations. The analysis in fact suggested that most errors were found in respect of substantial violations of procedural provisions and that actions were more often upheld in relation to substantial violations of procedure rather than incorrect application of substantive law. It is interesting, however, that actions were mostly brought because of the incorrect application of substantive law, and not because of violation of procedural provisions of procedure.

In order to ensure coherence of the legal and economic systems, tax legislation should not change considerably in a short period of time, especially in terms of a consistent provision of information to the taxpayers about their rights and obligations (Višnjevec, 2007, p. II). The Tax Procedure Act was amended several times, also as a result of the Government programme for the elimination of administrative barriers. The programme simplifies the procedures for the taxpayers and the tax authorities, since the Tax Procedure Act is the key regulation for regulating the relationships between participants in tax collection procedures (Kovač, 2010, p. 99).

It is also necessary to define the problems that repeated changes of laws bring in practice. For example, many reforms had not yet started well when a new minister introduced new reforms (more in Klun, 2006, pp. 7–22). Constant legislative changes are not good, and the Government and the Parliament should be more considerate and reluctant in amending legislation (more in Stanford, 2010). Better regulation is in fact one of the key elements for achieving a competitive economy and establishing an efficient and friendly public administration (more in Jovanović, 2013, pp. 109–120).

Likewise necessary is to carefully examine the impact of constant legislative changes on the population and the authorities, i.e. whether the population and the authorities are able to follow the changes and whether there

is enough time to adjust to and fully master such. Changes are not necessarily bad, they can even be very positive, necessary, and welcome. They can be evolutionary, taking place within an existing structure, or revolutionary, with deeper changes in the structure. In terms of the speed and pattern of change, changes can be either rare and episodic, or cumulative and continuous changes.

The taxpayers consider the frequent changes all but welcome, as they do not allow a full, coherent and transparent functioning of the tax system as a whole. The situation of the tax system is certainly not encouraging for the economic and societal development and for the transition from a state governed by the rule of law to a social state. Tax legislation should not change much in a short time. This is important to ensure that taxpayers know their rights and obligations. The authorities are striving to minimise the shortcomings and bring the tax system closer to both the addressees of the law and its implementers.

Only time – as well as the practice of the taxpayers on one side and of the tax authorities on the other – will show how the changes will come to life in practice and whether the objectives regarding the simplification of the tax collection process and the reduction of administrative burdens will be achieved.

5 Conclusion

It is necessary to carefully examine the impact of constant legislative changes on the population and the authorities, i.e. whether the population and the authorities are able to follow the changes and whether there is enough time to adjust to and fully understand such.

The taxpayers consider the frequent changes all but welcome, as they do not allow a full, coherent and transparent functioning of the tax system as a whole. The situation of the tax system is certainly not encouraging for the economic and societal development and for the transition from a state governed by the rule of law to a social state. Tax legislation should not change much in a short time. This is important to ensure that taxpayers know their rights and obligations. The authorities are striving to minimise the shortcomings and bring the tax system closer to both the addressees of the law and its implementers.

Only time – as well as the practice of the taxpayers on one side and of the tax authorities on the other – will show how the changes will come to life in practice and whether the objectives regarding the simplification of the tax collection process and the reduction of administrative burdens will be achieved.

The principles of the tax procedure will undoubtedly contribute to the objectives of the new law. As always, however, also in this case, the actual value of the legislative provisions will only be created by administrative and judicial practice.

The analysis rejected the claim that, according to publicly available court cases by the Administrative, Supreme and Constitutional Courts in tax matters in 2014 and 2015, most errors related to the incorrect application of substantive law rather than procedural violations. The analysis in fact suggested that most errors were found in respect of substantial violations of procedural provisions and that actions were more often upheld in relation to substantial violations of procedure rather than incorrect application of substantive law. It is interesting, however, that actions were mostly brought because of the incorrect application of substantive law, and not because of violation of procedural provisions of procedure.

The results of the research can be used for drafting future acts amending the ZDavP-2, or possibly even a completely new Tax Procedure Act. The Master's thesis will contribute to administrative-legal science and the tax profession. With this article, the reader will obtain an insight into the development of the Tax Procedure Act in Slovenia.

The research will also benefit the tax profession, because the article presents the advantages and disadvantages of the development and changes in the tax procedure to date. The analysis of the judgments of the Administrative, Supreme and Constitutional Courts will contribute to the understanding of how the ZDavP-2 is applied in practice, whether it is properly interpreted by the tax authorities and the courts, and how the Constitutional Court contributes to case law through judgments concerning the incorrect application of substantive law or procedural violations. The research covers multi- or interdisciplinary aspects of public management of law, economics, and informatics.

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EU-Compatible State Measures and Member States Interests in Public Services: Lessons from the Case of Hungary[1]

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ABSTRACT

National interest, also as a critisism against the pradigm of New Public Management (NPM), is very much emphasised nowadays in public policies, even in sector ones. This article is about a removal from the classical meaning of general (public) interest to that new approach represented by certain EU Member States and the reasons behind. Our analysis focuses on contextual motives and impacts of these changes illustrated by the Hungarian case. The result shows that the market of public utility services has already been influenced by direct political considerations. Our findings indicate that these understandings for legitimate influence on EU market rules can also be derived from the legal framework itself. Measures examined in the paper run completely counter to the spirit of the original intention of the founders of the integration, and recent changes in EU law do not seem to raise unavoidable obstacles to such cases. Lessons of this case may be relevant for other EU Member States as well, at least for those from the Central-European region.

Keywords: *centralism, exclusive rights, non-regulative price cutting, public services, services of general economic interests (SGEI)*

JEL: K23

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1 Introduction

Centralization may be an answer on problems brought by crises like in the case of Greece (Tsekos T. N. and Triantafyllopoulou A., 2016) and Hungary, or on effects of political turn like in Poland (Białecki, I., Jakubowski, M., Wiśniewski, J., 2017) in 2010s. Our hypothesis is that both of the two directions originate in economic reasons. This thesis can partially be proved by applying an inductive method in this study. The recent Hungarian example in public utility service provision is about actual changes in the way as direct political actions' may influence the market. Lessons of this case may be relevant for other EU Member States as well, at least for those from the Central-European region. The authors evaluate these changes through the policy of administrative price cutting scrutinizing motives and reasons of measurements. Contextual issues are also important, because reorganizing ('reform-') strategies are not really built on evaluation logic of New Public Management (NPM). A national-value orientation and a very strong direct interest motivation are heavily involved. In the system of central influences, the meaning of evaluation is necessarily different than in the environment of liberalized market. Here it is much less based on actions of independent regulators, benchmarking or comparison when it comes to well-run undertakings.

It makes much difference whether sector policies and measures of EU Member States are non-liberal or still compatible with the internal market law of public services. However, borderlines are nowadays rather relative between these qualifications especially from the point of view of those Member States which are reluctant enough to follow the mainstream without criticism. Based on the examination of that particular case, our research question is that in what extent recent trends in national policies and regulations of public service provision are compatible with the requirements of the European Union from a legal and public policy perspective. Examples like the Hungarian case highlight the challenges and threats of recent understandings of state measures in services of general interests (SGEIs) at different intergovernmental levels in the 2010s. The present paper seeks to explore the international and domestic background for such trends and also evaluates, by analysing the relevant EU regulatory framework, the margin of discretion left to the Member States in this respect.

2 Methods

After the international credit crisis (2008) and a moderate sovereign debt crisis (in the decade of the 2000s) the former management structure of public services (Horváth, 2000) was questioned in Hungary. Social conflicts led to radicalism in politics. The effect on municipal activities and functions became very restrictive. Also as a response, the regulatory position of the state was enhanced, and central government preferences were greatly widened. In some European countries the crises have led to corrections in the competition policy of public services. In Greece, as a comparable case, municipal overspending had to be given up, with a turn to NPM-proposed alternative solutions

of service delivery (Tsekos T. N. and Triantafyllopoulou A., 2016). This policy involves increasingly the roles of private actors either as investors or volunteers. In strong contrast, the Hungarian case is one showing a trend towards pure centralism. The Hungarian example shows that the market of public utility services has already been influenced by direct political considerations. In the meantime, public civil solutions and control are also rapidly neglected in welfare services, as it is also clear from the example of the education reforms in Poland (Białecki, I., Jakubowski, M., Wiśniewski, J., 2017). The Hungarian case may lead to a model of extensive state intervention.

The direct *theoretical* background of the paper is threefold. Firstly, country-specific[2] but contextual crises studies are based on explanatory research (Hajnal, 2014; Hajnal and Rosta, 2016) of the present turn in the development of the country. Secondly, different concepts of 're-public' solutions have recently been used as explanatory variables like the concept of re-municipalisation (Hall, 2012; Pigeon et al., 2012, Water Remunicipalisation Tracker) and the re-emergence of municipal corporations (Wollmann and Marcou, 2010).In addition, the policy of Hungarian centralization model has been scrutinized in context by Horváth (2016) on this basis. Thirdly, the paper also examines the above process from the perspective of Member States' obligations under EU law as public services are subject to EU internal market rules and EU competition rules (Sauter, 2014).

There are a few *methods* being combined in this paper:

i) EU law, though it also uses terms evolved at national level (i. e. public utilities or/and public services), has a distinct conceptual framework (in details, see Szyszczak, 2017). The EU terminology is based on the categories of Services of General Economic Interest (SGEI), Services of General Interest (SGI), and Services of Social General Interest (SSGI) recently, together with emergence of the 'European Social Model' (European Commission 2006). The former (SGEI) is used in primary law texts, without being defined in the Treaty or in secondary legislation. However, in the case-law of the European Court of Justice (hereinafter ECJ) and EU Commission practice there is broad agreement that SGEI refers to services of an economic nature, with the Member States or the EU being subject to specific public service obligations (PSO) as compared to other economic activities by virtue of a general interest criterion.[3] The term SGI, the closest EU law equivalent to the traditional notion of public services (Sauter 2014, 17), is also derived from the practice. It is broader than SGEI and covers both market and non-market services which the public authorities classify as being of general interest and subject to specific public service obligations (Bauby and Similie, 2016a).
ii) Although evaluation studies of public sector (Wollmann, 2003) and institutional reforms (Kuhlmann and Wollmann, 2011) at intergovernmental

2 Cf. Gajduschek, G., Horváth M., T., Jugovits, K., 2017.

3 See in particular the definition given by the ECJ in its judgments in cases C-179/90 *Merci convenzionali porto di Genova*, ECLI:EU:C:1991:464 and C-242/95 *GT-Link*, ECLI:EU:C:1997:376.

levels are based on the reform rhetoric of NPM, in this case the question is to what extent this terminology may be used, because the orientation of changes is clearly beyond the motivations of public service performance.

iii) The relationship to the NPM paradigm is opposed heavily by the present Hungarian central government,[4] which involves the denial of market-orientation in most of the public services and open competition for foreign investors. National interest is very much emphasised nowadays in public policies, even in sectoral ones. In addition, reform as terminology has been neglected in the rhetoric of the government since 2010. Official communication is instead built upon national community-based heuristic statements. It seems that at least voters have been convinced.

The domestic background and international context have been explored on the basis of participant observation and comparative analysis carried out as being involved in national company's[5] urban service management projects and activities, and as a part of the research in other domestic and international projects.[6] For Chapter 4.1 and 4.2, we also obtained data from a specific ECJ case-law database[7] containing a thematic collection of all ECJ cases related to the EU Member States' public service provision legislation and administrative practice, as well as from a case study database resulting on field research and empirical data collection.[8]

3 Results

3.1 Starting Conditions in Context

The corporate government in the infrastructural sector came to the attention of the national-conservative *Viktor Orbán's* government[9] very early after the election win in 2010 and its subsequent re-election in 2014. It obtained a two-thirds majority in both the Parliament and in most of the city assemblies. According to their narrative the former type of economic power was based on earlier political bargaining called privatization by liberals, who were leading supporters of the transformation process from the formal system transition (1990) to joining the European Union (2004). The nationalist government coalition, consisting of so-called national conservatives supplemented with Christian Democrats, differentiated from but supported by extremists, wanted to re-make originally long-terms contracts in order to change the players of the game.

4 For the Hungarian Government's approach, see the Magyary Zoltán Public Administration Development Programme (Mp 12.0), especially pp. 6–7, <https://magyaryprogram.kormany.hu/admin/download/a/15/50000/Magyary_kozig_fejlesztesi_program_2012_A4_eng_%283%29.pdf>.

5 Budapest Urban Management Centre cPlc.

6 COST Action Local Public Sector Reforms (LocRef) WG I External (Post-)NPM Reforms (2013–16); MTA-DE Public Service Research Group ‚Regulatory Tools for Local Public Services' project (2012–2017).

7 Non published database of the MTA-DE Public Service Research Group.

8 Case-study database of the same research group: <https://jog.unideb.hu/hu/node/191>.

9 Viktor Orbán is the Prime Minister of Hungary between 1998–2002, 2010–2018 and 2018 by now. This paper especially focuses on the period of 2010s.

The really specific context of the Hungarian case that Prime Minister Viktor Orbán argued on this issue in his campaign and by his general political attitude to the public was that foreign private companies had abused their dominant position by overcharging for their services.[10] That was why the conservatives wanted to buy back shares of these companies. This was one of the key motivations for changing the political system (Hajnal, 2014) and market relations, including public services provision. The national-conservative ideology here paradoxically focuses on state-centred solutions for every conflicting social or economic issue. Market-orientation shifted to state-centred defence of so-called national interests.

In the background there is an economic logic linked to user charges. To understand the recent situation let us go back to the transformation process. From that time user charges became again an important element of public financial transfers (Horváth and Péteri, 2001). User charges are also forms of systemic financing mainly in public utility services. The long history of transition countries demonstrates that these sources may also be considered transfers depending on the decision regarding which level of government may collect them. In communist countries most urban services, like water and sewerage, central heating, and solid waste collection were free or the price was a symbolic payment involving social rental flats. Some services were subsidized centrally, particularly electricity and gas.

In the period of transformation giving these revenues 'back' to governments became a decision on financial transfers. This sector transition process was composed of several steps. Firstly, starting from 90s prices were to be liberalized in the public sector. This was important even if the state enterprises were the only providers at the beginning. Secondly, conditions for competition had to be established. An emerging market was built up with privatization for these services parallel with the multiplying number of service providers. This was an opportunity to decide about the application of user charges.

In principle user charges are good for some different purposes of local government. These include covering costs and maximizing revenues, and they can act as an incentive for economical use. According to the theory (Bird, Ebel and Wallich, 1995) the importance of user charges is that municipalities can behave as service providers. It means that the correct (roughly marginal cost) price is achieved for public consumers. In the new situation the government politically criticized foreign providers to monopolize the definition of user charges. Additionally, after the elections quite a lot of criminal cases were created against top managers in public utility companies accusing them of political corruption.

However, on the basis of this radical political concept, there are quite a few arguments, based on pure economic interests, which seem to explain their

10 See especially Orbán's speech in Tusnádfürdő (Baile Tusnad, Romania, 26.07.2014) about his political programme. <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>.

motivation. First of all an easy explanation is shown by the national government with the support of consumer price indexes. It is illustrated in Figure 1 in the Annex. The interrupted line below (signified by the arrow also) is the level of total Consumer Price Index in Hungary between years of 2003–2012. The level of water pipe services, solid waste management and disposal, waste water treatment, central heating and warm water services are typically at a higher level continuously. The rise of prices is higher in these sectors than the actual inflation rate. As an exemption, an extreme increase in prices of central heating was compensated by the former government regime. However, others remained on the upper level when the nationalist government started its term from 2010. According to the official argument, utility companies, especially their foreign private owners, pulled out profits from households, that is to say, from 'the nation'.

Behind this argument there are critics of two different inherited basic scenarios in the ownership structure of public utility companies which had arisen by the 2000s. One is the model of formerly privatized companies. It was accused of uncontrolled monopolization by new government powers. The other model, i.e. companies remaining in municipal hands, was also criticized heavily because it was seen as affiliation the former government parties either at local or national levels.

As far as the first scenario is concerned, it was true that implemented solutions of privatization in the public utility sector were rather different. In order to properly understand this issue, let us turn to Bauby's and Similie's generalized classification (Bauby and Similie, 2014, p. 108) .There are two basic specific contractual models on the extension of the private sector in public services. The traditional French legal practice is based on lease and concession contracts. The German model prefers corporative structures in which the operating assets are corporatized and where in the asset holding company the private providing company (the operator of the concession) is a minority shareholder at the same time. From the second half of 1990s the German model was followed in Hungary, with the difference being that not only operating but also core assets (pipelines, networking works) were corporatized in many situations. The importance of this kind of systemic failure was realized about fifteen years later when it became clear that multinational private companies have a strong position mainly in the situation when municipalities as local clients wanted to shift their contracts.

'Who is responsible for this situation?' The question was raised in the systemic turn from 2010, because the solution was against the basic legal regulation of the local government act of 1990, which was passed at the beginning of system transition. Core assets should have been kept in municipal ownership because marketing was prohibited by the law. There are different answers on the responsibility question from the government side, which are as follows:

i) *Responsibility' of former governments.* Privatization had been preferred by central governments for many terms before 2010. However, public utility assets had not yet been registered at all. Content of ownership was not

defined earlier, especially during the long period of state socialism, where this kind of specification was not in question at all. So, the registry court registered memorandums of new private sector providing companies, without any questioning in many situations.

ii) *City leaders' and politicians' 'responsibility', who had been in position at that time*. The new government accused its predecessors of selling out assets consciously, following only their own interests.

iii) *Foreign investors' 'responsibility'*. According to the political rhetoric international professional companies wanted to obtain a monopoly in order to get extra-profit and only foreign interests were represented by them. It has been being emphasized by the government since 2010 that some of the West-European governments and German federal member states (Länder) are also shareholders in quite a few utility companies providing services in Hungarian cities and regional areas.

These above mentioned motives have been inspired by the policy of re-structuring in public service corporate sector during the era of the nationalist government since 2010.

3.2 Public Services in the EU Integration

As a general rule, EU internal market and competition rules apply to services of general economic interest as well, save where they fall under specific regulations or exceptional clauses of the EU Treaties. In this section, we will briefly outline the legal fundamentals relevant to SGEIs including those provisions escaping them from the generally applicable market rules.

Before the adoption of the Single European Act (SEA) of 1986, the matter of public service provision was not at the heart of the European integration process. In line with the principle of subsidiarity under Article 5 of the Treaty of European Union (hereinafter TEU), a consensus have been reached between the Member States that each country has the competence to organize and finance its basic public services (Bauby, 2014, p. 99). It was based on the general idea to balance the EU interest in the free market with the national public interests, which means that public enterprises, state monopolies, special and exclusive rights as well as SGI are compatible with EU law to the extent that they involve proportionate restraints with regard to the internal market and competition rules (Sauter, 2014, pp. 20–21 and 41). This early economic compromise has been expressed in certain (and still existing) provisions dating back to the original Rome Treaty of 1957 (currently Articles 37, 93, 106 and 345 of the Treaty on Functioning of the European Union, hereinafter TFEU), as guarantees for safeguarding the interests linked to the provision of public services.

Article 106(1) TFEU generally states that public undertakings and those entrusted with special or exclusive rights are not exempted from EU competition rules. Article 106(2), however, lays down a derogatory regime for services of

general economic interest (Bauby and Similie, 2016b), providing that these undertakings are subject to EU competition law provisions (that is Articles 101, 102 and 107 TFEU) only in so far as the application of such provisions does not obstruct the performance of their particular public service obligation.

Most cases concerning the EU competition rules and public services have been examined in the context of dominance abuse and state aid rules (Sauter, 2014, p. 75). Granting exclusive or special rights to an undertaking often generates the dominant position itself that is the precondition for unlawful conduct under Article 102 TFEU which, as Article 106(2) suggests, may nevertheless be saved by referring to the 'particular tasks assigned to them'. The legality of public monopolies and other entities (often operating as state-owned companies) enjoying exclusive or special rights is supported by the freedom of Member States to choose their system of property ownership, guaranteed by Article 345 TFEU (Sauter, 2014, p. 44).[11]

Most forms of state aid are in principle prohibited under Article 107(1), unless they are found to be compatible with the internal market because of their specific objectives under paragraphs (2) or (3) of the same provision. In the case of SGEI, however, public service obligation compensation (that is where the State pays aid to undertakings as a compensation for fulfilment of PSOs), under certain conditions (see judgment of the ECJ in case C-280/00 *Altmark Trans,* ECLI:EU:C:2003:415), does not qualify as state aid. In addition, non-economic SGI a priori fall outside the scope of Article 107 TFEU, since state aid rules only extend to services that qualify as economic activities (Sauter, 2014, p. 76).

Europeanization of Public Services. Although the above provisions had been incorporated into the founding Treaties in the very beginning of the European integration process, their role and significance have changed over time. The "Europeanization of public services"[12] started only in the mid-eighties with the entry into force of the Single European Act. The SEA, together with the Commission's white paper on reforming the common market, set the objective of the creation of a single market by 31 December 1992. As the national markets in transport and energy have become integrated with this conception, public service obligations have been obstacles to market creation (Opinion of AG Colomer in case C-265/08 *Federutility*, ECLI:EU:C:2009:640; Prosser 2005, 121). Thus, the process engaged by the SEA led to a progressive liberalisation, sector by sector (Bauby and Similie, 2016b). The case-law of the Commission and the ECJ also reflected this market-friendly attitude; provisions permitting special treatment for such services were interpreted narrowly and restrictively (Prosser, 2005, p. 12).

This free market orientation has been 'constitutionalised' in the Treaty of Maastricht, which set, by enacting a new clause (Art. 3a), "the adoption of an economic policy which is based [...] on the internal market [...] and conducted in accordance with the principle of an open market economy with free com-

11 The text of Articles 102, 106, 107 and 345 TFEU see Annex 1 below.
12 Term borrowed from Bauby and Similie (2016a, p. 27).

petition" as a common goal for the EU and its Member States. The advocates of the public service model responded to the reform by campaigning for a Treaty amendment (and even for a distinct 'Charter of Public Services') to recognize more clearly the distinctive role of public services. (Prosser, 2005, p. 154).

These critical movements led to the first Commission Communication on services of general interest of 1996, which laid a particular emphasis on the social elements of public services as well as the limits of market forces (Prosser, 2005, p. 156). Then, the Treaty of Amsterdam has been amended by a new Article 16 of the Treaty of European Community (TEC) which, among the fundamental principles of the EU, reinforces the constitutional importance of the role and protection of SGEI obligations. As safeguarding public services is primarily the interests of the Member States, the provision can be seen as a confirmation of the Member States' traditional prerogatives and discretionary power in the organization of such services (Rusche, 2013, p. 102; Schweitzer, 2011, p. 55; Varju, 2013, p. 112).

Although the real legal relevance of that provision is questionable (Ross, 2000, p. 34), SGEIs have been treated since then less as an obstacle to the completion of the internal market and more as an expression of citizenship rights and so of value in themselves (Prosser, 2005, pp. 172–174; Varju 2013, p. 112). This approach was also confirmed by the practice of the Commission and the ECJ, as well as by the adoption of The Charter of Fundamental Rights (in 2001) including a separate provision (Article 36) on right to access to SGEI.

The above process has assumed particular importance in the liberalization of specific sectors, especially in the field of utilities (Prosser, 2005, p. 174). Although market opening and access remained a central policy objective, other priorities were being also promoted. This 'paradigm shift' (Hancher and Larouche, 2011) is an important factor in explaining why the degree of liberalization varied from sector to sector. The liberalization was extensive (though not complete), for instance, in telecommunications, or electronic communications. The energy market, however, remained dominated by the presence of natural monopolies (dominant undertakings by the Member States), where the specific public service grounds (universal service obligation, security of supply, environmental concerns) gave the Member States more opportunities to derogate from market liberalization (Prosser, 2005, pp. 174 and 192–194; Hancher and Larouche, 2011).

Regulation of Public Services in the Social Europe. The "safeguarding" provision introduced by the Amsterdam Treaty (ex-Article 16 TEC, now Art. 14 TFEU) has been slightly (but importantly) modified by the Lisbon Treaty, with an express reference to the protection of national autonomy under Article 4 TEU. The new provision expressly pointed out the Member States' competence to provide, to commission and to fund such services. A Protocol on Services of General Interest (No. 26) was also added to the Treaties (TEU and TFEU). Reading Article 14 and the Protocol together, there is an even higher emphasis on national and local interests and a more state-centred approach seems

to be applied to the protection of public service values. Moreover, the Charter of Fundamental rights including the right to access to SGEI became binding with equal effect to the Treaties by entering into force of the Lisbon Treaty in 2009.

The above provisions reflect a political signal from the authors of the Lisbon Treaty that there is a need for protection of SGEI and particular local interests attached to them against the efforts of liberalization (Rusche, 2013, p. 106; Krajewski, 2011, p. 186). In other words, the Lisbon Treaty consolidated the 'welfare autonomy' of Member States (Marćou, 2016, p. 14).

The process of Europeanisation of SGEI and the 'paradigm shift' outlined above in the context of the Treaty provisions was also manifested in the case-law of the European Court of Justice and in the European Commission's soft law (and practice). The details of the relevant cases will be discussed below, however, we only summarize the main issues from SGEI jurisdiction.

Turning to secondary legislation and soft law, a similar process can be seen in the Commission's activity. The first SGEI Communication of 1996 was followed by several others[13] in the first half of the last decade. These pieces of soft law reflect a shift in emphasis, giving support to the more radical reading of the current Article 14 TFEU. The link between SGI and European citizenship as an important contribution to the values of European life was highlighted in the Commission's communications, rather than seeing the former as obstacles to the completion of a competitive single market (Prosser, 2005, p. 163).

The Commission's legislative activity from the mid-2000s was largely influenced by the case-law of the ECJ. The leading decision is the *Altmark* judgment of 2003 in which the Court held that the discharge of PSO is not covered by Article 107(1) TFEU where it merely compensates the provider of a public service mission for the costs that arise due to the performance of the PSO and determined four cumulative criteria which have to be met for not qualifying public service compensation as state aid.

By declaring these group of financial compensation out of the realm of state aid concept, the Court, in essence, largely reduced the monitoring and decision-making competence of the Commission over national measures granting compensation for public services (Bauby and Similie, 2016b), as the judgment allows for a self-assessment by Member States of that issue. This means in fact, that Member States were left relatively free under the criteria defined by the *Altmark* judgment. In particular, the fourth condition (the option of using a benchmark as an alternative for a tendering procedure in order to ensure efficiency) leaves wide room for Member States discretion. Such an outcome of the judgment clearly follows from the above mentioned paradigm shift in the constitutional framework whereby the EU leaves the Member States free to organise the SGEI markets themselves (Vedder, 2013, p. 66).

13 See European Commission communications COM(2001)598, COM(2004)374.

4 Discussion: Back to the Nation States?

4.1 Nation-based Reorganization in the Corporate Sector

There are three basic fields of corporate reorganization in the Hungarian public utility sector recently: (i) ownership, (ii) exclusive rights and burdens and (iii) user charges. Municipalities and the national government directly forced buying back shares of providing companies from foreign private investors. Acts passed by the Parliament supported this policy directly through re-defining and narrowing groups of authorized providers service by service. In further steps, consumers' fees were restricted for inhabitants by the central government via direct influence in the market of delivery services, neglecting any regular tools of regulatory authorities.

i) Re-distribution of influence on ownership in the public utility sector. At the very beginning policies of municipalities, mainly of cities, shifted. In the overwhelming majority of cases, party affiliation was the same as that at the central government level. The performance of utility companies was criticised heavily here. The main argument arose as follows:

– high level of consumer fees in comparison,
– little contribution to local municipal revenues,
– dirty businesses,
– liability problems in public contracts

As answers, if municipalities sold at least partly their shares earlier, then they wanted to buy back providing companies and the exclusive rights on the delivery of particular services from private owners and managing companies. In cases of companies remaining in the hands of local governments, changes of corporate management were forced, leading to the establishment of general asset holding companies.

In the countryside, amalgamation of service providers occurred under the umbrella of municipally or centrally owned companies. Private investors were forced by the government with sector laws on different public services (especially in the field of water, gas and electricity supply or waste management) to sell their majority shares. For instance, as a result the number of providers decreased to 20% from 2007 to 2014 in solid waste management. This has meant the integration of delivery service, in addition to change in the identity of the owners.

ii) Exclusive rights and special taxes. All of the new integrated providers obtained exclusive rights to provide particular services of general economic interests. This action is allowed by the secondary law of the EU. However, in the second phase of re-structuring, from 2012, several measures were undertaken by the national government to centralise profits from the energy, water, waste and other (funeral, park maintenance, chimney sweeping services) public utility sectors.

This is done by levying special central taxes. Providers are now burdened with tax levied on public utility networks on the basis of their length. There is an exemption if the company is 100 percent publically owned. Discrimination has been raised in several legal procedures, however so far these have not been obstacles for the implementation of obligations. Additionally, even municipality-owned providers are burdened with other taxes, like income tax on waste management (this burden is also placed upon energy companies), taxes on unbuilt sites, fees on waste disposal in landfills, etc. In these cases the aim of the central government must have been to centralize business profits, especially not to leave them to municipal owners.

iii) User charges. The third phase of the reorganization in the service providing environment started from the beginning of 2013. From that time the central government has in four waves decreased consumer fees of particular utility services for inhabitant users. The political impact of this measure was clearly targeted in the government's strategy. In the first round, from January 2013 to 2014, electricity, gas and district heating fees have been gradually reduced to 75,44 %, 74,80 and 77,34 % of the original price (established in 2012 December) of these services respectively. Then, from July 2013, liquid waste, solid waste, chimney sweeping and drinking water fees have been cut to 90% (in the case of solid waste 93,78%) as compared to the price level of January 2012, April 2012, December 2012 and January 2013. After 2014, the level of these utility fees has remained constant thus not following the decrease of energy prices on the world market.

Centrally ordered cut on tariffs of utility services was about a nominal 10–25 per cent. A direct regulation of user charges for utility services became a major focus of the Orbán government and one of its key policy aims. This popular policy ('decrease burdens of families') was also placed in the centre of the political agenda in order to win the 2014 elections. It was a very successful strategy from the nationalist right wing point of view in the general, EU and subsequent local elections. The political (and not policy) motivation is emphasized by the government in the way that the calculations for the savings of households are prescribed to be put on the official receipt sent out on a monthly basis. Even a coloured (!) background of this notice is obliged to be included by the law in order to make sure customers pay enough attention to the effect of the government intervention.

Now let us see the effect of the cuts. Annex 2 shows the change of customer price indexes in recent years. The reduction is lower in each item than is prescribed by the law. This must be explained by reference to the cut on inhabitants only. Legal persons and undertakings have to pay full price. Nevertheless, their rate is higher now than the original inhabitants' charge before the direct regulation. In contrast, the fact is that energy prices decreased on the world market. In addition, different supplementary services (change of water meter, controls etc.) are more expensive, especially for non-residents. Consequently, the level of service provision is not rising or effectively worse than it was before. Providers try to escape from barriers of regulation. For

instance, waste collection companies went back to the phase of a fixed frequency-based monthly charge from the existing quantity-based regime.

A clear evaluation of these input changes is shown by the fact that a third of existing solid waste management companies (171 in 2016) are working with a loss as a result of the described management policy.

4.2 Direct Impacts

The whole process of (re-)transformation in the public utility sector can be summarized as follows. The central government is extremely active in making rules for the economic environment of public utility service provision in this country. Since 2010, several measures have been undertaken to centralise profits from the energy, water, waste and other (funeral, park maintenance, chimney sweeping services) public utility sectors. Providers are now burdened with a central tax levied on public utility networks. The general cut in prices of user charges is supplementary and a new supervisory fee has been introduced for an administrative regulatory authority. Additionally, municipal utilities were exempted from some of the taxes, but this is no longer the case and the financial burden for municipal utilities is now heavier, especially for the central government. Although maintenance costs are covered by user charges, tariffs are however defined by Parliament and the government. As far as working capital investments are concerned, because the company is fully owned by municipalities or the state, paradoxically, national and European Union grants were more easily available because no further guarantee was needed for keeping the new utilities in public hands. The aim of the national government seems to shift public utilities to non-profit-making services. In this case, neither the role of municipalities nor the providers' presumable counter-interest has been specified. This process must have an effect on the public service level in a medium term perspective. The model of the process is shown by Figure 1 on the next page.

Figure 1. A logic framework for the recent Hungarian centralization process

Source: Author

The brief understanding of the 'EU law reading' of Figure 1 is as follows.

i) From 2010, as already mentioned, there is a tendency in Hungary for larger local governments to acquire the majority of shares in companies being in charge of public utility service provision. In the name of 'transparency', sector law issued by the central government also assisted that process of strengthening public ownership in entities operating under private law. (The EU has no voice here as, under Article 345 TFEU, EU law does not concern the rules in Member States governing the system of property ownership.) In addition, these companies were also entrusted with exclusive rights by Hungarian local governments to fulfil certain municipal public service obligations (see point ii. in Ch. 6 above). As was already explained, EU law allows a wide discretion for Member States in choosing their instruments (granting exclusive rights among them[14]) for the operation of SGEIs. Case-law of the ECJ also confirm that exclusive rights which restrict or even exclude competition in the internal market are not incompatible with EU law if they are necessary to ensure the performance of PSO assigned to the company concerned.

ii) The concept of 'in-house' refers to the implementation of re-municipalisation which involves providing services (which can be operated under market rules) directly by public means 'in house' instead of contracting with pri-

14 See especially Article 106 TFEU and relevant secondary legislation.

vate economic operators. However, the provisions of the EU public procurement directives did not apply to 'in-house operation'. ECJ case-law also made clear that Member States were not precluded from adopting rules which enable public undertakings to provide public services without being subject to the public procurement regime laid down by these directives. The *Altmark* decision (and subsequent Commission communications) also assisted this 'leniency-direction' in EU public procurement law.

iii) Then, as explained in point ii. Ch. 6, special taxes were levied on public utility sector. Although EU state aid rules generally prohibit tax burden imposed on undertakings in a selective way (Article 107 TFEU), the 'escape routes' in the regime can save Member States from the application of these general prohibitions.[15] Moreover, the tax on the utility network lines was originally imposed as a 'crises tax', which is a measure to reduce the negative effects of the global financial and economic crisis of 2008. As it is clear from its communications[16] the Commission shows more understanding towards such initiatives and more flexibility in assessing the compatibility of national measures with EU competition rules.

iv) This process was followed by cutting utility fees (point iii. Ch. 6) by the central government making use of the regulatory competence granted by EU secondary law to Member States. Though price cap is one of the most serious interventions into market trends, the protection of household consumers ('Hungarian families') seemed to be a good argument against EU rules, especially under the authorisation given by the revised consumer protection clauses of the latest electricity and gas directives,[17] and in light of the ECJ's *Federutility* judgment (C-265/08, ECLI:EU:C:2010:205).

v) The next step is nationalisation, i. e. the acts of the Hungarian Parliament not allowing to acquire the majority of ownership for private market participants in companies entrusted by public service provision. Here, Article 345 TFEU also supports Member States in escaping from their general obligations EU internal market and competition rules. The result of this policy is to redistribute shares in large service providing companies through getting the entire (or at least almost) 100% of the property in them in order to guarantee the full ownership rights for the government.

vi) Even if the EU law compatibility of the above measures may be called into question, the (de facto!) enforceability of the assumed infringement cannot be taken for granted. The effective protection of foreign undertakings' rights, who, as a result of the above process, were excluded from the market, cannot be ensured by the so-called infringement procedure (Art. 258 TFEU) and preliminary rulings (Art. 267 TFEU) as both of them take very often years to reach the final decision in the case. This long period of time is perfectly enough to reach the targeted market result of the national le-

15 See e.g. state subsidies saved by the application of Article 107(3)(b) TFEU.
16 As an example, see the '2008 Banking Communication' (OJ C 270, 25.10.2008, p. 8).
17 See Article 3(7) of Directive 2009/73/EC and Article 3(3) of Directive 2009/72/EC.

gislator (the case of the Hungarian gambling market or reorganisation of the voucher system clearly justifies this statement).[18]

4.3 Indirect Impacts

There are also indirect effects of the official Hungarian public utility policy. Firstly, infringement procedures by the European Commission are taking place, because consumers' prices are defined by the ministry instead of the regulatory authority. In addition, specific taxes, like a tax on the length of pipe networks and energy transaction fees must not be calculated as an accepted cost.

Secondly, competition is also under attack. There are different prices for inhabitants and undertakings, which appears to be discrimination. Newly established huge state owned enterprises are in better position in tenders, avoiding formal public procurement processes. Several antitrust procedures are initiated because of this reason. Although keeping state aid rules are also questioned, there are less of these kind of disputes in European institutions.

Thirdly, international investment disputes are taking place, because semi-nationalization procedures under the new state owned property act and the actions of municipalities and the national state are questioned by private, especially foreign investors.

Fourthly, an indirect effect has been highlighted. Charges in the global market of the energy sector decreased, until the Hungarian government froze prices at a static level.

Fifthly, the PR and propaganda of the government focuses on the cutting of charges in the utility sector. It is one of the key issues of the campaign called 'The Hungarian reforms are working!' The most important figures with regards to the savings are obliged to be put on receipts sent to owners of dwellings monthly. This policy has been an important strategy of the national government since the beginning of 2013.

Sixthly, some sector providers have become bankrupt, in such areas as chimney sweeping, as well as many waste companies. In these cases, the national authority of civil defence becomes responsible for fulfilling public tasks, completely neglecting market actors.

5 Conclusion

All in all, according to independent lawyers, the legality deficit is quite serious in general in this situation either in the economic or political field. The tactics of the government have been realized mostly with 'success', because legal procedures are long-term, i.e. 4-6 years are needed, while advantages are realized in financial and interest-based power games. The price of it is to be paid by the public as a whole.

18 See the ECJ judgments in cases C-98/14, *Berlington*, EU:C:2015:386 and C-179/14, *Commission* v. *Hungary,* ECLI:EU:C:2016:108, as well as Varju and Papp (2016) for more details.

As has already been proved, it is difficult in this case to term the actions of the government 'reforms', because the focus of the measures is more the reassessment of former preferences rather than improvement as such. As Prime Minister Viktor Orbán said in his speech at the national celebration on 15 March 2016, 'our results cannot be measured only with utilization, but the totality should be our preference'.

That is why 'renewal' is a more preferred term of the official PR, supplemented together with reforms, instead of particular sector policies. However, the phrase 'renewal' is substituted with the more neutral term of reassessment in the figure prepared by our investigation. The anticipated far-reaching objectives are very much interest-based, including economic interests of natural (national) monopolies. Comparing anticipated and non-anticipated aims we can conclude that the advantages of the intended effects are distributed to particular social and economic groups, while disadvantages are placed upon others.

In the above analysis, we identified a six-element process (amalgamation and transformation are forced by sector laws – re-municipalization – special taxes on utilities and utility services – central reduction of consumer fees – amalgamation and nationalization – problems in effective enforcement of Member States' compliance) which is able to change completely the market conditions for providing public utility services in an EU Member State. These actions investigated do not seem to be simply a package of intervention in order to achieve political aims, because – as we have proved – the development of EU law allows recently different (mis)understandings for the influence of the EU market rules from the side of the state (instead of the 'public' as such). It is also indicated by the analysis that EU rules are able to focus only on individual elements, but cannot serve as effective instruments against the whole (six-element) process of the change in the national 'public service regime'. According to our research, at least we are sure to state that as a result of the implementation of utility policies recently in Hungary, service levels did not improve. So, the reform rhetoric is not working in these circumstances, because the orientation of changes is clearly out of the question of public service performance. However, measures examined above run completely counter to the spirit of the original intention of the founders of the integration, and recent changes in EU law do not seem to raise unavoidable obstacles to such cases.

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Annex 1. Fundamental provisions of EU primary law on SGEIs

FUNDAMENTAL PROVISIONS OF EU PRIMARY LAW ON SGEIS

Article 14 TFEU

Without prejudice to Article 4 of [TEU] or to Articles 93, 106 and 107 [TFEU], and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council [...] shall establish these principles and set these conditions without prejudice to the competence of Member States [...] to provide, to commission and to fund such services.

Article 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Article 106 TFEU

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules [on competition] contained in the Treaties.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Article 107 TFEU

[...] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Article 345 TFEU

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

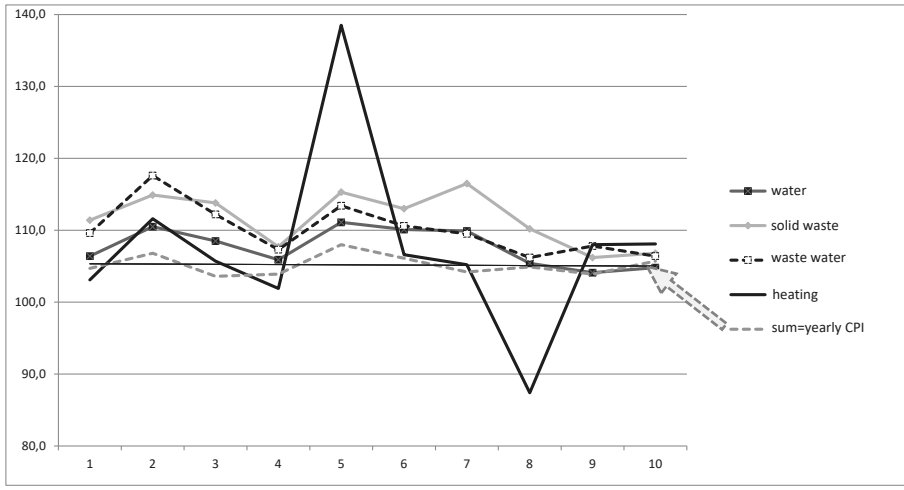
Protocol (No 26) on Services of General Interest annexed to TFEU
Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 [TFEU] include in particular:
- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; [...]

The Charter of Fundamental Rights of the European Union, Article 36
Access to services of general economic interest

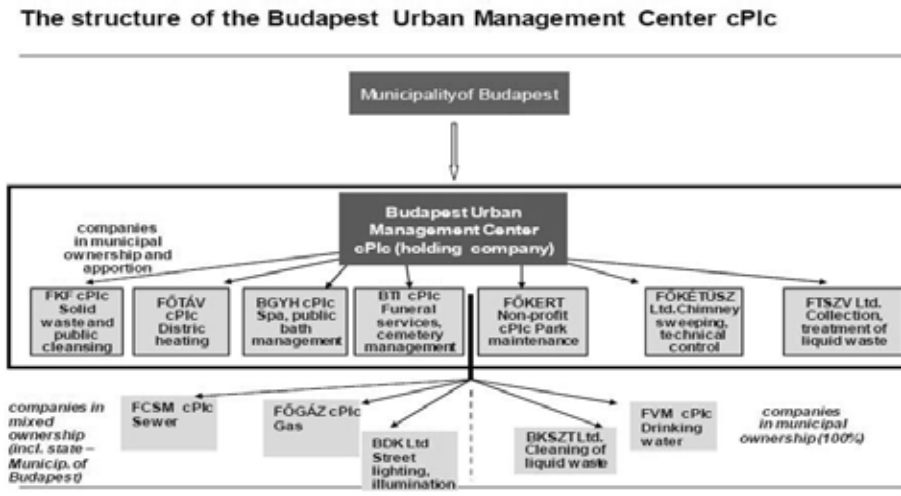
The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Annex 2. Trends of Consumer Price Indexes according to consuming in particular public services (2003–2012)



Source: STADAT COICOP indexes, 2013

Annex 3. Municipal corporations and field of re-municipalisation (Budapest Urban Management Centre cPlc)



Source: Budapest City Council

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New Approaches to the Right to be Heard in Relation to the Application of Alternatives to Administrative Sanctions[1]

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ABSTRACT

The right to be heard is one of the key instruments that ensure adequate protection of the participants´ rights during the proceedings before the administrative authority. This requirement is especially important in administrative offences proceedings due to fact that administrative bodies may issue also very serious sanctions and it is important to enable the offenders to influence the outcome of proceedings. Therefore may participants raise their objections, opinions, suggestions. The authors also focus on issues related to the possibility of alternative approaches to administrative sanctions and related issues concerning ensuring adequate position of offender. These questions have not yet attracted doctrinal attention. Article analyses the currently accepted new legislation on administrative offences proceeding, with overlaps resulting from the Council of Europe documents and including basic comparison with the processing on administrative offences in Germany and Poland. In addition, to the basic analysis of the new legislation benefits, the authors pay attention to the new instrument of "legal settlement" that allows administrative authorities to approve agreement between offender and injured party about committed administrative offence and the associated remedy. The new institute is worthy researching, particularly because it is one of the first attempts to adopt alternative approaches to administrative offences proceedings and brings new challenges for administrative authorities. This new institute is compared with the legislation in Germany and Poland. Also methods of analysis of legal requirements of legal documents of Council of Europe and national legislation, normative analysis, literature review and deduction were used in this connection. Authors reached a rather interesting conclusion that the approaches to ADR in administra-

1 *This article resulted from the research project within the Czech Science Foundation (GAČR) No.GA13-30730S* Measures of protection of rights in public administration, their system and effectiveness.

tive offences proceedings are in all three examined different while the article deals more closely with these differences.

Keywords: right to be heard, administrative offences, administrative offences proceedings, alternative dispute resolution

JEL: K23

1 Introduction

The article focuses on procedural aspects of dealing with the administrative offences where administrative authorities or courts exercise sanctioning powers against addressees of law who have committed an offence which is not serious enough to reach the same degree of seriousness as criminal offences. Authors deal with current Czech regulation of the offence proceedings in the area of entitlements and obligations arising from the right to be heard which have a direct relation to the right of defence not only from the Czech point of view, but look also at the regulation in Germany and Poland.[2] The authors therefore ask whether national legislations of all three countries differ fundamentally from each other and whether is here represented the process of Europeanization.

The mentioned right of defence is usually understood as the sum of all legal entitlements of a person against whom proceedings on any criminal charge are held to defend him/herself against the charge, reduce or refute his/her liability, make the respective authority establish all facts supporting his/her defence, and make the authority discharge him/her without sanction or impose less stricter sanction on him/her where possible.

The right to be heard and the obligations arising from it are regularly included in the broader framework of the right of defence and they are not new for administrative authorities or courts as they are a long-term part of the Council of Europe documents and already have a certain tradition in the Czech law.

The paper also takes into account a broader perspective of the right to be heard in administrative offence proceedings namely the traditional systems

2 The Czech Republic, Germany and Poland were selected to comparison on purpose because administrative offences are penalised in three main types of administrative offence proceedings. In the Czech Republic the matter is in the hands of, above all, administrative authorities; in Germany part of the proceeding is carried out directly by courts; finally, in Poland it is almost exclusively carried out by courts. The authors are convinced that the right to be heard is not influenced by the institution that conducts the proceeding (an administrative authority or an independent court). In other words, the participant can voice a complaint to the same extent at an administrative authority as well as at an independent court. This is further borne out by the fact that both administrative authorities and courts can receive such complaints and the right to be heard is acknowledged at proceedings held by either of them (as granted by Article 6 of the ECHR). Actually, this conclusion can find support in the ECtHR judgement in case Öztürk v. Germany of 21/2/1984, application No. 8544/79, which requires that minimum procedural standards be guaranteed in proceedings on administrative offences (including the right to be heard) as well as in the related ECtHR judgement rendered on 3/2/2005, application No. 46626/99 (Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania), specifying the entitlements following from the right to be heard in more detail.

of public administration where consensual approaches within the realm of administrative sanctioning were frequently deemed inapplicable. The current legislation enables the person accused of an offence to be more active in the proceedings and, under certain circumstances, to influence the outcome of the proceedings, or rather the decision to impose or not to impose an administrative sanction, beyond the usual scope of the right of defence, or rather the usual scope of the right to be heard. The authors also ask if the formalized processes are appropriate for dealing with administrative offences, and whether there is a tendency to promote more alternative approaches to dealing with administrative offences and to what extent they differ from each other in all three countries.

Such a measure was recently introduced in Czech law by the possibility to conclude a "settlement" agreement between a person accused of an administrative offence, on the one hand, and the aggrieved party, on the other hand; however, the authors believe that this measure exceeds the above scope of the right of defence, and thus of the right to be heard, because the administrative offence is, in fact, dealt with by the person accused of the administrative offence and by the person harmed by it (aggrieved party). The role of the administrative authority dealing with an administrative offence has been reduced and it cannot be described even as a mediatory role.

The authors focus more closely on this concept, which is new in terms of administrative sanction, while identifying the features of similar measures in several concepts introduced in the past. At the same time, they reflect on the systematic nature, availability and procedural framework of those new measures from the viewpoint of European standards regarding the right to be heard.

The authors realize that the necessary prerequisite for the application of these alternative solutions is the sufficient openness and transparency of such a proceedings towards the participant, as well as the increased flexibility of the administrative authority. Focus was also placed on the efficiency of the legislative measures in question, or rather on the conditions for fulfilment of their intended purpose in practice. The methods of analysis of legal requirements of legal documents of Council of Europe and national legislation, normative analysis, literature review, deduction and partial comparison with German and Polish legislation were used in this connection.

2 The Right to Be Heard in Legal Documents of the Council of Europe

If found guilty of an offence, the offender faces negative consequences—a sanction meted out by the administrative decision. It is thus desirable that the offender's rights are fully acknowledged at hearings before administrative authorities (courts). These rights should enable them to influence the outcome of the proceeding by means of voicing opinions, bringing complaints, etc. Naturally, the right to be heard serves this very purpose.[3]

3 See also Endicott, 2011, p. 115.

Its importance within the system of administrative sanctioning is stressed by the attention paid to it by the soft law of the Council of Europe. Resolution (77)31 of the Committee of Ministers of the Council of Europe considers the right to be heard one of the crucial principles of the protection of individuals and their rights when they become part of the administrative procedure.[4] The principle is further upheld by Recommendation of the Committee of Ministers of the Council of Europe (91) 1, which deals with the issues of administrative sanctions and explicitly states the obligation to give a participant the opportunity to be heard (Principle 6, par. 1, section iv).[5]

The right to be heard is also stated in Article 14 of the Recommendation of the Committee of Ministers (2007) 7 on good administration. This article mentions the right to be heard (not only) with regard to the matter of the proceeding. This is a key aspect of the right to be heard[6] since it enables the participant to be heard and to express his own opinions and bring evidence at the primary proceeding[7] (and not necessarily as late as at the appellate proceeding). The right to be heard should be reflected in the decision, especially in the reasoning of the decision. Both the decision and its reasoning should follow upon the previous procedure of the administrative authority and the reasoning should include information about how the participant's right to be heard was observed during the proceeding.

The importance of the right to be heard is also underlined by its inclusion in the handbook called The administration and you - A handbook, issued by the Council of Europe. It says here that in order to maintain justice between a participant and the administrative authority it is crucial that the participant is given the opportunity to be heard, i.e. to highlight any relevant facts, to deliver arguments and to supply evidence.[8] The right to be heard was also addressed by the Research Network on EU Administrative Law (ReNEUAL), which has included the right to be heard in Model Rules on EU Administrative Procedure.[9] Proceedings of administrative offences are not regulated only by the soft law of the Council of Europe though, there are also requirements found in Article 6 of ECHR.

4 In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.

5 He shall have opportunity to be heard before any decision is taken.

6 Košičiarová, 2012, p. 98, also Svoboda, 2007, p. 302.

7 The situation is different in the case of requests; here the participant exercises the right to a certain extent by the very act of submitting the request.

8 The administration and you - Principles of administrative law concerning the relations between administrative authorities and private persons A handbook [online]. Strasbourg: Council of Europe, 1980, pp. 342 – 343.

9 III-23 Right to be heard by persons adversely affected
(1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.

3 The Right to be Heard in Article 6 of the ECHR

It is rather disputable whether the requirements in Article 6, par. 1 of the ECHR can be applied to administrative proceedings, or rather to what kind of administrative proceedings.[10] R. Pomahač stresses the importance of the document with regard to procedural aspects and the right for a fair trial.[11] J. Kmec holds the opinion that Article 6, par. 1 is applicable in administrative proceedings dealing with matters of 'criminal' and 'civil' law.[12] S. Nöhmer believes that Article 6, par. 1 is not applicable to the majority of administrative proceedings; nonetheless, he admits that it may be applied providing the nature of the proceeding allows it and providing the extent does not exceed the character of an administrative proceeding[13] It seems that an administrative proceedings dealing with offences are a case in point. Finally, U. Stelkens is convinced that administrative proceedings do not generally allow the application of Article 6, par. 1 requirements.[14]

Although the theory is not uniform with regard to the application of Article 6 of the Convention, the positive exception between administrative proceedings is administrative offences proceedings, where the application of Article 6 of the Convention is confirmed and Article 6 of the Convention is applicable to a reasonable extent in its entirety. [15] When dealing with administrative offences, it is generally accepted that the "above-standard" enshrined in paragraphs 2 and 3 is ensured in the proceedings, as administrative offences fulfil the so-called Engel Criteria. [16] This conclusion is confirmed by the case law of the European Court of Human Rights[17] and the Czech legal practice. [18] The right to be heard is therefore part of the right for a fair trial, which is borne out not only in academic literature, but also in the practice of the ECtHR.[19] The application of the procedural guarantees of the Convention in the administrative procedure is undoubtedly linked to the fundamental risks of judicialization of the entire administrative procedure, which can ultimately lead to overburdening of the administrative authorities. It is therefore necessary to ensure that procedural institutes are not abused, for example, with the intention of avoiding sanctions.

10 During proceedings at a court these doubts do not appear.

11 Hendrych et al., 2016, p. 748.

12 The author concerned provides an exhaustive analysis in Kmec et al., 2012, pp. 580 – 600, to which we refer in detail.

13 Nöhmer,2013, p. 29

14 Stelkens, Bonk, Sachs, 2014, p. 73.

15 Judgment of the ECRH of 2/9/1998, application no. 26138/95 (*Lauko v. Slovakia*).

16 The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring.

17 „The general character of the rule and the purpose of the penalty, being both deterrent and punitive, is sufficient to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature" Case *Öztürk vs. Germany.*

18 Czech Supreme Administrive Court case no. 4 As 2/2005 – 62.

19 Grabenwarter and Holoubek, 2014, p. 268. The right to be heard does not warrant the right for a fair sentence, i.e. such a sentence that is in favour of the participant, but it should make sure the proceeding is fair. See also Molek, 2012, p. 205, Kmec et al., 2012, p. 755. From the practice of the ECtHR see for example Judgment of 3/2/2005, complaint no. 46626//99 (*Partidul comunistilor (nepeceristi) and Ungureanu v. Romania*).

In this context, the authors believe that it is necessary to emphasise the need for an appropriate legislative framework of sanctions that may be imposed by administrative authorities which complies with the principle of subsidiary of repression, or rather enables the imposition of another (less strict) sanction, where possible (e.g. less harmful offences committed by negligence).

4 Administrative Offence – A Brief Overview

It now seems apposite to provide a brief overview of what constitutes an administrative offence. The overview is based on legal regulations of the three countries in question.

In the Czech Republic administrative offences are mainly misdemeanours, which are defined by Act no. 250/2016 Coll., Art. 5 as 'unlawful acts labelled as misdemeanours in the system of law which accomplish the necessary elements stipulated by law, if they are not a crime'. In Germany administrative (minor) offences are the so-called 'Ordnungswidrigkeiten', which are defined in Act on Ordnungswidrigkeiten, Art. 1, par. 1 as unlawful conduct stipulated by law and punishable by a fine. Finally, in Poland a misdemeanour is such a socially dangerous act that is forbidden by law at the time of commission under the threat of arrest, restriction of the freedom of movement, a fine of up to PLN 5000 or an admonition.

The notion of administrative offence does have certain common elements in the three countries discussed in this paper. Generally speaking, it may be asserted that administrative offences are unlawful acts which are defined by law and which are punishable by enforceable public law sanctions. Furthermore, it is unlawful conduct that is not serious enough to constitute a crime.[20]

5 Czech Republic – The Current Situation

Administrative authorities in the Czech Republic have traditionally had a large-scale sanctioning power. Legal regulations contain no fewer than 7300 objective elements of administrative offences[21] which administrative authorities are called upon to deal with.

This considerably large scope of duties has been endowed with various kinds of imperfections, also with imperfections in the area of the right to be heard. The process of its (i.e. the right to be heard) firm presence in legal regulations and legal practice was far from easy because the authorities often had to do with previous legislation, which was imperfect (insofar as it failed to reflect the particularities of administrative sanctioning) and which also was more or less affected by the practice of, above all, the Supreme Administrative Court. The imperfect legislation led, among other things, to an approved use of anal-

20 The authors purposefully disregard disciplinary offences (i.e. offences characterised by a specific public-law civil-service relation between the state and its employees) as well as procedural offences (i.e. offences connected with a breach of obligation to perform procedural duties during administrative (court) proceedings. (compare e.g. Prášková, 2013, pp. 148–151).

21 Explanatory memorandum to Act no. 250/2016 Coll. on liability for offences.

ogy with criminal law including its procedural aspects. The unfortunate situation placed considerable (sometimes rather creative) demands on the authorities and it essentially meant that the position of the persons concerned (i.e. the accused people) was insufficiently stable and predictable. A case in point is the problem of concentration in proceedings according to Article 82, par. 4 of the Rules of Administrative Procedure[22], which makes it clear that the intent of the legislator is to introduce concentration into administrative proceedings; the intent was, however, interpreted by the case law as invalid for proceedings of administrative offences.[23] In this particular example, one may talk about a positive influence of the case law, because a new act does away with this imperfection, directly drawing on the given judgment in the explanatory memorandum.[24]

It is worth pointing out here that the new legislation is heavily based on the former practice of the Supreme Administrative Court and of the ECtHR in other aspects, too. On numerous occasions the legislator explicitly states that the main reason for the acceptance of a provision is the case law. Moreover, the legislator maintains that Engel criteria can be applied to administrative offences (which was not the case before), which creates the demand to ensure the participants the rights to which they are entitled to.

A quick look into legal regulations that are applied by administrative authorities (courts in Poland) when dealing with administrative offences reveals that all the three countries enable the participants to voice complaints, submit proposals and offer evidence and facts with a view to influencing the outcome of the proceeding. The given provisions are essentially little different[25] since they come from a common basis: the soft law of the Council of Europe

22 'New facts and new evidence requests stated in the appeal or during the appellate proceeding will be taken into consideration only if they could not have been offered before. If participants protest that they were not allowed to do or say something in the first instance proceeding, this must be done along with the appeal.'

23 According to Judgment of 7/4/no. 5 As 7/2011 – 48, „provision of Article 82 par. 4 of Rules of Administrative Procedure attempts to balance the rights of participants that are stipulated in Article 36, par. 1; namely the right to offer evidence and state facts during the entire proceeding until the decision is reached, and the right to proceed without unnecessary delays (...) If the administrative authority is required to determine all the decisive facts in favour or not of the person who is about to be sanctioned without a proposal (naturally without a proposal from the person to be sanctioned), the administrative authority cannot accept requests for further evidence based on Article 82, par. 4 of Rules of Administrative Procedure. The provision of Article 82 par. 4 of Rules of Administrative Procedure does not apply to proceedings in which there is a sanction imposed by the public authority.

24 According to Article 97, par. 1 of the new act on liability for offences 'the accused person can offer new facts and evidence in the appeal or during the appellate proceeding'.

25 Article 36/1–3 Rules of Administrative Procedure (1) Unless otherwise provided by law, participants may propose evidence and file other proposals throughout proceedings until the decision is issued; the administrative authority may declare by resolution the time until when participants may file proposals. (2) Participants may express their opinion in proceedings. If they request it, the administrative authority shall provide them information about the proceedings, unless otherwise provided by law. (3) Unless otherwise provided by law, participants must be given an opportunity to comment on the background materials for the decision before the decision in the matter is issued; this shall not apply to a petitioner whose petition was fully granted or to a participant who waived their right to comment on the background materials for the decision.
According to Article 66/1 *Verwaltungsverfahrengesetz* In formal administrative proceedings the participants shall be afforded the opportunity of making a statement before a decision is taken.

and Article 6 of the ECHR. The right to be heard is thus strongly affected by common principles of administrative sanctioning[26] applicable within the area of European law and its content is formed by the process of Europeanisation, or rather it can be perceived as an aspect of the process.

The new act on liability for offences does not always make matters easier though. On the contrary, in some cases it offers a too complicated process of dealing with administrative offences[27], which inevitably slows down the effectiveness of administrative sanctioning, which should be informal and simple, especially given the fact that the matters dealt with are usually of little danger to society. To illustrate the aforementioned demanding procedural solution on an example, reference can be made to the conditions for holding an oral hearing, which – in contrast to the former regulation – is no longer a mandatory part of full proceedings on an administrative offence; however, in terms of the requirements for a fair trial regarding administrative sanction, the conditions for the application of this significant procedural concept are rather unclear, which is undesirable, to say the least. This, once again, may trigger the "rescue" role of judicial review, which will probably (have to) create the desired state in terms of predictability of the procedural steps to be taken by administrative authorities, together with a clear framework for the exercise of the rights by the parties.

Based on the above example – along with certain other provisions of the law which will be addressed below in connection with the regulation of "settlement" – the authors believe that, as discussed below, it would be better to deal with administrative offences in a simple, or rather less formalised, procedure that should be generally available, especially for specified types and/or cases of less harmful administrative offences, and that should meet the requirements for a fair trial in administrative sanction.

According to Article 367/1 of the Polish Code of Criminal Procedure The President allows the parties to be heard as to any matter subject to the outcome.

26 As follows from the interpretation of the right to be heard in the regulations of the Council of Europe.

27 Article 82 Oral hearing Act no. 250/2016 Coll. on liability for offences
(1) The administrative authority may order an oral hearing.
(2) The administrative authority orders an oral hearing at the offender's request if it is unavoidable for the acknowledgement of his rights; otherwise, the proposal is rejected with a statement revealed to the offender only. The offender must be made aware of his right for an oral hearing. The administrative authority orders an oral hearing even without the offender's request if it is necessary for the a fair assessment of the situation. The first instance administrative authority orders an oral hearing without the offender's request if the offender is a juvenile. Under the new legislation administrative authorities thus face a difficult task of assessing whether oral hearings are necessary in the light of protection of the offender's rights. Even though the legislator clearly intended to speed proceedings up and to make life easier for administrative authorities, we believe that it is extremely difficult to justify the lack of need for an oral hearing. The administrative authority will therefore have to take into consideration even hypothetical arguments that the offender may think of (that the offender may have put forward had a hearing been ordered). With ordering a hearing is also linked the question of a deadline by which the offender may ask for an oral hearing, because the act does not state this and one may assume that in real life this will be a very frequently used type of obstruction.

6 Subsidiary Nature of Administrative Sanction vs. Right to Be Heard

In the authors' opinion, the right to be heard is one of the main instruments that allow participants of a proceeding to become an active part of it, i.e. with a power to influence the outcome and be active during the proceeding. In other words, it enables the participants to make their proposals and opinions be taken into account and influence the final outcome. Yet, a typical proceeding is still characterised by the feelings of superiority of administrative authorities or courts and a high degree of formalisation and impersonality of the whole process.

Such a procedural approach undoubtedly allows adequate sanction of administrative offences, but at the same time it does not prevent the participants from feeling passive in the proceeding.

In substantive terms, this is also a question of application of the principle of subsidiarity of administrative sanction.

Besides the public interest, modern public administration also respects the rights and legitimate interests of the persons concerned with which it shall interfere ..."*only under the conditions stipulated by the law and to the extent necessary"*,[28] as follows from the general principles of administrative law, and also from the principles of good governance, which are concentrated in the basic principles of activities of administrative authorities presented in the Czech Code of Administrative Procedure (Sections 2 to 8).

The general principles mentioned above dominate the public administration in general and, therefore, also apply to administrative sanction. Nevertheless, administrative sanctioning is also based on specific principles, both substantive and procedural, which were included, more or less, in the new Act on liability for administrative offences.

In addition to the specific principles described above, administrative sanction is also subject to the general *principle of subsidiarity of repression under the (administrative) law*, which is supplemented, in specific cases, with the *principle of proportionality* and the *principle of individualised* administrative sanction.

As far as the procedural principles are concerned, one should also mention the broader *right of defence*, which entails several subsidiary procedural rights. However, this principle is designed for the relationship between the accused, on the one hand, and the authority invoking his/her liability for an offence[29], on the other hand, and serves to address both the question of guilt and the question of sanction. However, alternative approaches to sanction also pose a new challenge – they can change the role of administrative authorities from entities strictly imposing sanction to mediators, and may also require, *inter alia,* that relationships be addressed between the offender and the person who incurred harm due to the offender's offence, where there is

28 § 2 para. 3 Rules of Administrative Procedure.
29 Prášková, 2017, p. 30 – 31.

such aggrieved party; these alternative approaches should be appropriately incorporated into the general provisions concerning the right to be heard. The above should enable to exercise, appropriately and fairly, the extended (or rather modified) role of administrative authorities, while respecting all relevant principles (including protection of the public interest and equality).

The aim of the above principles is to set conditions for administrative sanctions and their subsequent enforcement. The requirement of subsidiarity of repression under administrative law thus needs to be respected both in the legislation setting the sanctions (i.e. by the legislator) and in the area of law enforcement; however, as far as the latter area is concerned, said principle may only apply to the extent specified by the law, governed also by other principles, especially by the principle of *equality* and the *principle of legitimate expectation*.

One should not forget that imposing sanctions is not the main task of the public administration; this is only an – ultimate – measure for achieving the objectives of the administration and public tasks. Sanction should only be subsidiary, i.e. only imposed where the respective objective cannot be (sufficiently) achieved by any other means. [30]

In the current situation where criminal law itself employs diversions and certain alternative measures, similar measures should, all the more so, be used in the area of administrative law, which should not be lagging behind in this respect, i.e. in connection with enforcement of liability under administrative law. In other words, subsidiary of repression in administrative sanction should apply to the widest possible extent.

7 Fully Formalised Process: The Best Way to Be Heard?

The general requirement should also apply in administrative sanction: the *principle of efficiency* should be applicable both to procedural steps of administrative authorities and to measures adopted by them, as determined by the regulatory framework.

In overall assessment of the efficiency of administrative sanction, it is also necessary to take account of substantive and procedural aspects of administrative offences, and set a suitable procedural framework in this respect. For example, it is worth examining whether full (fully-fledged) administrative procedure is appropriate to deal with all types of administrative offences, or rather in terms of all types of sanction imposed, or whether there might be any more straightforward procedural measures or accelerated proceedings available, where appropriate.

In this connection, particular attention should be paid to a ***warning***, as one of possible administrative sanctions. Its primary role is prevention and education; it brings only "moral injury". When imposing a warning... "*the administrative authority shall notify the offender of the possible consequences of the unlawful conduct under the law if (s)he commits any such conduct in the future*". In

30 Hendrych et al., 2016, p. 297.

itself, a warning itself is only slightly repressive; its repressive character can be seen in a moral injury possibly incurred as a result of this sanction by certain offenders, especially in that they undergo proceedings of criminal nature, including charges brought against him/her[31].

It might be worthwhile to consider the efficiency of said solution, especially when examining the balance between the outcome (i.e. the effect on the offender) and procedural difficulty (unless a warning is imposed in a summary procedure – i.e. in the form of an order imposed on site).

The above considerations were inspired especially by the "notification", or rather "cautionary" function of a warning as specified above, which could either be separated in certain cases (especially with respect to offences caused by negligence when various notification or reporting obligations were violated), or rather shifted to the preliminary stage or to summary proceedings preceding full proceedings on an administrative offence. This measure would necessarily require careful assessment of the suitability of such a procedural departure in certain areas of public administration, taking into account the public interests pursued.

It might then be appropriate to link a ***notice*** of a defective state with a ***remedial measure***, while setting a deadline to remedy the defective state; this strengthens the active role of the accused in the preliminary stage.

Similar measures are presented in an unsystematic, or rather a selective manner, merely in certain specialised laws, where the respective conditions and procedures differ.[32] However, they definitely constitute an interesting stimulus for considerations and analyses regarding the future reform of administrative sanction in terms of its contents.

We believe that strictly formalised approaches may not always be effective enough as the admission of a participant as an equal partner in the proceeding may help to achieve the goal of dealing with and sanctioning the offence committed. The goal, however, is not only to sanction, but also to educate, amend and prevent further offences. We are firmly convinced that especially minor offences call for reactions which are not primarily sanctioning; instead, preventive-educational measures with emphasis on compensating the damage are deemed desirable. This can be achieved, for instance, if alternative approaches are invoked. The above follows even from Recommendation Rec(2001)9 of the Council of Europe Committee of Ministers on alternatives to litigation between administrative authorities and private parties. The widespread use of alternative means of resolving administrative disputes can bring administrative authorities closer to the public. The principal advantages of alternative means of resolving administrative disputes may be, depending on the case, simpler and more flexible procedures, allowing for a speedier and less expensive resolution, friendly settlement, expert dispute resolution, resolving of disputes according

31 This usually applies in the case of administrative offences against public order, civil cohabitation and property law.

32 For example, in the area of social security, in the Experts and Interpreters Act or in the Radio and Television Broadcasting Act.

to equitable principles and not just according to strict legal rules, and greater discretion. The regulation of alternative means should ensure that parties receive appropriate information about the possible use of alternative means and guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality. Alternative means to resolve disputes are thus nothing new in Europe; rather, from the viewpoint maintained in Recommendation Rec(2001)9 of the Council of Europe Committee of Ministers, they are considered a suitable procedure. It is thus quite surprising that, although it follows from the above that the statutory requirements following from the right to be heard are, as a result of the process of Europeanisation, almost identical in the countries compared, no such conclusion can be made with respect to alternative means of hearing administrative offences, in spite of the existence of the corresponding Council of Europe regulations. This is even more surprising in view of the fact that the possibility to apply alternative means to resolve a case are not unknown in criminal law of all the three countries.

8 Alternative Approaches in the Czech Republic

To promote consensual methods of dealing with offences, similar considerations could or should include assessment of the possibility of *greater involvement of the offender* in the corrective or reparatory role of sanction, i.e. his/her role (the significance of his/her approach to the committed offence and its consequences) should be strengthened, which should also be reflected in the procedural aspects of such measure. In principle, this would mean an expansion of the general "right to be heard" with respect to the offence – by expressing his/her opinion, the accused could significantly influence the outcome of the proceedings, and thus exclude or limit the punitive role of sanction. [33]The new act on liability for offences also saw the introduction of a hitherto unknown principle of compensation agreement, which is de facto (if the legal requirements are met) a compulsory agreement between the person accused of an offence and the victim. In this connection, the legislator drew inspiration from the provisions of the Code of Criminal Procedure, which also stipulates the possibility to conclude a settlement agreement between the accused, on the one hand, and the aggrieved party, on the other hand.[34]

This agreement must be approved by the administrative authority, and there are four conditions to be met: 1/ the agreement is in accordance with the public interest and it is sufficient with regard to the nature and seriousness of the offence as well as with regard to the extent to which the public interest was endangered, the offender and their personal situation; [35] 2/ the offender must of their own free will state that they committed the deed which is being

33 In the Czech Republic, there was a possibility in the earlier period to refrain from sanctioning if the proceeding itself led to correction of offender, or there was also the possibility of resolving minor administrative offences on the spot with so-called "agreement". Both of these solutions were based on the application of an indefinite legal concept, respectively on discretion of the administrative authority, and their application remained unclear for the entire duration of the previous law.

34 § 309 criminal proceedings act.

35 It is necessary to examine the outlined aspects in a comprehensive and interdependent way and subsequently to evaluate them in the reasoning of the decision approving the settlement

dealt with; [36] 3/ the offender has compensated the victim for the damage or has returned the unjust enrichment to the victim. The agreement stipulates the amount of compensation, the method chosen for it, alternatively, it also stipulates the amount of unjust enrichment; 4/ the offender has paid a certain sum into the account of the administrative authority. This sum, the amount of which as well as the recipient of which are determined by the authority, is accepted for a charitable cause.

An incentive for the agreement comes from the offender[37], who asks the administrative authority to determine the amount to be paid for a charitable cause as well as the recipient of the sum. [38] The administrative authority informs the offender of the recipient and of the sum to be paid and it then invites the offender to reach an agreement with the victim. Such an agreement must contain, above all, the extent of the damage caused by the offence or the amount of unjust enrichment gained by the offence. The agreement must also state the method of compensation; alternatively it contains other mutual rights and liabilities between the participants. This agreement, including all the legal requirements linked with it, is then checked by the administrative authority; if all the legal conditions are met, the agreement is approved.[39] The statement in which the offender admits their guilt is necessary if the agreement is to be accepted as a proceeding of the given offence.

The administrative authority is required to hear both the offender and the victim during the proceeding to determine the method and other circumstances of the compensation agreement. Therefore, it is necessary to order an oral hearing, which is thus logically a mandatory part of the entire process of adoption of the settlement agreement.The offender is also to receive a notice of the legal consequences of the compensation agreement. The administrative authority approves of the agreement by means of a decision which does not include a statement of guilt on the part of the offender; there are thus no further repercussions that typically follow standard decisions (e.g. an entry in the criminal record). Even though the administrative authority does not proclaim the offender guilty, the decision about the compensation agreement blocks any other potential proceedings. If and when the compensation agreement comes into force, the proceeding is finished. If the administrative authority concludes that the conditions for approval of the agreement are not met, a resolution should be issued under which the administrative authority explains the reasons for the non-approval of the agreement.[40]

(Ondrušová, 2017, p. 593).

36 In the event that the agreement is not approved, this statement can not be taken as evidence. This statement can not therefore be construed as guilty (viz judgement od the Czech supreme court 30/10/2008, no. 1 Skno 10/2008).

37 H. Prášková points out that the administrative authority does not actively conclude the agreement and it is not clear from the wording of the law how the agreement will be concluded (Prášková, 2017, p. 378).

38 To some extent, the question arises as to whether there is an advantage for offenders who have a certain amount of financial resources and also if there is or not the possibility of redeeming justice. The given amount of money can also have a corruption potential.

39 Thus if the offender reaches an agreement with the victim and other legal conditions are met as well, reaching the agreement can be required by the offender

40 Kučerová, 2017, p. 539.

We think that this method adequately maintains the balance between protecting the rights of the participant and the victim as well as the public interest, insofar as the administrative authority ensures that the approved agreement fulfils the letter of the law. Admittedly, the downside of the method which prevents its more frequent use is that it can only be applied in cases where the offence inflicts damage on a specific person.

In terms of intangible damage, or harm to honour, the Act on Certain Administrative offences again provides for a specific *amicable solution in the case of an administrative offence of harm to honour*, where the first initiative is to be taken by the administrative authority (it shall attempt "*.... to reconcile the accused with the person whose honour has been harmed.").* However, unlike the former regulation, this is no longer "settlement" in the form of mutual agreement, nor is such reconciliation approved by a decision taken by the administrative authority; the "reconciliation" is now a ground for discontinuing the proceedings by a resolution. It is thus a specific form of "diversion", and also an example of an alternative solution where the administrative authority plays the role of a mediator. However, for the time being, this procedure is taken only very rarely.

We also believe that the legislator could entertain the idea of introducing such a method that opens the door for an agreement on guilt and sanction, which is a method that exists in Czech criminal law. This method does not take into consideration the existence of a specific person harmed by someone's acts, thereby increasing the potential to be used more often. There would essentially be a contractual relation between the accused person and the state. In many administrative offences such an informal approach could result in more efficient correction of offenders while also serving the role of a preventive measure in the future. . Indeed, it should not be neglected that the concepts of diversion have considerable significance in terms of improving the reparatory and preventive functions of administrative offence proceedings, as a tool for regulating undesirable conduct of the addressees of public administration.

9. Alternative Approaches in Germany and Poland

The German law does not know the settlement agreement when dealing with administrative offences. Nevertheless, there is a procedure whose primary objective is to act as an alternative and which can be considered as an alternative to a "classical" administrative procedure. This is the so-called Verwarnungsverfahren, whereby an administrative authority may issue so-called warnings in the event of a minor administrative offence.[41] According to H.J. Lutz, in proceedings on a "warning", the authority also examines – along with the substantive elements of the given offence – whether there really are grounds for initiating sanction proceedings or whether other methods

41 § 66 odst. 1 Ordnungswidrigkeitengesetz: In cases of negligible regulatory offences the administrative authority may caution the person concerned and impose a cautionary fine from five to fifty-five Euros. It may administer a caution without imposing a cautionary fine.

of resolving the matter would suffice. A warning is suitable in borderline cases in terms of (non-)existence of the material aspects of the offence where the administrative authority determines that it is already appropriate for the State to intervene. The principle of subsidiarity of repression in the form of administrative sanction thus plays an important role in this respect. This specific procedure is, in substance, partially a procedure with an alternative to sanction and partially an alternative procedure as such. Indeed, a warning may be given orally, e.g. when the offender faces police officers during the procedure on site,[42] but may also be a result of standard administrative proceedings, which need to follow a certain (sometimes overly complicated, in view of the nature of the case) set procedure. It should be noted that under Article 66 (4) of Ordnungswidrigkeitengesetz, if a warning is issued, this constitutes an obstacle of *res judicata*, and a fine can thus no longer be imposed for the given conduct. In this respect, J. H. Lutz points out certain questions associated with the possible legitimate expectation that a warning issued by an administrative authority should generally constitute a precedent *pro futuro*, where similar cases (even involving the same offender) should again be dealt with by issuing a warning. Although the wording of the law does not provide a specific solution in this respect, the mentioned author finds it permissible (in our opinion, correctly in view of preventing possible recurrence) to also impose a fine for an identical act in certain situations (in case of its recurrence).

Unlike German law, Polish law does recognise a method that is to a certain degree similar to the Czech compensation agreement.[43] In Poland, the court approves an agreement between the offender and the prosecutor if it is proved beyond doubt that the offence was committed by the offender. Likewise, it is essential that the prosecutor is convinced that the compensation agreement attains the goal of the proceeding, and that the offender accepts the agreement. If the agreement is to come into force, the offender must not reject it within a period of time set by the court. The final judgment sealing the agreement is issue preclusion and has the same consequences as a judgement of conviction.

10 Comparison Analysis

Unlike Czech law, the system in Poland does not insist on an explicit way of compensation present in the agreement, but such a trend can be expected. An advantage of the Polish method is the possibility of accepting the agreement even in cases without there being specific person that suffered the damage; this is possible since the contractual relation exists between the offender and the state. Another difference (which seems to be rather a disad-

42 As a matter of fact, warning plays the most important role in these cases, according to H.J. Lutz – Senge et al., 2014, p. 670.

43 In Poland there exists a possibility for mediation in the preparatory phase (see Article, par. 9 of the rules of administrative procedure). In reality, this method has not been accepted (in the years of 2015 and 2016 there was only one case where mediation was used); this is probably because mediation is offered at the expense of the participant. The amendment of 1/6/2017 of the rules of administrative procedure partially transfers the financial burden onto the administrative authority, hence it is hoped that mediation is going to be applied more often.

vantage) is the fact that the offender is not forced to pay a certain amount of money for a charitable cause, which appears to be a beneficial educational aspect of compensation agreements. Yet another downside of the system in Poland is the judgment stating the guilt of the offender with the negative consequences attendant upon it.

Generally speaking, we may assert that the method of compensation agreement is beneficial mainly because the agreement is made in an informal setting. The administrative authority (or the prosecutor) confidentially informs the offender of what they are accused of, what the consequences may be and how the problem can be solved. Such an approach is favourable for the offender and it is also undoubtedly more effective as far as the application of state authority is concerned. Moreover, it contains some educational and preventive aspects that may be beneficial for the offender. In the Czech system of law the compensation agreement precludes negative effects linked with the statement of guilt (which is not made at all; unlike in Polish law). The German regulation is quite surprisingly rather limited in terms of alternative approaches to administrative sanctioning, although some possibilities of a less formalized solution also exist here.

11 The Perspective of Alternative Approaches to Administrative Offence Proceedings with Emphasis to the Czech Republic – Conclusion

The authors have confirmed the hypothesis that the regulations on administrative offences proceedings are very similar in all three countries discussed in this paper, but it is noteworthy that while in formal (traditional) proceedings the approach towards the offender is remarkably similar, these countries differ significantly in their alternative approaches (which may ensure the accused person a more active way to be heard). As the three countries opt for a different approaches (methods), it is not possible to consider this situation (solutions) as a part of the Europeanisation process.

It would surely be very interesting to compare and analyse also other the systems of other members of the Council of Europe so that more light would be shed on the effectiveness of alternative approaches in administrative sanctioning. Such an analysis could also help to make some recommendations, which admittedly may not be viewed as completely necessary from the point of view of the participants and their rights (the rights are acknowledged anyway, albeit sometimes in a rather awkward way). These recommendations could, however, make administrative sanctioning more effective and they could also prevent some other activities connected with unlawful conduct: recidivism, the convict's feelings of frustration, etc. and they are important also in the point of view of the principle of subsidiarity of the sanction.

One cannot turn a blind eye to possible obstacles that the introduction of alternative approaches in administrative offence proceedings is connected with. First and foremost, alternative approaches require a high level of ex-

pertise on the part of administrative officers: an area which, frankly, seems to leave a lot be desired.

The novelty and complexity of the new legislation along with some of its imperfections will probably result in the necessity to seek inspiration in and draw analogies with the realm of criminal law, further supported by the case law of administrative courts. This will happen at a more advanced and a more specific level than before, thereby placing more demand on the legal competence, which a number of administrative officers appear to lack. This will apparently create a more sophisticated means of defence for offenders or their attorneys. It is debatable whether this is the right direction for the application of the right to be heard.

In this respect, Poland is at an advantage because administrative offences are dealt with by courts, thus compensation agreements are drawn up by prosecutors with obvious legal qualifications. This is hardly the norm in the Czech Republic despite the fact that the act on administrative offences maintains that from 2022 onward persons dealing with such offences will be required to possess legal qualifications. Owing to some hints and the current state of public administration one can assume that there will be some delay before this regulation comes into force.

Another obstacle that alternative approaches may face is the heavy workload that administrative officers need to handle. As a consequence, they may end up sticking to the good old ways (i.e. the tried-and-tested traditional methods) and reject any novelties they are unfamiliar with.

A more general obstacle can appear in the present political and social climate in the Czech Republic, which does not seem to support any deviations from the previously accepted norms. In other words, compensation agreements may leave the impression that instead of a strict sanction, the offender gets away with a secret document that only 'covers' the guilt and protects the offender.

In spite of the disadvantages outlined above, we assert that alternative approaches are suitable for dealing with minor administrative offences and we believe that in the future they will acquire the adequate amount of attention.

Future intentions related to a reform of administrative sanction should also be logically aimed at improved communication between administrative authorities and the parties to the proceedings, especially the accused (the offender), and at finding less invasive solutions which better correspond to the principle of subsidiarity of sanction, thus also including amicable resolution of disputes.[44]

44 "*... preventing regular hearing of and decision in the given case.*" - Section 5 of the Code of Administrative Procedure.

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Report from the International Workshop on the Role of Public Administration in Public Policies' Design & 15th Anniversary of the *Central European Public Administration Review*

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In April 2018, the Faculty of Administration of the University of Ljubljana organised a two-day international workshop on the role of public administration in public policies' design. The workshop consisted of four parts: three sessions and one round table. In the first session, discussion was about evaluating public administration and public governance. The second session focused on the identification of the key success factors for effective public policies in Slovenia. These sessions were initiated based on the research project "Development of the model for monitoring and evaluation of development programmes and projects in public sector", known as the ATENA project. The project is co-funded by the Slovenian Research Agency for the period 2016–2019 (no. J5-7557) and led by prof. dr. Mirko Vintar (cf. Mencinger et al., 2017). The third session was motivated by the European research project EUPACK (European Public Administration Country Knowledge), focused on the analysis of public administration characteristics and performance in EU Member States (see Thijs, Hammerschmid & Palaric 2018). A special part of the workshop was devoted to the 15th anniversary of the Central European Public Administration Review. Here, a round table was conducted with the editors-in-chief of established public administration journals from the region, followed by an editors and reviewers recognition awards ceremony. The discussions were all very fruitful, also thanks to the participation of several internationally recognised scholars from the Netherlands, Croatia, Germany, Slovakia, the Czech Republic, Romania and Slovenia, as well as around twenty representatives of Slovenian ministries, other administrative authorities and non-governmental organisations. In a dynamic debate that comprehensively covered the evaluation in public policy cycle and the role of public administration and university therein, numerous

issues were discussed. Below is a report on the main topics discussed in the workshop.

The first session of the workshop – **Evaluating Public Administration and Public Governance** – was chaired by prof. dr. Mirko Vintar. The keynote speakers were prof. dr. Michiel de Vries (Radbound University, the Netherlands) and prof. dr. Ivan Koprić (Zagreb University, Croatia). Policies' evaluation was defined as "judging a policy based on specified criteria". Four main challenges in carrying out evaluation in the context of public policies were identified: (i) identification of the right indicators for evaluation, (ii) proving that policies have an effect, (iii) evaluations focused on policy goals rather than side effects, (iv) lack of evaluation due to challenges in measuring policy outcomes and the fact that it is difficult to prove that specific changes have arisen because of a specific public policy (de Vries, 2018). Prof. de Vries also presented a chronological classification of evaluation approaches according to their methodological emphasis: while in the 1970s evaluations were largely based on quasi-experimental design with no control group and were carried out only before and after the implementation of public policies, in the 1980s the focus was more on qualitative research methods (e.g. case studies, document analysis, interviews, observations). In the 1980s, stakeholders' opinions also gained considerable attention in the evaluations and became the centre of evaluations in the 1990s. In this period, policy outcomes became less important and policy effectiveness was frequently measured with satisfaction of the process. Finally, the evaluations taken after 2000 were mainly based on self-evaluations conducted with predefined criteria and checked by site-visit teams (as it is the case in EAPAA accreditations of study programmes, for example). Lately, evaluations have been mostly conducted via (1) meta-evaluations in terms of average effect of an independent factor on a dependent factor as identified in the scholarly literature, and (2) policy screening in terms of which evaluation instruments have been deployed in the past, the subject of evaluation, and how these can be used for knowledge about the policy as a whole. The importance of evaluation culture has also been stressed in terms of the need for inclination towards evaluation-generated knowledge production.

However, as emphasised by prof. Koprić, in many countries (e.g. Turkey, Greece, Croatia) such culture does not exist, even though the EU stimulates its development. Organisations with low evaluation culture may start with simpler approaches to evaluation, using official statistics, record keeping and system monitoring. Knowledge utilisation has been identified as the key success factor in the evaluation. It is a responsibility of both spheres: the politicians and the academia – and the evaluation-related collaboration between these two seems to be a good opportunity for their ongoing collaboration. Prof. Koprić put forward that evaluation should be a core milestone of modern public governance, but we must distinguish between different types of evaluation and evaluation studies. In any case, evaluation shows how scientific research can contribute to the holistic approach, particularly in the CEE and the Balkans, and to a formalistic attitude in the field (cf. Kovač & Bileišis, 2017). He also cited an example of good practice, a comparative study of lo-

cal public services in the EU, published by Palgrave Macmillan (Koprić et al., 2018). This book explains the increasing demand for evaluation as a result of the increasing frequency of reforms to local services and the wish to improve quality and reduce costs of public services, especially at the local (sub-national) level. It encompasses local public and social services and examines the hypothesis that there is a North-West–South-East divide in Europe in terms of the evaluation of local service reforms. Particular attention is devoted to the explanatory function of evaluation. However, the publication of such results is quite challenging since, as researchers, we are 'forced' to publish mainly scientific papers, preferably based on models (e.g. structural equation models) which are not the focus of evaluation studies. Both keynote speakers stressed the lack of empirical evaluations. The discussion among the guests and representatives from Slovenian ministries and the civil society highlighted the exchange of good practices. In the discussion, the participants detected, *inter alia*, a paradox between the plethora of existing data and the technical inability to process them, hence their non-use in political and administrative reality for the purpose of empirical based decision-making. Nevertheless, we agreed that procedural issues are important to pursue all phases of the feedback loop, including *ex ante* and *ex post* evaluation as well as measures taken upon established dysfunctions and gaps of public policies and legislation in public affairs. In this respect, we need to develop a balanced understanding of the law within public administration and governance, enabling legal certainty yet allowing a necessarily flexible response to up-to-date issues emerging in the society. There is an often reported tension between striving for democracy and rule of law on one hand and efficient PA with rationalised management of resources on the other. However, this dilemma seems artificial since an interdisciplinary approach is inevitable. Hence, legal as well as economic and managerial, organisational, IT related and other measures need to be developed complementarily. Pure normative approaches do not suffice to cope with PA issues systematically and successfully, while the lack of legal considerations affects constitutional democracy and the rule of law.

The following workshop session – **Public administration reforms (PAR) and policymaking capacity** – was motivated by the European research project EUPACK, focused on the analysis of public administration characteristics and performance in the EU Member States. The study presents a comparative overview of the key characteristics and performance of the national administrations in the EU as a first step to better understand the characteristics, functioning and dynamics of change of public administration across the EU Member States. The analysis is based on systematic evidence collected under an EC research project between late 2016 and April 2017. Quantitative and qualitative data map the similarities and differences among the 28 EU Member States with regard to size of government, scope and structure of public administration, key features of the civil service system, the political-administrative context and an indicator-based assessment of government capacity and performance. Presentations were given by three keynote speakers: prof. dr. Gerhard Hammerschmid (Hertie School of Governance, Germany), prof. dr. Juraj Nemec (Matej Bel University Banska Bystrica, Slovakia, and Masaryk

University, Czech Republic), and assist. prof. dr. Iztok Rakar (University of Ljubljana, Slovenia). The objective of the EUPACK project is to … "enhance the knowledge and understanding of the status of reform dynamics in PA in the EU MSs with a view to better target EU support in this area in the future" (Hammerschmid, 2018). In this regard, the project aims to provide a consistent countries' overview focusing on the characteristics of public administration in the Member States, as well as an insight into the effects and effectiveness of EU and other support in enhancing EU public administration quality. It was quite surprising that the main challenge of the project was to provide a comparative review of PA characteristics in the Member States (e.g. scope and structure of the government, etc.). Namely, it was recognised that there exists a truly high level of heterogeneity between public administrations in the EU countries – in terms of size and composition of public employment, state systems structure, degree of (de-)centralisation, types of civil servants systems, etc. In the very beginning, it was noted that we lack a common definition of the very core concepts, e.g. core public administration, civil servant/public employee, agency, etc. Nevertheless, it was established without a doubt that the Weberian model of governance still dominates in many countries. The analysis of reform approaches in PA explores five dimensions of public institutions in EU countries: transparency and accountability, organisation, policymaking, human resources management, and service delivery. The results reveal that the main drivers of reforms in public administration of the Member States are budget pressures/crisis, and that there is a remarkable influence of the European Commission in certain areas (e.g. digitalisation, administrative burden reduction, one-stop-shops). The project also revealed that reforms were mainly focused on open government/transparency, civil service, e-government, strengthening of coordination/centre of government and merging of agencies or other PA bodies, performance management and administrative burden reduction. New Public Management concepts are still quite attractive in PAR programmes. Unfortunately, most of the reforms so far have been conducted without strategic approach, and only half of the Member States included in their reforms all government levels. In addition, a dominance of incremental approaches, law-based and top-down approaches was identified in substantial PAR in the EU Member States.

Assist. prof. dr. Rakar and prof. dr. Juraj Nemec presented EUPACK reports for Slovenia and Central and Eastern Europe (CEE). The CEE perspective revealed that even in this group of countries there is a highly heterogenic approach to coordination of administrative reforms in terms of its institutional arrangement. As regards administrative tradition and culture, it was established that in most EU countries (CEE countries in particular, see also Kovač & Bileišis, 2017), public administrations are procedurally-based only, while only in the UK and in the Netherlands clean managerial patterns of operation exist. Slovenia will therefore have to intensify its reforms in the field of e-government and business friendly administrative environment, red tape, HRM and salary systems, as well as regulatory procedures and quality (Rakar, 2018; Virant & Rakar, 2017). In the discussion, the participants agreed that the legal determinants of public administration are important and Slovenia diligently complies

with the European standards in this respect, whereas there is a rather evident implementation gap, for instance with not only formal public consultation and participation in decision-making (cf. Kovač, 2017). Regulatory Impact Analysis is, in this context, a necessary part of good governance, as it pursues cross-cutting principles of administrative law, democratic authority, and efficient public administration. Moreover, public consultation may serve to not only improve the democratic deficit of public administration, but also significantly contribute to a better establishment of the relevant facts and exchange of expertise, which leads to better regulation and better implementation thereof, even though the regulatory process might take more time and effort.

The third session – **Identification of the key success factors for effective public policies** – began with keynote speakers prof. dr. Calin Hintea (Babes Bolyai University, Romania) and assist. prof. dr. Lan Umek together with assist. dr. Žiga Kotnik (University of Ljubljana, Slovenia). Prof. Hintea presented a valuable classification of PAR in terms of motivation and impact. He divided reforms according to motivation into 'must do' and ideologically driven reforms; according to impact, reforms were divided into structural and policy oriented. It was stressed that, in reality, 'must do' policy reforms were prevailing, even though ideologically driven structural reforms were something we should all wish for, but they could practically never be identified outside theory. He also presented four stages of administrative reforms (as identified in the Romanian context): (1) legislative reforms resulting in new forms of organisation and new working procedures, (2) reforms of formal structures and procedures, (3) reforms at the level of public policies, (4) structural reforms resulting in a redefinition of the dimensions of the state and of the prioritised intervention areas. The early stages of the fifth reform phase focus on a managerial approach with two main priorities: quality of service and performance management and measurement. It was established that strategic approach was of crucial importance for PAR (and it was identified in many Romanian local governments, mainly due to the fact that strategic plan represents a requirement in gaining EU funding). Also in this session the need for cooperation between academia and 'real-life' environment was stressed as very important. In this regard, prof. Hintea also presented a case of such cooperation between Babes Bolyai University and Romanian local governments, which proved to be very successful.

Assist. prof. Lan Umek and assist. dr. Žiga Kotnik presented the preliminary results of the ATENA project, which is based on the assumption that "the institutional and administrative aspects of the public policies, programmes, and projects (PPPP) implementation are one of the weakest points of the operation of Slovene government and its public administration". The main part of the ATENA project consists of 22 interviews with senior officials working on 15 public policy areas in Slovenian PA (e.g. spatial planning policy, budgeting policy, labour and social policy, science and research, consumer protection, etc.). The results of the research were acquired in two stages: (1) quantitative analysis of the results (see Mencinger et al., 2017) and (2) qualitative analysis by means of the ATLAS software (in progress). The results of the first stage

revealed "a need for establishing a systemic solution in public policy design, which would merge different authorities' efforts, epistemic communities, and the public in developing a structural multilevel model for good public governance" (Kotnik et al., 2018).

The final part of the event was dedicated to the **15th anniversary of the Central European Public Administration Review** journal. This part included a round table with editors-in-chief of established regional journals in the field of public administration, i.e. assoc. prof. dr. Polonca Kovač (Central European Public Administration Review), prof. dr. Juraj Nemec (The NISPAcee Journal of Public Administration and Policy), prof. dr. Calin Hintea (Transylvanian Review of Administrative Sciences) and prof. dr. Ivan Koprić (Croatian and Comparative Public Administration). The round table was opened by assoc. prof. Kovač with a brief overview of the development of the journal since 2003 (initially titled Administration and later renamed to International Public Administration Review) and its main milestones in order to gain higher scientific excellence and audience beyond national borders. Today, the Central European Public Administration Review publishes only original scientific articles in English, mostly on integrative and multidisciplinary research in public administration and governance. The journal mainly covers Central Europe, not only in geographical terms but rather in a contextual sense by supporting administrative reforms in accordance with European principles. According to the editors, the journal's aims are openness across national and disciplinary boundaries, focus on the specifics and importance of public administration as a societal system and its multilevel governance, and substantive and methodological scientific relevance of selected topics through a strict review process to enable thought-provoking debate and further research. The discussion that followed was indeed interesting since all editors presented their experience in journal management: from procedure, the role of authors, reviewers, editors and publishers, costs and benefits of the journal being indexed by Scopus and SSCI, to unethical practices used by researchers and other challenges faced by editors. A special emphasis was placed on the need for papers contributing to the knowledge transfer between academia and practice and on open access, as well as on English as a contemporary *lingua franca*. The participants also addressed interdisciplinarity and internationalisation of public administration as a scientific discipline.

Prof. Hintea pointed out that managing a scientific journal is a great responsibility and burden, but there is trade-off in the contribution to society. To this end, however, the activities need to be professionalised, especially with the requirements of indexation (taking into account that the TRAS magazine is one of the few in the region to be SSCI indexed), and a few hundred articles submitted annually. Although, he emphasised, the editorial board should follow the organic growth of the journal and the community more closely than formal acknowledgment to constitute a quality scientific publication. Prof. Koprić considered that the tradition of the scientific journal can be an advantage, but at the same time a burden since certain expectations of external colleagues arise, not necessarily topical for the development of PA nor the

journal, especially within the EU reality. Nonetheless, he presented some solutions in the development of Croatian and Comparative Public Administration for the efficient transfer of knowledge from scholars to practitioners, for example, the parallel publication of scientific articles in English and expert attachments in Croatian or taking interdisciplinary topics beyond national boundaries as a source of quality contributions (for example, migration), firstly as a special conference theme and afterwards a journal topic. Prof. Nemec emphasised that the NISPAcee Journal is the only non-faculty attributed journal. Therefore, it has certain advantages, for example, several comparative analyses and various profiles of authors. On the other hand, this brings problems, such as lack of capacity to support the management of the journal's production and dissemination. He also stressed the concern for the development of authors and reviewers, not only for the benefit of the 'publishing industry'.

Following the round table, the Faculty of Administration Senate's recognition awards for collective effort and results were given to the founding editorial board of today's Central European Public Administration Review: prof. dr. Stanka Setnikar Cankar as editor-in-chief, prof. dr. Janez Grad and prof. dr. Maja Klun as field editors, Marjeta Pečarič as technical editor, and Katarina Puc as language editor (see the cover photo). Moreover, awards were given to the best reviewers, namely prof. dr. Helena Blažić (University of Rijeka, Croatia) and prof. dr. Jacques Ziller (University Padua, Italy), based on their reliability, quality of reviews, and constructive attitude to the journal and authors.

Finally, the workshop participants agreed that public administration, as a key social subsystem, must respond to societal changes proactively and systematically in order to be effective, especially in the conditions of multi-level public governance in the EU. Empirical analyses and comparisons show that Slovenia is exemplary regarding compliance with European principles and development guidelines, but often only in terms of declaratory strategies or regulations. On the other hand, the implementation and evaluation of public policies are often weak due to, *inter alia*, (too) strong and often (too) rapidly changing political influence on public policies design to be run by professional criteria, the lack of public consultation and evidence based decision-making, the lack of cross-sectoral cooperation, almost exclusive focus on regulatory and formal aspects of public administration, etc. Nevertheless, the keynote speakers' presentations, accessible also online, and the debates suggested solutions to make both sectoral and horizontal public policies more effective. Successful approaches – in the framework of research projects and study programmes, as well as consulting and scientific publications – are mainly grounded on the collaboration between university based expertise and administrators in the national, regional and international arena.

The presentations held by keynote speakers are openly accessible at the workshop's web page: <http://www.fu.uni-lj.si/en/research-and-consulting/research-and-development/conferences/mednarodna-delavnica-o-vlogi-javne-uprave-pri-oblikovanju-javnih-politik/>.

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