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Contents

Wojciech Piątek

9 Access to the Highest Administrative Courts: between the Right of an Individual to Have a Case Heard and the Right of a Court to Hear Selected Cases

1.01 Original scientific article

Mihaela Vrabie

25 Judicial Review of Administrative Action at National Level under the EU Charter of Fundamental Rights and General Principles of EU Law

1.01 Original scientific article

Stefania Lotito Fedele

51 The *Ne Bis In Idem* Principle in Tax Law: European and Italian Frameworks

1.01 Original scientific article

Mirko Pečarič

69 Understanding Differences between Equal Public Governance Models

1.01 Original scientific article

Emilia Zankina

89 Public Administration Reform in Bulgaria: Top-down and Externally-driven Approach

1.01 Original scientific article

Dejan Ravšelj, Sabina Hodžić

115 The Role of Public Governance Practices for Business R&D Activity in the EU

1.01 Original scientific article

Nejc Lamovšek, Maja Klun

143 Efficiency of Medical Laboratories after Quality Standard Introduction: Trend Analysis of Selected EU Countries and Case Study from Slovenia

1.01 Original scientific article

Emilija Tudjarovska Gjorgjievska

165 The 'Silent Guardians' in the Fight against Corruption: The Case of North Macedonia

1.01 Original scientific article

Erzsébet Csatlós

185 The EU's Consular Protection Policy from the Administrative Law Perspective

1.01 Original scientific article

Marta Portocarrero

203 Arbitration in Administrative Affairs: The Enlargement Scope of *Ratione Materiae* in Portugal

1.01 Original scientific article

219 ACKNOWLEDGEMENT TO REVIEWERS

223 POVZETKI (SUMMARIES IN SLOVENIAN LANGUAGE)

229 AUTHOR GUIDELINES

230 SPECIAL CALL 2020 FOR REVIEW/SURVEY ARTICLES

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Access to the Highest Administrative Courts: between the Right of an Individual to Have a Case Heard and the Right of a Court to Hear Selected Cases

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ABSTRACT

Hearing a dispute by a court in a reasonable time is one of the crucial conditions for the existence of an effective judicial system as imposed by the European law and national legal orders. That requirement is contrary to the expectations of individuals to question the judgments of lower courts before the courts of the highest instance. The purpose of this article is to explore the question of values that should be taken into consideration by legislatures in a process of determining the access of administrative cases to the highest courts. The analysis is based on the example of Austrian and Polish legal systems. In both countries, there is a separate two-instance administrative judiciary. However, the conditions of the access to the Supreme Administrative Courts differ. In Poland, that access is unlimited, considering the constitutional principle of two-instance court proceedings. In Austria, the right in question is limited to cases deemed significant for broader interest, i.e. not only the one of the parties to the proceeding. An analysis of the normative consequences of each solution leads to the conclusion that procedural limitations concerning the access to the highest courts foster their role in preserving the uniformity of the case law and ensuring a high standard of its interpretation. A system with no limitations does not guarantee the determination of a concrete dispute in a reasonable time and thus cannot be considered effective.

Keywords: *administrative courts, access to justice, court-administrative procedure, effective appeal and judicial protection, Austria, Poland*

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1 Introduction

Administrative courts perform a crucial role in a protection of an individual towards the public administration and in achieving high standards of the rule of law. Though the administrative judiciary is not present in all European law systems,[1] in countries where it exists separately, is regarded as a basic institution responsible for an implementation of the principle of lawfulness.[2] In that sense case-law of administrative courts affects an activity of public administration which should be based above all on the rule of law.

These special branches of administrative judiciary are present in Austria and in Poland for years. There are significant similarities between a structure of the system of judiciaries in these countries. A Polish model of the administrative judiciary was adopted after the First World War form one-instance Austrian Administrative Tribunal (*Verwaltungsgerichtshof*),[3] which was created in 1875 (Piatek and Skoczylas, 2016, pp. 11-12). Currently, the structure of the administrative judiciary in both counties is a two-instance. In Poland the last structural reform was carried out in 2002[4] and in Austria in 2012.[5] Besides the courts of first instance on the top of the judiciaries are created the highest administrative courts: VG in Vienna and the Supreme Administrative Court[6] in Warsaw.[7] The administrative judiciaries in both countries function in the same requirements of an effective judicial control, created by the EU-law and the Council of Europe.[8]

The aim of this paper is to answer questions, which values should be taken into consideration by legislators in a creation of access to the highest administrative courts? How should be created the procedural conditions of access to the highest administrative courts such as admissibility requirements of legal remedy, the basis of this remedy and procedure aimed at evaluation of the admissibility? The basis for the answer will be an analysis of the procedural and

1 There are even countries without separate administrative judiciary like Denmark, Norway, Iceland, Slovakia and Japan. See (Schei, 2014, pp. 3-4; Bröstl and Gajdošikova, 2015, p. 287; Kurishima, 2017, pp. 150-154).

2 These opinion is strongly represented in Austria and in Poland. See (Dorazil, 1966, p. 56; Tarno, 2006, pp. 24-25; Hauer, 2013, pp. 2-3; Olechowski, 2019, pp. 436-437).

3 Hence forth as VG.

4 See more (Hauser et al., 2003, pp. 11-15).

5 See more (Pabel, 2013; Olechowski, 2019, pp. 434-435).

6 Hence forth as SAC.

7 In Austria, besides the VG is created a Federal Finance Court (das Verwaltungsgericht des Bundes für Finanzen), which is competent in adjudication about complaints against decisions in tax matters. See more Kofler, G., Summersberger, W. (2014). Das Bundesgericht für Finanzen im System der Verwaltungsgerichtsbarkeit: Handbuch der Verwaltungsgerichtsbarkeit, ed. J. Fischer, K. Pabel, N. Raschauer, Wien, pp. 626–627. In Poland tax disputes are adjudicated by administratrative courts. In the SAC is created a special department for tax matters named financial chamber (izba finansowa).

8 The standards of effective judicial control are developed in the case-law of European Court of Justice (ECJ), European Court of Human Rights (ECtHR) and in the literature. From Austrian and Polish papers see: Storr, S., (2014). Die österreichische Verwaltungsgerichtsbarkeit im europäischen Kontext: Handbuch der Verwaltungsgerichtsbarkeit, ed. J. Fischer, K. Pabel, N. Raschauer, Wien, pp. 75–104, Florianowicz-Błachut, P., (2019). Działalność uchwałodawcza Naczelnego Sądu Administracyjnego a funkcja europejska sądu administracyjnego: Stosowanie prawa europejskiego w orzecznictwie sądowym, ed. T. Grzybowski, M. Sarnowiec-Cisłak, Warszawa, pp. 58–68.

factual conditions of an access of the parties to this courts. Particular attention will be focused on the limitations of this right, their aims and consequences.

According to a preliminary thesis of this paper, an access to the highest courts should be limited only to selected cases, significant for the general legal order and for the functions performed by these courts. The open access to the court of the highest instance does not guarantee the highest standard of protection of individuals against unlawful administrative decisions. The supreme administrative courts should examine only selected cases, significant for legal order and proper functioning of public administration. The crucial importance has a solution how this access should be created and which role should perform in this process the parties of the proceeding, above all individuals?

The paper will be divided into three parts. In the first part will be analyzed functions of the supreme administrative courts, specified to Polish and Austrian legal orders. The second part will be devoted to an analysis of the procedural circumstances of an access to the highest administrative courts, both from European and national, Polish and Austrian perspectives. In the third part of this paper will be presented the practical consequences of the adopted procedural models.

2 The role of the supreme administrative courts

The administrative judiciary in Austria and in Poland creates a separate branch of courts, which are not linked with ordinary judiciary.[9] In both countries on the top of the structure of administrative courts which is two-instance are located supreme courts with a seat in capital cities of each country. These courts are mostly responsible for the adjudication of appeal remedies from the judgments of the first instance administrative courts. Besides these obligations, VG and SAC perform other tasks significant for individuals and public administration, due to their structural position and high substantial judicial competences. Their constitutional position, which finds confirmation in the constitutions of both states[10] gives a reason for analysing a role of the courts on the top of the structure of the judiciary.

The role of each court which is on the top of the structure of judiciary is specific. On the one hand, these courts perform judicial obligations as each court. In these courts are employed judges who enjoy independence and impartiality in adjudication. The courts are a part of the judicial power in each state, separated from other powers. On the other side, the judiciary of these courts

9 It is not possible to lodge a remedy from a judgment of administrative court to the ordinary court or even to the high court. The administrative and ordinary courts are in both countries structural and procedural separated. See Hauser R., Celińska-Grzegorczyk, K. (2016). Sądy administracyjne a system sądownictwa powszechnego: System prawa administracyjnego. Tom 10. Sądowa kontrola administracji publicznej, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa, pp. 99–131, Kodek, G. (2017). Verwaltungsgerichtsbarkeit und ordentliche Gerichtsbarkeit – Gemeinsamkeiten und Unterschiede: Grundfragen der Verwaltungs- und Finanzgerichtsbarkeit, ed. M. Holoubek, M. Lang, Wien, pp. 24–43.

10 See the Article 133 paragraph 1 the Austrian Bundes-Verfassungsgesetz (BGBl. Nr. 1/1930, idFNr. 164/2013, hence forth B-VG) and the Article 184 the Polish Constitution (Official Journal of Polish Law from 1997, nb 78, poz. 483 as am., hence forth as PC).

has crucial importance, because of their structural position and authority towards lower branches of courts and other state authorities. Therefore in the literature is stressed a double function of this courts, private and public.[11] The private function gives the parties of the proceeding a possibility to review the case again. The public function embraces other competences of the supreme courts, connected with shaping a uniform case-law and fulfilling other tasks imposed on courts by legislators.[12]

A relation between these two functions should be balanced in the sense, that each of them should not make the second role practical impossible to fulfill. It is clearly seen, if the court is burdened by the amount of appeals and cannot supervise properly its own case-law. It is obvious, that the procedural circumstances of an access to the supreme court should be adjusted to its personal abilities and housing conditions of the court. These requirements should not negate an obligation, that the supreme courts have to exercise judicial power in individual cases which give a reason to formulate a general interpretation concerning current legislation. The public function performed by these courts to a great extend will be groundless without the private function. There is also a connection between these two functions. Balancing between them serves to properly fulfill each of them.

The above mentioned functions are recognized in national doctrine of law which stress the special role of supreme administrative courts in Poland and in Austria as guardians of uniformity of case-law and its development (Hohenecker, 2014, p. 32), protectors of the rule of law (Olechowski, 2019, p. 443) or institutions which shape the legal culture in the best possible way (Jabloner, 2001, p. 144). Additionally, these courts affect not only the activity of public administration, but perceive an influence on legislation is some areas of administrative law (Hauser, 2011, pp. 11-16). In Poland the SAC is also regarded as the institution which supports the independence of the local self-government units (Tarno, 2006, pp. 29-30). The role of the supreme courts is undoubtedly positive. The level of affection of the supreme courts on the judiciary itself, individuals, public administration and legislation depends on many circumstances of the functioning of these courts which should be adapted to the tasks. Otherwise the positive role of these courts would be strongly limited.

11 See (Faber, 2013, pp. 88-89; Wiącek, 2016, pp. 1093-1095). See also literature from other countries (Lindblom, 2000, pp. 337-340; Stirn, 2017, p. 140).

12 The public functions of the Austrian Supreme Administrative Court are regulated in the Article 133 paragraph 1–2 B-VG. Partialy these function of the Polish Supreme Administrative Court is regulated in the Article 166 paragraph 3 of the Constitution and in the Law on proceedings before administrative courts, Official Journal of Polish Law from 2017, poz. 1369 as am.

3 The procedural conditions of an access to the supreme administrative courts

3.1 European standards of an access to the supreme administrative courts

The regulation of EU-law and the standards adopted by the Council of Europe do not formulate circumstances for a general access to the courts which are on the top of the structure of administrative judiciary. Nevertheless, if a legislator creates a possibility to that access, it should not be illusory and theoretical, but effective.[13]

The basis for the access to the court are regulated in Article 6 and 13 European Convention. It should be also noted that Article 47 of the Charter of Fundamental Rights guarantees a right to an effective remedy. Each state is obligated to ensure the citizens real access to a court, which includes not only the right to initiate the proceeding but also the right to obtain a determination of a dispute by a court.[14] Concentrating on the procedural side of that right, it is possible to create formal requirements which will be proportional to the aim of limitations and not violate an essence of the access. Such kind of limitations as time-limits governing the submission of documents or lodging of appeals, special requirements for that document are aimed at ensuring the proper administration of justice and comply with the principle of legal certainty.[15] A requirement that an individual has to be represented by a lawyer in a proceeding before a court of the highest instance is not regarded as a violence against the analyzed standards.[16] It is incumbent on the party of the proceeding to respect these rules and display special diligence in the defense of his interests.[17] These rules should be clear and foreseeable for an individual.[18] An excessive formalism in an interpretation of formal rules can prevent individuals from using an available remedy and making an access to a court too complicated.[19]The same assessment was given to a strict construction to a procedural rule which prevented an individual's action being examined on the merits.[20] The basic elements in the case-law of ECtHR which determine an admissible standard of formal requirements are "legal certainty" and "proper administration of justice". Transparent formalities of a remedy which are aimed at shaping circumstance for a determination in merits of a particular dispute are not regarded as too excessive to create real access to a court.

13 ECtHR, 12 February 2004, case no 47287/99, Perez v. France, paragraph 80, ECtHR, 23 March 2010, case no 15869/02, *Cudak v. Lithuania*, paragraph 58.

14 ECtHR, 26 November 2016, case no 76943/11, *Lupeni Greek Catholic Parish and others v. Romania*, paragraph 86.

15 ECtHR, 4 April 2019, case no 8981/14, *Kunert v. Poland*, paragraph 31.

16 ECtHR, 21 Dezember 2010, case no 18353/03, *Kulikowski v. Poland*, paragraph 60.

17 ECtHR, 10 February 2005, case no 69315/01, *Sukhorubchenko v. Russland*, paragraph 45.

18 ECtHR, 18 October 2010, case no 8863/06, *Mushta v. Ukraine*, paragraph 47.

19 ECtHR, 12 November 2002, case no 46129/99, *Zvolský and Zvolská v. Czech Republic*, paragraph 51.

20 ECtHR, 5 April 2018, case no 40160/12, *Zubac v. Croatia*, paragraph 97.

Both European Convention and the Charter of Fundamental Rights does not guarantee a right to more than one instance proceeding and to set up courts of appeal.[21] If that standard is shaped, a court should avoid extremities, such as "excessive formalism" and "excessive flexibility", which will eliminate requirements created for lodging an appeal.[22] A proceeding before courts of highest instances can be limited only to certain grounds which will protect above all public interest like the uniformity of case law or cases of special state interests. Nevertheless also in such cases should be ensured a right of each party to be heard and to determine a case in merits.[23] The determination of a case should also find its end in a final and binding judgment. A system of legal remedies should be limited in light of that guarantee which has both for individuals and public authorities great significance.

A right of an unlimited access to the supreme administrative courts is partially stated in the regulations of the Council of Europe. According to the Article B.4.i. of the recommendation (2004)20,[24] at least in important cases a decision of a tribunal that reviews an administrative act should be subject to appeal to a higher tribunal, unless a case is directly referred to this tribunal in accordance with national legislation. In the explanatory memorandum to the directive, the formulation about "most important cases" is related e.g. with disputes involving heavy administrative sanctions. Simultaneously, there are pointed out concrete standards of judicial review. Firstly, the right to appeal should be recognized in a reasonable time-limit defined by the individual national system. Secondly, national law should specify the conditions of the appeal and the jurisdictions of appeal body. Thirdly, the appeal body must satisfy the requirements of the Article 6 European Convention. Fourthly, states should decide the extent to which appeals can be lodged with the higher courts. The last formulation leads to a conclusion, that the appeal authority cannot be the same as the highest authority in a structure of the courts. Each state has its own competence to shape a structure of courts and access to the highest/supreme court can be more limited than to the appellate authority.

In the European law is not formulated a right to general access to the highest courts.[25] The standards are directed on an access to a court and only in the most important cases to the appeal bodies. Each state has a significant latitude in a creation of an access to the highest courts. The legal regulation in that area should not be arbitrary in the sense, that it should take into account general principles like the independence of the judicial authority, a right to a fair hearing, public nature of the proceeding, final and binding judgment.

21 ECtHR, 17 July 2012, case no 24197/10, *Muscat v. Malta*, paragraph 43.

22 ECtHR, 26 July 2007, case no 35787/03, *Walchli v. France*, paragraph 29.

23 ECtHR, 14 December 2006, case no 1398/03, *Markovic and others v. Italy*, paragraph 113–115.

24 Recommendation (2004)20 of the Committee of Ministers to member states on judicial review of administrative acts from 15th December 2004. https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dba26 (access on 27th July 2019).

25 In the literature is stated, that an excessively high number of appeals could compromise the exercise of the most fundamental function of this courts which is to ensure of the unity of law and to decide new and significant questions. See (Stern, 2017, p. 140). Towards a European Public Law, Oxford, pp. 140.

A lack of a right to a general access to the supreme courts is connected with the private and public role of these courts. If an individual had an absolute right to lodge an appeal remedy to the supreme court, then the private function would make the realization of the public function visibly more difficult or even impossible. The final decision about a relation between these functions is leaft the legislators who determine a border between a right of an individual to hear a case and a right of a court to hear selected cases.

3.2 Polish standards of an access to the SAC

The standards of access to the SAC are regulated in the PC. According to Article 176 paragraph 1 of the PC, which is located in a chapter titled "courts and tribunals", each court-proceeding is at least two-instance. The principle knows no exceptions and is regarded in a doctrine of law as a public subjective right which has a procedural nature (Grzegorczyk and Weitz, 2016, pp. 1787-1788) and as a guarantee of a reliable process in making individual decisions (Garlicki, 2005, p. 2). A significance of that principle for an individual has theoretical grounds.

As a result of the presented principle, in the court-administrative procedure are present remedies that give a right to question a judgment issued by the court of the first instance (*Wojewódzki Sąd Administracyjny*) to the court of the second instance, which is the SAC. That right knows no procedural limitations and exceptions besides an obligation to prepare a cassation remedy by a legal representative[26] and indication the grounds of cassation, which can be each kind of violation of substantive or procedural right, if the infringement could have affected the outcome of the case.[27] The broad scope of normative violations possible to appeal is confirmed in a special judgment of SAC, which has a binding force for all administrative courts.[28] In this judgment the SAC has stated, that in cassation can be revived both the violations of administrative and court-administrative proceeding made by the court of the first instance.[29] The SAC hears a case within the limits of the cassation complaint and takes into account ex offcio only grounds of invalidity of the proceeding.[30]

In reality, a party of the proceeding can formulate any charge connected with a violation of law by the administrative court of the first instance. The high standards of appealability of judgments of Polish administrative courts are followed by the Constitutional Tribunal.[31] In its case-law appealability of judgments is perceived as a guarantee for individuals without exceptions, which could make an admissibility of a remedy too complicated or difficult. Concen-

26 Article 175 paragraph 1 the Law on Proceedings before administrative courts (Journal of Laws 2018, item 1302 as am., hereinafter as PPSA).

27 Article 174 PPSA.

28 According to the Article 269 paragraph 1 of the PPSA, if any panel of the administrative court hearing a case does not share the position taken in the resolution by seven judges, by a panel of the entire Chamber or by the full panel of the SAC, it shall submit the arising legal issue for resolution by an appropriate panel of SAC.

29 SAC, 26 October 2009, case no I OPS 10/09, ONSAiWSA 2010/1/1.

30 Article 183 paragraph 1 PPSA.

31 Hereinafter as CT.

trating on the judgments of the CT based on the PPSA, the Tribunal negatively reviewed an interpretation of cassation basis which lead to inadmissibility of that remedy, because of formal mistakes in its creation. Such mistakes like an erroneous specification of a cassation basis, a violation of substantive law instead of procedural law, should not make a proceeding before the SAC impossible (*falsa demonstratio non nocet*). According to the Tribunal, attempts to acceleration of the procedure can not negate the right to two instances proceeding.[32]

In another judgment, the Tribunal stated, that a formal mistake made by a legal representative in preparations of a cassation cannot lead to inadmissibility of that remedy. The CT decided, that a party of a proceeding should not bear the negative consequences of not taking into consideration in a cassation complaint a request that a questioned judgment should be annulled or modified, together with indication of the scope of the requested annulment or modification. A rejection of an appeal without a summon to complete a formal mistake is in a view of the CT disproportionate.[33] It is truth, that a legal representative should undertake only beneficial activities for his principal. From the nature of the power of attorney is known, that all activities of the legal representative, not only beneficial, are made in the name and on the principal's account. Making a distinction between positive and negative effects of the representation has no grounds based on CP and PPSA. Additionally it is contradictory with the principle of the equality of arms both parties of the procedure (Piątek, 2014, p. 177).

The case-law of the CT based on Article 176 paragraph 1 of the Polish Constitution made some proposals of improvement procedural limitations in an access to the SAC impossible.[34] In 2012 was prepared a proposal to dismiss a cassation complaint by the SAC, if it is obvious, that there is a lack of justified grounds or a party abused the right of two-instance proceedings. From that decision issued in a panel of one judge a party would have a right to a complaint to the SAC, which would examine it in a panel of three judges (Kmieciak, 2012, p. 4). That proposal was not even taken to the Parliament because of critical assessments from former judges of the CT.

3.3 Austrian standards of an access to the VG

In a contrast to the Polish constitution, the Austrian *Bundesverfassungsgesetz*[35] does not contain a right to a two-instance court-proceeding, though the constitutional regulation about administrative courts (*Verwaltungsgerichtsbarkeit*[36]) is much more detailed as in the PC. The structure of administrative courts is

32 CT, 20th September 2006, Case SK 63/06, OTK-A 2006/8/108.

33 CT, 8th April 2014, Case SK 22/11, OTK-A 2014/4/37.

34 The same reason can be concluded from the case-law of CT on a basis of the civil and criminal procedures. See CT 12nd March 2002, Case P 9/01, OTK-A 2002/2/14, CT 13th January 2004, Case SK 10/03, OTK-A 2004/1/2, CT 20th May 2008, Case P 18/07, OTK-A 2008/4/61, CT 14th September 2009, SK 47/07, OTK-A 2009/8/122.

35 Bundesverfassungsgestez (BGBl. Nr. 1/1930 as am., hereinafter as B-VG).

36 The articles 129-136 are located in the seventh part of the B-VG, titled "Constitutional and administrative guarantees", nb A. Administrative courts (Verwaltungsgerichtsbarkeit).

two-tried. On a first level adjudicate administrative courts, after one of the nine of federal states, the Federal Administrative Court (*Bundesverwaltungsgericht*) and the Federal Finance Court (*Bundesfinanzgericht*). This structure is named as a model 9+2 and is created in 2012, in a result of a reform of administrative judiciary.[37] On the top of the structure of the Austrian administrative courts is the VG (*Verwaltungsgerichtshof*), as a court of second instance with a scope of jurisdiction regulated in Article 133 paragraph 1 B-VG and limited regarding to the appeal remedy (*Revision*) in Article 133 paragraph 4 B-VG.

An access to the VG in the scope of the appeal remedy is limited to the questions of law in a concrete dispute which are of particular importance.[38] In Article 133 paragraph 4 B-VG are stated concrete examples where such a question arises. These are connected with not unanimous adjudication of administrative courts, first of all the VG.[39] From that sense, an appeal remedy is admissible if a judgment of the first-instance court is divergent from the case-law of the VG[40] or its case-law in a concrete area is not uniform or such kind of legal dispute was not adjudicated by the VG.[41] If the case-law of the first-instance court has not a new content which will be significant for the whole case-law or the law interpretation, appeal remedy should be disqualified (Handstanger, 2015, pp. 679-680). In each of these premises a public interest is predominant towards a private interest in the sense, that without proving one of the premises it is impossible to initiate an instance control of a judgment of the first-instance court. The premises are connected with the creation of the case-law of administrative courts, either its uniformity or case-law in new areas of law.[42] In other words, the fulfillment of the private function of VG is combined with the public function. For each case the private function has to be supplemented by the public.

The procedural conditions for the admittance of the appeal remedy are regulated in the statute about the Administrative Tribunal (*Verwaltungsgerichtshofgesetz*).[43] Each appeal as a document should contain concrete elements

37 More about the reform of the administrative judiciary in Austria see (Steiner, 2014, pp. 117-132; Holoubek, 2017, pp. 18-20).

38 The competences for examination of the merits of a concrete case are a basis for an opinion, that the Administrative Tribunal is a court in a sense of the Article 47 of the Charter of Fundamental Rights and the Article 6 of the European Convention. See Grabenwarter, Ch., Fister, M., (2014). Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit, Wien, pp. 261.

39 A protection of an individual in the proceeding before the Administrative Tribunal is in the background. See Kahl, A., (2014). Rechtsschutz gegen Entscheidungen der Verwaltungsgerichte erster Instanz beim VwGH: Handbuch der Verwaltungsgerichtsbarkeit, ed. J. Fischer, K. Pabel, N. Raschauer, Wien, pp. 435.

40 A particular importance of a case can be also connected with a necessity of deepening the existing case-law of the Administrative Tribunal. See more Kahl, A. (2014). Rechtsschutz gegen Entscheidungen der Verwaltungsgerichte erster Instanz beim VwGH: Handbuch der Verwaltungsgerichtsbarkeit, ed. J. Fischer, K. Pabel, N. Raschauer, Wien, pp. 438.

41 It is not significant if that inconsistence comes from substantive or procedural law and concerns all areas of administrative law. See Faber, R., (2013). Verwaltungsgerichtsbarkeit, Wien, pp. 92.

42 In the last sentence of the Article 133 paragraph 4 B-VG is stated other condition for a limitation of appeal remedies connected with a small value of the subject-matter of review. These competition is passed on the legislator who determined such limitation in the Article 25a paragraph 4 VwGG. For cash punishment imposed by an administrative authority these limitation is on the level of 750 Euro and for judgments of the court of the first instance 400 Euro.

43 Verwaltungsgerichtshofgesetz (BGBl. Nr. 10/1985 as am., hereinafter asVwGG).

connected with the details of a concrete case and parties of a dispute. The most significant element is an obligation for a petitioner to write grounds of appeal, which are concrete violations of law made by a court of first instance.[44] There are two types of the appeal remedies, ordinary (*ordentliche Revision*) and extraordinary (*außerordentliche Revision*).[45] A difference between them is located in an art of an admittance of that legal remedy by the court of the first instance. Though an ordinary remedy is lodged after an admittance granted by the court of first instance, an extraordinary remedy is lodged to the VG without that. Therefore in that document the grounds of appeal have to be supplemented by the grounds which refer to Article 133 paragraph 4 B-VG.

An admittance of an appeal remedy is granted by an administrative court together with an issuing of a judgment and needs a short justification.[46] The VG is not bound by the decision of the court of first instance[47] and can dismiss an appeal remedy *in camera* with a form of an order.[48]

An extraordinary appeal remedy is lodged to the court of first instance and after serving copies of the remedy to the parties of a dispute and the competent Ministry, passed to the VG which leads an initial and in merits proceeding.[49] The grounds of these appeal should not be directed against an order of the administrative court about the inadmissibility of the remedy, but against the judgment of the court of the first instance which is appealed (Kahl, 2014, p. 440). A reference to other documents is not acceptable (Grabenwarter, 2014, p. 274). The Tribunal will examine the grounds of appeal remedy with the premises from Article 133 paragraph 4 B-VG.[50] The same like with an ordinary appeal remedy, it can be settled as inadmissible by an order or remand to the adjudication in merits.

There are also other competences of the VG regulated in the Article 133 paragraph 1 B-VG. Besides the determination of the appeal remedies, the VG is competent in application for setting the date for the settlement of the case by the court of first instance, after expiring that term and resolving jurisdictional disputes between administrative courts or administrative courts and the VG. These competences are exhaustive (Faber, 2013, pp. 88-89).[51] In connection to the both additional activities of the VG there are visible connections to the competences the SAC which adjudicate about excessive course

44 Article 28 paragraph 1 point 5 VwGG. The Administrative Tribunal besides a control over a competence of administrative courts and a violation of procedural law, according to the Article 41 is limited in adjudication to the grounds of appeal.

45 It is worth mentioning, that in the practice of the Administrative Tribunal, the extraordinary appeal remedies are majority towards the ordinary. In 2018 the ordinary appeal remedies was only 7% of all motions lodged to the Tribunal, whereas the extraordinary appeal remedies was 88%. See Information about activity of the Administrative Tribunal in 2018, p. 18. https://www.vwgh.gv.at/medien/mitteilungen/taetigkeitsbericht2018_190705_%5BWEB%5D.pdf?72qkz6 (access on 27th July 2019).

46 Article 25a paragraph 1 VwGG.

47 Article 34 paragraph 1a VwGG.

48 Article 34 paragraph 1 VwGG.

49 Article 30a paragraph 7 VwGG.

50 Article 34 paragraph 1a VwGG.

51 The competences not embrace the jurisdiction of the Constitutional Court. See more (Grabenwarter and Fister, 2014, pp. 258-259).

of proceeding before administrative authorities and resolve jurisdictional disputes between local government authorities and self-government appellate boards.[52] In these competences is realized the public function of the highest administrative courts.

4 The consequences of the presented procedural conditions

4.1 Polish experiences

A result of no deep procedural amendments in PPSA and a broad access to the SAC is the pending time of the proceeding before the SAC. According to available statistics, published annually by the SAC in the form of reports on the activity of administrative courts, the pending time for examining the cassation remedy in the court-administrative proceeding is gradually longer. The available figures indicate that in 2004 the SAC arranged, within 12 months, 2872 (47.3%) of cassation complaints,[53] in 2010 – 10922 (49.6 %) of cassation complaints,[54] in 2015 – 14892 (26.45 %) of cassation complaints,[55] in 2017 - 19192 (27.96 %)[56] and in 2018 – 18897 (36,45%).[57] Over a period of less than 15 years, the waiting time for the SAC to hear cassation complaints has been extended, which currently amounts around 1,5 year and for disputes heard at trial it is approximately even longer, till 2 years.[58] Adopting the method of measuring the length of pending time in the SAC (disposition time),[59] in 2004 the average pending time amounted 406 days (13,3 months), in 2015 - 633 days (20,8 months), in 2017 - 502 days (16,5 months), in 2018 - 531 days (17,4 months).

The basic reason for the prolonging pending time in the proceeding before the SAC is the gradually increasing number of cassations lodged against judgments of voivodship administrative courts. While in 2004, the SAC received

52 See more about this competence in Skoczylas, A., (2008). Rozstrzyganie sporów kompetencyjnych i sporów o właściwość przez NSA, Warszawa.

53 Information about activity of administrative courts in 2004, Warszawa 2005, p. 23 (access on 27th July 2019).

54 Information about activity of administrative courts in 2010, Warszawa 2011, p. 16 (access on 27th July 2019).

55 Information about activity of administrative courts in 2015, Warszawa 2016, p. 22–23 (access on 27th July 2019).

56 Information about activity of administrative courts in 2017, Warszawa 2018, p. 22 (access on 27th July 2019).

57 Information about activity of administrative courts in 2018, Warszawa 2019, p. 19 (access on 27th July 2019).

58 The information reports about activity of administrative courts do not contain the average disposition time for proceedings before administrative courts of first instance and before the SAC.

59 The disposition time is obtained by dividing the number of pending cases at the end of the observed period by the number of resolved cases within the same period multiplied by 365 (days in a year). See more in: European judicial systems. Efficiency and quality of justice. CEPEJ Studies. No. 26, p. 238. https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c (access on 13th October 2019).

6,471 cassation complaints,[60] in 2010: 11,676,[61] in 2015: 14,634,[62] in 2017: 17,746[63] and in 2018: 20 229.[64] In 2018 the cassations were lodged to the SAC more than three times as much as in comparison to 2004.

It is also truth that the number of solved cases from 2004 (2872) till 2018 (18897) is significantly increased, more than six times. In that period the number of judges in SAC is increased only from 64 till 107, less than two times.[65] The reasons for the increased number of cases are different, normative and factual. Firstly, the judges are obliged to solve more cases.[66] Secondly, more cases are solved not with public hearing, but *in camera*.[67] Thirdly, almost in each panel in the SAC is present one judge delegated from the first instance administrative court.[68] For that reason, it is possible to create more panels.

The presented data show that the organizational effort undertaken by the SAC expressing itself in an increasing number of cassation complaints does not translate into acceleration of pending time for their hearing. That effort does not stop the increasing amount of cassation complaints which are waiting for determination by the SAC. There are necessary other measures which make the procedure before administrative courts in Poland more effective. Besides the organizational measures, which has been already done, the legislative measures aimed at limitation the number of cassation appeals should be undertaken.

4.2 Austrian experiences

The normative regulation finds its consequences not only in Poland, but the same in Austria. In comparison to 2014, when a new regulation in Austria came into force,[69] the number of pending cases at the end of each year is

60 Information about activity of administrative courts in 2004, Warszawa 2005, p. 22 (access on 27th July 2019).

61 Information about activity of administrative courts in 2010, Warszawa 2011, p. 16 (access on 27th July 2019).

62 Information about activity of administrative courts in 2015, Warszawa 2016, p. 22 (access on 27th July 2019).

63 Information about activity of administrative courts in 2017, Warszawa 2018, p. 21 (access on 27th July 2019).

64 Information about activity of administrative courts in 2018, Warszawa 2019, p. 19 (access on 27th July 2019).

65 The current number of judges of the SAC is available on the website of the SAC http://www.nsa.gov.pl/sedziowie-nsa.php (access on 13th October 2019).

66 For each session with public hearing there are four cases which should be solved by each judge. If there are similar cases, this amount may rise. The number of cases heard *in camera* is not strictly determined and depends on presiding judge of each department.

67 It is possible specially after the amendment of the proceeding before the SAC which was approved in 2015. See more Hauser, R., Skoczylas, A., Piątek, W. (2015). Środki odwoławcze w postępowaniu sądowoadministracyjnym w świetle ustawy nowelizującej z dnia 9 kwietnia 2015 r. – analiza najistotniejszych zmian, Zeszyty Naukowe Sądownictwa Administracyjnego, 4, pp. 19-20.

68 The competence for such delegation is reserved for the President of the SAC, who may decide upon the consent of a judge to perform, for a definite period, the duties of a judge in the SAC. See the Article 13 para. 1 of the Law on the System of Administrative Courts (Journal of Laws from 2017, pos. 2188 as am.).

69 The new regulation was passed in 2012 and came into force at 1stJanuar 2014.

being reduced and therefore time for hearing a case by the VG became significantly shorter.

In 2014 the VG dealt with proceedings initiated before 1st January 2014, based on a former regulation and from the beginning of that year, according to new, presented above principles. From previous years the Tribunal has to deal with 4.623 proceedings. In the whole 2014 were lodged 3.938 new appeal remedies. The VG served 5.479 proceedings. For the next year remained 3.082 proceedings.[70] The waiting period for hearing appeal remedies is gradually decreasing. That phenomenon is a result of the reform of Austrian administrative judiciary in 2012. The balancing between private and public functions of the VG came to a result, that each function is carried out properly.

The number of remained proceedings for a next year was constantly smaller and at the end of 2018 amounted 2.696 proceedings.[71] An exception to that trend was 2017, when this number increased in comparison to the end of 2016 about 682 proceedings.[72] As justification to that trend should be taken into account an increasing number of new proceedings in 2017, which was bigger in comparison to the whole 2016 about 43%.[73] The increasing number of appeal remedies is a similar phenomenon to the Polish observations. It can be understood as a general tendency for applying for courts protection, which is visible also from data presented by courts in other countries.[74]

The number of new proceedings initiated before the VG from 2014 till 2018 was constantly growing up, from 3.938 in 2014 till 7.873 in 2018. In each year was increased the number of resolved proceedings, from 5.479 in 2014 till 7.998 in 2018.[75] A number of judges at the end of 2018, in comparison to the end of 2014 was increased only about one position from the 1st July 2018,[76] from 53 to 54. As a result of that effort in examination of more proceedings, a waiting time for hearing a case before the VG is constantly decreasing from 10,6 months in 2014, till 8,9 in 2015, 6,9 in 2016, 4,6 in 2017 till 4,1 in 2018.[77]

70 Information about activity of the Administrative Tribunal in 2014, p. 17. https://www.vwgh.gv.at/gerichtshof/taetigkeitsberichte/taetigkeitsbericht2014.pdf?6rl096 (access on 27th July 2019).

71 Information about activity of the Administrative Tribunal in 2018, p. 19. https://www.vwgh.gv.at/medien/mitteilungen/taetigkeitsbericht2018_190705_%5BWEB%5D.pdf?72qkz6 (access on 27th July 2019).

72 Exactly from 2.139 proceedings at the end of 2016 till 2.821 at the end of 2017. Information about activity of the Administrative Tribunal in 2017, p. 16. https://www.vwgh.gv.at/gerichtshof/taetigkeitsberichte/taetigkeitsbericht2017.pdf?6rl0ha (access on 27th July 2019).

73 Information about activity of the Administrative Tribunal in 2017, p. 4. https://www.vwgh.gv.at/gerichtshof/taetigkeitsberichte/taetigkeitsbericht2017.pdf?6rl0ha (access on 27th July 2019).

74 F.g. in Sweden in 2014 was lodged 7036 cases and in 2015 - 7369. See administrative justice in Europe. Report from Sweden., p. 17. See https://www.domstol.se/hogsta-forvaltningsdomstolen/Funktioner/English/Publications-in-English/ (access on 17th October 2019).

75 Information about activity of the Administrative Tribunal in 2018, p. 16. https://www.vwgh.gv.at/medien/mitteilungen/taetigkeitsbericht2018_190705_%5BWEB%5D.pdf?72qkz6 (access on 27th July 2019).

76 Information about activity of the Administrative Tribunal in 2018, p. 9. https://www.vwgh.gv.at/medien/mitteilungen/taetigkeitsbericht2018_190705_%5BWEB%5D.pdf?72qkz6 (access on 27th July 2019).

77 Information about activity of the Administrative Tribunal in 2018, p. 19. https://www.vwgh.gv.at/medien/mitteilungen/taetigkeitsbericht2018_190705_%5BWEB%5D.pdf?72qkz6 (ac-

This outcome is different to the Polish experiences. It is linked with the improvement of limitations to the procedure before the VG and selection of cases only for these which have a significance for public interest.

5 Conclusion

The analysis of the two systems of an access to the supreme administrative courts in Austria and in Poland presented both similarities and differences. The similarities are connected with structural position, tasks and functions performed by these courts. In Austria and in Poland the control over public administration is concentrated on the second-instance level in one court which is on the top of the administrative judiciary. The courts besides examination of appeal remedies are responsible for the uniformity and development of case-law. They exercise also other functions, such as determination of the competence disputes in public administration.

The differences are connected with procedural standards of judicial review of the courts of first instance. The SAC is a classical court of the second instance, because of the principle of two-instance court-proceeding. In Austria that principle not exist and an access to the VG is much more limited and connected with the public function of this court. Because of the balancing between private and public function, the factual access to the VG is more realistic than to the SAC. The activity of the VG is focused only on these disputes which are significant for the whole administrative judiciary, the quality of its case-law and the responsibility for the existence of the rule of law in the state.

In an access to the administrative judiciary should be taken into consideration values significant for the whole system of public entities, both public administration and courts. An unlimited access is not profitable for them, because the administrative judiciary is overloaded with typical cases and cannot properly react for the violations of law at the level of public administration. An unreasonable time for hearing particular cases is also inconvenient for individuals who often apply for court protection in concrete factual conditions and cannot wait two years for a final verdict. The Austrian regulation with the basis for the admissibility of revision gives a solution for such organization of the VG in order to use the knowledge and experience of this court in an effective way.

In a creation of requirements of an access to the highest administrative courts a legislator should take into consideration not only procedural but also factual standards. Receiving a final judgment in a reasonable time is significant for the economic interests of individuals and for fulfilling tasks performed by public administration. A great importance have factual possibilities of these courts, which are linked to the number of judges and other court's staff. For the courts of the highest instance it is also beneficial, if the relation between private and public functions is balanced. Contemporary that relation is disturbed in the Polish administrative judiciary. Though the speediness of the proceeding is not the only factor which determinates the effectiveness of the

cess on 27th July 2019).

proceeding, the unreasonable time of court proceeding makes the judicial control illusory.

Prolonged waiting time for the determination of concrete cases is harmful for the functions performed by the supreme administrative courts.[78] In a final result a delay in determination of cassation appeals in Poland reduces the practical importance of the court's decisions. It requires reforms which will make the system more practical for individuals. The final conclusion of this paper is not based on a necessity of an adoption the Austrian regulations into the Polish system. Each state should create its own solution of an access to the highest courts which will remain in accordance with the international standards of the rule of law. An Austrian amendment from 2012 is an exemplification how that process can be realized.

78 In addition, it is also harmful for the authority of the courts. See more (Steger, 2008, pp. 62-63).

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Judicial Review of Administrative Action at National Level under the EU Charter of Fundamental Rights and General Principles of EU Law

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ABSTRACT

This article aims to determine when the national authorities have the obligation to comply with EU fundamental rights, in the framework of administrative procedures carried out in the EU Member States. It also aims to determine the legal remedies available at national level in the context of judicial review in case of violation, by the national authorities, of EU fundamental rights guaranteed by the Charter of Fundamental Rights of the EU or as general principles of EU law. To this end, this study explains the impact of the legally binding EU Charter on public administration of the Member States and the field of application of the EU Charter at national level. The article also deals with the distinction between EU fundamental rights as primary EU law guaranteed by the EU Charter and EU fundamental rights as general principles of EU law. With reference to the judicial remedies available to national courts, the study outlines the effects of EU law (primacy of EU law, direct effect, direct application) in relation to the EU fundamental rights and the measures that can be adopted by the national courts when the action of the national administrative authorities is not compatible with EU fundamental rights. Finally, the article presents the most important findings concerning judicial protection of EU fundamental rights at the national level, especially from the perspective of the right to an effective remedy and to a fair trial stipulated by Article 47 of the EU Charter.

Keywords: *Charter of Fundamental Rights, general European principles, primacy of EU law, right to a good administration, right to an effective remedy, judicial review*

JEL: K10

1 Introduction

One of the main legislative changes introduced by the Treaty of Lisbon[1] in the area of fundamental rights protection in the European Union is represented by the official recognition of the Charter of Fundamental Rights of the European Union as a legally binding instrument, having the same legal value as the Treaties of the European Union.[2]

The entry into force of the EU Charter on December 2009 reaffirmed the EU's commitment to the protection of fundamental rights and created the necessary legal framework for the accomplishment of a better legal enforcement of fundamental rights at the European Union level.

As a consequence, since December 2009, the EU Charter is a part of EU primary law, it is supreme over national law of Member States, it is a directly applicable rule of law at national level and it has direct effect, in the same conditions established by EU law for the Treaties of the European Union.

According to Article 51 (1) of the EU Charter,[3] EU institutions, bodies, offices and agencies must comply with the EU Charter in all their actions, while Member States must comply with EU Charter only when they are implementing EU law. This means that the EU Charter is the principal measuring instrument for legality for the actions of EU institutions, as well as for the actions of Member States when they implement EU law.

Although since December 2009, the EU Charter is a legal instrument of outstanding importance for the protection of fundamental rights, at EU and national level, the official reports of the EU institutions still recall the importance of awareness-raising on the application of the EU Charter at national as well as at EU level among policymakers, legal practitioners and the rights holders themselves (Council of the EU, 2017, p. 3; European Commission, 2018, p. 13; European Union Agency for Fundamental Rights, 2018, p. 3). In this context, it is worth mentioning that the results of a recent Eurobarometer survey highlight that only 42% of respondents have heard of the EU Charter and only 12% really know what it is (European Commission, 2019, p. 3). This is because the EU Charter still raises a number of concerns and uncertainties related to its interpretation and field of application, especially at national level. The fact that the general principles of EU law are still protected by EU law as a distinct source of EU fundamental rights, after the entry into force of the EU Charter) increases the uncertainties related to the application of EU fundamental rights at national level.

Since at national level, the main institutional actors which must ensure compliance with EU Charter and with the general principles of EU law are the na-

1 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17. 12. 2007 (entry into force on 1 December 2009).

2 According to Article 6 (1) TEU, as it was modified by the Treaty of Lisbon: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

3 OJ C 326, 26. 10. 2012.

tional legislative and administrative authorities and the public institutions (as representatives of the Member States), when they are implementing EU law, this article aims to contribute to awareness-raising on the application of the EU Charter and of the general principles of EU law at national level in the national administrative procedures and also to outline what legal remedies are available at national level when the EU fundamental rights are not observed by the national administrative authorities.

In order to achieve this scope of work, this paper will examine the scope of application of EU Charter and of the general principles of EU law at national level, by outlining the specific situations in which the national administrative authorities have the legal obligation to comply with the provisions of the EU Charter (or with the general principles of EU law), based on the most relevant CJEU case-law related to Article 51 of the EU Charter and to the application of general principles of EU law.

Since the EU Charter and the general principles of EU law are two different sources of EU fundamental rights that are both applicable at national level, the paper also emphasizes the distinction between EU fundamental rights as primary EU law guaranteed by the EU Charter and EU fundamental rights as general principles of EU law, with the purpose of highlighting the most effective procedural means of claiming, in national courts, violation of EU fundamental rights. The analysis of the distinction is based on the most recent CJEU decisions in connection with the EU fundamental rights most often invoked in the administrative proceedings as being violated by the public administration of the Member States - the right of defence, the presumption of innocence and the right to a good administration – especially in the matters related to national competition authorities and tax authorities.

For the purpose of an in-depth practical understanding of the subject, the paper will deal, in Section 4, with the practical relevance of the distinction between the EU Charter and the general principles of EU law and will explain when certain EU fundamental rights are applicable at national level as general principles of EU law and when are applicable as rights enshrined by the EU Charter.

In the context of judicial review, the paper analyzes also the legal remedies available in the context of national judicial review of the national administrative decisions, in case of violation of EU fundamental rights guaranteed by EU Charter (or of the general principles of EU law), trying to determine when the EU fundamental rights can be invoked before the national courts based on the direct effect of EU law and when the national courts can decide the annulment of the decisions of the national public administration which are not compatible with EU fundamental rights. Moreover, the article will examine, as a case study, the most relevant judgements delivered in Romania which deal with the judicial review of national measures for compliance with EU Charter and with general principles of EU law.

2 Methods

This study is based, mainly, on relevant CJEU case-law, legislation and papers regarding the field of application of EU Charter to Member States. Also, this study analyzes post-Lisbon CJEU case-law concerning the application of certain EU fundamental rights at national level, in the context of national administrative proceedings (the right of defence, the presumption of innocence and the right to a good administration) in order to highlight the distinction between the general principles of EU law and the rights enshrined by the EU Charter. For this analysis, were selected the most often invoked EU fundamental rights in the administrative proceedings as being violated by the public administration of the Member States, especially in the matters related to national competition authorities and tax authorities. In order to illustrate practical and concrete examples of national judicial review of the national administrative action for compliance with EU Charter and general principles of EU law, the article examines and presents the most relevant judgements delivered in Romania by the Romanian Constitutional Court and the High Court of Cassation and Justice. Official reports of the relevant EU institutions are also analyzed.

3 The field of application of EU Charter at national level. When must national authorities comply with the legally binding EU Charter?

According to Article 51 (1) of the EU Charter, Article 6 (1) and Article 6 (3) TEU,[4] Member States – including all national institutions, authorities, bodies, offices and agencies – must comply with the EU Charter "only when they are implementing EU law".

Whilst Article 51(1) of the EU Charter, which defines the field of application of the EU Charter, clearly states that Member States are bound by the EU Charter „only when they are implementing EU law", the field of application of EU Charter regarding acts adopted by Member States and national authorities raised a number of uncertainties. Besides, the scope of application of EU law has been extended, as the CJEU case-law shows,[5] to include acts adopted by the national authorities that constitute derogations from provisions of EU law, or acts adopted by the national authorities that only remotely are connected with EU law.

The definition of the field of application of the EU Charter with regard to Member States and national authorities is directly related to the interpretation of the notion of "implementing EU law" used by article 51(1) of the EU Charter, the essential question being whether the expression refers only to the transposition of EU law into national legislation, or it may be extended beyond these limits, with the direct consequence of extending the limits of

4 TEU version after the entry into force of the Treaty of Lisbon.

5 Case C-60/00, Carpenter, CJEU; Case C-71/02, Karner, CJEU; Case C-36/02, Omega, CJEU; Case C208/09, Wittgenstein, CJEU; Case C33/07, Jipa, CJEU.

the application of the EU Charter to any measure or act of the Member States and of the national authorities which falls within the scope of EU law.

Since Article 51(1) of EU Charter does not give a complex definition of the notion of "implementing EU law", different opinions have been issued, after the entry into force of the EU Charter. The majority of scholars (Schwarze, 2001, pp. 407-410; Garcia, 2002, pp. 492-514; Eeckhout, 2002, pp. 945-994) supported an extensive interpretation of Article 51(1) of the EU Charter, according to which the implementation of EU law refers to all situations when Member States and national authorities are acting within the scope of EU law, even when Member States and national authorities are derogating from EU law or attempting to obtain an exemption from the application of EU law.

The Explanations relating to the EU Charter[6] ("Explanations") and the relevant decisions of the CJEU rendered after the entry into force of the EU Charter, in cases concerning the compatibility of acts adopted by the national authorities with the EU Charter, clarified the uncertainties related to the interpretation of Article 51 (1) of the EU Charter and of the notion "implementing EU law", by embracing, officially, the extensive interpretation of Article 51(1) of the EU Charter.

First of all, the Explanations bring a broader perspective over the field of application of the EU Charter with regard to Member States, mentioning the pre-Lisbon case-law of the Court of Justice of the European Union,[7] which means that the non-compliance of the national authorities with the EU Charter "will be assessed whenever the national action (or omission) comes within the gravitational orbit of Union law" (Di Federico, 2011, p. 40). The message transmitted by the Explanations is that "Member States are bound by fundamental rights when they act in the scope of Union law, and that the phrase <implementing Union law> is intended to capture the various senses in which Member States could be said to be acting in the scope of Union law" (Craig, 2010, p. 212).

But above all, the most significant indicator in determining the situations in which national authorities must comply with the provisions of the EU Charter remains the CJEU case-law rendered after the EU Charter became legally binding, because all the national courts and all the national authorities must observe the CJEU's judgments with regard to the interpretation of EU law when they are confronted with a problem of the same nature.[8]

In this context, the most relevant and important decision of the CJEU rendered after the entry into force of the EU Charter, with reference to the interpretation of Article 51(1) of the EU Charter, is the decision rendered in case *Fransson,*[9] where CJEU clearly embraced the extensive interpretation of the

6 Explanations related to the Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, p. 18.

7 Case C-60/00, Carpenter, CJEU; Case C-71/02, Karner, CJEU.

8 Case C-106/77, Simmenthal, CJEU and case C-61/79, Denkavit, CJEU. This obligation arises also from the principle of sincere cooperation, established by Article 4 (3) TEU.

9 Case C-617/10, Fransson, CJEU.

notion "implementing EU law" which defines the field of application of the EU Charter to Member States.

In *Fransson* case, CJEU defined the notion "implementing EU law" by ruling that "the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law"[10] and that "the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter".[11] Within the same context, the CJEU held that in Fransson case, the Member State was implementing EU law within the meaning of Article 51 (1) of the EU Charter (even if the national legislation in question was not adopted to transpose an EU Directive), because "its application is designed to sanction an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union."[12]

It follows clearly that by this ruling, CJEU adopted a wide and extensive interpretation of the notion "implementing EU law" in the meaning of Article 51(1) of the EU Charter and subsequently, a wide understanding of the field of application of the EU Charter to Member States and to national authorities. Thus, this ruling extends also the number of situations and cases at national level in which the national authorities must comply with the rights laid down by the EU Charter.

It can be concluded, from the *Fransson* case, but also from other CJEU case-law delivered after the entry into force of the EU Charter,[13] what are the specific situations when Member States actions – including the measures, the acts or the decisions of the national authorities (administrative authorities, public institutions, etc.) – fall within the scope of EU law and consequently, must comply with the fundamental rights laid down by the EU Charter:

– when Member States/national authorities are implementing EU law,[14] acting as agents of the European Union, adopting administrative or legislative acts in order to implement EU regulations, transpose EU directives or apply EU decisions;
– when Member States/national authorities are derogating from EU law;[15]
– when Member States/national authorities are acting within the scope of EU law, adopting national law or adopting national acts/measures/decisions that fall within the scope of application of EU law, either because the

10 Case C-617/10, Fransson, CJEU, para. 21.
11 Case C-617/10, Fransson, CJEU, para. 21.
12 Case C-617/10, Fransson, CJEU, para. 28.
13 Case C-34/09, Zambrano, CJEU; Case C-249/11, Byankov, CJEU; Joined Cases C-411/10 and C-493/10, N.S. and Others, CJEU; Case C-27/11, Vinkov, CJEU; Case C-279/09, DEB, CJEU.
14 Case C-5/88, Wachauff, CJEU; Case C-442/00, Cabalero, CJEU; Joined Cases C-465/00, C-138/01 and C-139/01, Rechnungshof, Neukomm and Lauermann, CJEU; Case C-78/11, Anged, CJEU; Case C-555/07, Kücükdeveci, CJEU; Case C-101/01 Lindqvist, CJEU.
15 Case C-260/89, Elliniki Radiophonia Tileorassi (ERT), CJEU; Case C-60/00, Carpenter, CJEU; Case C-71/02, Karner, CJEU; Case C-208/09, Sayn-Wittgenstein, CJEU; Case C-36/02, Omega, CJEU.

national legislation or national action is connected in any way with EU law, or because the subject matter of the national legislation or of the national action in question is governed by a legally binding provision of EU law[16] (other than the EU Charter).

With reference to the categories of national legislative and administrative authorities that are responsible with ensuring compliance with the provisions of EU Charter and application of the rights stipulated by the EU Charter in national legislative or administrative procedures, the Explanations mention that the EU Charter applies to the central authorities as well as to regional or local bodies, and to public organizations.[17]

In conclusion, the field of application of the EU Charter with regard to Member States is not narrow, but a large and complex one, since all the central authorities as well as regional or local bodies (including administrative authorities), and also public organizations must comply with the provisions of EU Charter whenever they implement EU law, derogate from EU law or when they adopt measures that fall within the scope of EU law.

Even if the Explanations do not mention the national courts among the national authorities which must apply the EU Charter, it is understood, from the fact that the national courts are among the most important national authorities as part of judicial system, that they also have the obligation to comply with the provisions of EU Charter when are confronted with cases that fall within the scope of EU law.

Providing a more exhaustive description of the national actors which have the obligation to implement the EU Charter at national level, the European Union institutions mentioned that "national authorities (judicial authorities, law enforcement bodies and administration) are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter" (European Union Agency for Fundamental Rights, 2018, p. 12). Also, it has been outlined that the duty to respect the EU Charter when implementing EU law "rests on all organs of the Member States, including national lawmakers, administrations, judges, etc." (European Union Agency for Fundamental Rights, 2018, p. 25).

4 Distinction between EU fundamental rights as general principles of EU law and EU fundamental rrights laid down by the Charter of Fundamental Rights of the European Union

Before the EU Charter became a legally binding instrument, national authorities had to comply with EU fundamental rights as general principles of EU law, derived from various international instruments and constitutional traditions

16 Case C-617/10, Fransson, CJEU; Case C-34/09, Zambrano, CJEU; Case C-249/11, Byankov, CJEU; Joined Cases C-411/10 and C-493/10, N.S. and Others, CJEU; Case C-27/11, Vinkov, CJEU; Case C-279/09, DEB, CJEU.

17 Explanations related to the Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007 - Explanation on Article 52 — Scope and interpretation of rights and principles.

common to Member States.[18] Also, long prior to the entry into force of the EU Charter, the CJEU exercised jurisdiction to review acts of Member States within the scope of EU law for compliance with the general principles of EU law (Craig and de Burca, 2011, p. 395; Bazzocchi, 2011, p. 60).[19]

After the entry into force of the Treaty of Lisbon and after the EU Charter became legally binding, EU fundamental rights kept their status as general principles of EU law,[20] but acquired also a superior legal value - primary law stipulated by the EU Charter, equal to EU Treaties.[21]

It follows that, after the entry into force of the Treaty of Lisbon, according to Article 51 (1) of the EU Charter and Article 6 (1) and (3) TEU, Member States – including all national legislative and administrative authorities - must comply with fundamental rights as provisions of the EU Charter but also as general principles of EU law, equally, when they are adopting measures that fall within the scope of EU law.

Regarding the field of application of the general principles of EU law as unwritten court-made general principles that can be invoked before national courts as grounds for legal review of the national action, the pre-Lisbon CJEU case-law established a large perspective over the field of application of the fundamental rights as general principles of EU law to national measures, stating that Member States are bound to respect fundamental rights as general principles when national legislation and measures fall within the scope of EU law,[22] which is similar to the field of application established by the CJEU for the EU Charter, after its entry into force. That means that all the observations regarding the field of application of the EU Charter which were concluded above in Section 3 of this paper are equally applicable to EU fundamental rights as general principles of EU law.

Regarding the possible derogating effect of the EU Charter from general principles of EU law already existent at the point in time when the EU Charter gained legal force, this is not allowed under the current provisions of Article 6 (3) TEU, which maintain the category of the general principles of EU law as a distinct source of EU fundamental rights, even after the entry into force of the EU Charter (since the same Article 6 TEU recognizes also the legally binding status of the EU Charter *and* the legally binding status of the general principles of EU law). Article 6 (3) TEU is regarded today as a provision which codifies the case-law of the CJEU on the general principles of EU law (Craig and de Burca, 2011, p. 366). The general principles of EU law occupy an important place in the normative system of EU law, even after the entry into force of EU Charter, since they are situated on the second tier of the hierarchy on norms,

18 According to Article 6 (2) TEU (version before the entry into force of the Treaty of Lisbon).

19 Case 29/69, Stauder, CJEU, Case 11/70, Internationale Handelsgesellschaft, CJEU, Case 4/73, Nold, CJEU.

20 According to Article 6 (3) TEU (version after the entry into force of the Treaty of Lisbon).

21 According to Article 6 (1) TEU (version after the entry into force of the Treaty of Lisbon).

22 Case C-309/96, Annibaldi, CJEU; Case C-299/95, Kremzow, CJEU; Case C-60/00, Carpenter, CJEU; Case C-71/02, Karner, CJEU.

after the EU Treaties and the EU Charter (which are situated on the first tier), according to some scholars (Craig and de Burca, 2011, p. 109).

The autonomy of general principles of EU law, after the entry into force of the EU Charter is supported also by Article 6 (1) TEU which makes direct reference to the Explanations of the EU Charter and indirect reference to the sources of the EU Charter, read in conjunction with Article 52 (3) and Article 52 (4) from the EU Charter, which contain guiding lines regarding the interpretation of some provisions of EU Charter and clarify as well the relationship between some provisions of the EU Charter and the general principles of EU law. Thus, according to these provisions, the rights provided by the EU Charter must be interpreted by taking into consideration the equivalent rights provided by the ECHR and by the national Constitutions of the Member States (as general principles of EU law), when the ECHR and the Constitutions of the Member States are the normative sources of the provisions of the EU Charter (Vrabie, 2017, p. 36). It follows that the general principles of EU law continue to exist in EU law as an autonomous source of EU fundamental rights even after the entry into force of EU Charter, since the EU Charter must be interpreted, in certain cases, by taking into consideration the general principles of EU law. This also means that the general principles of EU law were not invalidated by the entry into force of EU Charter – the general principles of EU law continue to apply, in parallel with the provisions of the EU Charter, whose entry into force did not produce a derogating effect on the general principles of EU law.

The autonomy of the general principles of EU law, as a distinct source of EU fundamental rights, even after the entry into force of the EU Charter, was confirmed as well by the case-law of the CJEU which was rendered after the EU Charter became legally binding. Thus, the CJEU continued to recognize the existence and the status of the general principles of EU law after 2009,[23] as it did before the entry into force of the EU Charter. The CJEU continued to take into consideration and to apply both the general principles of EU law and the rights enshrined by the EU Charter, as two different sources of EU fundamental rights, outlining the specificities and the differences between the two sources (e.g. Case C-419/14, WebMindLicences, CJEU, para. 84. or Case C298/16, Ispas, CJEU, para. 26 and 27).

In conclusion, there are two main sources of fundamental rights in EU law, that must be equally observed by the EU institutions and by the national legislative and administrative authorities (and also by national courts): (i) the (unwritten) general principles of EU law identified by CJEU, derived from various international instruments and from constitutional traditions common to Member States and (ii) the EU Charter. These two main sources of fundamental rights provided by EU law must be added to the national legal sources providing fundamental rights. There are many similarities between the two categories provided by EU law (general principles of EU law and EU Charter), because both the general principles of EU law and the EU Charter provisions constitute EU primary law, and they also overlap in many situations with regard to

23 Case C-419/14, WebMindLicences, CJEU.

the content of the guaranteed right. Also, both categories apply only within the scope of EU law and thus have the same field of application (European Union Agency for Fundamental Rights, 2018, p. 15).

Another important similarity between general principles of EU law and EU Charter derives from the specific effects of EU law in national legal systems - primacy of EU law over national contrary law, direct effect and direct applicability. All these three specific effects of EU law are characteristic for both the general principles of EU law and for the rights enshrined by the EU Charter.

From this perspective, it must be pointed out that the general principles of EU law can have direct effect (under certain conditions even horizontal direct effect)[24] and can serve as a legal ground for setting aside the national legislation contrary to EU law and as a legal ground for the application of the principle of consistent interpretation (Lenaerts, 2010, p. 224). Also the rights enshrined by the EU Charter can have direct effect and even horizontal direct effects, when certain conditions are met, given the fact that the EU Charter has the same legal value as the EU Treaties.[25] The CJEU established that a provision of the EU Charter can have horizontal direct effect when the provision of the EU Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual.[26]

However, the distinction between the general principles of EU law and the rights enshrined by EU Charter is not without relevance.

First of all, the general principles of EU law, together with the case-law of the CJEU, were the legal instruments which allowed the fundamental rights of the Member States and the rights guaranteed by the European Convention of Human Rights to enter the European Union legal order (Tridimas, 2005, p. 298). Since the general principles of EU law are still recognized, after the Treaty of Lisbon, by Article 6 (3) TEU as a legal source with binding legal force, it follows that they still have the potential of continuously including "new" fundamental rights into the European Union legal order originating from national legal systems or from international law. Thus, the general principles of EU law ensure the flexibility of the EU legal order with regard to EU fundamental rights.

There are also other specific differences between some general principles of EU law and the equivalent rights enshrined by the EU Charter, which makes the distinction between the two categories of fundamental rights extremely relevant from a practical perspective. These specific differences are related mainly to the normative content and to the special field of application of each right and must be known and taken into consideration when the general principles of EU law and the equivalent rights enshrined by the EU Charter need to be applied by national administrative authorities or invoked before national courts as legal grounds for judicial review of the national measures. These

24 Case C-144/04, Mangold, CJEU and case C-555/07, Kücükdeveci, CJEU.
25 According to Article 6 (1) TEU.
26 Joined cases C-569/16 and C-570/16, Bauer, CJEU; case C-684/16, Max-Planck, CJEU.

differences can be outlined from the recent case-law of the CJEU regarding some of the most often invoked EU fundamental rights in the judicial context of challenging the decisions of the administrative authorities of the Member States, when the allegedly violated right constitute both a general principle of EU law and a right laid down by the EU Charter.

4.1 Case study. The right of defence and the presumption of innocence

The right of defence and the presumption of innocence are protected under the EU law both as a general principle of EU law identified by CJEU and as a right laid down by Article 48 of the EU Charter.

As primary law, the right of defence provided by Article 48 of the EU Charter is binding, according to Article 51 (1) of the EU Charter, for the EU institutions, bodies, offices and agencies and also for the Member States – including all their public institutions, bodies and administrative authorities – when they implement EU law.[27]

As a general principle, the right of defence is binding for the EU institutions, bodies, offices and agencies and also for the Member States – including all their public institutions, bodies and administrative authorities – as a result of the decisions of the CJEU, which recognized the status of the right of defence as a general principle of EU law both before the entry into force of the EU Charter[28] and after its entry into force.[29]

Since the interpretation of EU law held by the judgments of the CJEU is binding on all the national courts,[30] it follows that the CJEU rulings in references for a preliminary ruling on the right of defence are useful in identifying situations in which the right of defence is binding for the administrative authorities of Member States and in determining when it is appropriate to claim this right as a general principle of EU law and when it is appropriate to claim it as primary EU legislation, stipulated by EU Charter.

Prior to the entry into force of the EU Charter, the right of defence, as a general principle of EU law, had an important role to play in the case-law of the CJEU, which has repeatedly held that this right is part of the EU law, and that it is binding both in procedures conducted by EU institutions and in procedures of the administrative authorities and of the public institutions of Member States.[31]

27 CJEU recognized the status of primary law for the right of defence in many decisions rendered after the entry into force of the EU Charter: Case T-104/13, Toshiba Corp./European Comission, CJEU; Case C-74/14, Eturas, CJEU; Case T-68/09, Soliver/European Comission, CJEU; Case C-89/11, E.ON Energie AG/ European Comission, CJEU.

28 Case C-301/87, France/European Comission, CJEU; Joined Cases C-48/90 and 66/90, Kingdom of the Netherland/ European Comission, CJEU; Case T-122/99, Procter&Gamble, CJEU.

29 Case C-419/14, WebMindLicences, CJEU.

30 According to the principle of sincere cooperation, stipulated by Article 4 (3) TEU. Case C-61/79, Denkavit, CJEU.

31 Case C-349/07, Sopropé, CJEU, para. 33 and 36.

CJEU held, for example, that this principle must be ensured in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person and must be guaranteed even in the absence of any specific rules.[32] At the same time, CJEU ruled that observance of the right of defence is a general principle of EU law which applies where the national administrative authorities are minded to adopt a measure which will adversely affect an individual.[33]

CJEU ruled also that respect for the right of defence is a general principle of EU law, according to which addressees of decisions of public authorities which perceptibly affect their interests must be enabled to express their views effectively.[34] Even in the area of national fiscal administrative procedures, CJEU confirmed, in Case C-349/07 Sopropé, that the right of defence is a general principle of EU law and described the conditions that national laws and administrations have to comply with in order to make effective the exercise of the right to be heard.[35]

In the end, the CJEU judgements have imposed the respect of the right of defence as a general principle of EU law in any procedure carried out by the national administrative authorities and institutions of the Member States which may lead to sanctions.[36]

Following the entry into force of the EU Charter, the right of defence has been codified by Article 48 of the EU Charter and ranked as primary EU law, having the same legal value as the Treaties of the EU.

From this perspective, it must be determined when it is appropriate to claim, in national courts, the right of defence as general principle of EU law and when it is appropriate to claim it as primary EU legislation, stipulated by EU Charter. Also, it must be determined when the national courts must apply the right of defence as general principle of EU law and when they must apply it as a provision of EU Charter.

This issue has been addressed by CJEU, in case C-419/14, WebMindLicences,[37] which concerned VAT and Directive 2006/112. In this case, the national court asked whether the national fiscal administration has, in order to ensure com-

32 Case C-301/87, France/European Commission, CJEU; Joined Cases C-48/90 and 66/90, Kingdom of the Netherland/European Comission, CJEU; Case T-122/99, Procter&Gamble, CJEU.

33 Case C-349/07, Sopropé, para. 36.

34 Case T-122/99, Procter&Gamble, CJEU, para. 42.

35 Case C-349/07, Sopropé, para. 38: "The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement. As regards the implementation of that principle and, in particular, the periods within which the rights of the defence must be exercised, it must be stated that, where those periods are not, as in the main proceedings, fixed by Community law, they are governed by national law on condition, first, that they are the same as those to which individuals or undertakings in comparable situations under national law are entitled and, secondly, that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order."

36 Joined Cases T-186/97, Kaufring and others, para. 151.

37 Case C-419/14, WebMindLicences, CJEU.

pliance with the right of defence pursuant to Article 48 of the EU Charter and the principle of good administration enshrined in Article 41 of the EU Charter, the obligation to grant the taxable person access to the evidence obtained and to hear the taxable person in the course of the administrative procedure. First, CJEU reiterated the general duty of public authorities in the Member States to respect the fundamental rights guaranteed by EU law, both as general principles of EU law and especially as rights laid down in the EU Charter, in all situations governed by EU law, in the meaning established by Case C617/10, Fransson.[38]

Then, CJEU ruled that the provisions of Article 48 of the EU Charter are not applicable to the case, but not because the provisions of the EU Charter are not applicable to administrative proceedings of the administrative authorities of the Member States,[39] but because from the wording of Article 48 of the EU Charter it follows that Article 48 is applicable only in those procedures of the national authorities involving the existence of a person 'who has been charged' (i.e. an 'accused' person), which are only the criminal and contraventional matters.[40] As the procedure in question was a fiscal administrative procedure, the CJEU concluded that the administrative authorities of the Member States have the duty to respect the right of the defence as a general principle of EU law, "which applies where the authorities are minded to adopt in respect of a person a measure which will adversely affect him".[41] The CJEU also established that "in accordance with this principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even if the EU legislation applicable does not expressly provide for such a procedural requirement".[42]

As regards the legal remedies available at national level in the context of judicial review in case of violation of the right of defence guaranteed by EU law by the administrative authorities of the Member States, the CJEU stated that, according to Article 47 of the EU Charter, it is incumbent upon the national court which reviews the legality of the national fiscal administrative decision to verify if the national authorities have breached the right of defence and if the national court finds that the taxable person did not have the opportunity, in the context of the administrative procedure, of gaining access to the evidence and of being heard concerning it, the national court "must disregard that evidence and annul that decision if, as a result, the latter has no basis".[43]

38 Case C-419/14, WebMindLicences, CJEU, para. 66, 67, 68.

39 In this respect, the CJEU stressed that the provisions of the EU Charter are binding on the administrative authorities of the Member States - Case C-419/14, WebMindLicences, CJEU, para. 68.

40 Case C-419/14, WebMindLicences, CJEU, para. 83.

41 Case C-419/14, WebMindLicences, CJEU, para. 84. For the same conclusion see Case C298/16, Ispas, CJEU, paras. 26 and 27.

42 Case C-419/14, WebMindLicences, CJEU, para. 84.

43 Case C-419/14, WebMindLicences, CJEU, para. 91.

Another component of the right guaranteed by Article 48 of the EU Charter, which is also a general principle of the EU law, is the presumption of innocence. The CJEU case-law held that the authorities of the Member States are subject to the obligation to respect the presumption of innocence guaranteed by EU law, both as general principle of EU law[44] and as a right laid down in the EU Charter,[45] when they implement EU law.

In case C-74/14,[46] a reference for a preliminary ruling which concerned the interpretation of Article 101 TFEU in conjunction with the presumption of innocence in the context of national judicial review of an administrative decision of the Competition Council, CJEU ruled that "the presumption of innocence constitutes a general principle of EU law, now enshrined in Article 48(1) of the EU Charter, which the Member States are required to observe when they implement EU competition law".

CJEU also held that "where the national court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement", according to the presumption of innocence, that "constitutes a general principle of European Union law, currently laid down in Article 48(1) of the EU Charter".[47]

Based on the above mentioned CJEU case-law, it can be concluded that:

– After the entry into force of the EU Charter, the right of defence and the presumption of innocence are binding under EU law both as a general principle of EU law identified by CJEU and as a right laid down by Article 48 of the EU Charter;
– The right of defence and presumption of innocence are binding both for the EU institutions, bodies, offices and agencies and also for the Member States (including all Member State public institutions, bodies and legislative/administrative authorities) when they act within the scope of EU law;
– The right of defence and the presumption of innocence are applicable as a right laid down by Article 48 of the EU Charter only in those procedures of the national authorities involving the existence of a person 'who has been charged' (i.e. an 'accused' person), which are the criminal and contraventional matters (e.g. the decisions of the national competition authorities), while in all the other matters (e.g. national fiscal administrative procedures, asylum procedures, customs procedures, etc.), the right of defence and the presumption of innocence are still applicable, but as a general principle of EU law.

44 Case C-301/87, France/European Commission, CJEU; Joined Cases C-48/90 and 66/90, Kingdom of the Netherland/ European Comission, CJEU; Case T-122/99, Procter&Gamble, CJEU.

45 CJEU ruled that the presumption of innocence must be respected as primary law, stipulated by the EU Charter in many decisions, rendered after the entry into force of the Charter: Case T-104/13, Toshiba Corp., CJEU; Case C-74/14, Eturas, CJEU; Case T-68/09, Soliver, CJEU; Case C-89/11, E.ON Energie AG, CJEU; Case T418/10, Voestalpine AG, CJEU; Case T-398/10, Fapricela, CJEU.

46 Case C-74/14, Eturas, CJEU.

47 Case C89/11 P, E.ON Energie AG, CJEU, para. 72; Case T-104/13, Toshiba Corp., para. 50; Case T-418/10, Voestalpine, para. 116; Case T-68/09, Soliver, para. 58.

4.2 Case study. The right to a good administration

The right to a good administration is protected under EU law both as a general principle of EU law identified by CJEU and as a right laid down by Article 41 of the EU Charter.

As primary law, laid down by Article 41 of the EU Charter, the right to a good administration is binding, according to the wording of Article 41(1) of the EU Charter, only for the EU institutions, bodies, offices and agencies: "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union".[48] Since Article 51(1) of the EU Charter provides that the EU Charter is binding for the EU institutions, bodies, offices and agencies and also for the Member States when they implement EU law, certain questions were raised regarding the field of application of the right to a good administration to Member States. These questions were clarified by CJEU, that held that "it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union",[49] which means that Article 41 of the EU Charter has a narrower scope than that of the EU Charter as a whole.

However, the right to a good administration is applicable to all Member States action within the scope of EU law – including to all public institutions, bodies and administrative authorities of the Member States - as a general principle of good administration, as established by CJEU.[50]

In this regard, it is relevant to observe that the wording for the right to a good administration in the first two paragraphs of Article 41 of the EU Charter is based on the previous CJEU case-law which was rendered before the entry into force of the EU Charter[51] and the wording regarding the obligation to give reasons comes from Article 253 of the EC Treaty.[52]

According to the case-law of the CJEU, the right to good administration as general principle of EU law, which is binding on national authorities, requires that the national authorities should act impartially, fairly (transparently) and within a reasonable period of time.[53] Also, according to the same principle, parties to national administrative proceedings should not be penalised by

48 Article 41 (1) of the EU Charter.

49 Case C-419/14, WebMindLicences, CJEU, para. 83; Case C141/12 and C372/12, YS and Others, para. 67; Case C166/13, Mukarubega, para. 44; Case C-482/10 Cicala, para. 28, CJEU.

50 Joined Cases C-141/12 and C-372/12, YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S., paras 66 – 69; Case C46/16, LS Customs Services, CJEU, para. 39; Case C604/12, H.N., paras. 49 and 50. For the same opinion, see also Hofmann, H.C.H. and Mihaescu, B.C. (2013). The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case. European Constitutional Law Review, 9, p. 96.

51 Case C-222/86, Heylens, CJEU, para. 15; Case 374/87, Orkem, CJEU; Case C-269/90, TU München, CJEU.

52 According to the Explanations related to the EU Charter, published in OJ 2007 C 303, 14.12.2007, p. 18.

53 In Case C-604/12, HN, para 50, CJEU: "as regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law".

virtue of the fact that they did not comply with procedural rules "when this non-compliance arises from the behaviour of the administration itself ".[54]

In case C46/16, LS Customs Services, CJEU held that "the right to good administration, insofar as it reflects a general principle of EU law, has requirements that must be met by the Member States when they implement EU law".[55] Continuing the same line of arguments in the same case, CJEU ruled that "among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions."[56]

Also, in case C604/12, H.N., which concerned the interpretation of Directive 2004/83/EC on the qualification and status of third country nationals as refuges, CJEU ruled that the right to good administration, enshrined in Article 41 of the EU Charter reflects a general principle of EU law and, based on this principle, "where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities."[57]

This analysis of the CJEU's case-law regarding the right to good administration leads to the following conclusions:

– After the entry into force of the EU Charter, the right to a good administration is binding under the EU law both as a general principle of EU law identified by CJEU and as a right laid down by Article 41 of the EU Charter;
– The right to a good administration as a right laid down by Article 41 of the EU Charter is binding only for the EU institutions, bodies, offices and agencies and is not applicable to Member State action;
– The right to a good administration as a general principle of EU law identified by CJEU is binding and applicable to all Member State action within the scope of EU law, including to all public institutions, bodies and legislative/administrative authorities of the Member States.

In conclusion, the distinction between the general principles of EU law and the rights enshrined by the EU Charter is mainly relevant, from a practical perspective, in the process of identifying the most appropriate effective procedural means of claiming, in national courts, violation of EU fundamental rights by the national legislative and administrative authorities, when the violated right constitute both a general principle of EU law and a right laid down by

54 Case C-428/05, Laub GmbH & Co., CJEU.
55 Case C-46/16, LS Customs Services, CJEU, para. 39.
56 Case C-46/16, LS Customs Services, CJEU, para. 40.
57 Case C-604/12, H.N., para. 49 and 50.

the EU Charter. Also, the distinction between the general principles of EU law and the rights enshrined by the EU Charter can be relevant, from a practical perspective, when the national administrative authorities are in the process of issuing an administrative act in a field which is governed by EU law, because the national authorities have also the obligation to comply with EU law.

The specific differences between the general principles of EU law and the equivalent rights enshrined by the EU Charter related to the normative content and to the special field of application of each right are significant and must be evaluated before invoking in court EU fundamental rights as legal grounds for judicial review of the measures of the national authorities, because, as it clearly results from the analyzed CJEU case-law, a certain EU fundamental right might not be binding on national authorities as a right stipulated by the EU Charter, but the same EU right might be binding on national authorities as a general principle of EU law (e.g. the right to a good administration). Also, in the same context of the judicial review, even if a certain EU fundamental right is binding as a right stipulated by the EU Charter only in some specific national administrative procedures, depending on the subject matter of the procedure, the same EU right might be binding in all national administrative procedures as a general principle of EU law (e.g. the EU right of defence and the presumption of innocence).

5 Judicial national review of national administrative measures under the EU Charter of Fundamental Rights and under the general principles of EU law

In case the national legislative and administrative authorities do not comply with the provisions of the EU Charter or with the general principles of EU law, it is opened the possibility of the judicial review, guaranteed by another EU fundamental right laid down by Article 47 of the EU Charter - the right to an effective remedy and to a fair trial.

That means that where the EU Charter or the general principles of EU law apply (or both), based on the direct effect of the EU Charter and of the general principles of EU law, individuals[58] can rely in national courts, in the context of judicial review, on the provisions of the EU Charter or on the general principles of EU law, against Member States (i.e. against any national legislative or administrative authorities) to claim the violation of their fundamental rights laid down by the EU Charter or recognized as general principles of EU law and to obtain an effective remedy.

Although the direct effect of the EU Charter was seen mainly vertical, based on a strict interpretation of the wording of Article 51 of the EU Charter, immediately after the entry into force of the EU Charter, the CJEU acknowl-

58 In the category of the beneficiaries that can rely on the EU Charter and on the general principles of EU law can be included private legal persons, corporations or other legal entities. In this context, it is relevant case C-279/09, DEB, CJEU.

edged later, in its recent case-law,[59] the possibility of the horizontal direct effect of the EU Charter and has then admitted the possibility of relying on certain rights conferred by the EU Charter in disputes between private parties before national courts.

In connection with the violation of the EU Charter and of the general principles of EU law by the national authorities, the CJEU will have the jurisdiction to interpret provisions of the EU Charter and general principles of EU law in connection with Member States actions, based on Article 267 TFEU, whilst the national courts will be bound to apply the EU Charter and the general principles of EU law whenever EU law will play a role, in the context of national judicial review.

The effects of the EU Charter and of the general principles of EU law within the national law and before the national courts – i.e. the primacy over the contrary national law, the direct effect and the direct applicability – follow directly from EU law and from case-law of the CJEU and not from the national Constitutions or national law.

Given the fact that the EU Charter has the same legal value as the EU Treaties[60] and that the CJEU has recognized the direct effect for the provisions of EU Treaties whenever they confer rights to the individuals and are sufficiently precise and unconditional,[61] it follows that also the provisions of the EU Charter must comply the same conditions in order to have direct effect.[62]

Thus, whenever the provisions of the EU Charter confer rights to the individuals and are sufficiently precise and unconditional, based on the vertical direct effect of the EU Charter, the individuals can invoke the EU Charter in national courts and the national courts are obliged to review the acts of the national legislative and administrative authorities for conformity with the EU Charter, whenever the national acts or measures fall within the scope of EU law. That implies that, in case the national courts find that the acts of the national legislative and administrative authorities violated the EU Charter, the national courts may render inapplicable the national legislation conflicting with EU Charter and may also, in certain conditions, decide the annulment of the reviewed national action.

Moreover, based on the horizontal direct effect of the EU Charter, which was acknowledged recently by the CJEU,[63] whenever a provision of the EU Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual, that provision can be invoked in disputes between private parties, too, before national courts.

59 Joined cases C-569/16 and C-570/16, Bauer, CJEU, paras 84-86; case C-684/16, Max-Planck, CJEU, paras 73-75.

60 According to Article 6 (1) TEU.

61 Case C-26/62, Van Gend & Loos, CJEU.

62 Case C-176/12, AMS, CJEU.

63 Joined cases C-569/16 and C-570/16, Bauer, CJEU, paras 84-86; case C-684/16, Max-Planck, CJEU, paras 73-75.

According to the 'right to obtain an effective remedy in a competent court', which is enshrined in Article 47 of EU Charter and Articles 6 and 13 ECHR, but is also protected as a fundamental general principle of EU law,[64] the national courts have the obligation, where they find a violation of a fundamental right protected under EU law, to grant a remedy to ensure its enforcement. The EU fundamental rights would be useless if individuals affected by measures of the European Union or of the Member States acting within the scope of European Union law were not able to challenge in court measures affecting their interests (Hofmann et al., 2011, p. 204). Since the national courts have the most important role in ensuring, at national level, the judicial protection of rights under EU law, judicial review of national measures for compliance with EU fundamental rights must always be governed by the right to an effective remedy and to a fair trial and by the conditions laid down in Article 47 of the EU Charter.

Although the detailed procedural rules designed to ensure the protection of the rights which were acquired under EU law are a matter for the national legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, it must be emphasized that CJEU held clearly that Member States may apply their procedural autonomy provided, however, that national procedural rules are not less favorable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).[65] In this respect, it must be also pointed out that CJEU held that the application of the national procedural autonomy is subsidiary to explicit EU law.[66]

5.1 Case study. Judicial review in Romania of national action under the EU Charter or under the general principles of EU law

After the entry into force of the EU Charter, it was noticed, in practice, an increased interaction between the CJEU and the national courts of the Member States, in the context of the preliminary reference procedure, in cases regarding the application of the EU Charter (Vrabie, 2017, p. 238).[67]

The entry into force of the EU Charter has strengthened also the role of national courts of the Member States in the application of EU law, by adding an important legally binding instrument in the field of protection of fundamental rights that must be taken into account and applied by the national courts when EU Member States are implementing EU law. This multiplication of the legal instruments for the protection of fundamental rights on EU level can result in contradictions between national legislation and the provisions of the EU Charter, that must be solved by the national courts (Vrabie, 2017, pp. 227-228).

64 Case C-85/76, Hoffmann-La Roche v Commission, para. 9; Case C-222/84, Johnston, para. 19.

65 Case C-298/16, Ispas, CJEU, para. 29; for the same reasoning, see also Case C14/16, Euro Park Service, para. 36.

66 Case C-33/76 Rewe-Zentralfinanz, CJEU, para. 5.

67 See also the preliminary reference made by the Spanish Constitutional Court in case C-399/11, Melloni, CJEU.

In Romania, the judicial review of national measures under the EU Charter was considered by the Constitutional Court after the entry into force of the EU Charter. In 2012, the Constitutional Court declared that 'it is clear from the case-law of the CJEU that the EU Member States are required to comply with the EU fundamental rights enshrined by EU law, when they are implementing EU law' and acknowledged that this rule, as provided by the EU Charter, applies equally to central authorities and to regional or local courts, as well as to public bodies when they are implementing EU law; therefore, the Romanian Constitutional Court concluded that EU Member States should apply the EU fundamental rights enshrined by the EU Charter.[68]

It must be pointed out also that the Romanian Constitutional Court acknowledged the legal status and the legal force of the EU Charter, ruling that EU Charter is a legal instrument having the same legal force as the constitutive treaties of the European Union.[69]

After acknowledging the EU Charter as a legally binding instrument, in 2015, the Romanian Constitutional Court exercised the constitutionality control of a provision of national law by using EU law – including a provision of the EU Charter – as a legal ground. The Constitutional Court ruled that Article 153 (1) TFEU, Article 27 from the EU Charter and Articles 2 and 3 from the Directive 98/59/CE, can be used in the context of judicial control of constitutionality of national law, as 'interposed norms of EU law', because these EU law provisions were sufficiently clear, precise and unconditional and had a certain level of constitutional relevance that can support the violation of the Romanian Constitution. Thus, the Court concluded that the national law in question was unconstitutional.[70]

After the Directive 2006/24/CE was invalidated by the CJEU in case *Digital Rights Ireland Ltd*[71] for breaching Articles 7 and 8 of the EU Charter, the Romanian Constitutional Court was called to review the constitutionality of a national law that transposed the Directive 2006/24/EC. In this case, the Constitutional Court used the opportunity to refer to Articles 7 and 8 of the EU Charter, quoting also the most relevant fragments from the reasoning of the CJEU in case *Digital Rights Ireland Ltd.*[72]

In 2016, when the Romanian Constitutional Court submitted its first preliminary question to the CJEU, in case *Coman,*[73] the preliminary question was also related to the EU Charter. The case concerned Article 277 of the Romanian Civil Code which provided that marriages between same-sex persons conclu-

68 Romanian Constitutional Court, decision no. 53/25.01.2012, published in the Official Journal of Romania no. 234/06.06.2012.

69 Romanian Constitutional Court, decision no. 967/20.11.2012, published in Official Journal of Romania no. 853/18.12.2012.

70 Romanian Constitutional Court, decision no. 64/24.02.2015, published in Official Journal of Romania no. 286/28.04.2015.

71 Joined Cases C293/12 and C594/12, Digital Rights Ireland Ltd, CJEU.

72 Joined Cases C293/12 and C594/12, Digital Rights Ireland Ltd, CJEU.

73 Case C-673/16, Coman, CJEU. Case no. 78D/2016 of the Constitutional Court of Romania.

ded in other countries are not recognized in Romania and Article 21 (1) TFEU and Article 7 (2) of Directive 2004/38/EC.[74]

The case was generated by the refusal of the Romanian authorities to grant a right of residence in Romania for more than three months to a third-country national based on a marriage lawfully concluded abroad between a EU citizen and his spouse of the same sex, a third-country national, based on the ground that marriage between people of the same sex was not recognized by Romanian law. In the context of constitutionality control, the Constitutional Court asked the CJEU for an interpretation of Articles 2(2)(a), 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the EU Charter, asking whether these EU law provisions require the Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the EU. The CJEU held that Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national has the right to reside in the territory of the Member State for more than three months and that derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.[75]

Finally, the Constitutional Court embraced the interpretation of the CJEU and decided to use EU law provisions as interposed norms integrated in the standard of review for the control of constitutionality of national law. Thus, the Court declared that the provisions of Article 277 of the Romanian Civil Code are constitutional only to the extent that they allow granting of the right of residence on the territory of the Romanian state, under the conditions stipulated by EU law, to the spouses – citizens of the Member States of the European Union and/or third-country nationals – from same-sex marriages, concluded in a Member State of the European Union.[76]

Regarding the judicial review of the action of the Romanian administrative authorities for compliance with EU law (EU fundamental rights included), it must be pointed out that, besides the primacy of EU law, direct applicability of EU law and the direct effect of EU law, which allow any national ordinary court to apply the EU fundamental rights when a breach of these rights is invoked and ascertained, the Romanian legal system provides also a special revision procedure.

Article 21 of the Law no. 554/2004 on administrative proceedings[77] allows the national ordinary courts to revise and to change the final court decisions (having the authority of *res judicata)* which are incompatible with EU law,

74 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

75 Case C-673/16, Coman, CJEU.

76 Romanian Constitutional Court, decision no. 534/18.07.2018, published in Official Journal of Romania no. 842/03.10.2018.

77 Published in Official Journal of Romania no. 1154/07.12.2004.

delivered in the course of administrative proceedings, as a special revision procedure.

In this context, it must be mentioned that the Constitutional Court acknowledged, by decision no. 1609/2010,[78] the possibility of the judicial revision of the definitive court decisions delivered in administrative litigation, in case these definitive decisions breach the principle of the primacy of EU law. This decision of the Constitutional Court was confirmed also by the High Court of Cassation and Justice (panel of judges for interpreting Romanian law), in decision no. 45/12.12.2016[79] (which is mandatory for all the Romanian courts), where it was declared that this procedural possibility of revisiting the final judgements must be recognized also in case of non-compliance with the interpretation of EU law given by the Court of Justice of the European Union after the moment of the delivery of the final judgement. Thus, in the Romanian legal system, the special revision procedure provided by Article 21 of the Law no. 554/2004 on administrative proceedings can be used not only to revise final judgments that are incompatible with the provisions of EU law (e.g. the EU Charter), but also to revise final judgments that are incompatible with the general principles of EU law and with the interpretations of EU law adopted by the Court of Justice of the European Union.

6 Conclusion

First of all, this study shows beyond doubt that the entry into force of the EU Charter as binding primary law did not influence, in a negative way, the existence and the validity of the EU's core values which were guaranteed as general principles of EU law long before the entry into force of the EU Charter. On the contrary, the general principles of EU law and the EU Charter of Fundamental Rights are coexisting, according to Article 6 TEU and according to the analyzed post-Lisbon CJEU case-law, in the complex system of the protection of fundamental rights of the European Union, as different sources of EU fundamental rights.

The most important consequence of this plurality of sources of fundamental rights at EU level, which are also binding at national level, under some conditions, is that the sources can be combined and invoked alternatively for a better protection of individuals - as general principles of EU law or as fundamental rights laid down by the EU Charter - in the context of judicial review in case of violation of EU fundamental rights, based on the particularities of the case.

Although the general rule regarding the application of EU fundamental rights to Member State action is that EU fundamental rights (regardless if they are guaranteed as general principles of EU law or by the EU Charter) are binding to all national authorities, institutions and bodies of the Member States when they are acting within the scope of EU law,[80] there are many differences and

78 Romanian Constitutional Court, decision no. 1609/09.12.2010, published in the Official Journal of Romania no. 70/27.01.2011.

79 Published in Official Journal of Romania no. 386/23.05.2017.

80 Terminology that must be understood in the light of Case C-617/10, Fransson, CJEU.

conditions that must be taken into consideration in determining when it is appropriate to claim in court EU fundamental rights as general principles of EU law and when it is appropriate to claim in court EU fundamental rights as primary law, laid down by EU Charter of Fundamental Rights. The EU fundamental rights and the differences between general principles of EU law and the EU Charter must be taken into consideration also by the national administrative bodies when they are issuing various administrative acts in the fields that are governed by EU law (competition, protection of environment, VAT, customs, consumer protection, public procurement, etc.), because if an administrative act is not compatible with EU law might be annulled in the judicial administrative proceedings.

The study shows also that EU fundamental rights, guaranteed as general principles of EU law or laid down by the EU Charter, are not just a list of values, but they are useful legal instruments that can be invoked as legal grounds in national courts when these EU fundamental rights are violated by national authorities.

The legal remedies that can be granted by the national courts in the context of the judicial review of the Member State action when violation of EU fundamental rights is invoked and it is ascertained by court can even lead to the annulment of the measures of the national authorities (regardless if they are guaranteed by general principles or by the EU Charter), under some conditions established by CJEU.[81] In this context, CJEU held, for example, that "according to EU law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different".[82]

The possibility to claim in court the violation of EU fundamental rights guaranteed as general principles of EU law or laid down by the EU Charter against the national authorities and to obtain an effective legal remedy for such violation (like the annulment of the administrative measure or compensatory damages) in the context of a fair judicial review, is guaranteed by another EU fundamental right laid down by Article 47 of the EU Charter - the right to an effective remedy and to a fair trial. Also, the right to an effective legal remedy in the context of judicial review in case of violation of EU fundamental rights by the national authorities derives from the principle of sincere cooperation[83] and from the principle of effectiveness of EU law.[84]

81 Case C-419/14, WebMindLicences, CJEU, para. 91. The condition mentioned by CJEU in this case made reference to the lack of basis of the administrative decision, as a result of disregarding the evidence that was obtained by the administrative authority with the violation of the right of defence.

82 Joined cases C129/13 and C130/13, Kamino International & Datema Hellmann, CJEU, paras. 78, 79, 80. See also, for the same reasoning, Case C301/87, France v Commission, para. 31; Case C288/96, Germany v Commission, para. 101; Case C141/08 P, Foshan Shunde Yongjian Housewares & Hardware v Council, para. 94.

83 Article 4 (3) TEU and Article 288 TFEU.

84 Case C298/16, Ispas, CJEU, para. 29.

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The *Ne Bis In Idem* Principle in Tax Law: European and Italian Frameworks

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ABSTRACT

In the national and supranational legal area, the need to address the *ne bis in idem* principle is justified by the growing interest aroused by the most recent pronouncements of the European Courts. The principle prohibits anyone who has already been acquitted or convicted in a previous trial from being tried again. Moreover, it has become a fundamental right enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. The interest in the issue also derives from the need to understand whether the approach of the Italian legal system – or any other similar national order – can be considered compliant with European tax law and case law, based on the definitions of criminal and tax offences. Thus, talking about a European legal space means rethinking the idea of punitive power in a dimension that tends to be 'solidarity-based'. The State can consider itself impervious to repressive demands from outside but is instead called to cooperate actively to safeguard its own guarantees. The traditional self-referential conception of criminal repression effectively summarised in the expression 'punitive sovereignty' gives way to an idea of jurisdiction that draws directly from the principle of mutual recognition. In this scenario, the profile of the protection of the individual from the risk of a duplication of the exercise of punitive power for the same fact in different states assumes the role of the first magnitude. Hence, there is a need to act on two levels at the same time: to seek solutions aimed at resolving possible conflicts of jurisdiction (prohibition of competing prosecutions for the same fact), and to attribute, within each Member State, preclusive effects to the previously judged foreigner (*ne bis in idem*).

Keywords: *European tax law and case law, fiscal administration, Italy, ne bis in idem principle*

JEL: K14, K34, K41

1 Introduction to the system

With the fall of the Berlin Wall, criminal law has ceased to be a pure state phenomenon. The collapse of the barriers that marked the division into blocks of the international community was indeed accompanied by a vast process of globalisation of the law, which affected the entire legal system, particularly the criminal law.

However, the process of globalization of criminal law has assumed distinctive traits, characterised by a marked asymmetry. On one hand, there has been a centralisation of criminal law. On the other hand, there is an opposing trend to limit this process, under the aegis of human rights.

Both these phenomena tend towards the principles of sovereignty, territoriality, and legality, which constitute the traditional triad of modern criminal law. Moreover, the crisis of state sovereignty reveals itself in the loss of absoluteness of national punitive power: la loi n'a plus tous les droits.

Nowadays, a complex net has replaced the traditional pyramidal structure of the sources of law. The national legislative monism ratified in the nineteenth-century codes is undermined by different types of normative acts: directives, regulations, framework decisions and community sources on one hand and international covenantal laws on the other hand.

In this historical, political and cultural context, the principle of *ne bis in idem* ceases to be a purely national phenomenon to become an international issue. It constitutes the epiphenomenon of a process that is characterized by the presence of two contradictory imperatives.

On one hand, the greater mobility of individuals and the rise of international crime, brought by the fall of many frontiers, has led the States to adopt extraterritorial criteria for the application of jurisdiction as well as to widen the scope of the criminal penalty.

On the other hand, the interdiction of both pursuits and penalties is justified by the need to respect the fundamental rights of individuals in the framework of national criminal policies, which are increasingly less impenetrable and conditioned by the demands of the international community.

The Latin phrase *ne bis in idem* means "not twice for the same thing". Therefore, no one can be tried more than once for the same fact. This principle has been known since the time of Roman law and it has been applied in all types of trials: civil, criminal and administrative ones. Contemporary, this principle represents one of the most evident indicators of an advanced stage of legal civilization.

The *ne bis in idem* principle provide that a person cannot be criminally prosecuted or punished twice for the same offense. That fundamental right is recognized both by the Charter of Fundamental Rights of the European Union (art. 50) and by the European Convention on Human Rights (Protocol No. 7,

art. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

2 Starting point

2.1 Theoretical background

This contribution finds its roots in very recent judgments of the ECtHR (e.g. first 15th November 2016, A and B v. Norway,[1] n. 24130/11 and 29758/11, and then, 18th May 2017, J. J. v. Iceland[2]). These sentences raised very important debates on the fiscal system and the relationship between the general values of the EU law and the national constitutional values.

Indeed, the Grande Chambre established that whether a final sentence has been issued against a defendant who has already been fined (with a surtax) by the tax administration, the penal trial does not violate the conventional principle of *ne bis in idem*. What is the *conditio sine qua non*? There must be a "sufficiently close connection in substance and time".

Moreover, in the Icelandic case, the ECtHR confirmed the same principle: it restated the necessity of executing the two proceedings (administrative and penal) at the same time to avoid a duplication of the investigation activity regarding the evidence collection. Thus, the same Court completely changed what was declared in this regard up to now, creating further confusion.

Before examining the above-mentioned cases, it may be worth spending a little time thinking about what is objectionable about Double Jeopardy in the context of tax cases. Article 4 of the Seventh Protocol of the ECtHR prohibits a person being "tried or punished again in criminal proceedings" for an offense for which he has already been finally acquitted or convicted. Thus, it covers both situations where an individual is punished twice and where the individual is tried twice (or is liable to be tried or punished twice).

In the tax context, it is not unusual for multiple consequences to flow from a taxpayer's failure to comply with tax laws: the individual will be liable to pay the additional tax, plus interest, plus administrative penalties (generally assessed by the tax authorities, but subject to review or appeal). More than one tax might be at issues, such as income tax, social security taxes, and VAT.

In an ideal world, a taxpayer would face a single set of proceedings with a cumulative outcome reflecting the severity of the taxpayer's conduct.

The General Advocate of the Court of Justice also pointed out that the *ne bis in idem* principle is an integral part of the primary law of the Union, and as such prevails over the national rules of the Member States.

Therefore, if the rules are incompatible with the universal right of the *ne bis in idem* principle, the national Court or the competent administrative authori-

1 ECtHR, *Grande Chambre*, 15 November 2016, *A e B. v. Norway*, App. n. 24130/11 and 29758/11.
2 ECtHR, Sec. I, 18 May 2017, *Jòhannesson and others v. Iceland,* App. n. 22007/11.

ties will have to file the pending proceedings, without negative consequences for the person who has already been prosecuted or sanctioned in another criminal or administrative proceeding.

Finally, on 20th March 2018, the CJEU filed three judgments relating to different facts but having the same subject - Cases C-524/15, C-537/16, C-596/16, C-597/16 - in which the Court has mostly confirmed the continuity of the duplication of proceedings envisaged by Italian law.

Based on those considerations, the statements of the Grande Chambre (regarding the Norway case) are likely to be relevant for all those Countries that have ratified the Seventh Protocol, in which tax matters can be part of criminal law and provide substantial administrative fines or surcharges.

3 Key issues and method

Efficiency, in the context of this work, is understood as the capacity of the internal criminal and administrative procedures to generate decisions containing a double penalty. It also seems necessary to follow up the questions below:

1. Compatibility between the Italian double track system and European conditions: a) What interpretation should be given to the *ne bis in idem* principle to ensure its correct application? b) What limits must be recognized (and respected) for the coexistence between the (European) *ne bis in idem* system and the (Italian) double-track penalty system? c) Can the Italian legal system comply with the requirements of the A and B v. Norway judgment?
2. What is the European action? Eliminate duplication in the same legal situation and excessive sacrifices, including in terms of the burden of proof. Therefore, according to the ECtHR, a considered circulation of data and evidence during the tax and criminal procedure phase could only be achieved through preventive cooperation between national and supranational authorities: a) Are National Authorities prepared to cooperate with European authorities?

First, it is useful and necessary to briefly describe the principle of *ne bis in idem* to better understand the birth of the double (European) track and the effect it has on the Italian system.

Clearly, in the latest years, the relationship between the national and supranational judges has become important, given the strong influence on the production and interpretation of the domestic law. Specifically, the fiscal matter always raised a discussion about the interpretation and application of the supranational law regarding the inviolable values of the Italian Constitution.

Indeed, the tax system has been ruled for a long time by the overlapping of the criminal and administrative penalty (i.e. double track) which was partially modified by article 19 of the legislative decree No. 74/2000.[3] The principle of

3 Legislative Decree no. 74 of 2000 concerns violations of income tax and VAT, with the exclusion of taxes of a different nature.

specialty, introduced by the Art.19, provides the choice of the special norm over the general norm, to avoid the duplication of the procedures and penalties. By doing so, the Italian legislator has overcome the antinomy between two different forms.[4]

Nowadays, after seventeen years, it seems that the double-jeopardy rule has never really disappeared, determining an obscure return to the past. Nevertheless, beyond the rise of relevant doubts on its rationality, the double-track system is in contrast with the principle of *ne bis in idem*, declared by both the art. 50 EUCFR and art. 4, Prot. n. 7, ECHR.

In its general structure, this decree has also taken a form typical of the techniques of international regulatory instruments. In fact, Title I consists of a single article containing the "definitions": the intent is to provide a synthetic perspective of the main legal concepts whose knowledge, on the one hand, represents an inescapable premise for the correct interpretation of the single incriminating provisions, on the other hand, allows to quickly detect the boundaries of concepts sometimes complex as they relate to substantive tax law.
The technical-legal instruments, through which the legislator intended to convey preventive and punitive responses appropriate to the consistency of the evasive phenomenon, represent an indispensable prerequisite of the above-mentioned regulations, contributing to determine the crisis of the 'double-track' tax sanctions.
These instruments can be identified in the first instance in Articles 19, 20 and 21 of Decree 74/2000.
Thus, the legislator perfected an overall system already outlined by Legislative Decree No. 472 of 18 December 1997, where a certain 'qualitative analogy' between administrative and criminal offence is highlighted and where the former is 'constructed' and regulated in its general connotations in substantially criminal terms (at least about the criteria of imputation and techniques of quantification of the sanction).

4 It should be pointed out, first of all, that the principle of speciality, to which Article 15 of the Criminal Code refers (with regard to the hypothesis of several criminal laws or several provisions of the same criminal law regulating "the same matter") on the one hand aims at implementing the principle of *ne bis in idem* and, on the other hand, serves to identify and regulate an apparent concurrence of incriminating rules which is opposed to the actual or real concurrence and the formal concurrence of the same. In fact, there is a uniqueness of crime, since the incriminating rule applicable in the specific case is the only one.
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In the second place, it is worth remembering that the same Article 19 is followed by Articles 20 and 21, which, together with the first, contribute to delineate the overall system in which the specialty criterion operates, with the specification of the concrete operative modalities of the same.
Article 20, in fact, provides that the administrative assessment procedure and the tax trial cannot be suspended due to the pending criminal proceedings concerning the same facts or facts on whose assessment the relative definition depends. In the same way, and pursuant to Articles 3 and 479 of the Criminal Code, the criminal trial cannot be suspended pending the definition of the tax trial, given the probative limits relative to this second trial.
Thus, the double-track system is composed of two main corollaries: on the one hand, the tax judgement has no effectiveness in the criminal trial, unlike what happened before the Legislative Decree No. 429 of 1982, when the rule of the 'tax preliminary ruling' was in force; on the other hand, and correlatively, not even the criminal judgement has effectiveness in the tax trial, even if the extra-penal ineffectiveness of the first seems to derive from Article 654 of the Criminal Code, in relation to the probative limitations to which the second trial is submitted.
With regard to Art. 21, the Legislator has evidently intended to make a balance between the application of the principle of specialty and the principle of the double track - as transposed by the previous Articles 19 and 20 - and the need not to determine an excessive expansion of the time of carrying out, in concrete terms, the administrative activity of ascertaining the tax evaded and of imposing the connected non-criminal sanctions.

Also, except in rare cases, the Court of Cassation does not agree with the ECtHR vision. Indeed, the Judges do not reveal a contrast among the principles cited above but do confirm the possible existence of a penal/administrative double track. In fact, with the legislative decree N. 158 of 2015, the Italian legislator did not feel the need – neither the duty – to offer a solution to the evident violation of the principle of *ne bis in idem*, as suggested by the ECtHR. On the other hand, the ECtHR has often declared the conventional illegitimacy of the penal/administrative double track, even if related to the punitive tax-related system of other States (as in the art. 4, Prot. n. 7, ECHR).

In this context, it appears relevant to mention the most important ECtHR case-law in the field of *ne bis in idem*, i.e. 8th June 1976 – Engel vs. the Netherlands, 10th February 2009 – Zolotukhin vs. Russia, 4th March 2014 – famous case of Grande Stevens vs. Italy, 27th November 2014 – Lucki Dev vs. Sweden, and 10th February 2015 – Kiiveri vs. Finland; CGUE: Akerberg Fransson vs. Sweden): these judgments are the basic guidelines for the ongoing debates.

4 Results

4.1 European and Italian point of view. Similarities and differences

The analysis of these European case-law has been relevant in this context because they entailed certain reflections on the Italian penalty system. Indeed, the remarkable jurisprudential and doctrinal debate on the *ne bis in idem* principle has finally reached the Constitutional Court, thanks to the Court of Monza.

The case concerned the owner of an individual company who was sanctioned in a final judgment first with an administrative penalty and then he was prosecuted in a criminal proceeding (for the same year and the same taxes) for the crime of omitted revenue declaration pursuant ex-art. 5 of the legislative decree No. 74 of 2000.

The judge of Monza, after having recalled the jurisprudence of the supranational Courts about matters regarding the *ne bis in idem* violation, turns to the Constitutional Court and he points out that the administrative penalties that were given in this case:

– They were criminal penalties;
– The historical fact at the base of the two proceedings was the same;
– On one hand, the Italian system provides a remedy to the double-track judicial system;
– On the other hand, the *ne bis in idem* principle, as required from the international jurisprudence, is not always guaranteed.

While the ECtHR had sometimes deemed compliant to art. 4, Prot. 7, ECHR, the Constitutional Court declares that the criterion of "sufficiently close con-

nection in substance and time" could not be viewed as a general principle since it had only been applied in specific cases. Thus, it recognizes the imperative nature of the conventional *ne bis in idem* and that its effects cannot be mediated by personal considerations of the national judges.[5]

Indeed, according to the constitutional judges, these criteria could be applied to the relationship between tax and criminal proceedings only if (as it is the case in Italian law) both the administrative and criminal judges are required to independently assess the facts. Therefore, the substantial and temporal relationship between the two proceedings would not be enough condition for the European case law, to effectively exclude the *ne bis in idem* principle.

However, with the Norway case, the Court of Strasbourg has embarked on a new development of the subject, trying to meet the interpretative difficulties created as a result of the strict interpretation of Art. 4, Prot. 7.

The Constitutional Court provides that the ECtHR (with the Norway case) recognizes that the principle of *ne bis in idem* principle ceases to act as an imperative rule, but its application is subordinated to the assessment by the judge about the existence of a "sufficiently close connection in substance and time" of the two proceedings.

In other words, it can be stated that we have moved from the prohibition imposed on the States to start two independent proceedings for the same unlawful act, to the faculty of coordinating, in time and substance, these procedures, so that they can be considered as a unique and adequate punitive answer.

In conclusion, the Court states that the new meaning of the law, introduced by the Norway case, involves the return of documents to the National Court to be assessed on the issue of constitutional legitimacy. In fact, if the national court considers that the criminal proceedings are connected, in substance and time, to the tax proceedings (so as not to constitute a conventional *ne bis in idem*) there would be no need to introduce any rule, which imposes not to proceed for the same fact.

5 Discussion and conclusion: what are the most appropriate solutions today?

For some years now, especially since the well-known Grande Stevens judgment of the ECtHR, the question of the possible violation of the principle of *ne bis in idem*, as conceived by national case law, has been raised in doctrine and jurisprudence based on the already mentioned rules contained in Art. 4, Prot. 7, ECHR and Art. 50 EUCFR. The problem relates to the compatibility of the dual-track system of sanctions with the transnational regulatory system as interpreted by the case-law of the EDU and the European Court of Justice. And - at least in the abstract - it affects, transversally, all tax crimes that punish

5 Italian Constitutional Court, 5 December 2018, sentence N. 48.

conduct substantially superimposable on those punished also at the administrative level.

The issue is of extreme importance, as demonstrated by the fact that - following numerous rulings by the Strasbourg and Luxembourg Courts (relating, in large part, to the subject of tax offenses) - it is precisely the Italian judges who have in recent years raised multiple preliminary questions (of interpretation before the European Court of Justice, and constitutional legitimacy).

The contrast derives in particular - and in a nutshell - from a series of principles, by now more than consolidated in transnational jurisprudence (but not yet fully transposed by Italian jurisprudence), through which the ECtHR and the European Court of Justice have reconstructed - in a binding way for national judges - the content of the *ne bis in idem*; content that, with all evidence, is decidedly wider than the restricted scope of criminal proceedings and, in particular for the Italian system, than the perimeter outlined by Article 649 of the Italian Criminal Code.

As repeatedly highlighted in the body of the contribution, the recent ruling of the Grand Chamber of the ECtHR (judgment of November 15, 2016) regarding the Norwegian tax penalty system has had a far from marginal - and in a restrictive sense - impact on the boundaries of *ne bis in idem*, significantly weakening the problem of compatibility between double track sanctions and prohibition of bis in idem.

Thus, this principle, originally confined within the narrow limits of a national-territorial dimension, has today become a fundamental right of the European citizen, deploying its effects in the territory of all the member states of the European Union. To the already mentioned prohibition of double proceedings for the same fact before the judicial authorities of the same State (so-called internal dimension) corresponds the prohibition of double proceedings for the same fact before the judicial authorities of different States (so-called transnational dimension), a sphere which is expressly contemplated in supranational sources.

The ECtHR and the European system, centred on the Charter of Fundamental Human Rights, seem to move in the same direction, although with the inevitable differences imposed by the different legal contexts in which the two Courts are located. Both impose a reflection on the domestic system focussed on the double track and on the principle of specialty, a system which - as interpreted by the Court of Cassation and, last but not least, as seen by the Constitutional Court itself - seems not entirely consistent with supranational approaches.

Rebus sic stantibus, from the analysis carried out so far, the situation of immobility appears rather evident.

On the one side, a jurisprudence too cautious and shrewd to affirm the superiority of the right to *ne bis in idem* on the internal sanctioning mechanisms; on the other side, an unarmed legislator, or rather, absent, who continues to

renounce to furnish answers and concrete solutions to the multiple problems of compatibility between the internal regulations and the aforementioned fundamental right[6] (Scaroina, 2015, pp. 2920–2921).

Also, the pronouncements of the internal Courts have not failed to underline the necessity of a legislative intervention on the subject, which would finally bring to a conclusion the much desired and spurred - and, at this point of the path, one could say almost utopian - overall reorganization of the relations between administrative and criminal offenses.

The Constitutional Court has chosen itself not to intervene through a strong solution (as could have been the declaration of constitutional illegitimacy of the double-track sanctions, as happened in France), thus turning off the last lights of hope turned on in doctrine (Fatta, 2017, p. 23).[7]

The legislator should undoubtedly have made a greater commitment to really protect, and not only through proclamations, the fundamental right to *ne bis in idem*.

At the same time, it cannot fail to take into account a necessary reflection, regarding problems which have repeatedly emerged of compatibility between the obligation to comply with the ECtHR and the legal tradition on which the national criminal law (first, and then the tax law) is based (Scaroina, 2015, p. 2922).[8] While waiting for the legislator to take action, the national judges could have derogated from one of the founding values of our democratic system (through recourse, for example, to an extensive interpretation of Art. 649 of the Criminal Code) in the perspective of the maximum guarantee of fundamental rights.

Among the thousands of doubts and uncertainties that still permeate the ground of the double track and its relations with the prohibition of bis in idem, all that remains is to identify the only solutions that seem to exist, in a hypothetical and (perhaps too much) optimistic perspective.

To achieve this possible 'way forward', it is considered necessary to briefly go over the different approaches put in place by the Constitutional Court, since they allow us to understand how the supranational norm affects the national one.

6 In which it considers that "the hermeneutic chaos that transpires from the decisions of national courts is first and foremost the child of the guilty absconding of the legislator, increasingly concerned to respond, invariably with the sole instrument of criminal sanction, to the changing and contingent security demands of the citizens, coagulating and at the same time interpreting the social consensus in an instrumental way and directing it towards more and more well-defined types of enemies".

7 Which had indeed hoped that the Consulta would take the opportunity (relating to the question raised by the Court of Monza) to intervene decisively as had been done by the Conseil Constitutionnel in France. The latter declared, in fact, the constitutional illegitimacy of the double track, "qualifying as disproportionate the combination of administrative and criminal penalties for the Declaration of Human and Individual Rights of 1789, which requires the legislature to provide only for penalties that were strictly and necessary".

8 Widely on the point Scaroina which highlights just how the principle of legality (present in the ECtHR as 'inviolable core right') is understood by the Strasbourg Court "in its more limited meaning of knowability and, above all, predictability of decisions, being instead (...) the reservation of law extraneous to the conventional legal tradition and the granitic coverage of art. 7".

First, to draw conclusions (and therefore to establish starting points) on the national tax system and the related problems discussed so far, it can be argued that:

– the formally administrative but essentially criminal sanction cannot be cumulated with the criminal sanction imposed for the crime envisaged concerning the same concrete fact;
– the relationship between the proceedings relating to the application of the first and the proceedings relating to the application of the second is regulated by their time scale, i.e. the rule of prevalence of the proceedings that end first in a sort of race against time applies: once one of the two proceedings has been defined, the other may not be initiated, and if it is pending it must in any case stop, without ever ending, let alone lead to the imposition on the same person of a second sanction that can be cumulated with the one already paid;
– the result is that the system outlined in Articles 19, 20 and 21 of Legislative Decree 74/2000, which focuses on the application of the principle of specialty, the double-track rule and the mechanism of linking the acts of definition of the proceedings that take place in administrative and criminal proceedings, is certain and manifestly incompatible with the Community regulations.

Now, the Constitutional Court has initially extended the scope of the rule - as provided for in the literal data - to make it applicable not only to the case of a sentence or criminal decree of conviction that has become definitive, but also to that in which a new criminal trial is brought against the person against whom another proceeding is simply pending. This shows that there are no reasons in principle to oppose an extensive reading of the code of conduct.

On the other hand, the Judge of Laws has provided some indications relevant to this reasoning, although in the context of a ruling of inadmissibility of the constitutionality questions raised by various referring judges. Inter alia, the Constitutional Court – called to intervene such as to declare the constitutional illegitimacy of Article 649 of the Criminal Code ("in so far as it does not provide for the applicability of the prohibition of a second trial to the case in which the defendant has been tried, by irrevocable measure, for the same fact, in an administrative procedure for the application of a sanction which must be recognized as criminal by the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols") – did not show a discouraging upstream attitude about this possibility. This is demonstrated by the fact that it has incidentally highlighted the existence of a 'structural violation' by the Italian legal system of the prohibition of *ne bis in idem*, at least in the area of sanctions relating to the financial market, already the subject of the Grande Stevens ruling.

At the same time, the Court was also unable to rule on several questions, based on the finding that the application was inadmissible, given the uncertainties expressed by the referring court itself.

In particular, in the judgment at issue, the referring Court maintains that "the acceptance of such a question would give rise to uncertainty as to the type of response to penalties - administrative or criminal - which the system relates to the occurrence of certain types of conduct, based on the random circumstance of the procedure defined more quickly".

It is therefore clear that the perplexities expressed therein do not seem insurmountable, so much so that it is reasonable to assume that, faced with a better formulated question, the Constitutional Court could in the future pronounce on the constitutional legitimacy of the Art. 649 of the Penal Code, as read in the European guidelines.

In fact, based on the above-mentioned statement, this situation[9] is precisely the one outlined by the sentence in a comment. Therefore, should this situation occur, far from raising doubts, it would be entirely consistent with the guidelines expressed by conventional jurisprudence. On the other hand, the possible violations of other constitutional regulations, to which the same order of remittance refers, do not seem to be acceptable, precisely in consideration of the essentially criminal nature of the tax sanctions.

Therefore, from the writer's point of view and in contrast with many opinions, the suitable solution to overcome the contraindications proposed in the tax sector can be found in the possibility of supporting the interpretative adaptation of the system based on Art. 649 c.p.p. to the guidelines manifested by the ECtHR, in such a way as to render our system conform to them without the need for positive interventions by the Legislator.

In this sense, although it is true that the Court of Cassation, in a similar case, considered the question of the constitutional legitimacy of Article 649, Code of Criminal Procedure (which had been requested based on the *ne bis in idem* provided for by the ECtHR) as unfounded, it is also true that this groundlessness was raised only for the acknowledged non-criminal nature of the sanction provided for by Article 649. The article 116, para. 8, letter a), Law no. 388 of 23 December 2000,[10] such as to exclude a conspiracy with the crime of failure to pay the social security withholding tax referred to in Article 2 of Law no. 638/1983. From such a perspective, it would be evident the reinforcement of the thesis that, by now, the conventional norm, as univocally interpreted by the ECtHR, constitutes the only reference parameter in the matter of *ne bis in idem*, to which the code forecast is obliged to adapt.

Again, in a more recent speech on the same issue, the Constitutional Court - although it has once again called on the legislature to regulate the issue directly to "remedy the frictions that the so-called double-track system generates between the national system and the ECtHR" - has enhanced the criteria

9 I.e. the situation in which the judge of the trial that starts second is obliged to stop in order not to violate the *ne bis in idem*

10 This provides that 'persons who fail to pay the contributions or premiums due to social security and welfare management within the prescribed period [...] shall [...] pay a civil penalty, yearly, equal to the official reference rate plus 5,5 points'.

developed by the A and B v. Norway judgment without, however, solving the sense just argued.

The Court reiterates that Article 649 of the Criminal Code "applies only to criminal matters in the proper sense" and maintains that "in the absence of a declaration of constitutional illegitimacy, the forecast code is not able to regulate the case in question". So, what consequences could this have? From writer's point of view, the reference to the criteria elaborated in A and B case would be valid, but only to the extent that they allow the combination of the two criminal and administrative sanctions. In the opposite hypothesis, i.e. where such a cumulation is contrary to the principle of *ne bis in idem* as elaborated by the ECtHR, then the reconstruction of the scope of the principle by the latter would not be able to comply with the internal provision and would, therefore, cease to be effective internally until the legislator or the Constitutional Court itself intervenes, alternatively, with a declaration of constitutional illegitimacy of the code.

Secondly - looking at the repercussions (and trying to imagine the ones that will still exist) that, on such proceedings, the judgment of the ECtHR has brought - in the opinion of the writer, it seems necessary to point out that all the reasoning developed by the Grand Chamber, in support of the assertion that in the present case there is no violation of Art. 4, Prot. 7, moves from the preliminary consideration that the principle of *ne bis in idem* does not exclude, a priori (and subject to compliance with certain conditions), that individual States adopt regulatory systems characterized by a double track of sanctions (administrative and criminal).

As is sufficiently clear from the judgment in question, however, this regulatory option can be compatible with the *ne bis in idem* principle only and exclusively when there is - first and foremost - a prerequisite: in the system taken into consideration, the two sanctions (criminal and administrative) must pursue different and complementary purposes and - in particular - the criminal sanction must be provided, alongside the administrative one, for the punishment of acts of tax evasion that do not end with the mere non-payment of the tax but are instead connoted by an additional component and, specifically, by fraudulent conduct.

In other words, the first requirement that the ECtHR requires in order to exclude a breach of Art. 4, Prot. 7, ECHR is that, as in the case of the two Norwegian citizens, the celebration of a dual procedure for the same fact is derived from the need to prosecute the taxpayer, also in criminal (and not only administrative) proceedings, concerning the fraudulent conduct that the taxpayer has committed, which is an additional element to the non-payment of the tax.

It seems, in short, untenable an interpretation which, while admitting the lack of difference between a formally criminal sanction and a sanction (otherwise called) - which, however, has the substance of the latter - and while recognizing the pervasiveness of the supranational jurisprudence which has founded such an assimilation, stops in the face of the literal tenor of the internal disposition and from this, gives rise to the need for intervention by the legislator or a

demolition ruling by the Constitutional Court. If the ECtHR itself has conclude that the 'living law' referred to above has shaped the letter of Art. 4, Prot. 7, ECHR, an identical effect must also be possible about the internal provision.

On closer inspection, moreover, in other contexts our Supreme Court has not hesitated to admit such an interpretation, arguing that the domestic court must interpret the domestic norm following the ECtHR 'as it lives in the case-law of the European Court'.

On the other hand, different reasoning would lead to giving the individual states party to the EDU Convention considerable discretion in grading the applicative effects of the conventional rules shaped by supranational jurisprudence. Such a possibility would, of course, be incompatible with the objectives of the Convention itself and, on the contrary, would run counter to the uniform function attributed to the latter.

It would justify, in other words, a 'leopard's eye' application of the principles developed by the ECtHR, now admitting their influence on the interpretation of the domestic provision (as concerning the rules of due process under Article 6, ECHR), now denying it as in the present case.

While being aware, to date, of the rejection by the Italian Constitutional Court and the Italian Supreme Court itself, from the writer's point of view the solution just proposed would have the merit of guaranteeing the conformity of our system to conventional obligations in an automatic way, without mediation by internal bodies, with the related expansion of time.

In this sense, such an approach would also be consistent with the requests coming from the neighbouring area of European Union law - in which it has been argued that the prohibition of *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union - is also valid concerning the sanctions formally called tax sanctions but which are endowed in substance with such a function as to assimilate them to criminal ones.

There is no doubt that even in the European context, as has been pointed out repeatedly in this contribution, there is no lack of ambiguity. In fact, contradicting the Advocate General's requests in the Menci case the European Court of Justice has recently admitted the cumulation of criminal and administrative sanctions for failure to pay withholding taxes (Article 10-bis of Legislative Decree 74/2000 and Article 13 of Legislative Decree 471/1997), limiting itself to stating that it is legitimate to the extent that there is "coordination aimed at reducing to what is strictly necessary the additional burden that such cumulation entails for the parties concerned".

Such a move is in the wake of the prudential approach - which is also reflected in the A and B judgment, which after the very clear positions taken in the first judgments - softens the absoluteness of the *ne bis in idem* principle since it is more likely to come under political pressure from the Member States. Compared to the context outlined by the ECtHR, the position of the Court

of Justice is less clear, justifying the view of those who see a disconnection between the case-law of the former and the latter.

However, the Menci judgment, in admitting the cumulation of penalties which it considers to be consistent with the Union's objective of effectively combating VAT evasion and fraud, seems to suggest an approach not unlike that of the A and B v. Norway judgment, the results of which are expressly referred to by the Luxembourg courts. It is stated that, in the meantime, an accumulation of sanctions conforms with Article 50 EUCFR, where not only does the overall severity of the sanction not exceed a limit of severity commensurate with the seriousness of the offense, but also where there is effective coordination between the two proceedings, in terms of both the functions pursued and the procedural burden.

Again, as pointed out above, the discrepancy between the jurisprudence of the ECtHR and the European Court of Justice has been particularly evident in terms of the principle of homogeneity. The approach of the Court of Luxembourg to the Art. 52(3) is useful to highlight that, in the Åkerberg case, the Court kept silent on the case-law of the ECtHR and, implicitly, invoked the application of Engel's criteria, and then placed the matter in the hands of the national court to determine the criminal nature (or otherwise) of the surcharge. On closer inspection, it never specified that these criteria were developed in the case-law of the Court of Luxembourg itself, but it directly mentioned the Bonda case, which expressly refers to the case-law of the Court of Strasbourg and the Engel criteria. The case was received by the Court in 2010, which means that, following the entry into force of the Charter and because of Poland's opt-out protocol, the Charter was not invoked.

The fact that the European Court of Justice did not mention the case-law of the ECtHR in the Åkerberg case gave rise to different views on its actual intentions. On the one hand, it was argued that the Court wanted to give a specific - more limited - meaning to the homogeneity clause in Article 52(3) of the Charter, thus avoiding mentioning the Convention. On the other hand, it was also argued that the Åkerberg case "skilfully and indirectly aligns the criteria of the European Court of Human Rights for determining a criminal charge with those of the Charter" and that "the Charter has reinforced the impact of the ECtHR". The latter opinion seems to be more appropriate and in line with the judgment since, while only citing the Bonda case, the Strasbourg Court indirectly referred to the ECtHR in the Engel case.

It would seem, therefore, that from the conclusions of the Åkerberg case the alignment of the European Court of Justice with the view of the ECtHR is inferred, which would lead one to think that the European Court of Justice has never directly addressed the issue of Art. 52(3) in the Åkerberg case, but has indirectly used the Engel criteria.

The assertion made by some professors (Groussot–Ericsson, 2016, p. 73; Lock, 2009, pp. 383-384) that the Court in Luxembourg decided to adopt a 'minimalist interpretation' of Art. 52(3) in the Åkerberg case seems correct.

This means that to maintain a certain distance from the ECtHR, the CJEU did not explicitly address its case law or any other issue related to the Convention but preferred to adopt the Engel criteria silently, making sure, more than anything else, that the focus was entirely on the Charter and issues concerning the legal order of the European Union and not on possible disconnections between the Courts since the ultimate aim is and must always be the correct application of the rule.

All that has been stated so far, highlights, even more, that the acceptance of the solution proposed therein would be the easiest - and at the same timeless traumatic - way to avoid the protection gap that, rebus sic stantibus, our sanctioning system creates against a taxpayer who is the author of a tax illegal conduct. It would take the issue away from the inevitable long timescale of the legislator's action (which has been required for years) and, at the same time, would not require a demolition intervention by the Constitutional Court.

Ultimately, it is a matter of taking note of the fact that supranational bodies have determined - in this as in many other areas - a profound modification of concepts and institutions proper to national systems, so much to make it more than necessary to re-read the internal rules based on the (now increasingly urgent) requirements that living law, not only national but also supranational, suggests.

Perhaps, even, in this case, a more intense and fruitful dialogue between our Supreme Courts and supranational jurisdictions - which has already proved effective regarding the well-known Taricco case - would make it possible to prevent misunderstandings and would open the way to forms of interpretation of internal norms in a systematic key about the complex of supranational principles and values that now permeate, and in some way dutifully define the national order.

As argued since the beginning of this contribution, "*rien n'est une excuse pour agir contre ses principes*".[11] There are superior rules whose respect is essential to safeguard the interests of all. Rules which, if violated, would undermine even more the current social landscape, since their violation would necessarily bring harmful consequences for citizens. Rules without which the foundations of today's society would fail.

The *ne bis in idem* principle is an undoubtedly part of these rules and that is why, at this moment in history more than ever, a firm point must be made.

11 Mention of *Madame de Staël* (Anne-Louise Germaine Necker), *Considération sur la Révolution française* (posthume, 1818).

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Understanding Differences between Equal Public Governance Models

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ABSTRACT

Public administrations try to address changes in societies with various styles through various reforms based on different governance models, which are frequently transformed into domestic frames regardless of local specifics. The need for a tool with which the ideal types of governance models could be accommodated with national goals is, in times of increasing complexity, more and more relevant. As data as such are produced through numerous predispositions, the article proposes Ashby's variety to capture the latter, through which it is possible to get closer to a successful administration of goals. On the other hand, Douglas's grid and group model, Miles et al.'s organisational strategy, structure and process, and Hofstede's cultural dimensions are used for the identification of needs. Even though public bodies are aware of the impact that culture/values has/have on models of public administration, countries base their decisions on it/them only indirectly. This article emphasises that certain values should be directly included in the governance models in accordance with their cultural backgrounds. The latter are always present in decisions' predispositions (from which decisions obtain their frames and weights), and a successful administrator should not disregard them.

Keywords: *public governance models, cultural dimensions, public administration, reforms, side effects, univergency*

JEL: K29

1 Introduction

Models are simplifications of the real world. Even when the same or similar styles of governance models, competences, legal rules or other arrangements in different legal systems are used, different results would still emerge. This can be seen e.g. in the EU member states' results using the *same* EU regulations. A gist is hence to know how a specific administrative tradition could be

compatible not only with a specific governance model and the global, international or the EU's performance imperatives, but also with national (cultural) differences that serve as the formers' predispositions. Decisions' adverse effects could cause a pessimistic stance, but this could be improved if decisions' predispositions and/or their common denominators are known. Each governance model is also based on legal principles (e.g. Weberian on the rule of law, governance on transparency) that are not only the universal element of law, but also (in)directly express the basic cultural standpoints of society. These conditions predispose individual actions and describe the so-called Zimbardo's Situation: 'the bigger power for creating evil out of good [is] that of the System, the complex of powerful forces that create the Situation. A large body of evidence in social psychology supports the concept that situational power triumphs over individual power in given contexts' (Zimbardo, 2008, p. x). The core of culture 'is formed by values as broad tendencies to prefer certain states of affairs over others. They deal with pairings such as…following: evil versus good, dirty versus clean' (Hofstede et al., 2010, p. 9) etc. Values can serve as "normative patterns" through which norms are legitimised (Parsons, 1985). Works in this domain are focused on the relation between the values and electoral institutions (Katz, 1997), the values and economic (Ben-Ner and Putterman, 1998), on values that produce institutions and social norms (Argandona, 1991), on democratic values and institutions (Besley and Persson, 2019), values and accountability (Pečarič, 2018b) and legal principles as extrapolated reality (Pečarič, 2018a). Based on the mentioned connection between the governance models and legal principles, a research question is:

RQ1: If countries want to minimise the side effects of their decisions/models, should they consider their dependencies based on their (cultural) predispositions?

As the science of public administration (PA) is built on general factors (the same as legal principles) that transcend national borders, this paper claims different practices or path dependencies of PAs can be reconciled with a new approach, here-called "univergent". This approach acknowledges *universal* platforms and differences at the same time (like the EU's motto "united in *diversity*" or the concept of universal service in regulated industries). The univergent approach is based on "universal diversity", i.e. the approach that recognises the known general elements of PA (e.g. centralisation, decentralisation, hierarchy, subsidiarity; in the legal side of PA it is present in the legal principles of administrative law), but also perceive differences that emerge by applying these general elements through (national/local) *values*. In the last decade of the 20th century OECD claimed (in the instrumental manner) that basic PA values are shared between the EU member states and the EU candidate countries with the notion of "the European Administrative Space" (1999), while to the European Commission (in the semi non-instrumentalist manner) 'distinguishing principles as durable values is less important than ensuring the set of values governing public behaviour is clear and widely shared' (2015, p. 17). The promotion of values by their enumeration and descriptions as the principles of good governance is not enough, because values emerge only within

specific contexts, and in connection with specific actions. The latter in time transform external motions into intrinsic desirability as they become embedded in culture. Values from one country do not automatically work under different circumstances in another, and the same – based on different countries' scorings on various indexes – stands for the well-known Weberian or other governance models. European Commission admits 'there is very little rigorous research how values become integrated and ingrained in the culture of public administrations' (European Commission, 2015, p. 23). At first it should be known how values evolve, (re)act and change their content in different surroundings and how they can be implemented in different countries. How values or models capture the environmental dynamism, how they react in a predicted manner? The implementation of formally equal values/principles in a different environment produces different results from the "ideal type" governance models. This gap can be partially filled with institutional actions that change social practices, provided that a model's value is known. Based on the above-mentioned ideas (of univergency, predispositions, values, actions and principles) related with the Ashby's requisite variety (1957), Douglas's grid and group cultural model (2012), Miles et al.'s (2003) adaptation cycle model, and Hofstede's cultural dimensions (2010) the hypothesis is:

H1: The institutional environment depends on the fit between strategies, tools and implementation processes, when they derive their meanings and understandings from the cultural-value background.

H1 will be tested to answer on RQ1. The global competitiveness and human development indexes of countries will be used for this; both indexes are put into a four-quadrant cultural model. H1 is based on the predisposition that countries, which embrace a model that incorporates values as decisions' predispositions, can achieve a better fit between strategies and processes. To support this, a method will be presented that can help us understand how ideas are gradually transformed into values. By using the country-specific findings each country could better choose which decisions and means could be the most appropriate for its cultural context. The proposed method can also explain how national (cultural) differences – that should be considered – can be considered/changed to be better aligned with the dynamic environment. By these steps, countries can be armed with new perspectives and possibilities to reach the same goals by more effective paths. Decisions in PA depend on time, place, resources, their implementations and other factors, while values as decisions' predispositions depend on practices as path dependencies. The latter also causes for discrepancy between our inner values and the outer formal law. These differences will be shown in the second section, and will in turn be used in the third to address variety to be able to address the cultural conceptions of values in public reforms in the fourth section. In the fifth, differences between conceptions and countries will be used to show a platform (made by four basic dimensions of human character or culture) that will serve as a standpoint from which PAs' reforms can be explained *de novo*. The same platform as a model of universal value spectrum that embraces differences as

its *conditio sine qua non* will also show implications for the PA's model in the sixth section, after which conclusion follows.

2 Every model of governance has its specifics

The example of New Public Management (NPM) is used here to show a discrepancy between the inner values and outer formal law. In the present time, when NPM's euphoria has subsided and increasingly resembles to other theories of PA that wanted to enhance the effectiveness and efficiency of PA. In Waldo's style decision-makers can ask "Efficiency for what" (1948)? If they want relevant answers, they should ask who, what, when, how and with what something should be done. Answers would probably be to some point different for each PA. For Ongaro 'the basic note [of public reforms] seems to be one of continuity: the public administration of the five countries under examination [Portugal, Greece, Spain, France and Italy] still displays many of the basic characteristics that could be found 30 or 40, or many more, years ago' (2010, p. 263). According to Pollit and Bouckaert (2011) from the late 1990s to 2010 there is '[n]o dominant model [of public management, but rather] several key concepts, including governance, networks, partnerships, "joining up", transparency, and trust' (2011, p. 11). There are many specifics in every country, and any kind of "good" ideas should be handled with care: 'far from being new-minded in the 1980s, most of the basic ideas about how to manage in government have a history…[so] we need to be wary of taken-for-granted assumptions about who is to count as a manager of public services, what management means, what "best practice" amounts to and who or what to blame when things go wrong' (Hood, 1998, p. 22). There is neither time nor space to further enumerate all authors that have elaborated the positive and negative effects of the PA reforms (Crozier, 1964; Merton, 1968; Simon, 1997), but they would probably agree that each administration has a positive potential *vis-à-vis* positive effects, which can become also negative.

Decision-makers should be aware on different contexts in which decisions/models are taken/used; solutions depend on numerous elements that include also the unknown, uncertain or probable, which might undermine desired results. Many times, partial successes are present with side effects produced. The principle of care cannot *per se* provide appropriate grounds for making decisions without taking differences into account. Despite numerous claims about inter- and multi-disciplinarity PAs need a wider perspective from which evaluation, balance or better explanation of intended actions can be understood. PAs have along the different characteristics and specifics also differences present in the apparently equal elements: what can be good somewhere can be bad in other place (one man's poison is another man's cure[1]). Nature is more complex than people; there is always more variety in the world than can ever be built into any kind of governance model. Yet we ought to be aware of what we can still do – unintended consequences or side effects

1 Variety or relativity is known for a long time: the Roman poet Lucretius coined the expression in the first century BC, "*quod ali cibus est aliis fuat acre venenum*" (what is food for one man may be bitter poison to other).

emerge due to non-understanding of variety, and to build a more relevant model of PA or to make an effective decision the understanding and administration of variety is required.

3 Variety

Ashby proposed variety as the measure for complexity in the 1950s. For him '[a]n essential feature of the good regulator is that it blocks the flow of variety from disturbances to essential variables' (Ashby, 1957, p. 201). If variety in outcomes is to be reduced to some assigned number, than a regulator's variety of tools *vis-à-vis* environment 'must be increased…to at least the appropriate minimum' (Ashby, 1957, p. 206). Only Variety can force down Variety and vice versa: *only variety can destroy variety*. Ashby's variety balances the system from a control standpoint between the regulator and the outer environment. A homeostatic loop of the regulator's amplifiers (from the regulator to the system) and filters (from the system to the regulator) is inserted to deal only with an interested part of the environment, because the latter is too complex to deal with it as a whole. Complex adaptive systems are the 'systems that involve many components that adapt or learn as they interact' (Holland, 2006, p. 1) have a characteristic element known as *emergence*: '[a]n emergent property is a global behaviour or structure which appears through interactions of a collection of elements, with no global controller responsible for the behaviour or organisation of these elements. The idea of emergence is not reducible to the properties of the elements' (Feltz et al., 2006, p. 241). With its regulatory and learning element it is no wonder why variety and complexity has attracted attention also of scholars, who tried to transfer complex systems theory to organisations and PA. Efforts include works of Senge (2010), Stacey (1992), Wheatley (Wheatley, 2006), Goldstein (1994), and others (Bovaird, 2008; Haynes, 2008; Klijn, 2008; Teisman and Klijn, 2008), but Rhodes and her colleagues (Eppel and Rhodes, 2018a, 2018b; Koliba et al., 2016; Rhodes, 2008; Rhodes et al., 2010; Rhodes and MacKechnie, 2003; Rhodes and Murray, 2007) conclude 'there has been little attention paid to how this research [on complexity theory] has translated into practice or into the teaching of public administration' (Eppel and Rhodes, 2018a, p. 1).

Complexity represents things with many parts that interact with each other in multiple relations, while variety is the measure for defining the number of those possible relations. Performance criteria – that are so emphasised in quality management – can be set only after we have identified goals and available tools as the amplifiers and filters (the non-identification of these tools could be fatal for many PAs). The larger the variety of actions controllers can have, the larger the variety of perturbations that must be compensated. There should be as many elements on the one side as there are on the other side, if one wants to establish variety in their relations (requisite variety).[2] Requisite variety is a tool that can give decision-makers the appropriate mo-

2 If it is almost self-evident that two sports teams should have a same number of players, this self-evidency is somehow lost in more important things...

dus operandi with which they can are closer to their goals; in order to deal effectively with diverse problems, there must be multiple responses that should be as nuanced as the problems at hand. This approach is *sine qua non* for managing variety, but it cannot give us an answer to *why* one alternative was chosen instead of another. Which decisions are chosen and implemented can depend on causes hidden in our cultural values as predispositions. As will be demonstrated in the next chapters, values are not only present in our decisions, but form a very influential part, although we are mostly unaware of this – pre-decisional – point.

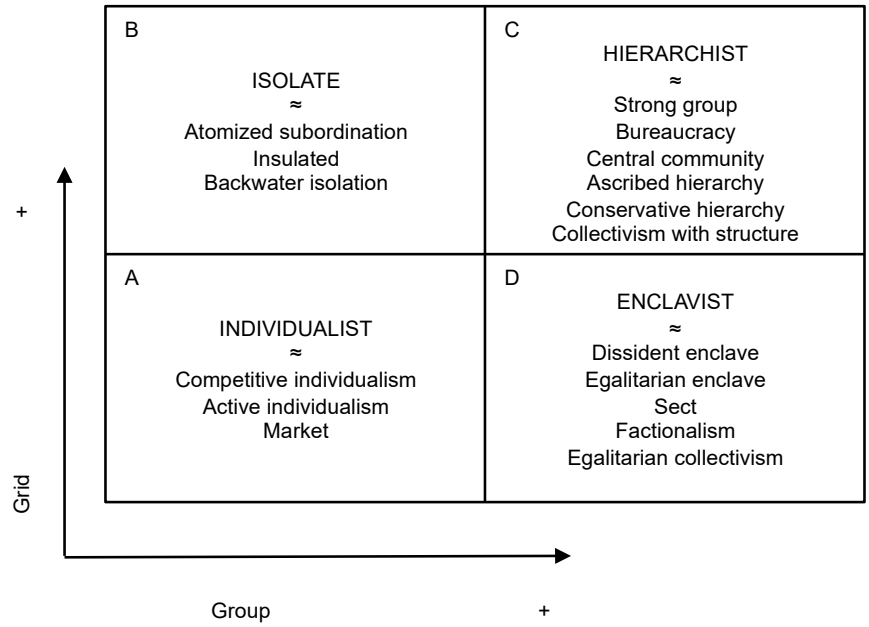
4 Cultural conceptions of values in public reforms

For Durkheim as the author of the concept of (mechanical and organic) solidarity, social solidarity is a moral phenomenon, which is not amenable to exact observation and measurement, so 'we must substitute this internal datum with a visible one, with the law' (1984, p. 24). Despite of differences between solidarity and law, they can be put into the same frame within one culture as their denominator. And Mary Douglas did precisely this: '[a]rguing from different premises, we can never improve our understanding unless we examine and reformulate our assumptions' (1986, p. 8), so any kind of decision can exist only when individuals have the common categories of thought. Both Durkheim and Douglas point to *public institutions* that primarily formulate assumptions for the public, and these assumptions are built into decisions. As public institutions are authority figures their decisions will be respected up to a certain point, but their decisions could be more effective, if they targeted our common assumptions. 'Ideas and values only become strongly entrenched when they are embedded in institutions' (Douglas, 2012), while the latter are embedded in a nation's culture. To cultural theory a boundary line between the legal and the non-legal is not self-evident, because it is *socially constructed*; classification is thus a creation of culture: '[t]he culturally learned intuitions guide our judgment for any of our fields of competence, [and] teach us enough probabilistic principles, but they are heavily culture bound' (Douglas, 1994, p. 57). Cultural theory can help us describe the complexity of modernisation because it shares a common denominator. The inherited ideas, beliefs, and values bind society together, and are also present in the public law; the latter more or less binds us to one another through the public interest and solidarity. The public opinion analysis or opinion should not be used only for the enhanced consultation and dialogue with citizens in search for higher legitimacy, but to gain insight into the people's motivations, feelings and reactions with regard to a particular topic. We will try to show how culture reflects our decisions and/or also the (un) successfulness of public reforms.

4.1 The grid and group cultural model

One of the well-known typologies for the distribution of values within a population is Douglas's grid and group analysis (Douglas, 1982, 2003, 2012);[3] it shows connections between the different kinds of social organisation and values that uphold them. Her model of the distribution of values gives – under the grid and group as the basic dimensions of sociality – a fourfold typology of solidarities or four ideal types of cultural bias: individualism, hierarchy, fatalism and egalitarianism:

Diagram 1: Some synonyms for the four quadrants of grid and group



Source: Fardon, 1999, p. 224.

Douglas's GGCT model was applied by Hood in the field of public management: 'a cultural-theory approach has much to offer to the art of the state as a framing approach for thinking creatively about available forms of organization and in exploring the variety of what-to-do ideas that will always surround public services and government' (1998, p. 241). To him '[t]here is no universal agreement on what counts as "problem" and what as "solution", or when the point is reached where the "solution" becomes worse than the "problem"' (1998, pp. 24–25). For the individualist good administration happens within the market and is driven by competition, for the hierarchist it is present in expertise and authority within government, for the egalitarian it can be achieved by consensus, while the fatalist (in isolation) does not even

3 The group dimension taps the extent to which 'the individual's life is absorbed in and sustained by group membership', while the grid dimension is characterised by 'an explicit set of institutionalised classifications that keeps individuals apart and regulates their interactions' (Douglas, 1982, pp. 202–203).

care for it and does not think about many unpredictable/side effects of planning, so s/he just goes with the flow. For Douglas, all cultures can be assessed and classified according to these ways of life, which constitute an exhaustive list of viable cultural possibilities. This however cannot yet provide sufficient grounds for understanding them; countries should know what values prevail within their borders to effectively apply reforms, and a warning should be made before transferring legal institutes from other countries that do not have the same values. Regulation places constraints on a specific nation's cultural platform, by providing (dis)incentives for human behaviour, markets and companies (Ashby's requisite variety is hence a method of operation to amplify or to filter, not a goal *per se*). We have to select the most appropriate regulative and economic tools (as amplifiers and filters) from those that are legally and materially available. Regulatory approaches require changes in behaviour by introducing negative/positive effects for those who do or do not comply with regulatory provisions. Only then can requisite variety achieve its goal. Douglas's GGCT model can be used for a better interpretation of a particular regulatory tool and its placement into a specific field within the square according to people's preferences. An analysis of people's preferences would give better opportunities to choose the most appropriate policies and their corresponding tools. An online voting platform for people to voice their opinions and choices by filling in questionnaires or surveys on political views or similar issues important to them could provide a better means of selecting the most appropriate regulatory tool. This could be implemented by IT and – as a matter of fact – it has been already done. We refer to Hofstede's cultural dimensions that will be presented in the subchapter 4.3.

4.2 Strategy, structure and process

Before we turn to Hofstede's dimensions we must mention another model that is similar to Douglas's GGCT model, namely the adaptive cycle model of Miles et al. (1978). Within this model there are three "problems" of organisational adaptation: the entrepreneurial problem (goal – strategy), the engineering problem (system – technology) and the administrative problem (structure – process). Performance depends on the adoption of strategies, systems and processes that are aligned with an organisation's environment. Organisations must employ strategies for solving problems according to essentially three strategic types of organisation: Defenders, Analysers and Prospectors,[4] while

4 1. Defenders are organizations which have narrow product-market domains. Top managers in this type of organization are highly expert in their organization's limited area of operation but do not tend to search outside their domain for new opportunities. These organizations seldom need to make major adjustments in their technology, structure, or methods of operation. Instead, they devote primary attention to improving the efficiency of their existing operations. 2. Prospectors are organizations which almost continually search for market opportunities, and they regularly experiment with potential responses to emerging environmental trends. However, because of their strong concern for product and market innovation, these organizations are usually not completely efficient. 3. Analysers are organizations which operate in two types of product-market domains, one relatively stable, the other changing. In their stable areas, these organizations operate routinely and efficiently through use of formalized structures and processes. In their more turbulent areas, top managers watch their competitors closely for new ideas, and then they rapidly adopt those which appear to be the most promising. 4. Reactors are organizations in which top managers frequently perceive change

the fourth, Reactor, is residual and occurs when a business lacks insight, or if it fails to take advantage of alignment opportunities afforded by the adaptive cycle. Andrews et al. (2012), based on the work of Miles and Snow (2003), focused on the impact of strategic management on the effectiveness of public services. They confirmed their hypotheses on structure and strategy content:

high performance appears to be more likely for public organizations that match their decision-making structure with their strategic stance. Defending organizations with a high degree of hierarchical authority and low staff involvement in decision-making, in particular, perform better, but prospecting organizations with high decision participation are also likely to do well. By contrast, hierarchy of authority and participation in decision-making make no difference to the performance of reacting organizations (Andrews et al., 2012, pp. 124–125).

They have statistically confirmed that the degree of both hierarchy of authority and participation in decision-making are unrelated to how well services perform, but on the other hand, strategies work better if they are aligned with the organisational structure: rational planning with hierarchy and centralisation (while centralisation is unrelated to performance with an absence of strategy), and logical incrementalism with decentralised responsibility. 'Reactors perform better only when they are subject to regulation that complements their existing strategic orientation' (2012, p. 145). 'Prospecting will improve performance if carried out in combination with a high level of decision participation…[while] organizations that adopt a defending strategy enhance their performance if they centralize authority and reduce decision participation' (2012, p. 122). Public managers should not seek the best strategy but ought to identify and accommodate the many contingencies that shape the success of different strategies: 'what counts is the combination of strategy with other influences on organizational outcomes' (2012, p. 150). If we want the right fit between the desired goals we should be aware of ways that form them. Miles and Snow are one step ahead of Douglas because they emphasise the right fit between strategy, system and process, and not just the strategic typologies. The latter can be aligned with Douglas's GGCT model in the

and uncertainty occurring in their organizational environments but are unable to respond effectively. Because this type of organization lacks a consistent strategy-structure relationship, it seldom makes adjustment of any sort until forced to do so by environmental pressures (R. Miles & Snow, 2003, p. 29)endlessly. But a few do stick, and this book is such a one. Organizational Strategy, Structure, and Process broke fresh ground in the understanding of strategy at a time when thinking about strategy was still in its early days, and it has not been displaced since.\"—David J. Hickson, Emeritus Professor of International Management & Organization, University of Bradford School of ManagementOriginally published in 1978, Organizational Strategy, Structure, and Process became an instant classic, as it bridged the formerly separate fields of strategic management and organizational behavior. In this Stanford Business Classics reissue, noted strategy scholar Donald Hambrick provides a new introduction that describes the book's contribution to the field of organization studies. Miles and Snow also contribute new introductory material to update the book's central concepts and themes.Organizational Strategy, Structure, and Process focuses on how organizations adapt to their environments. The book introduced a theoretical framework composed of a dynamic adaptive cycle and an empirically based strategy typology showing four different types of adaptation. This framework helped to define subsequent research by other scholars on important topics such as configurational analysis, organizational fit, strategic human resource management, and multifirm network organizations."

following way: Hierarchist – Defender; Individualist – Prospector; Enclavist – Analyser; Isolate – Reactor. This typology and Douglas's GGCT model will be now used in Hofstede's cultural dimensions.

4.3 Dimensions

Geert Hofstede has examined variations in values and organisational norms over three decades across fifty countries. A cultural perspective has quite a lot to do with public management reform because 'Hofstede's measures… reflect the broad cultural climates in which management reforms will have to be announced, interpreted, promoted, and resisted in each particular country' (Pollitt and Bouckaert, 2011, p. 64). In the style of cultural relativism, Hofstede et al. claim that '[w]e cannot change the way people in a country think, feel, and act by simply importing foreign institutions…Each country has to struggle through its own type of reforms, adapted to the software of its people's minds' (2010, p. 25). According to them there are six dimensions of culture that can be measured in relation to other cultures, but here we shall use only the 1st, 2nd and 4th dimension (because the 3rd, 5th, and 6th one [Femininity versus Masculinity, Long-term versus Short-term Orientation and Indulgence versus Restraint] cannot be connected with Douglas's GGCT model and Miles and Snow's strategic typologies – these will all later be put in the model of ranking values in cultural dimensions):

Power Distance is defined as "the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally" (ibid, p. 61). Collectivism versus Individualism: "individualism pertains to societies in which the ties between individuals are loose: everyone is expected to look after him or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onward are integrated into strong, cohesive in-groups, which throughout people's lifetime continue to protect them in exchange for unquestioning loyalty" (ibid, p. 92). Uncertainty Avoidance: "the extent to which the members of a culture feel threatened by ambiguous or unknown situations" (2010, p. 191).

If these dimensions and their specifics are applied to states' actions, differences between states can be seen or easily understood. The following sections of this paper attempt to do this: Hofstede's cultural dimensions can be at first compared with Douglas's GGC model (the latter is similar to Hofstede's collectivism versus power distance - first two dimensions). It is possible to compare them because they contain similar elements: power distance corresponds to grid, while individualism versus collectivism corresponds to group. Many countries that score high on the power distance index (PDI; the horizontal axis) score low on the individualism index (IDV; the vertical axis), and vice versa. They are either hierarchical or individualistic. Countries with low PDI and IDV are enclavist, and those with high PDI and IDV are isolative. While the first two fit very well into Hofstede's classification, the enclavist and isolative do not. It should be stressed that Douglas's model is an ideal type. It is a useful methodological device to begin the comparison of biases within related cultures

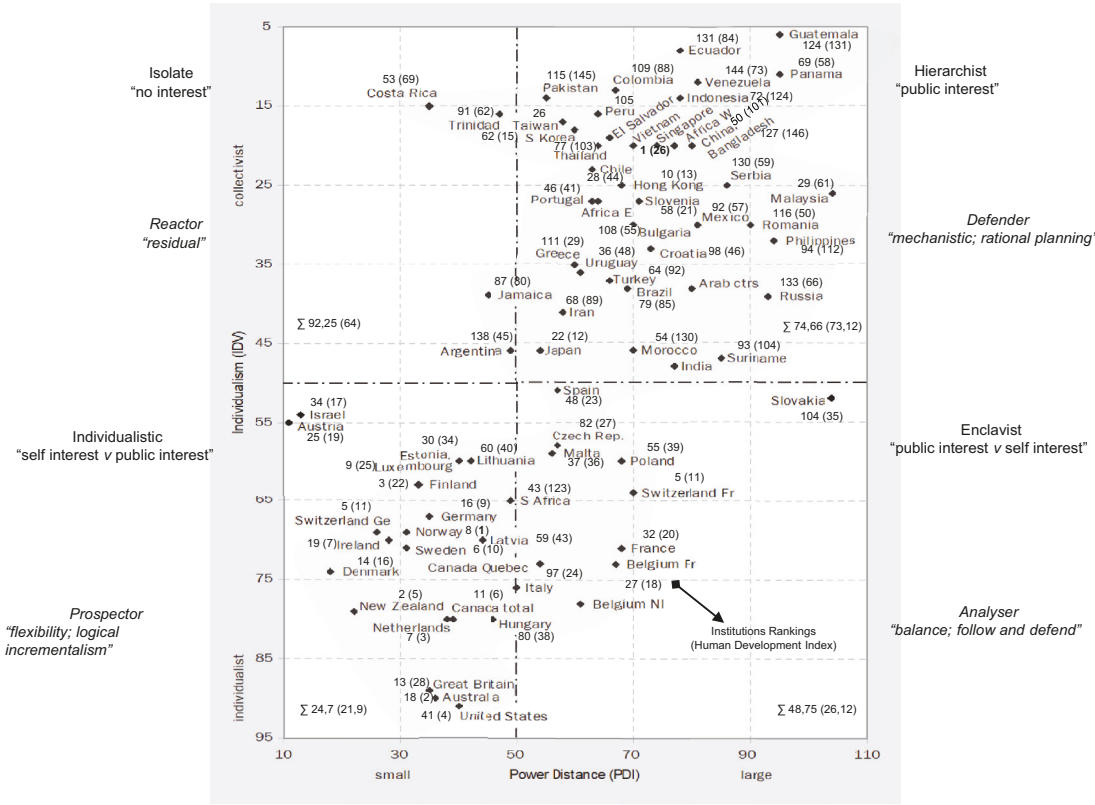
with; however, a social reality is more complex. Her description of the isolate and egalitarian positions can hold if we are within[5] a nation's culture, but if we compare cultures, then these positions exchange places: isolate becomes egalitarian and vice versa. Countries with a high grid value and a low group value are more consensus-oriented, egalitarian, there rankings and ordering are the usual ways of controlling the social impact, and they have (modest) citizen participation, problems of leadership, authority and decision making, whereas countries with a low grid value and a high group value (from their point of view) might be more influenced by randomness, isolation and dependence on other countries. This is more clearly presented in the following section.

5 Between conceptions and countries

The legal and administrative framework within which individuals, companies, and governments interact to achieve their goals determines an institutional environment, which is co-determined also by socio(cultural)-economic context. While the latter is mainly influenced by technology, place and time, the institutional environment depends on the fit between strategies, tools and procedures of implementation processes. We shall verify this by analysing the global competitiveness (because we are interested in PAs, we shall look at the elements of the quality of institutions and the quality of life) and human development indexes. Both indexes for specific countries are put into Hofstede's PDI v. IDV model (Figure 1). The numbers added into his model are the rankings of quality of institutions from The Global Competitiveness Report 2012-2013 (Schwab, 2012), and the numbers in the brackets are the Human Development Index 2011 rankings (2011):

5 The extreme top on the left side has strong grid controls, without any group membership to sustain individuals. Anyone who arrives here is a cultural isolate…as far as public policy is concerned. Isolates attract no attention; no one asks for their opinion or takes them seriously in argument. Hence their reputation of apathy (Douglas, 2012).

Figure 1: Power Distance versus Individualism[6]



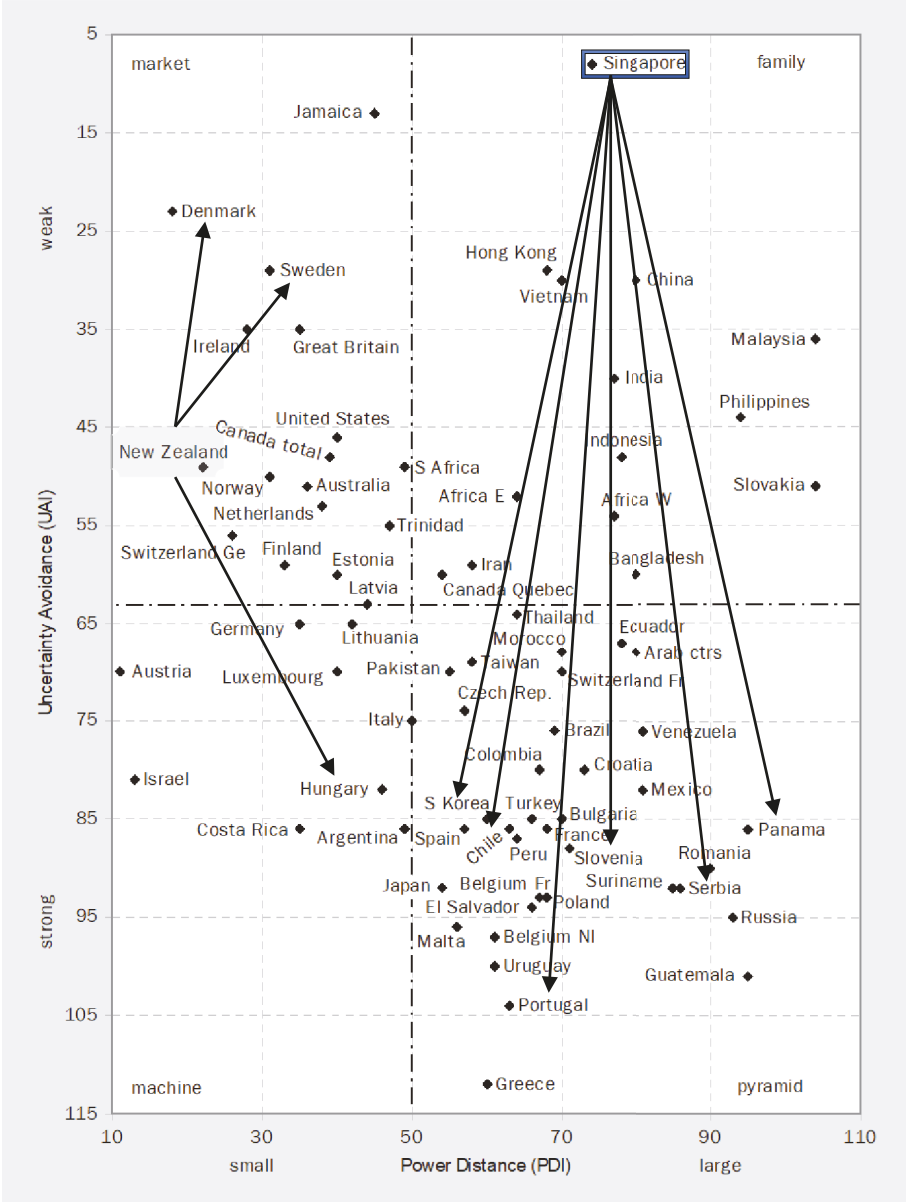
As can be seen in the Figure 1 the highest-ranking institutions and the highest quality of life can be found in the Prospector (Individualist) countries (e.g. Norway, New Zealand, the Netherlands), but also in the Defender (Hierarchist) countries (e.g. Singapore, Japan). While this confirms the analysis of Andrews et al. that neither centralised nor decentralised decision-making has an independent effect on the public service performance, the average number of countries in each quadrant confirms even more Miles and Snow's (2003) argument that an organisation's overall strategy must fit to its environment, organisation structures and management processes, whereas the entire organisation must continually adapt in order to maintain its fit over time. The top countries can be found in the lower quadrants and in the right upper quadrant, but the average numbers show that 1) the area of Prospector (∑ 24,7 [21,9]) is the most favourable place for institutions and in terms of the quality of life; 2) the area of Analyser (∑ 48,75 [26,12]) is in the middle of those countries where the quality of institutions drops faster than the quality of

6 The basic scheme is taken from Hofstede et al. (2010, p. 103). The following has been added to the original scheme: the quality of institutions and human development indices, a grey area indicating the dominant positions of countries between the PDI and IDV, and descriptions next to individual quadrants pointing out the prevailing ideas according to Douglas's GGCT model and Miles and Snow's model of adaptive cycle.

life; and 3) in the area of Defender (∑ 74,66 [73,12]) the quality of institutions is lower than that of Analyser and higher than that of Reactor (∑ 92,25 [64]), but the quality of life is the lowest. The distribution of countries in quadrants presented by the given averages (∑) shows that it is erroneous for governments to use the same approach and tools for different goals or even for the same goals in different times or places. The Defender (Hierarchist) countries can be as good as the Analyser (Enclavist) or Prospector (Individualist) ones, while all must take care of the right fit between goals, tools and processes. In large power distance countries, hierarchy causes a considerable dependence of subordinates on the rulers and rules or vice versa, on rational planning, centralisation and information channels. Defender should use Defender's tools and processes, Analyser and Prospector their own, while Reactor usually uses those of Defender. Collectivist countries should be careful when using individualistic methods for economic incentives, while individualistic countries could use collective methods mainly for the rule of law and the basic social welfare.

Figure 1 can also highlight a set of ideal types for managing performance. People always want to decrease uncertainty (a source of anxiety). As the laws and rules are among other methods (religion, culture, technology) most "convenient" for diminishing uncertainty, uncertainty avoidance can be presented to show differences between countries (Figure 2), foremost because of its similarity with the law, i.e. with legal certainty and legal expectations:

Figure 2: Power Distance versus Uncertainty Avoidance[7]



In the Figure 2, Singapore and New Zealand are the starting points, being the countries of the first and of the second rank in terms of the quality of institutions. The arrows point from these two countries to the countries that are in their neighbourhoods, while here are placed more apart due to the un-

7 The basic scheme is taken from Hofstede et al. (2010, p. 303). The arrows added to the original figure show how some countries that are close to each other in the PDI – IDV model are here separated.

certainty avoidance dimension. The countries that are within the quadrant of individualistic countries (with a low PDI and a high IDV) in the PDI – IDV model retained a more similar position than the countries with a high PDI and a low IDV. Due to the added uncertainty avoidance dimension, the countries with a high PDI and a high IDV are now more similar to some countries with a low IDV (Portugal, Slovenia, Serbia, S Korea and Chile[8] with France and Belgium). Although the last two states place high value on individualism, it seems that it is not as powerful as in the countries with the same degree of individualism but with a smaller PDI (otherwise the uncertainty avoidance value would be similar as for the first cited countries). According to the global competitiveness index, the inefficient government bureaucracy is among the most problematic factors for doing business (Schwab, 2012). The Power Distance versus Individualism and Power Distance versus Uncertainty Avoidance figures can give some explanation why the NPM's "euphoria" cannot bring good results for the NPM in the areas of Reactor, Defender or Analyser (from worse to less bad): countries in these areas have other backgrounds, and use different models for institutions and rules. Some of the NPM's ideas (e.g. "let the middle managers manage" and/or "slim down central civil service") are not as easily achieved in the countries with a high PDI and a high(er) IDV as they can be in those with a low PDI and a low(er) IDV.

6 Implications for the models of public administration

What can be recommended for PAs according to the applied method? Well, countries in the Prospector area (Individualist), with a high IDV and a low PDI (see the lower left quadrant in Figure 1), are on average the best for maintaining competitiveness and the quality of life – but only on average. Top countries in terms of these criteria are also found in the Analyser (Enclavist) and Defender (Hierarchist) areas, although they represent a minority among the countries of the same type. Creating a strategy with appropriate tools and processes is vital for the overall success. Introducing the NPM in hierarchical countries might cause side effects of the larger bureaucracy, more public servants, wastefulness, re-regulation, higher corruption[9] etc., because such countries are not accustomed to the decentralised methods of organisation and individualistic mentality; contrary, individualistic countries – to which the model of NPM is the most appropriate – should be cautious about introducing hierarchical elements because these diminish democracy and freedom, as well as enhance control and obedience. Those are all elements of centralised, Weberian organisations, which from the collectivist point of view are essential for good administration. People living in hierarchical countries do not view

8 These countries – if they want to reduce uncertainty – should model themselves more after the main features of public administration Singapore-style and transfer them according to their contexts. For the main features of the public administration in Singapore see (Quah, 2010). The above-mentioned countries should also reduce collectivist elements, which would bring them closer to France or Belgium.

9 From 2001 to 2011 the Corruption Perception Index mostly got worse for hierarchical countries: Slovenia (34–37), Croatia (47–62), Russia (79–133), Romania (69–66), Hong Kong (14–14), Brazil (46–69), Turkey (54–54), Greece (42–94), Thailand (61–88), Taiwan (27–37), Malaysia (36–54). Available at: http://www.transparency.org (accessed 20 December 2018).

their freedom as the people in the individualistic ones; they have a different perspective, so it is not useful to talk about less freedom from the individualistic point of view in hierarchical countries, just as it is useless to talk about the "selfish" individualistic mentality from the hierarchical point of view.

Exporting ideas or models of governance to other countries without regard to their respective contexts and values into which new ideas are transferred can have a limited success (although the transfer is well-intentioned); failures are then described as inefficiency, illegality, corruption etc. Every country has its own causes for a prevalence of specific values (they have proved successful during a country's history; they have stored information that is constantly transmitted into values). Values can be changed only gradually, and by small steps. Culture is influenced by our experiences not by our genes. A human power to move and change physical things is, or can be, used for the efficient control over our psychological elements, which we can influence indirectly through our activity:

Because we always have control over our component of behaviour, there are also simultaneously – if we significantly change our behaviour – changed components of thinking and feeling and our physiology. The more we actively engage in the active behaviour…the more we will also revise our thoughts, feelings, and listen to what our body tells us. If this gives us greater control, there will also be better feelings, more pleasant thoughts, and physical comfort (Glasser, 1994, p. 51).

Activities that cause failure or success are usually formed in a sequence; each level represents its distinct tendency, but together they form an interactive whole in which higher levels provide the context for the lower ones. The same stands for institutions and their models of governance. We should thus be attentive to new circumstances, to the "new rules of the game". The cumulative effects of these stages ultimately manifest themselves in a shift of paradigm, from "it has always been done this way" to "we are going to challenge our assumptions as often as we can". Unpredictability can be undermined by prediction and preparation. Multi-minded purposeful organisations are the basic requirement for all countries (i.e. with a high or a low PDI or IDV) to enable the amplifiers and filters (managing variety) to be formed at the right time and place. There is a constant need for better information in public administration, but apart from information a commitment to evaluate it – and to change our practices if this is necessary for better results – is also welcome. An answer to what is needed, urgent or what is better can be found only in the relative (higher or lower) importance of our goals that emanate from our values.

7 Conclusion

The science of PA can build its elements on predispositions that are different from the present ones. A country's cultural and socio-economic context can give more relevant predispositions (cultural dimensions) upon which deci-

sions and tools for their implementation should be made and/or operate in a certain country. Decision-makers should be aware of different cultural, social, economic and other countries' backgrounds, because they cause differences among countries. These differences as values should fit to strategies, tools and implementation processes: the better fit means the higher rank. H1 is thus confirmed and with this also the answer on RQ1: countries should consider relations between decisions and their cultural backgrounds. Good governance can be established in a frame of different values without affecting the idea of good governance itself. It is backgrounds that decide what will work and what will not – not in an absolute sense, but they can undermine otherwise well-intentioned plans. Cultural predispositions as the real purpose in action can be slowly changed by longevity, determination and modelling behaviour if appropriate strategies, tools and processes are used. The institutional environment depends on the fit between strategies, tools and implementation processes, while they all derive their meanings and understandings from the cultural-value background. Countries should consider dependencies between decisions and their (cultural) predispositions; the ranking of values in cultural dimensions can give us a better platform with which decisions can be customized to a country's specifics, while each country is on its own decisional path and actions. A general, nomothetic recipe cannot bring the same results in different countries. This paper emphasised the countries' inevitable differences and specifics that form their specific varieties. The latter can be tamed only with opposite varieties within the mix of organisational strategy, structure and process that corresponds to specific cultural dimensions. Reforms can be successful, not only if they include cultural dimensions, but primarily if they serve as the starting point of reforms. From these standpoints the value of governance models can be established for a specific country.

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Public Administration Reform in Bulgaria: Top-down and Externally-driven Approach

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ABSTRACT

The article examines public administration reform (PAR) in Bulgaria and the main factors that shaped the reform agenda and dynamics. PAR is examined along five key dimensions – transparency and accountability, civil service and human resources management (HRM), public service delivery and digitalisation, organisation and management of government, and policy-making coordination and implementation. The article argues that there are four main factors influencing reform dynamics and determining policy outcomes in the Bulgarian case: the specific political choices made by government elites, external influence of the EU and of past national legacies, and the importance of institutions and reform mechanisms. To illustrate these factors at work, the article examines three policy initiatives, i.e. e-government, the reduction of administrative burden, and civil service reform. The article presents a longitudinal analysis and a qualitative case-study approach, utilising Annual Reports on the Status of the Public Administration 2001–2018, mapping European Semester Documents 2011–2017, an inventory of PAR initiatives 2005–2018, and interviews of public officials. The pushes for reform have been top-down, externally-driven, and stop-and-go in nature. The results confirm previous findings that Bulgaria is among the EU countries with the poorest record in PAR, struggling to overcome communist legacies and high levels of corruption and politicisation. The Bulgarian case highlights several important lessons: the importance of political will and political dynamics for the outcome of reform efforts; the importance of external pressure and financing; the difficulty of uprooting long-standing legacies in administrative traditions; and the limitations of the top-down approach as an obstacle to the sustainability of reform efforts.

Keywords: public administration reform, Bulgaria, e-government, reduction of administrative burden, civil service

JEL: D73, H11, H83

1 Introduction

The article examines public administration reform (PAR) in Bulgaria and the main factors that shaped the reform agenda and dynamics. PAR is examined along five key dimensions – transparency and accountability, civil service and human resources management (HRM), service delivery and digitalization, organization and management of government, and policy-making coordination and implementation. The article argues that there are four main factors influencing reform dynamics and determining policy outcomes: 1) the specific political choices made by government elites; 2) the external influence and the role of the EU, 3) the persisting influence of past legacies, and 4) the importance of institutions and reform mechanism. To illustrate these factors at work, the article examines three policy initiatives – e-government, the reduction of administrative burden, and civil service reform. These initiatives are examined in terms of goals and content, reform outcomes, and lessons learned. They represent a continuum in terms of policy outcomes, with e-government being the most successful, civil service reform being the least successful, and reduction of administrative burden placed in the middle.

The article confirms previous findings that Bulgaria is among the EU countries with the poorest record in PAR and the highest need for improvement in public administration (Thijs et al., 2018, p. 58). The system has encountered great obstacles in overcoming communist legacies and combating high levels of corruption and politicization. The push for reform has been top-down, externally-driven and stop-and-go in nature, with a decreasing commitment on the part of government. The Bulgarian case highlights several important lessons: 1) the importance of political will and political dynamics for the outcome of reform efforts; 2) the importance of external pressure and financing; 3) the difficulty of uprooting long-standing legacies in administrative traditions; and 4) the limitations of the top-down approach which is an obstacle to the sustainability of reform efforts.

The article proceeds with an overview of theoretical approaches to PAR in CEE and an outline of the methodology. It then summarizes early reform efforts and outlines the five key priorities of PAR in Bulgaria (transparency and accountability, civil service and human resources management (HRM), service delivery and digitalization, organization and management of government, and policy-making coordination and implementation). It further examines the three case studies – e-government, reduction of administrative burden, and civil service. In conclusion, the article aims to tie the lessons learned from the Bulgarian case to the theoretical approaches applied to PAR in CEE and the broader theoretical and empirical significance of the Bulgarian case.

2 Theory and method

The study of PAR in Central and Eastern Europe (CEE) provides ample opportunities for gathering new empirical data, testing and expanding theoretical

knowledge, and enriching the comparative literature.[1] Several approaches have been applied in examining PAR in CEE in the past three decades. One such approach emphasizes the importance of Historical Institutionalism (HI) (Peters, 1999; Vachudova, 2007). As Meunier and McNamara explain, in their application of HI to European integration (2007, p. 4), institutions shape policy outcomes "rather than simply reflecting the distribution of political power and preferences….Once in place, [they] can take on a life of their own and contribute to determining and explaining subsequent developments." Despite significant differences, CEE countries all shared a common past under Communism, including Soviet-style administrative systems: highly centralized, with no clear separation between the party and the state apparatus, and with selection for management positions based on a *nomenklatura* system, which stressed ideological and political loyalty rather than merit (Meyer-Sahling and Veen, 2012). These common administrative traditions and legacies played an important role in shaping civil service reform in CEE (Camyar, 2010; Meyer-Sahling and Yesilkagit, 2011; Meyer-Sahling, 2009), because civil service systems were, in most cases, not created from a clean slate. Rather, they reflected an evolving baggage of norms and beliefs carried from the past that framed and guided future actions. In those cases, reform was slow and difficult because the behavior of civil servants and the newly created institutional mechanisms in CEE were influenced by what was inherited from the Soviet system (Meyer-Sahling and Yesilkagit, 2011; Baker, 2002).

A second, and closely related, concept for understanding the evolution of civil service systems is path dependency. As Järvalt and Randma-Liiv (2010) put it, "[o]nce a specific way for HRM development has been chosen (often on an emergency basis and with limited prior analysis), it is very hard to change it afterwards." CEE countries went through a rapid and to some extent chaotic transition, faced with making major changes in virtually all aspects of their political, economic. Initial decisions about the shape of the civil service were made hurriedly, not necessarily based on a rational analysis of a range of options. But once in place, they created institutions and individuals with vested interests in maintaining them, thus making drastic redirection very unlikely.

Elite studies and political choice further shed light on PAR dynamics. Elite fragmentation and political polarization often led to instability of reform policies. Coalitions and governments changed frequently, and, by the time a set of policy changes reached administrators, a new set of policy changes with drastic shift was put in place by a successor government and sent to administrators (Zankina, 2010). This manipulation of both policies and structures for political ends dampened the positive effects expected from the initial transition reforms (Frye, 2010).

1 This section draws on Ban, C., E. Zankina, and F. Yuldashev. (2012). After Conditionality: Progress or Backsliding in Civil Service Reform in the New Member States of the European Union? Paper presented at the 20th annual conference of NISPAcee (Network of Institutes and Schools of Public Administration in Central and Eastern Europe), Ohrid, North Macedonia, 23–26 May 2012.

A large body of literature examines the role of the EU and conditionality on administrative systems in CEE. The EU used conditionality as an incentive for CEE countries to conform to EU standards (Schimmelfennig and Sedelmeier, 2005). Compared to previous enlargements, EU conditionality for CEE countries was more comprehensive and required administrative capacity to absorb the *acquis* and to manage EU-supported projects. Not only were CEE countries required to improve the absorptive capacity of the key sectors such as trade, justice, etc., but they also had to meet conditions such as establishing an independent and professional civil service system as well as competition authorities and anti-discrimination commissions (Dimitrova, 2010; Verheijen and Kotchegura, 1999). The European Commission also created manuals that guided the creation of independent civil service systems in CEE countries, which called for civil servants to be recruited based on their professional qualifications and legally protected from politicians (Verheijen and Kotchegura, 1999). At the same time, civil service was not formally part of the *acquis*, and there was no single document with a standard model of civil service systems that candidate countries were required to adopt. Still, SIGMA's assessments of the state of their civil service systems were based on a common set of standards, and administrative capacity was sometimes mentioned in the EC's annual progress reports. What is particularly interesting about the SIGMA standards is that, while OECD as a whole was strongly supporting New Public Management models across European countries, including pay for performance and greater flexibility for managers, SIGMA was arguing quite the opposite for the new member states. As Meyer-Sahling (2011, p. 240) makes clear, the EU policy "reflects the assumption that the delegation of discretion to managers was not suitable for former communist countries. The legacy of over-politicization and the weakness of the rule of law meant that too early, too much new public management could be a risky choice, leading to unpredictability and even corruption." Thijs and Palaric further affirm that "[e]xperience in Europe in the past two decades shows different administrative reform paths and results, mainly due to different degrees of reform capacity, sustainability of reform approaches, coverage and a 'fitting context" (2018).

The conditionality approach would certainly lead one to believe that conditionality played a very large role in shaping administrative systems in CEE, yet its effect proved to be limited (Epstein and Jacoby, 2014) for several reasons. First, the process of compliance in this area was quite different from that required for policy areas contained in the *acquis*, which required the aspiring member states to revise their legal codes to harmonize with EU policies and even to put specific administrative structures in place to meet EU standards. The countries of Western Europe did not share a common approach to the structure of civil service, and so the EC relied on the rather vague concept of a European Administrative Space and of a series of standards used by SIGMA in assessing progress (Meyer-Sahling, 2011). Second, the EU based its assessments on formal legislative and institutional changes rather than full implementation, so that in this, as in other areas, such as anti-corruption efforts, reforms "often had merely declaratory character" (Szarek-Mason, 2010, p. 213). Third, by the time accession negotiations began, in many cases adminis-

trative systems were already in place and dramatic changes in direction were difficult. Lastly, external influence was at times chaotic, with CEE countries sometimes being overwhelmed by a surplus of sources of aid and advice, which were sometimes actively competing with each other and sometimes advocating standard models without much understanding of the specific environment (Ban and Huddleston, 1999). Randma-Liiv (2005) provides a clear sense of the dimensions of such aid in Estonia, listing aid coming from multinational organizations (including the EU and UNDP) as well as a total of 11 bilateral donors.

Scholarship has also focused on post-conditionality and the likelihood of continued progress in civil service reform in CEE. Some scholars expressed concerns about backsliding in the implementation of professional civil service systems after accession and the absence of post-enlargement leverage (Dimitrova, 2010; Epstein and Sedelmeier, 2008; Meyer-Sahling, 2011; Sedelmeier, 2008; World Bank, 2006).

In attempt to answer the main research question, namely what are the key factors shaping PAR in Bulgaria, this article draws on these various theoretical approaches. As Nakrošis argues, administrative reforms in the various CEE countries are the result of complex and dynamic relationships among various factors and, "[d]epending on specific combinations of these factors, countries exhibit a variety of reform trajectories" (2017). I similarly argue that PAR in Bulgaria was influenced by a variety of factors, including past legacies, external influences, specific political choices and institutional mechanisms. Some of those factors were already proved significant in a large comparative study by Kostadinova and Neshkova (2013). What is unique about this study is that it provides a longitudinal analysis utilizing a large amount of qualitative data and providing three detailed case studies to illustrate reform dynamics and outcomes, as well as the interplay of these four main factors. The article builds on research conducted for the EUPACK-Project[2] – the largest, thus far, initiative to systematically examine and document PAR in all EU28 countries. The article utilizes analysis of the Annual Reports on the Status of the Public Administration 2001-2018, mapping and analysis of European Semester Documents 2011-2017, an inventory of PAR initiatives 2005-2018, and interviews of public officials.[3] Although all of these documents are publicly available, they have not thus far been examined systematically and combined together to assess PAR in Bulgaria. Qualitative in nature, the article allows us to examine reform priorities, dynamics, and outcomes in the course of two decades and to draw lessons that can be useful beyond the Bulgarian case. Moreover, the article enriches our theoretical and empirical knowledge on PAR in CEE and contributes to an ever growing literature of PAR in the region and in the wider European context.

2 Contract VC/2016/0492 "*Support for developing better country knowledge on public administration and institutional capacity building"*, by the consortium of: The European Institute of Public Administration (The Netherlands), *Nick Thijs - project leader*; Hertie School of Governance (Germany), *Gerhard Hammerschmid – policy expert*; Ramboll Management Consulting (Denmark), *Karin Attström – Monitoring & Evaluation Expert*. The author was the country expert on Bulgaria

3 All interviewees gave permission to be identified and quoted.

3 Overview of early reform efforts

According to a recent comparative study, Bulgaria is among the EU countries with the highest need for improvement in public administration (Thijs et al., 2018, p. 58). Bulgaria remained under the Cooperation and Verification Mechanism (CVM) for over twelve years after accession. Although the most recent report (European Commission, 2019), finds significant improvement in all recommendations related to public administration, including the role of internal inspectorates, public procurement procedures, and mechanisms for dealing both with high-level and petty corruption in the public sector, and the Commission suggested terminating the CVM mechanism for Bulgaria, it clearly outlined the need for continued improvement and monitoring both internally and externally.[4]

The Bulgarian public administration is characterized as belonging to the East European tradition (Kullmann and Wollmann, 2014), the South-Eastern tradition (Demmke and Moilanen, 2010) and the Balkan tradition (Eurostat Academic Study, 2010). These various classifications emphasize two main features of the Bulgarian public sector – its Ottoman legacy that translates into inefficiency and a high level of corruption, and its communist legacy that translates into highly centralized system, strong control of the former *nomenklatura*, and a great degree of politicization (Zankina, 2018, p. 82). These administrative traditions and legacies played an important role in shaping public administration reform (Camyar, 2010; Meyer-Sahling and Yesilkagit, 2011; Meyer-Sahling, 2009), as new systems were influenced by the Soviet system (Meyer-Sahling and Yesilkagit, 2011; Baker, 2002).

Political instability and economic downturn during the early transition period pushed back reform of the public administration in the list of priorities not only in Bulgaria, but in several post-communist countries, leaving administrative systems largely intact (Baker, 1994). Administrative reform was closely linked to success in the democratic and economic transition. Thus, countries where opposition forces managed to oust former communist leaders and implement reform programs early on, also had a greater chance in reforming their public administrations (Meyer-Sahling, 2004).

In Bulgaria, the strong political position of the former communist party hindered impetus for reform, as party cadres and the *nomenklatura* coalesced in attempt to "survive" under the new conditions (Verheijen, 1999, p. 96). Little progress was made in the early years of the transition and PAR did not become a priority until the late 1990's when a severe financial and banking crisis toppled the socialist government and a new government of the United Democratic Forces (UnDF) came to power in 1997, completely reorienting the country towards the Euro-Atlantic structures. Desire to join the EU and NATO became the main driver behind reform of the public administration (Ellison, 2007, p. 227). Following the EU SIGMA guidelines for reform of the public

4 European Commission (2018), "Report from the Commission to the European Parliament and Council on Progress in Bulgaria under the Cooperation and Verification Mechanism", Available at: https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-com-2018-850_en.pdf.

administration, the UnDF government developed a Strategy for the Modernization of Public Administration (1998), set up a Ministry of Public Administration and adopted the State Administrative Law in 1998 and the Law on Civil Service in 1999. By 2000, the Institute for Public Administration and European Integration (IPAEI) and the Council for Coordinating the Implementation of Integrated Administrative Service were established. The subsequent government of Simeon Saxecoburggotski and his party the National Movement Simeon II (NDSV) continued with reform efforts putting emphasis on civil service training, performance evaluation, service delivery and one-stop shops, and e-government. A major milestone were the Public Procurement Law adopted and the Law for Limiting Administrative Regulation and Administrative Control of Economic Activity. These developments were in sharp contrast to the previous lack of reform and were positively noted by the EU commission. Consequently, Bulgaria was invited to sign the EU accession agreement in 2004, with an accession date of January 2007. EU conditionality and the ability of the EU to tie both membership and funding to the success (or failure) of reform efforts served as key drivers. Overall, the pre-accession process had a very positive effect on the professionalization of the civil service, since the public administration was heavily involved in the pre-accession phase and increasingly responsible for priority setting (Borissova, 1999, p. 3). Interviews with public officials indicate this was the most exciting time in their career as they had the ability to learn best practices from their European counterparts and actively participate in the transposition of EU laws and the establishment of new structures (Ban et al., 2012).

While the UnDF (1997-2001) and NDSV (2001-2005) governments were instrumental in setting the foundations of public administration reform, subsequent governments proved far less committed to continuing reform efforts. As stated in the Excellence in Public Administration Report (Pitlik et al., 2012), "Bulgaria performs significantly below the EU-average as measured by the World Bank's government effectiveness indicator, which provides an assessment of the quality of public administration in a broad sense. Hence, perceptions of the quality of public services, the quality of policy formulation, the implementation of policy and the credibility of public servants' commitment to such policies are considerably worse than the EU-average. In addition, Bulgaria's scores have remained virtually unchanged since 2006." In addition, PAR has become increasingly dependent on EU funds (see Tables 1 and 2). While Bulgaria was a champion in the transposition of EU law, with a transposition deficit of 0% in 2008 (Trauner, 2009), implementation was a serious problem. CVM reports were consistently critical on all counts, with particular emphasis on corruption. High level political corruption and ties between the state apparatus and private interests proved a persistent problem that undermined the already weak trust in government institutions and harmed the business climate in the country, hampering economic growth (Trauner, 2009, p. 7). Stanishev's government (2005-2005) was harshly criticized for fraud and corruption. OLAF carried out a series of audits in 2008, revealing mismanagement and corruption on a serious scale. The revelations pointed to misuse of funds under the SAPARD, PHARE, and ISPA programmes and resulted in the

freezing of over €800 million of EU funds in 2008. This made Bulgaria the first EU member state to lose EU funds due to misuse (Trauner, 2009, p. 10).

Table 1: Administrative Capacity Projects Funded by the National Budget

	Central Administration	Territorial Administrations	Total Administrations	Total Projects	Total funds BGN
2009	8	15	23	30	86,699,495
2010	4	10	14	34	59,198,490
2011	5	10	15	22	59,085,840
2012	9	22	31	72	52,013,532
2013	7	21	28	71	17,600,000
2014	7	10	17	48	24,044,009
2015	4	12	16	24	5,265,733

Source: State Administration Reports available at: <http://www.strategy.bg/Publications/View.aspx?lang=bg-BG&categoryId=&Id=81&y=&m=&d=>.

Table 2: Administrative Capacity Projects Funded by the EU (mainly OPAC) or Other Foreign Donors

	Central Administration	Territorial Administrations	Total Administrations	Total Projects	Total funds BGN
2009	--	--	90	107	208,53,955
2010	--	--	181	499	29,827,655
2011	38	66	104	319	51,507,051
2012	53	160	213	--	59,085,840
2013	36	180	216	--	128,000,000
2014	60	257	317	787	162,392,311
2015	55	143	198	326	190,959,506

Source: State Administration Reports available at: <http://www.strategy.bg/Publications/View.aspx?lang=bg-BG&categoryId=&Id=81&y=&m=&d=>.

The main achievement of the Stanishev government was the start of the Operational Program on Administrative Capacity 2007-2013 (OPAC), financed by the European Social Fund and the national budget. A milestone in public administration reform, OPAC aimed to improve the relationship between the administration and citizens by optimizing the structures of the central, district and municipal administration, focusing on four priority axes – good governance, human resource management, service delivery and e-government, and technical assistance. The subsequent government of Borisov and his party, Citizens for European Development (GERB), put great emphasis on anti-corruption efforts by passing legislation and setting up new administrative bod-

ies to fight corruption. At the same time, Borisov closed the Ministry of Public Administration and Reform, signaling deprioritization of PAR.

4 Key priorities of the reform agenda

The key priorities in PAR as initially outlined in the 2003-2006 Strategy and reconfirmed in subsequent strategies include transparency and accountability, human resource management and civil service training, service delivery and e-government, and, as of later years, decentralization. Each of those are reviewed below.

4.1 Transparency and accountability

Corruption has been a persistent and serious problem in Bulgaria, as reiterated in all CVM reports. It has been the main focus of government policy in the last decade with emphasis on anti-corruption efforts, transparency, and accountability. Despite such focus, the fight against corruption was highlighted in the January 2017 CVM report as the area where least progress had been made in Bulgaria over the ten years of the CVM.

The foundations for observing the principles of transparency and accountability are embedded in a legal framework such as 1) the State Administration Law (1998) mandating the creation of inspectorates in every ministry and allowing citizens to file complaints; 2) the Access to Public Information Law (2000), which along with the digitization of the public administration provides access to information, including through specially designated portals; 3) the Ombudsman Law (2003), and its later amendment linking the Ombudsman to municipal administrations, in addition to the central administration; and 4) the Public Procurement Law (2004), which has been amended multiple times and is based on the principles of competition, transparency, equality, and non-discrimination.

Most recent initiatives have been focused on high-level corruption. One set of initiatives concerns illegal property as addressed in the Law for the Expropriation of Property Acquired through Criminal Activity (2005) and the Commission for the Identification of Property Acquired through Criminal Activity (2005), and subsequent amendments. Another set is related to the prevention of conflict of interest with the Conflict of Interest Law adopted in 2009, the Commission for the Prevention and Identification of Conflict of Interest established in 2011, and the National Strategy for Public Procurement in Bulgaria adopted in 2014. The greatest emphasis has been placed on countering corruption with numerous initiatives by each government. The most recent anti-corruption law adopted in 2018 set up a unified body to coordinate anti-corruption efforts. However, questionable clauses in the law that infringe on individual freedoms and the presumption of innocence, as well as public scandals involving high-rank anti-corruption officials have resulted in a public outcry.

Some positive developments include mandatory regulatory assessment of normative acts and mandatory public consultation, the Open Data Bulgaria providing a unified registry of electronic databases of various government structures, and strengthened administrative control with mandatory reporting requirements.

Overall, Bulgaria's track record on improving transparency and accountability has been mixed. Measures countering corruption have had dubious results. According to Transparency International's Corruption Perception Index (CPI), Bulgaria scores 41 out of 100, ranking 69 out of 168. Control of corruption is in the 52% percentile rank and the Open Budget Index gives Bulgaria a score of 56 (Transparency International). More importantly, control of corruption has not improved, but in fact has decreased in recent years. Bulgaria continues to rank the highest in the EU in terms of perceived level of corruption and corruption is considered the main obstacle to doing business in the country. As stated in the 2016 CVM report, the institutional framework for fighting corruption is "fragmented, uncoordinated, and unequal to the challenge" (European Commission, 2016). Anti-corruption efforts in Bulgaria are characterized by lack of political will and sustained strategy, fragmented institutional framework, and poor implementation record. High-level corruption is particularly problematic, especially at the last stage of convicting government officials. Improvements in the monitoring, identification, and exposure of corrupt practices have been undermined by the unwillingness or inability of courts to prosecute political figures. Continuous criticisms in CVM reports have failed to bring about political will and compliance. There have been some positive changes at the institutional level, with improvements in the normative and legal framework and increased transparency as a result of e-government initiatives and open data. Overall, progress in these areas is reactive (to EU recommendations) and externally-driven, disruptive, and behind track.

4.2 Civil service and HRM

Civil service reform constitutes a major part of Public Administration Reform. The key priorities in reform efforts have been introducing a merit-based system and limiting politicization. The strategy for achieving these goals entails implementing a comprehensive human resource management system that includes evaluation systems and performance pay, mechanisms of recruitment and motivation, civil service trainings, etc. A detailed account of civil service reform follows in section 7.

4.3 Service delivery and digitization

Improving the quality of services and introducing e-government has been a key priority in public administration reform set by the Kostov and NDSV's governments and pursued by subsequent governments. The foundations for reform in that area were laid in the Law on Public Service Delivery to Natural and Legal Persons (1999) and the Strategy for E-government (2002). One of the first steps was establishing a Coordination Center for Information, Com-

munication, and Management Technologies (CCICMT) in 2002. In 2006, the Administrative-procedural code was adopted, regulating service delivery, establishing unified procedures for legal and private persons, and rules for judicial control of administrative acts. An Administrative Service Self-evaluation System was also adopted in 2006, which allows for annual reporting and monitoring of all administrative units. An Information System for Regional Statistics with the National Statistical Institute was set up in 2006, providing for better monitoring and public access to information of territorial units. The E-governance Law was adopted in 2007, introducing mechanisms for one-time entry multiple-use data. In the same year, the List of Unified Labels of Administrative Services was adopted.

The main initiative in this area has been OPAC's Priority Axis III on Service Delivery and E-government starting in 2007. The program achieved 67.7% completion rate of financial implementation as of 2014. One-stop-shop services, a key strategic priority, were adopted only in 15% of administrative units, while 25% of administrative units use Quality Management Systems. Document Management Systems were adopted in all units, and 2,540 services are currently offered online, with 98% of administrative units delivering services within the legal deadline (OPAC, 2015). In 2014, one-shop services were replaced by a new project for the introduction of Complex Administrative Service which aims to further improve service delivery. Some problems still remain. As stated in the Integrated Service Delivery Model of 2013, administrative service delivery has achieved integration only within the given administration, with no cooperation between different administrations. Moreover, services are frequently delivered at inconvenient locations, requiring travel to the capital or the regional center (Thijs and Mackie, 2016).

Some other initiatives include: the Plan for the Optimization of the Public Administration 2010-2011, with emphasis on improving service delivery; the Good Governance Program 2010-2013, focused on improving the business climate; the adoption of a Unified Electronic Communication Network in 2011; the Comprehensive Strategy for E-government in Bulgaria 2011-2015, focused on integrated management of IT resources; the Basic Model of Complex Service Delivery adopted in 2013 (part of OPAC), implementation started in 2014, with expected completion envisioned within the Strategy for the Development of the Public Administration 2014-2020 ; the Strategy for the Development of E-government 2014-2020 with updated goals and priorities, and the National Plan for Reducing the Administrative Burden of the Business 2010 – 2017, adopted in 2010 and updated in 2012 and 2015. Important developments in e-government are examined in section 4.

4.4 Organization and management of government

The key problem in the organization and management of government has been the high level of institutional instability and frequent restructuring of government units. Major restructuring of the central administration and ministries is observed with every change of government, due to the legal provi-

sion allowing each government to open, close or reorganize ministries and agencies. In addition, changes in the organizational rules of administrative units allow for under the radar restructuring that does not require approval by parliament and personnel changes. Such instability and restructuring have solidified a long tradition of politicization of the public administration and have undermined efforts for improving the quality of services. Despite reform efforts, politicization remains a major problem in Bulgaria and is much higher than in many other EU countries (Zankina, 2016).

The main priorities in the organization and management of government have been decentralization and good governance. The foundations of the organization of government were set up in the Local Self-Government Act (1991), the Local Administration Act (1991), and the State Administrative Law (1998), all amended numerous times in the last 20 years. The 2006 amendments to the State Administrative Law introduced annual reporting and yearly goals for each administrative unit, an administrative registry, and strengthening of the inspectorates. The main initiative in this area has been the OPAC Priority Axis I "Good Governance" program. As of 2014, the program had achieved 88% completion rate in this priority axis, with a third of the administrative units introducing optimization procedures, over a third introducing monitoring regulations, and a quarter having completed functional analyses as of 2015 (OPAC, 2015). A major setback in the organization of government and public administration reform has been the closing of the Ministry of Public Administration and Reform in 2009 and its replacement with an advisory council.

More positive recent developments include the Strategy for the Development of Public Administration 2014-2020, with key strategic goals of effective governance and rule of law, public-private partnership governance, open and responsible governance, professional and expert governance; District Administration Strategies 2014 – 2020, containing good governance and civil service objectives at the district scale; Plans for Municipality Development 2014 – 2020, containing good governance and civil services objectives at the municipality scale; and the establishment of Governance Decentralization Council in 2013.

An updated Strategy for Decentralization adopted in 2016 is emphasizing the transferring of authority to local governments, achieving an optimal distribution of resources between central and local government, citizen control over public institutions, and greater influence of regional authorities in policy coordination. The goals of the strategy in the first period (2006-2009) and the second period (2010-2013) were largely unachieved – under 40% of all measures were achieved. The major problem was refusal of the central government to allow financial autonomy of the municipalities. At the same time, we have seen a reduction in size of the central administration, coupled with an increase in size of territorial administrations. Another major issue is also the financial autonomy of local government and the continued dependency on the central government. Local governance in Bulgaria is experiencing steady deterioration especially in terms of financial health as the level of indebtedness

and consequently the dependency of local authorities on the central government and the subsidies from the state budget increase. Progress in this area can be characterized as top-down, disruptive and highly differentiated based on the sector and geographic location.

4.5 Policy making, coordination and implementation

Implementation and coordination have been a great challenge in the Bulgarian context. While we notice an excellent record in transposing EU legislation and a large volume of strategies adopted in every area, implementation lags seriously behind. Institutional instability contributes to a fragmented institutional framework, characterized by lack of coordinated and integrated operational structures. The first step forward in policy coordination was made with Kostov's Strategy for Administrative Modernization that identified the clear distribution of responsibilities at the different levels of the executive and unification of the structure as key goals. The NDSV government continued to work in this direction in an attempt to improve policy coordination and functionality, eliminating double-functions and functions atypical for government, and identifying gaps. Such goals have been embedded in subsequent government strategies, yet, problems persist. Mechanisms of policy formulation have been established, including public consultations and input from various stakeholders. However, not enough attention and time are given to implementation and evaluation. As identified in earlier studies (Shoylekova, 2007), policy formulation is dominated by the ruling majority, the role and input at the political level (particularly the ministers and their political cabinets) are not well-defined, and policy phases are not well synchronized. In this area, as well as in all others, the EU has been the main driver of reform and of financial support through its structural and investment funds. A major problem has been the misuse of EU funds and the failure to absorb allocated funds. Sanctions on the part of EU included freezing of a large amount of funds in 2008, following OLAF investigations, as well as smaller financial sanctions.

Some of the initiatives in this area include the strategies for decentralization (2006) aimed at improving territorial governance and coordination between government levels and facilitating public participation in local governance., the National Strategic Reference Framework 2007 – 2013 that aims at balanced territorial governance, the Convergence Program aligned with EU strategy "Europe 2020". Overall, policy-making, implementation, and coordination are the most problematic areas after corruption. Improvements in other areas have failed to improve policy-making capacity. Lack of coordination, doubling of functions, frequent change of governments and policy priorities have hindered progress. Progress in this area can be characterized as disruptive, top-down, and stagnating.

5 E-government

E-government is one of the most successful reform initiatives in the context of public administration reform in Bulgaria. As such, it has witnessed the most

progress and the least political resistance. E-government has been a key priority for every government since 1997 and each government has registered a list of initiatives and accomplishments. E-governance is seen as an instrument to reduce corruption, improve the business environment, improve efficiency, and provide a channel for inclusion of citizens and non-governmental actors in decision-making. It is a priority that has been largely funded externally, primarily through the OPAC and the Good Governance programs. Although there has been continuous improvement in the quality and scope of e-services, progress has been slow and far behind track compared to other new EU member states. There has been constant change and re-alignment in e-government strategies, as well as delayed implementation and large, inefficient spending.

E-government first appeared on the agenda in 1997 with Kostov's government. After establishing a Ministry of Public Administration and Reform in 1997, the government launched a number of e-government initiatives, including an IT investment project, a website of the Council of Ministers, a Registry of Administrative Services, a Registry of Public Procurement, a Registry of Civil Servants, a public administration portal, and discussion forums. These first initiatives costed $5 million, with another $22 million budgeted for completing the reform.[5] The subsequent NDSV government continued work on public administration reform and e-government, adopting the first E-government strategy in 2002, establishing a basic infrastructure and a coordination center, and introducing the first e-services.[6] A management monitoring system was introduced to track the implementation of e-government,[7] electronic signatures were first introduced in some ministries, and a comprehensive i-Bulgaria project was launched.[8]

The start of the Operational Program on Administrative Capacity 2007-2013 (OPAC) during the tenure of the Stanishev government was a milestone in PAR and e-government. OPAC financing combined with the efforts of the Minister of Public Administration and Reform, Nikolay Vassilev, provided the necessary driver for reform both in terms of resources and political will. Vassilev aligned priorities with the e-Europe objective to deliver 20 administrative services, introduced legislative changes and launched a number of initiatives such as, the e-Justice project with a total cost of BGN 6 million,[9] a Unified Trade Registry with a total cost over BGN 4 million (almost entirely financed by the World Bank), an Integrated e-Government System, an Integrated e-Municipality Sys-

5 2001 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

6 Those included change of address, judicial registry of companies and physical persons, social security payments of individuals, and company contributions to the social security system. 2002 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

7 2003 Annual Administratrive Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

8 The program included 5 initiatives for schools (i-class), universities (i-university), research institutes (i-net), as well as an i-Center to facilitate access to internet and electronic services in small towns and villages2004 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

9 2006 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

tem, an electronic health portal,[10] as well as OPAC funded projects such as an e-Payment system. The most significant step of the Stanishev government was the adoption of the E-Government Law in 2007 which provided the legal framework for transitioning from e-government to e-governance.

With the closing of the Ministry of Public Administration and Reform in 2009, e-government was transferred to the Ministry of Transport, Information Technologies and Communications. In 2011, the government adopted a Comprehensive Strategy for E-government in Bulgaria[11] and established the E-Governance Council. Both were modeled after the Estonian model of e-governance.[12] Other initiatives include, the "Integrated administrative service and the central and local level", the Unified environment for exchange of e-documents (UEEED), the Unified Electronic Communication Network, the e-document exchange system, as well as two large OPAC projects – "Development of the administrative service by electronic means" (BGN 18 million) and "Improving Administrative Services through Developing Centralized E-government Systems" (BGN 12 million).[13] A major initiative was the launching of the Bulgarian open data portal in September 2014 – a collaboration project between the Council of Ministers and an NGO aiming to facilitate access to electronic resources, increase the use of e-services, and inform citizens of government actions. Subsequent efforts included roadmaps for e-justice and e-customs, a strategy for the integrated electronic communication network, and a project for optimizing the EU funds 2020 system. In 2016, the E-government Council was transformed into the State Agency "E-Governance", a new law on Electronic Identification was adopted, along with a strategy and roadmap for Developing E-Governance 2016-2020.[14] The most recent project by the State Agency "E-government" is to carry out an inventory check of the IT infrastructure, with the goal of creating a registry of e-services, with a total cost of BGN 2.5 million.

Although e-government was a priority for all governments and a number of positive developments took place, there was delay in implementation, insufficient progress, and lack of coordination and strategic approach. According to the 2016 European semester documents, the slow implementation of reforms in the areas of public administration and e-government prevent significant improvements in the business environment. Some of the key obstacles in e-government have been:

10 The health portal was completed in 2007, servicing 40,000 civil servants.2007 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

11 The strategy focused on integrated management of IT resources and stressed the importance of service to the public, business and the administration, partnerships at national and international levels effectiveness and efficiency, 24/7 access, equal access to e-services, transparency and accountability. Comprehensive Strategy for Eg0government 2011-2015. Available at: http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=662.

12 Comprehensive Strategy for Eg0government 2011-2015. Available at: http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=662.

13 2011 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

14 The key priorities of the strategy are implementing electronic identification, transition to hybrid cloud infrastructure, and a pilot project for electronic distance voting. E-governance report 2016. Available at: https://e-administration-report.eu/.

- Lack of political will at the local level, especially in the early stages of the reform. There was a lot of resistance from territorial administrations and municipalities who feared e-government would lead to cutting positions and reducing the size of the administration.
- Lack of financial resources. Although most of the projects in e-government are funded or co-funded externally, resources have been scarce and insufficient for building and maintaining IT infrastructures and training civil servants. At the same time, there have been accusations in the media that too much money was spent on e-government with limited results. The latest scandal with hacking large amounts of data on citizens and businesses from the National Revenue Agency is a case in point.
- Lack of qualified civil servants – a persisting problem throughout the public administration. Turnover is high, young people are hard to attract, long-serving cadres are hard to train.
- Lack of technical resources. Computers are old, operation systems are not frequently renewed, software licenses are not available in sufficient numbers.
- Lack of a clear strategy, sound management, and coordination, especially at the local level. There is often confusion as to what are the priorities, who is responsible, and what are the expected results. There is no cascading down of strategic priorities at the national level and no bottom-up processes for defining and implementing strategies.
- Lack of motivation by the leadership and the lower levels to implement e-government. Aversion to using new systems, tokenism, and resistance, failure to see the need and the benefits of e-government lead to an apathetic attitude towards e-government reform.

A recent study by the Bulgarian Industrial Association compares e-government reform in Bulgaria and Estonia.[15] According to the study based on official Eurostat and World Bank reports, Bulgaria has spent around € 2 billion on e-government between 2002-2016. The public administration offers a total of 2,900 e-services, 87% of which primary and only 13% complex. By comparison, in Estonia there are over 900 electronic systems offering over 5,000 electronic services, most of which complex. Only 19% of the public administrations in Bulgaria offer e-services and only 12% maintain specialized registries for offering e-services, 27% of administrative registries are paper-based only, 3% of administrative structures do not accept electronically signed documents, and 98% of e-service requests are for five administrative agencies – the Registry Agency, Agency for Geodesy, Cartography and Cadastre, the National Revenue Agency, the General Labor Inspectorate Executive Agency, and the Agency for Vocational Education and Training. Only 19% of Bulgarian citizens have used online government services in the past 12 months, compared to 77% in Esto-

15 "СТИГА ВЕЧЕ!" 18: ЕЛЕКТРОННО ПРАВИТЕЛСТВО (БЪЛГАРИЯ - ЕСТОНИЯ) [That is Enough 18: E-government (Bulgaria-Estonia)], Bulgarian Industrial Association, December 2, 2017, https://www.bia-bg.com/news/view/23682/. The study is based on the Annual Reports on the State of the Public Administration, Eurostat and World Bank data. A detailed list of all sources can be found at the provided url.

nia. The report has triggered a heated political debate, a change of the director of the State Agency E-Government, and an additional accusation in one of the non-confidence votes in parliament against the Borisov III cabinet.

A look at a particular e-government initiative confirms such findings. E-healthcare was launched in Bulgaria in 2007. A report of the Bulgarian National Audit Office declares e-healthcare reform a complete failure.[16] Despite commitment by every government in the last decade to e-healthcare, Bulgaria does not have an integrated health-information system and does not meet the requirements for trans-border health information exchange. Bulgaria is far behind other EU countries in e-healthcare and data exchange between the various information systems and registries in the countries remains a major challenge. There is no comprehensive digital medical record of patients and no national health portal, offering a one-stop shop for health services and information. Only 9% of patients have used e-healthcare, while 47% are aware of the existence of e-healthcare.

Such criticisms notwithstanding, Bulgaria has an ever-improving e-government system. Some of the key elements in this system include systems and portals that can be grouped in three categories: 1) providing services to the citizens and business; 2) transparency and accountability – providing information on government initiatives, decisions, budgets, funds, etc., 3) providing mechanisms of inclusion of citizens in decision-making.

There are several lessons to be learned from the Bulgarian case:

– The importance of coordination and collaboration between the central and local levels of government. The Bulgarian case shows that political will at the central level does not translate into support and implementation at the local level. It also shows that some of the problems at the local level, namely overdependence on financing by the central budget, lack of resources for local-level initiatives, lack of investment, innovation, and entrepreneurship, can impede specific projects and e-government in particular. The municipalities who have been most successful in implementing e-government have been the largest and the wealthiest or those not financially dependent on the central government.
– The external influence of the EU, EU funding, and the wider EU-context in terms of strategic direction and best practices have both provided the blue print for reform and secured political consensus at the top level. The question, however, is why the presence of these factors has not had such a positive influence in some other areas such as civil service reform for example. One explanation may be that civil service systems within the EU vary greatly, whereas e-government being relatively new is not entrenched in past practices and path dependency and therefore is easier to transpose.

16 "10-годишен провал на електронното здравеопазване установи одит на Сметната палата' [10-year failure of e-healthcare reported following an audit by the Audit Office], Bulgarian National Audit Office, September 28, 2017, http://www.bulnao.government.bg/bg/articles/10-godishen-proval-na-elektronnoto-zdraveopazvane-ustanovi-odit-na-smetnata-palata-1782.

– Administrative capacity is a major problem. E-government requires a certain minimum of human and material resources. The low salaries of civil servants in Bulgaria, the under-resourced units and the low-quality material base create a vicious circle that perpetuates the lack of quality cadres and lack of innovation and initiative. Although Bulgaria ranks high in terms of innovation, this applies only to the private sector, while the public sector remains hungry for quality people and for creative solutions. Another element is the lack of public-private partnerships (there are a few as of recently) that can transfer knowledge from the private sector and assure a mutually beneficial collaboration. Such public-private partnership can speed up reform efforts, improve quality, and reduce cost.

6 Reducing administrative burden

The reforms aimed at reducing the administrative burden have been characterized by steady and continuous progress aligned with EU priorities and the Action Programme for Reducing Administrative Burdens in the EU (ABR Action Programme). The main driver for reform in the early years was EU membership. The external influence and financial support by the EU has been crucial for jumpstarting and implementing reforms in that area. The OPAC and "Good Governance" programs have been key funding sources for programs aimed at reducing the administrative burden. The indefinitely extended CVM mechanism further plays an important disciplining role. The goals of the reform are improving the business climate, attracting FDI, improving effectiveness and efficiency of the public administration, and increasing transparency. Several mechanisms have been adopted in this area – 1) reducing the number and scope of regulatory regimes, and transposing EU regulatory regimes, 2) improving service delivery, including establishing one-stop shops, establishing once only principle of information collection and mandatory information exchange, computerizing services, integration and standardization of processes and procedures, 3) reducing cost to citizens and business through reduction of documents and time required, reduction of information obligations, reduction of taxes and fees, 4) improving access to information to citizens and business through registries, websites, electronic alerts, 5) including citizens and businesses in decision-making through consultation portals and feedback mechanisms.

The reform initiative has enjoyed political support by all governments since its start in 2001-2003. At the same time, there are some tensions within the administration, between central and local authorities, and among political parties, as well as discontent by business organizations. Such tensions are fueled by fears of personnel cuts as a result of improved efficiency and digitization of processes,[17] accusations of mismanagement and overspending,[18] disagree-

17 „Споделените услуги ще заместят част от чиновниците до 2018 г." [Shared services will preplace civil servants by 2018], Capital.bg, September 25, 2017, https://www.capital.bg/politika_i_ikonomika/bulgaria/2017/09/25/3047926_spodelenite_uslugi_shte_zamestiat_chast_ot/.

18 „Депутатите бистрят: е-управление, колко пари са отишли..." [MPs are debated over e-government, how much was spent….], Dnes.bg, January 19, 2018, https://www.dnes.bg/politika/2018/01/19/deputatite-bistriat-e-upravlenie-kolko-pari-sa-otishli.365540.

ment and lack of coordination between central and local administrations,[19] and continued criticisms by business.[20]

The reform has been characterized by continuity with three action plans building one onto the next. There has been great emphasis on the legal framework. The main challenges have been in coordinating efforts among various administrative units, and particularly among the central and local administrations. Implementation at the local level has been slower and harder. The delay in e-government implementation has been an obstacle, given the close link between e-government and improved service delivery. Changes in institutional structures, and, in particular, the bodies overseeing the administrative reform, have further impeded progress.

The reduction of the administrative burden is embedded in the strategic objectives of the Operational Programs "Administrative Capacity" and "Good Governance".[21] Reducing the administrative burden for citizens and business first appeared on the agenda in 2001, yet, no progress was registered in 2001.[22] It became top priority in 2003 with the adoption of the Law for Limiting Administrative Regulation and Administrative Control on Economic Activity (Llaracea).[23] One stop shops became mandatory in 2006, yet, at the time, 96.7% of administrative units reported they have not adopted any normative acts aimed at reducing the administrative burden.[24] In 2007, the Ministry started a Better Regulation Program as part of the European Commission's Program "Better Regulations, Growth, and Employment". In the same year, the Ministry of Economy partnered with the World Bank to develop a regulatory strategy for Bulgaria that envisioned a unit to oversee public administration reform, civil servant trainings in "better regulation", completing the administrative registry, collaborating with local government on improving regulatory regimes, and establishing Regulatory Impact Assessment (RIA). The adoption of the Better Regulation Program 2008–2010 became the cornerstone of regulatory reform. As part of this program, the Better Regulation Unit (BRU) at the Council of Ministers (CoM) was established in 2008, followed by a training program for administrative personnel and preparation of regulatory impact as-

19 „Спешни мерки за намаляване на административната тежест за гражданите и бизнеса обяви държавата" [The State announced Urgent Measures for Reducing the Administrative Burden], Bnr.bg, June 16, 2017, http://bnr.bg/post/100842770/vlasti-i-institucii-obsajdat-pri-borisov-namalavaneto-na-administrativnata-tejest-i-oblekchavaneto-na-rabota-ta-s-grajdani.

20 „Тромави процедури гонят инвеститори в строителството от България" {Clumsy procedures chase away construction investors from Bulgaria], Ivenstor.bg, October 2, 107, https://www.investor.bg/bylgariia/451/a/tromavi-proceduri-goniat-investitori-v-stroitelstvoto-ot-bylgariia--247625/.

21 Atanassov, A. et al., "Assessment of the Administrative Burdens for Businesses in Bulgaria According to the National Legislation Related to the European Union Internal Market," *Journal of Contemporary Management Issues*, Vol. 22, 2017, Special issue, pp. 21-49.

22 2001 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

23 The law settles the regulation of economic activity, sets up the framework of administrative control, and defines the various regulatory regimes. "Better Regulation for Higher Growth: Bulgaria's Business Regulations – Achievements and Regulations," World Bank, October 2010, Vol I.

24 2006 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

sessments of important legislation.[25] By the end of the mandate of the Stanishev government, 149 administrative units reported adopted measures aimed at reducing the administrative burden, 6 regulatory regimes were removed out of the 16 envisioned by the Better Regulation Program, and 100 municipalities reduced regulatory regimes at the municipal level.[26] The Administrative Service Self-Evaluation System established in 2006 became the main tool for monitoring and evaluating the quality of administrative service, including measures to reduce the administrative burden. In 2010, the first Borisov cabinet adopted an Action Plan for Achieving the National Target for Reducing Administrative Burdens by 20% by 2012. The plan envisioned 135 measures of eliminating or reducing regulatory regimes, with a main focus on removing information obligations on business. With the adoption of the plan, Bulgaria completed the first stage of the ABR Action Programme.[27] According to a World Bank report, Bulgaria has made great progress between 2004 and 2010 in reducing the administrative and regulatory burden on the business. In 2008 the World Bank's Doing Business ranked Bulgaria one of the world's top ten reformers, as a reduction in regulations and procedures made it easier to start and conduct a business in Bulgaria.[28] The same report highlights further achievements, such as reductions in the number of procedures, the time to register, the cost of registration, and minimum capital requirements for opening a business, reduction in corporate taxes and improved regime of paying taxes.

In 2011, the Registry of Administrative Services was launched and a Second Plan for Reducing Administrative Burdens was adopted in 2012.[29] From the total of 135 measures for 2012 in the plan, 112 were completed. A total of 77 regulatory regimes were relaxed and 10 completely removed.[30] A project funded by OPAC and the ESF was started, aiming to review and align administrative taxes with clear principles and specific socio-economic priorities. As a result, 12 tariff taxes were removed in 2012. In 2013, another OPAC and ESF-funded project was started on improving investment policy through better regulations and e-government. Specific measures included amendments to the LLARACEA and other laws that eliminated tariffs and taxes.[31]

The Third Action Plan for Reducing Administrative Burdens by 30% between 2015-2017 was adopted by the Oresharksi government. The plan envisioned 130 measures for reducing the administrative burden that are expected to

25 "Better Regulation for Higher Growth: Bulgaria's Business Regulations – Achievements and Regulations," World Bank, October 2010, Vol I.

26 2008 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

27 Atanassov, *op. cit.* p. 24.

28 "Better Regulation for Higher Growth: Bulgaria's Business Regulations – Achievements and Regulations," World Bank, October 2010, Vol I.

29 The plan envisioned 247 measures, including removing regulations over entrepreneurial and economic activity, reducing government intervention and reduction of regulatory fees, and reduction of procedures. 2012 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

30 *Ibid.*

31 2013 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

reduce business expenses by BGN 144.5 million annually.[32] Other initiatives include amendments to the LLARACEA, transposition of EU regulatory regimes, and reduction of regulatory regimes at the municipal level, including reduction of taxes, documents required, and time to process requests.[33] The second Borisov cabinet adopted a Roadmap for the Development of Public Administration, which put great emphasis on RIA, shared services, complex administrative services, "life cycle" and "business events" principle, and overall improved institutional structure.[34] Notable projects started by the Borisov II government include "Transformation of the Administrative Service Model" and "Open Government Partnership 2016-2018" with 6 priorities – e-government, citizen participation, open cities, information access, open data and responsible governance. Reducing administrative burden is a top priority for the current Borisov III cabinet.[35] Some of the latest initiatives include amendments to the Tax and Social Security Procedural Code that would reduce the number of required documents by citizens and business,[36] and similar amendments to the law on investments and the employment law.[37]

According to a government report, measures taken up to 2015 have reduced the administrative burden on business by 21.7% of the 30% reduction envisaged in the third action plan. The reduction has led to cost-saving of BGN 104.5 million a year.[38] Some of the most important measures were related to the Customs Agency.[39] A November 2017 report by the deputy prime minister overseeing administrative reform, Tomislav Donchev, states that 170 measures for reducing the administrative burden were adopted out of the total of 605 proposed measures by the current government. 211 measures are in the process of implementation and 224 measures were not started at all.[40] In 2018, Parliament passed 11 laws to reduce the administrative burden

32 „Административната тежест за бизнеса намалява с 124.4 млн. лева годишно" [The administrative burden for business reduces by 124.4 million leva annually, 24chasa.bg, September 21, 2017, https://www.24chasa.bg/novini/article/6459323 © www.24chasa.bg.

33 2014 Annual Administrative Report. Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

34 Administrative Reform Report 2016. Available at: https://e-administration-report.eu/.

35 „Спешни мерки за намаляване на административната тежест за гражданите и бизнеса обяви държавата" [The State announced Urgent Measures for Reducing the Administrative Burden], Bnr.bg, June 16, 2017, http://bnr.bg/post/100842770/vlasti-i-institucii-obsajdat-pri-borisov-namalavaneto-na-administrativnata-tejest-i-oblekchavaneto-na-rabota-ta-s-grajdani.

36 „Предлагат намаляване на административната тежест върху гражданите и бизнеса" [Proposals for reducing the administrative burden for citizens and business], Actialno.com, September 27, 2017, https://www.actualno.com/politics/predlagat-namaljavane-na-administrativnata-tejest-vyrhu-grajdanite-i-biznesa-news_635387.html.

37 „Приеха редица мерки за намаляване на административната тежест" {A number of measures adopted for reduction of administrative burden], Manager News, October 18, 2017, https://www.manager.bg/politika/prieha-redica-merki-za-namalyavane-na-administrativnata-tezhest.

38 "Bulgaria claims huge reduction of red tape on businesses," Sofia Globe, April 27, 2016, https://sofiaglobe.com/2016/04/27/bulgaria-claims-huge-reduction-of-red-tape-on-businesses/.

39 "Bulgaria claims huge reduction of red tape on businesses," Independent Balkans News Agency, April 27, 2016, http://www.balkaneu.com/bulgaria-claims-huge-reduction-red-tape-businesses/.

40 „Вече са изпълнени 170 мерки за намаляване на административната тежест" [170 measures for reducing the administrative burden have been adopted], Trud.bg, Novem-

in the agricultural sector.[41] The report on the Third Action Plan for Reducing Administrative Burden indicates an annual reduction of BGN 124.4 million in administrative burden.[42] Among the most significant recent changes is the established mechanism for information exchange between the National Revenue Agency and the State Agricultural Fund which would save businesses close to BGN 2.6 million annually.

Progress in reducing administrative burden is closely linked and dependent on two important aspects – establishing a legal framework and implementing e-government. The legal framework has been continuously evolving, resulting in reduction in the number and scope of regulatory regimes, transposing EU regulatory regimes, and improving the quality of regulatory regimes, especially through the adoption of RIA. The implementation of e-government has greatly contributed to the reduction of administrative burden. At the same time, the delayed implementation of e-government has posed obstacles to reducing the administrative burden. A 2015 Staff Working Document of the EU commission points to the insufficient development of e-government which limits efforts to increase transparency and reduce the administrative burden.[43] However, a 2014 report acknowledges a general increase in effectiveness and efficiency, and progress in technological innovation and provision.[44] A major step forward is the e-justice system, the e-services of the Ministry of Interior (including the traffic agency), the property registry and the upcoming integration of the registry with the cadaster.

At the same time, serious problems remain. According to a 2016 Staff Working Document of the European Commission, in spite of the implemented regulatory reforms, the need for reducing the administrative burden and cutting red tape remains significant.[45] The prime minister argued that a lot of money was spent on various electronic registries, but there is little use of them for the moment.[46] According the World Bank's Doing Business indicator, Bulgaria ranks 50th and is behind all East European new member states.[47] An EBRD

ber 24, 2017, https://trud.bg/%D0%B2%D0%B5%D1%87%D0%B5-%D1%81%D0%B0-%D0%B8%D0%B7%D0%BF%D1%8A%D0%BB%D0%BD%D0%B5%D0%BD%D0%B8-170-%D0%BC%D0%B5%D1%80%D0%BA%D0%B8-%D0%B7%D0%B0-%D0%B-D%D0%B0%D0%BC%D0%B0%D0%BB%D1%8F%D0%B2%D0%B0%D0%BD/.

41 „Парламентът промени 11 закона с цел намаляване на административната тежест" [Parliament passed 11 laws to reduce the administrative burden], Bulgarian Telgraph Agency, January 24, 2017, http://www.bta.bg/bg/c/OF/id/1732019.

42 „Административната тежест за бизнеса е намаляла със 124.4 млн. лева годишно" [The administrative burden has decreased by 124.4 million leva annually], September 21, 2017, https://www.24chasa.bg/novini/article/6459323.

43 SWD P55, 2015. Available at: https://ec.europa.eu/transparency/regdoc/?fuseaction=home

44 "Study on eGovernment and the Reduction of Administrative Burden", European Commission, 2014, p. 71.

45 SWD P54, 2016. Available at: https://ec.europa.eu/transparency/regdoc/?fuseaction=home.

46 „Спешни мерки за намаляване на административната тежест за гражданите и бизнеса обяви държавата" [The State announced Urgent Measures for Reducing the Administrative Burden], Bnr.bg, June 16, 2017, http://bnr.bg/post/100842770/vlasti-i-institucii-obsajdat-pri-borisov-namalavaneto-na-administrativnata-tejest-i-oblekchavaneto-na-rabotata-s-grajdani.

47 Doing Business: Bulgaria, World Bank, http://www.doingbusiness.org/data/exploreeconomies/bulgaria.

report outlines the top priorities as alleviating procedures for starting a business, getting electricity, and paying taxes.[48]

There are three lessons to be learned: 1) the importance of a sound and continuously improving regulatory framework, 2) the importance of coordination with reforms in other related areas, such as e-government, and among the different levels of government, and 3) the positive effect of EU's external influence and financial support. Another very important aspect is the much broader context of reforms. Reducing the administrative burden is linked to the overall quality of service delivery, the successful implementation of e-government, the effectiveness of the legislative process, the effectiveness of the judiciary, and more. Hence, improvement in this area is linked to overall improvement in governance, strengthening of institutions, and economic growth.

7 Civil service reform

Civil service reform in Bulgaria has been largely defined by 1) the domination of the former communist elite, 2) difficulty in overcoming legacies of corruption and politicization, and 3) externally-driven reform efforts with lack of strong political will for reform at the domestic level and lack of clear direction of the reform (Ban et al., 2012). Entrenched former communist elites were reluctant to adopt administrative reform that would reduce their control over the allocation of state resources (Kostadinova and Neshkova, 2013, p. 6), while a weak opposition that failed to win the first post-communist elections was unable to champion reform efforts. As a result, there was no political support for civil service reform domestically and the issue did not reach the agenda before it was pushed externally by the EU. Desire to join the EU and NATO became the main driver behind civil service reform (Ellison, 2007, p. 227). The EU identified public administration reform as one of the key areas that needed to be addressed in order to gain membership. The combination of external pressure and a new government committed to integration in the Euro-Atlantic structures jump-started reform efforts. In addition to external pressure and financial support, the pre-accession process had a very positive effect on the professionalization of the civil service, since the public administration was heavily involved in the pre-accession phase and increasingly responsible for priority setting (Borissova, 1999, p. 3). Interviews with public officials indicate this was the most exciting time in their career as they had the ability to learn best practices from their European counterparts and actively participate in the transposition of EU laws and the establishment of new structures (Ban et al., 2012).

Since the late 1990's all governments have been at least nominally committed to civil service reform and have pursued numerous reform initiatives. The Civil Service Law was continually amended in order to eliminate loopholes and provide a stronger and better legal framework. A lot of focus was placed on

48 "Bulgaria needs to focus on reducing administrative burdens on businesses in 2018 – EBRD," SeeNews, November 23, 2017, https://seenews.com/news/bulgaria-needs-to-focus-on-reducing-administrative-burdens-on-businesses-in-2018-ebrd-592112#sthash.eLdC8bOh.dpuf.

professional development, performance evaluation, and competitive compensation. The Operational Programs "Administrative Capacity" and "Good Governance" have been a key source of finance that has also defined strategic goals and specific reform initiatives. Subsequent governments have competed to absorb EU funds and show results that would secure continued EU support. The indefinite extension of the CVM mechanism and the specific recommendations some of which, such as measures to fight corruption, related to civil service, have further contributed to keeping civil service reform on the agenda. Thus, the commitment of all recent governments to civil service reform can be seen as a function of EU financial support through the operational programs tied to results and the pre-accession and post-accession (CVM) conditionality. As one expert has argued, without EU funding, incentives for administrative reform would not exist.[49] Yet, EU's ability to exercise external pressure has been much greater in the pre-accession period, as evidenced by the fact that most reform efforts were concentrated between 1999-2007, while reform efforts in the last decade have subsided both in terms of commitment and results.

Furthermore, reform initiatives have been much more eagerly embraced by the central administration and have encountered resistance at the local level. Territorial administrations have been consistently slower to implement laws and regulations, and to pursue specific projects and initiatives. For example, territorial administrations have resisted granting civil servant status off public employees, with the rate of implementation being consistently and significantly lower since the adoption of the Civil Service Law. Corruption and politicization have remained a major challenge, particularly at the local level, where the reluctance of new officials to work with staff who have served the previous government has been high. Local administrations have also disposed with much more limited resources, which has further obstructed the ability to modernize the civil service at the local level and render civil service jobs more attractive.

The key goal of the civil service reform has been the transition from a highly politicized, corrupt, and inefficient nomenklatura system to a professional merit-based civil service. Specific objectives include:

- Setting up a legal framework that the provides the foundation of a civil service system;
- Increasing the number and percentage of public sector employees who have civil servant status;
- Establishing open, unbiased, and competitive hiring procedures that counter corruption and politicization tendencies;
- Improve the skills and qualifications of civil servants through professional development activities;
- Introducing fair and competitive compensation system that is tied to performance and can attract new entrants;

49 Interview 2 with Pavel Ivanov, Institute of Public Administration, October 2017.

– Developing a comprehensive human resource management system that integrates all elements from recruitment, performance evaluation, compensation, professional development, and more.

Compared to other East European countries, civil service reform in Bulgaria can be characterized as belated, externally-driven, and with a poor implementation record (Zankina, 2016). The system has encountered great obstacles in overcoming past legacies and combating high levels of corruption and politicization. The push for reform has been primarily external which puts into question the sustainability of reform efforts. The poor reform record reinforces the traditional low trust in government institutions, further eroding the efficiency of the public sector.

In his typology of civil service reform paths, Meyer-Sahling characterizes civil reform in Bulgaria as "sticking with the old guard", whereby incoming governments show little willingness to work with the administrative staff which served their predecessors in government and where political interference at the top of the civil service continues to contradict attempts to establish professional civil services insulated from politics (Meyer-Sahling, 2004). Dimitrova, in turn, groups East European countries in three categories – full, partial, and no reform – when it comes to reforming the civil service (Dimitrova, 2005). According to her, Bulgaria falls in the group of no reform or what Dimitrova terms "rhetorical reformers" in that it had not adopted any legislation on the issue until the late 1990s. In a more recent study Katsamunska (2010) points to the persistent high turnover of staff, unattractive salaries, which breed opportunities for corruption, and outdated, centralized procedures (p. 56).

Despite two decades of reform efforts, civil service reform faces several key challenges:

– Compensation: the salary gap between the public and private sector remains large. This poses obstacles to attracting and retaining skilled labor, resulting in high turnover and lack of expertise and continuity. There have been several initiatives in this regard, including a new compensation system, which have produced some reduction in turnover and has made jobs, particularly in central administrations, more attractive.
– Evaluation mechanisms have been criticized for failing to provide an objective assessment of performance and create incentives for improved performance. Annual reviews have often taken the form of formality and performance pay has been insignificant in amount to motivate top performers.
– Recruitment still leaves loopholes for politicization and allows for bypassing legal requirements for mandatory exams and competitive hiring procedures. This is evidenced by the fact that most changes in personnel take place through reappointments or the conversion of temporary positions into full positions, none of which requiring an exam and open competition. The latest changes to the law aim to address such loopholes. However, this would still leave other instruments such as restructuring. Frequent re-

structuring of administrative structures has been used for political ends as an instrument for bypassing the legal protection of civil servants and exercising party patronage and political purging (Zankina, 2016).

– Professional development has had limited impact. According to interviews with experts, a lot of European money was absorbed for professional development, but with little impact. Both interviewed experts agree that this was money not well-spent. According to an expert from the managing authority of the "Good Governance" program, in the previous program period (2007 - 2013) there was no political stability and the OPAC was left on without strategic governance. Consequently, money was spent quite inefficiently in an attempt to satisfy and placate as many units and make employees happy. OPAC funded over 600 projects for trainings, seminars and HR development, while there were no projects for much needed priorities such as digitalization, inter-ministry data exchange or other pressing administrative needs.[50] Another expert argues that municipalities were given 100,000 BGN for trainings, which proved quite ineffective. In his view, trainings should been done in a centralized way, as opposed to pouring money into private training organizations.[51]
– Corruption remains a deeply-rooted and lasting problem. The January 2017 CVM report highlights the fight against corruption as the area where least progress had been made over the ten years of the CVM.[52] On the positive side, the most recent amendments to the Law on Public Administration adopted in October 2017 set up a legal framework and common operating standards for the internal inspectorates in the public administration.

Such criticisms notwithstanding, one cannot overestimate the progress that has been made since the time of the communist-era nomenklatura system in all aspects of civil service reform. Bulgaria today has a sound and continuously improving legal framework establishing a professional, merit-based system. Recruitment has been continuously improving to address questions of politicization and close remaining loopholes. Salaries in the public sector have been increasing (by 5.9% in 2016),[53] though at a much lower rate than salaries in the private sector. Yet, a new compensation system has created conditions for attracting skilled labor and rewarding good performance. Compared to the 1990s the size of the administration is reduced, while the number and percentage of public employees with a civil servant status has been continuously increasing. Decentralization efforts have improved the capacity of territorial administrations and increased their staffing. Turnover has decreased to

50 Interview with Mariya Hristova, Managing Authority, OPGG, October 2017.

51 Interview with Pavel Ivanov, Institute of Public Administration, October 2017.

52 Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism, January 25, 2017, https://ec.europa.eu/info/sites/info/files/com-2017-43_en.pdf.

53 2016 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

under 10% in 2016 and is even lower in the central administration.[54] Although lagging in reform efforts, Bulgaria today has a modern civil service.

Civil service reform was a major challenge following the collapse of communism for all East European countries, including Bulgaria. At the outset of democratization, Bulgaria inherited a Soviet-type nomenklatura system of public administration, marked by a fusion of party and state and an intimate relationship between the government and the public administration. The public sector was the only sector, argues Baker (Baker, 1994, p. 55), and political loyalty rather than merit was the only criterion for hiring and promotion. The result was a largely overstaffed and inefficient civil service with no accountability other than to the party, top-down decision-making with no room for management, and absence of any dissent (Ban et al., 2012). Incentives for efficiency were virtually absent, as delay and administrative hurdles created additional opportunities for spoils. The outcome was alienated public servants and endemic corruption – a legacy that has been extremely hard to break to the present day and that has been posing a continuous challenge to building a professional civil service.

Early efforts in public administration reform focused on establishing a legal framework for central and local government and not on civil service. During that time, the structure of the civil service remained largely intact, although it doubled in size. The growth in size was coupled with excessive turnover, particularly among senior civil servants (Borissova, 1999), poor professional skills, lack of training and low pay. These factors made for an inefficient civil service that was further demoralized by allegations of corruption and low standard of living of public employees (Verhereijen and Kotchegura, 1999, p. 92). Poor terms of employment and job insecurity (three-year contracts and no protection of civil servants who were employed under the general labor code) rendered the public sector particularly unattractive, reinforcing the challenges of high turnover and lack of professionalism. Frequent restructuring of ministries and state agencies used as a way to create new spoils positions for the party in power or a way to get rid of politically unsuitable public servants further contributed to high turnover and solidified patronage practices and politicization (Zankina, 2016).

Civil service reform came on the agenda with the start of the negotiations for EU membership, with the EU becoming the key driver of reform. In 1997, the Commission singled out public administration reform as a prerequisite for launching membership negotiations with the second wave of applicants, including Bulgaria (Noutcheva and Bechev, 2008, p. 130). That and a new government clearly oriented towards the Euro-Atlantic structures jumpstarted the reform of the civil service. The Kostov government managed to push through the legislature and adopt the Administrative Law in 1998 and the Law on Civil Service in 1999. Both laws aimed at laying the foundations of a modern public administration system and creating a professional civil service, lim-

54 2016 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

iting politicization, which has been a defining characteristic of the post-communist administrative system (Dimitrova, 2002). The government established the Ministry of Public Administration and Reform (1997) and the Institute of Public Administration (2002) which were respectively in charge of overseeing civil service reform and carrying our civil service exams and trainings.

The Civil Service Law set up a system with two types of public employees – civil servants protected under the Civil Service Law and non-civil service employees who were under the general labor code and whose contract could be temporary or indefinite. Both categories were included in the newly created in 2000, "Unified classifier of administrative positions." The system has three tracks – manager (reserved for civil servants), experts, and technicians. Civil servants are divided in two categories – junior and senior, with five levels each. Until very recently, recruitment represented a mixed system of unified and departmental approaches. All civil servants are appointed following an open competition. Junior civil servants are appointed following a centralized exam that is organized by the Institute of Public Administration. Those who pass the exam can then be appointed at any junior level position in any of the governmental structures. In addition, individual ministries, agencies, and other governmental organizations carry out their own open competitions for specific positions both at the junior and senior levels. Senior level positions are filled only through this departmental approach. Each level has the appropriate minimum level entry requirements and there is a 6-month trial period for new entrants. The Law on Civil Service was amended several times in response to criticisms including a vague definition of the term civil servant, lack of performance evaluation and performance pay, and contradictions with the labor code. With the adoption of the Civil Service Law, the main efforts were directed towards introducing the civil servant category in central and local administrative units and increasing the number of public employees with civil servant status. By 2001, 31% of public employees in the central administration had a civil servant status, compared to 18% in the territorial administrations.[55] Civil service trainings were also a high priority and were funded by USAID, the British Know How Fund, and the EU (PHARE, IPSA and SAPARD programs).[56]

The NDSV government put great emphasis on civil service reform. In 2002, it adopted the Regulation for Performance Evaluation of Civil Servants, and in 2003 the Law for Conflict of Interest. Although the new evaluation system was well-received by civil servants, it was criticized on a number of counts, including inflated evaluations, poorly trained evaluators, and lack of impact on the motivation of civil servants due to the formality of the process and the low performance pay (Tzankova, 2007). In 2004, the government adopted regulations assuring a competitive hiring process of civil servants through a mandatory open and publicly announced competition and a Code of Behavior for Civil Servants that aimed to improve service delivery and increase trust in

55 2001 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

56 2000 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

civil servants.[57] In 2005, the government introduced amendments to the Civil Service Law that introduced mandatory annual training in line with the adopted in 2002 "Strategy for Training of Public Administration Employees."[58] Currently there is a 3-months mandatory training for new civil servants and a 3-month mandatory training for anyone promoted to a managerial position. In addition, senior civil servants undergo mandatory annual training carried out by the Institute of Public Administration. In 2005, the government also tied additional pay to performance evaluation, effectively introducing performance pay. Up to that moment, additional pay was based on the base salary and not on performance. The main goal of the NDSV government was to improve the quality and attractiveness of the civil service, as well as to increase recruitment among high-skilled workers and young people. Thus, its focus expanded beyond increasing the number and percentage of public employees with a civil servant status, to also introducing new evaluation procedures, regulating performance pay, and improving the qualifications of public employees. During NDSV's tenure, the size of public administration continued to increase which was linked to the development of the territorial units.[59]

The main priority of the Stanishev government was the launch of the Operational Program "Administrative Capacity" 2007-2013 (OPAC), which proved the main factor for progress in civil service reform in the years to follow. OPAC was placed at the heart of the Strategy for Human Resource Management 2006 – 2013 adopted in 2007. Amendments to the Civil Service Law aimed to address loopholes in the law, which allowed avoiding open competitions for civil service positions through part-time and temporary appointments which are later converted to full-time appointments.[60] In 2009, the size of the public administration reached its lowest value since 2003 and at the same time, the number of public employees with a civil servant status for the first time exceeded that of employees not covered by the law, reaching 51%.[61]

The first Borisov government started its tenure by closing the Ministry of Public Administration -- a clear sign of backsliding and a signal that "we are back to the state of chaos", according to former According to former minister, Nikolay Vasilev.[62] In 2010, GERB introduced amendments to the Civil Service Law which expanded the category of civil servants to additional government units (including the police in the category of civil servants), increasing the number and percentage of public employees with civil servant status. The government continued the tendency of reducing the size of the administration and increasing the salaries. In 2012 the government put a ban on the size of the public administration and pursued an active policy of size reduction, as

57 2004 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

58 2005 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

59 *Ibid.*

60 2005 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

61 2009 Annual Administrative Report: Available at: http://www.strategy.bg/Publications/View.aspx?Id=81.

62 Interview with Nikolay Vasilev, Sofia, May 9, 2012.

part of its strategic goal of optimizing the public administration and reducing expenses. Other positive developments included actively implementing the Conflict of Interest Law, resulting in the discharge of several senior civil servants due to corruption and fraud. A major accomplishment was the introduction in 2012 of a new compensation system. The new system restructured the compensation model and introduced several major changes. Bonuses, which were usually tied to revenues in an administrative unit and not to performance, were eliminated. Instead, compensation was tied to performance and closely linked to the annual evaluation. A new matrix was developed with salary ranges for each position, eliminating differentiation based on years of service and stimulating new entrants. The new model made the civil service more competitive in terms of compensation.

The Oresharski government oversaw the completion of the OPAC program and start of the Operational Program "Good Governance" 2014-2020. Among the more notable OPAC projects during that period is the creation of an Integrated Information System for Human Resource Management, which allows self-serving of managers and civil services and handles HR matters from the time of hire to the end of employment. The system started operating at the beginning of 2016. The government adopted a new Strategy for the Development of Public Administration 2014-2020, aligned with the "Good Governance" program. A key priority of the strategy is developing professional and expert governance, as well as civil service objectives at the local level. In line with the strategy, in 2013, the government established Governance Decentralization Council, aimed at improving administrative functions at the local level. The goals of the "Good Governance" program related to the civil service, include developing a flexible administrative structure, improving HR development policies and adopting standards to their successful implementation. The "Good Governance" program will play an important role in the coming years both in terms of identifying and pursuing strategic priorities and financing specific projects and initiatives. The second GERB government (2014-2017) continued the implementation of the "Good Governance" program.

The main accomplishment of the second GERB government were the 2016 amendments to the Civil Service Law which introduced a two-phase recruitment strategy – a centralized exam at step one run by the Institute of Public Administration and second phase intended to assess specialized skills, which is carried out by the specific search commission at each ministry or agency. Only candidates who have passed the first step are allowed to compete in the second, which effectively closes the opportunities for new entrants in the civil service without having passed a competitive and transparent process. This is a significant step in controlling politicization and arbitrary appointments. At the same time, this more centralized procedure does not apply to civil servants transferring from one unit to another, which constitutes the most common pathway to new appointments in the civil service. Transfers are weakly monitored compared to new hires, thus still allowing for politicization and arbitrary practices. However, with time there will be less and less opportunities for occupying positions without passing through the new competitive

two-steps procedure. Another important initiative is the Plan for Implementing the European Common Assessment Framework of quality control. The Institute of Public Administration is overseeing the process, starting with a pilot project in 48 administrative units.[63]

There are several lessons that can be learned from the Bulgarian example. In the first place is the importance of political will and political dynamics for the outcome of reform efforts. As Meyer-Sahling argues, civil service laws are seldom the expected catalysts for the stabilization, depoliticization and professionalization of the public administration (2004). Instead, political dynamics and party politics have exercised persistent influence over public administration reform, and personnel management in particular. As one expert points out, the efficiency of EU funding does not depend on the form or type of funding, it depends on the willingness of the beneficiary country to do reforms, and no one could convince policy-makers to enact reform.[64]

Second, external pressure and financing is important and can help jump-start reform. Yet, it cannot prevent abuse, as illustrated by the funding spent on trainings. Domestic actors have their own objectives and incentives and can skillfully use external support to further their own agenda. At the very least, if their goals are not aligned with that of the funder, the outcomes of the funded projects can turn out very different from what was originally intended.

Third, long-standing legacies are hard to uproot and have great influence over administrative culture and civil service reform. Despite the conceptual shortcomings of the legacy argument (Meyer-Sahling, 2009), legacy effects have had great influence on the trajectory of civil service reform in Bulgaria. Deeply-rooted and long-standing practices of politicization, corruption, and inefficiency have been resilient to reform efforts. Instead, they have maintain an administrative culture that helps perpetuate inefficiencies, corruption practices, and political patronage. Thus, reform efforts need to be sustained over a prolonged period of time on order to slowly start changing value systems and attitudes.

8 Conclusion

Public administration reform in Bulgaria has had one of the worst records among East European countries. The system has encountered great obstacles in overcoming communist legacies and combating high levels of corruption and politicization. The push for reform has been primarily external which puts into question the sustainability of reform efforts. The poor reform record reinforces the traditional low trust in government institutions, further eroding the efficiency of the public sector. Lack of political will and great political instability in recent years have further impeded any previous efforts. The reform has been stop-and-go in nature, with a decreasing commitment (particularly financial) on the part of recent governments. Some success stories do

63 Administrative Reform report 2016. Available at: https://e-administration-report.eu/.
64 Interview with Mariya Hristova, Managing Authority, OPGG, October 2017.

exist. Some municipalities have been able to benefit from EU funding more than others and to adopt best practices. The key factor for success or failure has been the political will. With widespread and endemic corruption benefitting the power holders, it is unlikely that sustained and meaningful efforts can be made. The external leverage of the EU is weakening in the context of an overall European crisis of governance. Given that the EU has been the main driver of reform in this area, we can expect to see further backsliding and deprioritization of public administration reform. The overall top-down and centralized approach makes it hard for local governments to be autonomous and be able to drive their own reform efforts. The central government, in turn, fails to address regional differences and disparities, resulting in great territorial inequalities. The best course of action in such context is to empower civil society organizations in the monitoring and reporting and to focus on increased transparency and voice. Support for the senior management level is also critical, as it can offset deficiencies at the political level. Focusing on the civil service, its continued professionalization and professional development can prove a smart strategy to pursue.

The Bulgarian case illustrates that PAR is a complex process influenced by a variety of factors. Reform trajectories may differ despite common legacies and administrative traditions. Specific political choices can reinforce or uproot such legacies and traditions and can either reinforce exiting institutional mechanisms or help institute new ones in their place. External pressure can go a long way in incentivizing government officials and civil servants to stay on the reform track, however, such leverage has its limitations and can often lead to legal transposition without actual implementation to follow. The country-specific context and the interplay of the various factors determine a unique reform trajectory and outcome, which puts into question the transferability of public management models and traditions. The Bulgarian case further confirms the importance of political will (Kostadinova and Neshkova, 2013) and the limitation of the top-down approach (Nakrošis, 2017). More importantly, this article illustrates the importance of a wholistic approach to the study of administrative reform and dynamics that combines theoretical with country-specific knowledge, as well as the value of qualitative studies that complement quantitative comparative studies.

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The Role of Public Governance Practices for Business R&D Activity in the EU

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ABSTRACT

The public sector and public governance play a crucial role in the contemporary society which takes care of social needs. Therefore, it is not surprising that good governance has often been used to explain good economic performance as well as the well-being of a society over the last decade. However, the business sector often represents a channel through which public governance affects economic performance, which has largely been neglected in the existing literature. In this context, not much is known about the role of public governance in promoting research and development (R&D) in the business sector in the EU. Therefore, this article aims to explain the interaction between the public and business sectors in a cross-national setting by investigating the relationship between different public governance practices and business R&D activity. The aim is to be achieved by applying a multiple regression analysis on a cross-sectional dataset of EU member countries. The empirical results show the following. First, they reveal that, in general, public administration in the EU is predominantly based on neo-Weberian state rather than New Public Management governance practices. Second, they reveal that public governance practices have important implications for business R&D activity. They show that impartiality, accountability and efficiency enhance business R&D activity in the EU, while closeness deteriorates it. The findings of the article are especially beneficial for contemporary governments and policymakers to establish appropriate public governance and policy practices in the future.

Keywords: *business sector, EU, neo-Weberian state, New Public Management, public governance, R&D activity*

JEL: H11, O38

1 Introduction

In a society, the public sector, together with public governance, play an important role (Ropret et al., 2018). Precisely, the public sector delivers goods and services, redistributes income through mechanisms such as taxation or social security payments, and the ownership of assets or entities. On the other hand, effective governance provides better service delivery in order to achieve a higher quality of life for citizens. Contrarily, weak governance can deteriorate the investment environment and increase risks related to investment decisions in the business sector (Thanh and Hoai, 2019). It is therefore not surprising why good governance has often been used to explain the good economic performance as well as the well-being of a society over the last decade. Although the relationship between public governance and economic growth is well established in existing literature, most empirical studies ignore the fact that the business sector often represents a channel through which public governance affects economic performance. Namely, investment activity in the business sector represents a main part of the market economy. This is also supported by a recent opinion in literature that business investment is more directly associated with economic growth than public investment is (Ghura, 1997; Khan and Reinhart, 1990). Therefore, it is inevitable to establish such governance that ensures a more attractive investment environment for the business sector, especially in terms of R&D investments which are expected to be the most important investments in the future.

As not much is known about the role of public governance in promoting R&D activity in the business sector in the EU, the main aim of this paper is to establish the relationship between public governance and R&D activity in the business sector by considering different public governance practices in the EU member countries. Accordingly, the paper contributes to existing literature in the following way. It explains the interaction between the public and business sectors in a cross-national setting by investigating the relationship between public governance practices and business R&D activity. The remainder of this paper is structured as follows. After the introduction, a brief literature review and the theoretical framework are presented. The following section describes the data and research methods. In the next section, the empirical results are presented. The paper ends with a discussion and conclusion in which the main findings are summarized.

2 Literature review and theoretical framework

In existing literature there are not all too many papers that examine governance with regard to promoting R&D activity in the business sector in the EU member countries. One group of authors examined the relationship between good governance and economic growth (Knack and Keefer, 1995; Barro, 1996; Kaufmann et al., 1999; Hall and Jones, 1999; Kaufman and Kraay, 2002). They found a positive relationship between good governance indicators and economic growth. For the good governance indicators, they used six Worldwide Governance Indicators: 1) voice and accountability; 2) political stability and

the absence of violence; 3) government effectiveness; 4) regulatory quality; 5) the rule of law; and 6) control of corruption (World Bank, 2007, p. 2). The role of good governance is to ensure that the entities in a country always act in the public's interest. This can be achieved by a strong commitment to integrity, the rule of law, openness and comprehensive stakeholder engagement. The basic principles of good governance theory include accountability, control, responsiveness, transparency, public participation, economy, efficiency and etc. The main goal of this theory is to treat people not merely as customers or consumers, like in New Public Management, but as citizens. Moreover, "the citizens have the right to hold their governments to account for the actions they take or fail to take" (Ekundayo, 2017, p. 154).

Therefore, it is important that countries establish good governance that ensures a more attractive investment environment for the business sector (Aristovnik and Obadić, 2015; Ravšelj and Aristovnik 2018a; Ravšelj, 2019). One of the possible solutions is investment in R&D. It also matters for economic growth (Aghion and Howitt, 1992; Griffith et al., 2004; Inekwe, 2015; Ljungwall and Tingvall, 2015).

There are quite a number of studies as well as empirical evidence in existing literature regarding the effects of public R&D support, but the results vary. One group of authors (Branstetter and Sakakibara, 1998; Aerts and Schmidt, 2008; Czarnitzki and Lopes-Bento, 2011; Doh and Kim, 2014; Ravšelj and Aristovnik, 2018b) found positive effects of R&D support on firm performance and R&D investment, while other authors (Klette and Møen, 1999; Guan and Yam, 2015) did not find any effect produced by public R&D support. In a study by Guo et al. (2018) the effects of public R&D subsidies and how the governance of such grants influences those effects was examined on the basis of a case in China. Based on an analysis of a firm-level panel dataset between 1998-2007 they found that after receiving public R&D support, supported firms experienced a significantly higher increase in productivity than other firms. Petrin (2017) examined the impact and effectiveness of government support for R&D and innovation in the EU, OECD countries, China and Taiwan. The results showed that "the effectiveness of government support is greater when targeted to R&D expenditure and it diminishes with respect to its impact on firm innovation activities and macroeconomic outcomes that are the end goal of policy intervention" (p. 31). In addition to the aforementioned research, Capron (1992); Capron and Van Pottelsberghe (1997); David et al. (2000) also examined the effects of public financing on business investment in R&D activity. In the majority of EU member states, governments use fiscal incentives as direct support for public and private companies to encourage investment in R&D activity and innovation. The process of innovation promotes technological progress, but also endogenous economic growth.

To face the problems related to an ageing society, social security and healthcare costs, youth unemployment and public service infrastructure, governments can find a solution by means of public sector innovation. According to the Expert Group on Public Sector Innovation established by the Europe-

an Commission (2013), public sector innovation is defined "as the process of generating new ideas, and implementing them to create value for society either through new or improved processes or services" (p. 9). Based on their research they also found enabling factors that limit the development of innovation throughout Europe's public sector. These are innovation governance and public sector reform; diffusion and scaling up of good practices; smart regulations and responsive administrations; technology adoption; innovation procurement; funding issues, organizational learning and institutional innovation. Moreover, they found four broad categories of barriers to public sector innovation. These are "weak enabling factors or unfavorable framework conditions; lack of leadership at all levels; limited knowledge and application of innovation processes and methods; and insufficiently precise and systematic use of measurement and data" (p. 15). The characteristics of innovation in the public sector include networked governance, community governance and collaborative innovation. Arundel et al. (2019) found that a possible solution for public sector innovation needs to be greatly supported by the government for the data collection of a research program. If the public sector is oriented towards innovation, this can be reflected in greater national competitiveness, especially in the case of intensive interaction with an innovation-oriented business sector (Porter and Stern, 2002).

In the line with economic theory, four different public governance practices are considered in this paper. These are two Neo-Weberian State (NWS) (impartiality and closedness) and two New Public Management (NPM) practices (accountability and efficiency). These two concepts are namely considered to have different aims. On the one hand, the primary aim of the NWS is to focus on quality issues, and particularly issues relating to legality and equal treatment. Moreover, under this theory, the government remains a strong steering and regulating presence within society. In addition, government is steadily modernizing, professionalizing and seeking improved efficiency. On the other hand, the primary aim of the NPM is to increase flexibility and efficiency. The main attributes of NPM according to Gruening (2001) can be categorized as either undisputed or debatable. Examples of undisputed attributes are budget cuts, separation of provision and production, user charges, customer concept, vouchers, competition, freedom to manage, separation of politics and administration etc. The debatable attributes are legal budget constraints, improved regulation, democratization and citizen participation etc. This is also the reason why the NWS is more oriented towards input and processes, whereas the NPM is more output-oriented (Bringselius and Thomasson, 2017).

According to Weberian public administration, public administration should act impartially and public sector employees should be "personally free and subject to authority only with respect to their impersonal official obligations" (Weber, 1968, p. 333). The impartiality of public administration ensures that the rules are consistent and generalizable, which consequently enhances fairness and justice (Guy Peters, 2010). The aforementioned is often reflected in enhanced trust, which can lead to more innovative public administration (Fukuyama, 1995). Moreover, impartiality also has a beneficial effect on public

sector employees' motivation so that they perform their work better, which can ultimately be reflected in positive spillover effects on the society and the business sector, as well (Guy Peters, 2010). Furthermore, the shift from a supply-side towards a demand-side approach over the last decades can encourage business R&D activity (Edquist and Zabala-Iturriagagoitia, 2012; Petersen et al., 2016). In this context, impartial public administration provides the conditions for the business sector to feel free to ask for public support for R&D investment (Suzuki and Demircioglu, 2017). Similarly, the NWS emphasizes professionalization of public administration, which is closely related to impartiality (Pollitt, 2008). According to the theoretical framework, the following research hypothesis is proposed:

– Hypothesis 1: Impartiality as a NWS public governance practice is positively associated with business R&D activity.

Weberian public administration is often considered to have a closed bureaucratic structure (e.g. France and Spain), which limits discretion and motivation in the decision-making process. This system is characterized by formalized entries and promotion, internal promotion, strength of seniority rules and special labor laws that regulate the public sector. Contrarily, open bureaucratic structures (e.g. the United Kingdom) strongly resemble management in the business sector, since they allow flexibility (Dahlström and Lapuente, 2012). Accordingly, the aforementioned characteristics of an open bureaucratic structure stimulate the motivation to innovate, while the characteristics of a closed bureaucratic structure reduce the motivation to innovate. In general, open bureaucratic structures provide a variety of opportunities for interaction between the public and business sectors as well as public-private partnership and consequently for enhancing R&D activity in the business sector, while this is not the case for a closed bureaucratic structure. In the context of the NWS, authority is exercised through a hierarchical structure (Pollitt, 2008). Therefore, the following research hypothesis is proposed:

– Hypothesis 2: Closedness as a NWS public governance practice is negatively associated with business R&D activity.

Following the traditional aspect of accountability, where politicians and civil servants are liable to elected authorities, accountability within the NPM was established. This type of accountability is a shift from the political to the managerial sphere and from input and processes to output and outcomes (Fatemi and Reza Behmanesh, 2012, p. 42). Moreover, the main emphasis is on getting results and achieving goals. This can be improved by increasing the competencies of public institutions in a way that they create new and innovative products or services in parallel with business R&D activity. Accordingly, our proposed research hypothesis is:

– Hypothesis 3: Accountability as a NPM public governance practice is positively associated with business R&D activity.

Within the traditional approach of public administration, greater emphasis has been placed on rules and procedures, whereas the NPM approach is more

focused on the attainment of results and outputs. Therefore, the NPM encourages the government to concentrate on the efficient production of quality services (Manning, 2001). To achieve this, adopting private sector styles of management practices, especially the R&D activity of the business sector, is inevitable. Therefore, our proposed research hypothesis is:

– **Hypothesis 4: Efficiency as a NPM public governance practice is positively associated with business R&D activity.**

3 Data and research metods

The paper is focused on evaluating the relationship between public governance and R&D activity in the business sector by considering different public governance practices in the EU member countries. This paper utilizes a dataset which has been compiled from three different data sources. The first data source is the Quality of Government (QoG) Expert Survey, which contains information on the structure and behavior of public administration in different countries (Dahlström et al., 2015). The second data source is the QoG Basic Dataset, which consists of a wide variety of different variables at the national level from numerous different data sources (Dahlberg et al., 2019). The third data source is the Global Competitiveness Index Dataset 2015-2016, which contains information about the competitive landscape of different economies and provides a unique insight into the drivers of their economic growth (WEF, 2015). The aforementioned data sources, which are based on the opinion of academic and practical experts, are merged to create a comprehensive cross-sectional dataset of the EU member countries. Due to the availability of data, the latest available data for 2015 is considered in the empirical analysis.

The empirical analysis includes different types of variables, namely the dependent variable, independent variables and control variables. The dependent variable considered in the empirical analysis is business R&D activity at the national level of the EU member countries. It is derived from the individual indicator provided by the Global Competitiveness Index Dataset 2015-2016 and denoted as company spending on R&D. Actually, it is derived from the following question: "In your country, to what extent do companies invest in R&D?" Experts were asked to answer this question using a scale from 1 (do not invest at all in R&D) to 7 (invest heavily in R&D). The higher values of this variable indicate higher level of business R&D activity.

The empirical analysis employs four different independent variables, capturing different public governance practices, which can be recognized within the public administrations in the EU member countries. The independent variables capturing the NWS and NPM public governance practices are calculated as an average of the individual questions, where all of the independent variables are derived from the QoG Expert Survey Dataset. For the individual questions, experts were asked to answer these questions using a seven-point scale from 1 (hardly ever) to 7 (almost always).

As regards the NWS public governance practices, the first independent variable is impartially. It is constructed from the following two questions: 1) "Gen-

erally speaking, how often would you say that public sector employees today, in your chosen country, act impartially when deciding how to implement a policy in an individual case?"; and 2) "Public sector employees strive to follow rules." The higher values of this variable indicate more impartial public administration. The second independent variable is closedness. It is constructed from the following two questions: 1) "Entry to the public sector is open only at the lowest level of the hierarchy."; and 2) "The terms of employment for public sector employees are regulated by special laws that do not apply to private sector employees." The higher values of this variable indicate more closed public administration.

As regards the NPM public governance practices, the third independent variable is accountability. It is constructed form the following two questions: 1) "Citizens and media actors can track the flow of government revenues and expenditures"; and 2) "When found guilty of misconduct, public sector employees are reprimanded by proper bureaucratic mechanisms". The higher values of this variable indicate higher accountability of public administration. The third independent variable is efficiency. It is constructed from the following two questions: 1) "The salaries of public sector employees are linked to appraisals of their performance"; and 2) "Public sector employees strive to be efficient." The higher values of this variable indicate higher efficiency of public administration.

For the purpose of controlling other relevant factors that are expected to influence business R&D activity at the national level, control variables were taken into account. Due to a relatively small sample of EU member countries, it was not possible to consider a large number of control variables in the empirical analysis. Accordingly, control variables are limited to three crucial factors. The first control variable is government procurement of advanced technology products. It is derived from the following question: "In your country, to what extent do government purchasing decisions foster innovation?" Experts were asked to answer this question using a scale from 1 (not at all) to 7 (to a great extent). A higher level of this (incentive) variable indicates that a government fosters business R&D activity to a greater extent. The second control variable is human resources (availability of scientists and engineers). It is derived from the following question: "In your country, to what extent are scientists and engineers available?" Experts were asked to answer this question using a scale from 1 (not at all) to 7 (widely available). A higher level of this (infrastructure) variable indicates better availability of human resources. These two variables were obtained from the Global Competitiveness Index Dataset 2015-2016. The third control variable is government fractionalization. It is derived from the government fractionalization index provided by the QoG Basic Dataset, which measures "the probability that two deputies picked at random from among the government parties will be of different parties" on a scale of 0 to 1. A higher level of this (political competitiveness variable) indicates higher government fractionalization. A summary of all variables used in the empirical analysis is presented in Table 1.

Table 1: A summary of variables considered in the empirical analysis

Variable	Scale	Source
Dependent variable		
Business R&D activity	1-7	Global Competitiveness Index Dataset 2015-2016
Independent variables		
Administrative impartiality	1-7	QoG Expert Survey
Administrative closedness	1-7	QoG Expert Survey
Administrative accountability	1-7	QoG Expert Survey
Administrative efficiency	1-7	QoG Expert Survey
Control variables		
Government procurement	1-7	Global Competitiveness Index Dataset 2015-2016
Human resources	1-7	Global Competitiveness Index Dataset 2015-2016
Government fractionalization	0-1	QoG Basic Dataset

Source: authors' elaboration.

The impact of public governance practices on business R&D activity in the EU is estimated on the basis of a cross-sectional dataset of the EU-27 member countries (except Luxembourg), for which the data of all relevant variables is available. Given the nature of the variables considered in the empirical analysis, an ordinary least squares (OLS) regression analysis is employed. Due to the expected high correlations among the independent variables capturing public governance practices, each main independent variable of interest (public governance practice) is considered separately in the empirical analysis. The estimation is performed in two consecutive steps. In the first step, only the bivariate relationship between public governance practices and business R&D activity is estimated. In the second step, control variables are considered in order to check for other relevant determinants of business R&D activity at the national level as well as to check the robustness of the empirical analysis. The estimated multiple regression models are summarized and presented by Equation (1).

$$Business\ R\&D\ activity_i = \alpha_0 + \beta_1 Public\ governance\ practice_i + \beta_n Control\ variables_i + \varepsilon_i \quad (1)$$

Accordingly, business R&D activity is the dependent variable, α_0 is the constant term, public governance practices is the independent variable (administrative impartiality, closedness, accountability and efficiency). These are followed by the control variables (government procurement, human resources and gov-

ernment fractionalization), and , ε_i is the disturbance term. In this context, it is expected that public governance practices have important implications for business R&D activity by considering other relevant determinants of business R&D activity at the national level.

4 Empirical results

The paper is focused on estimating the impact of public governance practices on business R&D activity in the EU. Table 2 presents the descriptive statistics, namely the mean, standard deviation, minimum and maximum values for the variables considered in the empirical analysis. The comparison between the mean values of the main independent variables of interest provides interesting insights, based on which the popularity of individual public governance practices within the EU can be established. First, it reveals that impartially is the most prevalent public governance practice. Further, it exhibits that closedness and accountability are medium prevalent public governance practices. Finally, it shows that efficiency is the least prevalent public governance practice. Considering the NWS (impartiality and closedness) and NPM (accountability and efficiency) public governance practices together, the comparison reveals that, in general, public administration in the EU is still predominantly based on NWS rather than on NPM public governance practices.

Table 2: Descriptive statistics

Variable	Mean	Std. Dev	Min	Max
Dependent variable				
Business R&D activity	3.970	0.922	2.751	5.549
Independent variables				
Administrative impartiality	5.302	0.702	4.000	6.167
Administrative closedness	4.513	0.679	2.769	5.647
Administrative accountability	4.705	0.916	2.400	6.083
Administrative efficiency	3.775	0.805	2.300	5.231
Control variables				
Government procurement	3.344	0.456	2.579	4.277
Human resources	4.517	0.591	3.480	6.060
Government fractionalization	0.379	0.243	0.000	0.743

Source: authors' elaboration, based on applied database.

Table 2 shows the correlation matrix, where Pearson correlation coefficients between variables considered in the empirical analysis are presented. Simple correlations between the dependent variable (business R&D activity) and the main independent variables (impartiality, closedness, accountability and efficiency) preliminarily support the proposed research hypotheses. As regards the correlations between the dependent variable (business R&D activity) and the control variables (government procurement, human resources and government fractionalization), they are also in line with the initial expectations. Due to the high correlations among the independent variables capturing public governance practices, an individual consideration of public governance practices is necessary in the empirical analysis. Moreover, the correlations between the independent variables and control variables do not indicate any strong linear relationship. This suggests that there is no issue of multicollinearity in the data.

Table 3: Correlation matrix

		1	2	3	4	5	6	7	8
1	Business R&D activity	1							
2	Administrative impartiality	0.757***	1						
3	Administrative closedness	-0.502**	-0.509**	1					
4	Administrative accountability	0.705***	0.799***	-0.428*	1				
5	Administrative efficiency	0.703***	0.780***	-0.508**	0.763***	1			
6	Government procurement	0.767***	0.605**	-0.365	0.510**	0.017**	1		
7	Human resources	0.577**	0.377	-0.174	0.323	0.298	0.431*	1	
8	Government fractionalization	0.052	0.270	-0.124	0.302	0.290	0.152	0.134	1

Note: 1) Significance: *p<0.05; **p<0.01; ***p<0.001.
Source: authors' elaboration, based on applied database.

The results of empirical analysis for the relationship between public governance practices and business R&D activity are presented in Table 4.

Table 4: The empirical results for the relationship between public governance practices and business R&D activity

	NWS MODELS				**NPM MODELS**			
	Impartiality model		**Closedness model**		**Accountability model**		**Efficiency model**	
	Model 1	**Model 2**	**Model 3**	**Model 4**	**Model 5**	**Model 6**	**Model 7**	**Model 8**
Independent variables								
Administrative impartiality	0.994*** (0.172)	0.484** (0.163)						
Administrative closedness			-0.681** (0.235)	-0.315* (0.150)				
Administrative accountability					0.709*** (0.143)	0.340** (0.116)		
Administrative efficiency							0.805*** (0.163)	0.341* (0.153)
Control variables								
Government procurement		0.839** (0.251)		1.065*** (0.244)		0.934** (0.238)		0.881** (0.277)
Human resources		0.367* (0.166)		0.435* (0.178)		0.384* (0-167)		0.430* (0.176)
Government fractionalization		0.695 (0.374)		0.876*** (0.396)		0.652 (0.380)		0.712* (0.403)
Constant	-1.301 (0.918)	-3.319*** (0.830)	7.044*** (1.072)	-0.464 (1.278)	0.634 (0.683)	-2.735*** (0.789)	0.931 (0.628)	-2.473** (0.834)
Number of observations	27	27	27	27	27	27	27	27
R^2	0.573	0.802	0.252	0.768	0.497	0.800		0.773
Adjusted R^2	0.556	0.765	0.222	0.726	0.477	0.763		0.732

Note: 1) Significance: *p<0.05; **p<0.01; ***p<0.001. 2) Standard errors in parentheses.

Source: authors' elaboration, based on applied database.

From the empirical results, it is evident that public governance practices play an important role in business R&D activity. First, the regression coefficient for administrative impartiality is positive and significant (see Model 1 and Model 2), suggesting that impartiality as an NWS public governance practice is positively associated with business R&D activity. This implies that administrative

impartiality, which is often reflected in consistent and generalizable rules, which enhance fairness, justice and trust, increase the motivation of public sector employees to be innovative within public administration, which can also have positive spillover effects on business R&D activity. Moreover, the shift from a supply-side towards a demand-side approach has led to the business sector being dominant in society. This confirms the first research hypothesis (Hypothesis 1), stating that impartiality as an NWS public governance practice is positively associated with business R&D activity. Second, the regression coefficient for administrative closedness is negative and significant (see Model 3 and Model 4), suggesting that closedness as an NWS public governance practice is negatively associated with business R&D activity. This implies that administrative closedness limits discretion and motivation in decision-making processes, flexibility, interaction between the public and business sectors as well as public-private partnerships, which can have adverse impact on business R&D activity. This confirms the second research hypothesis (Hypothesis 2), stating that closedness as an NWS public governance practice is negatively associated with business R&D activity.

Third, the regression coefficient for administrative accountability (see Model 4 and Model 5) is positive and significant, suggesting that accountability as an NPM public governance practice is positively associated with business R&D activity. This implies that administrative accountability, which in the context of the NPM resembles the managerial sphere in the business sector by emphasizing results and goals, can encourage the creation of new and innovative products or services in parallel with business R&D activity. This confirms the third research hypothesis (Hypothesis 3), stating that accountability as an NPM public governance practice is positively associated with business R&D activity. Finally, the regression coefficient for administrative efficiency (see Model 7 and Model 8) is positive and significant, suggesting that efficiency as an NPM public governance practice is positively associated with business R&D activity. This implies that administrative efficiency, by emphasizing results, outputs, efficient production of quality services and consequently private-sector styles of management practices, stimulate business R&D activity. This confirms the fourth research hypothesis (Hypothesis 4), which states that efficiency as an NPM public governance practice is positively associated with business R&D activity.

As regards the control variables, the empirical analysis shows that government procurement, human resources and government fractionalization are positively associated with business R&D activity, while only the regression coefficient of government fractionalization is not significant in each model (see Model 2 and Model 6). Nevertheless, the empirical analysis suggests that government procurement of advanced technology products represents an incentive driver of R&D activity in the business sector. Furthermore, it suggests that human resources are also very important for R&D activity, since they represent one of the infrastructure determinants in the business sector. Finally, government fractionalization, which measures political competitiveness, also seems to have important implications for business R&D activity.

5 Discussion and conclusion

In all EU-27 member countries innovation, especially digital innovation, should be accelerated in the public sector. Moreover, the benefits will be of both a financial and non-financial nature. For example, the financial benefits are the ability to increase the efficiency and reduce the costs of public services by creating e-government services, while the non-financial benefits are numerous, i.e. leadership and innovation skills in the public sector; attractiveness of the public sector as a place to work for highly talented people and trust in government. Therefore, the connection between the public and private sectors is necessary to achieve all these goals.

The interaction between the public and private sectors is very important and consequently both sectors should cooperate with each other and complement one another. Good governance is nowadays namely one of the important determinants of good economic performance, while the role of the private or business sector should not be neglected, since it represents a transmission channel through which public governance practices can be reflected in overall national competitiveness and economic performance. Despite the increased interest in the field of public administration, there is a lack of cross-national empirical evidence investigating the interaction between the public and private sectors. Therefore, the paper attempts to illuminate this relationship by investigating the relationship between different public governance practices and business R&D activity in the EU.

The results of the empirical analysis reveal that public governance practices play a very important role for business R&D activity in the EU-27 member countries. The empirical results show interesting outcomes. First, they reveal that, in general, public administration in the EU is predominantly based on NWS rather than on NPM public governance practices. Second, they reveal that public governance practices have important implications for business R&D activity. Namely, they show that impartiality, accountability and efficiency enhance business R&D activity in the EU, while closedness deteriorate it.

Public administration should pursue modern public governance practices, since they stimulate the private sector and R&D activity. However, not all NWS public governance practices are problematic. What is especially problematic is closedness, meaning that, in practice, decisions are made without consulting the public. Hence, governments should create practices of good public governance where new forms of politics, and layers of governance, both internationally and locally, emerge. Therefore, the interaction between the public and private sectors is very important for the creation of governance innovation. To achieve this, changes are inevitable, especially within institutional forms of government and organizational forms and arrangements for the planning and delivery of services to citizens. All of this can only be achieved by appropriate administration reforms. The history and current politics of every EU-27 member country plays a crucial role in shaping commitment to reforms. Reforms should consist in reforms of public tasks and services, organizational reforms, legal reform and technical reforms, i.e. e-government.

The findings of this paper are especially beneficial for contemporary governments and policymakers in order to establish appropriate public governance and policy practices in the future. Despite the interesting insights regarding the interaction between public governance practices and business R&D activity, some limitations should be recognized and acknowledged. This research is limited by the publicly available data for all the EU member countries. Therefore, we could not conduct a more detailed analysis. A recommendation for future research is to observe a longer time period for all the EU member countries and to expand the analysis by other variables.

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Efficiency of Medical Laboratories after Quality Standard Introduction: Trend Analysis of Selected EU Countries and Case Study from Slovenia

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ABSTRACT

The evaluation of efficiency and effectiveness in the public sector has a long tradition in literature. The data envelopment analysis (DEA) method is hereby a commonly applied method for examining the efficiency of individual public sector units. It also applies to healthcare; however, research on individual parts of this activity is rare, particularly as regards the evaluation of laboratory-based activity. In this article, the DEA method is used to evaluate the efficiency of biomedical laboratories and the change upon quality standards introduction. This is the first example of verification of a change in technical efficiency in relation to the accreditation of ISO standards. In the article, the analysis of the efficiency of Slovenian medical laboratories is presented in terms of the obtained quality standard; moreover, a comparison of Slovenian medical laboratories and two laboratories from neighbouring countries, Austria and Italy, is provided. The results show that the use of the DEA method and the Malmquist index do not indicate an improvement in the technical efficiency of accredited laboratories but the quality indicators indicate a higher quality of performed work. The comparison of Slovenian and foreign laboratories indicates high technical efficiency of accredited laboratories, as they are the highest-ranked; however, the knowledge of laboratories indicates that there are also other reasons for such a ranking. These research results can be utilised in comparable areas and countries.

Keywords: *medical laboratories, quality standards, ISO, public sector efficiency, Slovenia, DEA method*

JEL: I18, C67, H41

1 Introduction

One of the key areas of laboratory medicine development is quality management system improvement, and thus also patient safety improvement. The International Organisation for Standardisation (ISO) defines quality design as the whole of the properties and characteristics of a product or service that considers the ability to satisfy indicated or implied requirements. In a nutshell, meaning a product or service is quality offered when it meets customer-specific requirements (Dybkaer, 1994). There are several standards in the field of laboratory medicine that define quality work. ISO 17025, ISO 9000/9001, ISO 22870, and ISO 15189 standards are the most widely used and implemented ISO standards. Experts on quality work in the field of laboratory medicine consider the ISO 15189 standard as the most relevant (Zima, 2010; Boursier et al., 2016). ISO 15189 accreditation is compulsory in some European countries, i.e. France and Hungary; and only partially compulsory for particular areas of laboratory medicine in some other countries, i.e. Belgium. Moreover, the main elements of the ISO 9000/9001 standard are included in legislation in Austria and Italy. In Germany, Italy, and Romania, an institutional work authorisation is also required; namely, laboratories may only conclude contracts with national health insurers if they have the institutional work authorisation. In Slovenia, the accreditation of ISO 15189 is voluntary; however, a statutory provision sets out that a work authorisation should be obtained from the Ministry of Health of the Republic of Slovenia (Boursier et al., 2010, p. 5). As indicated above, the ISO 9001 standard is used more 'in the field of quality of the work of medical laboratories in Austria, and consequently, on average, less than 5% of Austrian medical laboratories are ISO 15189 accredited. The same applies to Italy. In the field of quality of work, the ISO 9001 standard is more widely used than ISO 15189, and is also legally required. Thus, on average, less than 5% of medical laboratories are ISO 15189 accredited in Italy; however, all laboratories are required to have ISO 9000/9001 accreditation in order to be financed from the state budget (Oosterhuis and Zerah, 2015, p. 12).

The possibilities to improve laboratory performance, as a result of the introduction of the ISO 15189 standard, are as follows (World Health Organisation, Clinical and Laboratory Standards Institute, & Centers for Disease Control and Prevention (U.S.), 2011):

- Improved procurement and consumption system;
- Improved workflow in the laboratory, which positively impacts on the quality of work in all fields of work in the laboratory (reduction of pre-analytical errors and faster and more accurate performance of laboratory tests, etc.);

– Improved laboratory safety;
– Improved laboratory equipment management.

As indicated above, in Slovenia, the process of obtaining a quality standard is voluntary; however, a development project on medical laboratory accreditation was launched in 2015. Three laboratories were involved in the project. At the beginning of December 2017, all three medical laboratories obtained an accreditation certificate of eligibility and ISO 15189 accreditation (UKCL, 2017; SA, 2017). The research presented includes two laboratories which fall within the category of biochemical medical laboratories; the third one does not fit into this category of laboratories.

The central research hypothesis that we wish to verify within this paper is: The technical efficiency of laboratories that obtain the quality standard improves.. Furthermore, as part of the research, we also examined the efficiency of accredited laboratories with respect to other comparable laboratories in Slovenia, and the efficiency of the accredited laboratories compared to foreign accredited laboratories.

The introductory part is followed by a presentation of the quality standard importance, and a review of the literature evaluating efficiency changes that may result from the impact of quality standards on laboratory efficiency. Following the overview section, the methodology of the research in Slovenia is presented, which is followed by the research results and a comparison of efficiency with selected foreign laboratories.

2 Quality standard importance and an overview of the DEA method application for measuring efficiency in healthcare

Doctors refer patients for laboratory tests in the case of injuries and illnesses, for which it is difficult to predict the types and extent of laboratory services; therefore, in the applied system, it is desirable that these services are available to individuals. In this case, laboratory services are considered to be goods of particular social importance, i.e., so-called merit goods (Brščič and Tajnikar, 2007; Stanovnik, 2012). As observed by Rohr et al. (2016), the fact that 60% to 70% of diagnoses are based on the results of laboratory tests, is highly important in determining the position of laboratory medicine in healthcare. Consequently, medical laboratories represent an important stakeholder in correct and quality integrated patient care. Therefore, laboratory medicine, as a public health subsystem, provides services that directly affect the health of patients, and consequently, all stakeholders interacting with medical laboratories (Price et al., 2016).

There is a constant tendency to improve efficiency and productivity in the field of laboratory medicine, upon maintaining the same level of quality of service provision. Medical laboratory management can ensure this by optimising both the work process and the technology used, and thus improving their

efficiency (Croxatto and Greub, 2017). In the case of laboratory medicine, the focus is primarily on the quality of the provided services, the scope of activities, and the cost of operation (Price et al., 2016).

Although laboratory medicine is provided throughout the EU, it is not uniformly regulated; namely, the regulation in this respect is left to the individual EU Member States. In Europe, laboratory medicine practitioners are grouped into two associations (the European Federation of Clinical Chemistry and Laboratory Medicine, and the European Association of Specialists in Laboratory Medicine). Moreover, the areas within the sphere of laboratory medicine in the EU are highly diverse. In certain countries, it covers all areas of human sample analysis (Germany and Austria); in certain countries, particular areas (e.g. haematology, transfusiology, etc.) are excluded (France, Spain) (Oosterhuis and Zerah, 2015, p. 9).

Another important aspect of laboratory operation is innovation. Healthcare innovations are the driving force in searching for tools to balance the costs and the quality of healthcare, and can be defined as the introduction of a new design, idea, service, process, or product aimed at improving medical treatment, disease diagnosis, education, accessibility, disease prevention, and research, with long-term goals to improve quality, safety, health outcomes, efficiency, and cost minimisation (Omachonu and Einspruch, 2010, p. 10). The introduction of ISO standards can thus be defined as an innovation in the process of medical laboratory operation. There are several ways to measure the effects of innovation introduction. We can define the effects on the output side – produced by an organisation – or on the input side – consumed by an organisation. Economic effects on both sides can be defined through the application of econometric methods. This means that we can define greater productivity and efficiency of an organisation and quantify the resources used to provide product or offer service to consumers (Rogers, 1998, p. 17).

Mitropoulos et al. (2018) observe that sound management practices, which reduce the cost of medical consumables, lead to the improvement of hospital productivity. Reduction in the cost of laboratory reagents and material can thus prove to be sound management practice. The same management practice may also be reflected in the optimisation of the technology and work methods used (e.g. quality system introduction, which is reflected in the reduction of the number of repeated laboratory tests due to inadequate quality, and thus the reduction in the amount of laboratory reagents used, i.e. the introduction of ISO standards).

In the field of public healthcare, the issue of the efficiency and productivity of healthcare providers is crucial for the achievement of effectiveness of overall healthcare systems (Sahin, Ozcan, & Ozgen, 2011, p. 34). In economic terms, efficiency is determined using Pareto efficiency. A producer or service provider is deemed technically efficient if it produces a maximum level of output in the scope enabled by the available inputs, and is thus at the limit of production capacity. However, in terms of cost, a producer is efficient when it produces a certain amount of outputs by minimising production costs (inputs)

(Došenović, 2014). In the case of one input and one output, productivity is defined by the ratio of the quantity of inputs and outputs. When an organization use more inputs and produce more outputs, the productivity of the organization is defined as the ratio of production level index and input level index. The change in this ratio over time reflects the change in the productivity of the organization (Primorac and Troskot, 2005).

The most commonly used methods for efficiency analysis are: least squares method, stochastic frontier analysis, ratios analysis, total productivity factor, and data envelopment analysis (Ozcan, 2008, p. 6; Cylus et al., 2016; Worthington, 2004; Pelone et al., 2015). In the field of healthcare, data envelope analysis is one of the most widely used methods for determining efficiency, and a practical supportive tool for making management decisions (Emrouznejad et al., 2008). DEA evaluates the relative technical efficiency with a 'linear programming model', by using input and output variables from similar and homogeneous DMUs." (Charnes et al., 1978). In the DEA method, the so-called weighted comparison analysis enables us to use multiple inputs and outputs, which reflects a more realistic efficiency evaluation and enables better dispersion of results vis-à-vis parametric methods. One of the advantages of the DEA method is the empirically determined frontier of production possibilities, without a predetermined production function. The result is a mathematical evaluation of the efficiency of the analysed units with respect to the set of referential units (Pelone et al., 2015). Therefore, the DEA method was selected for the present study. Medical laboratories, as part of the health network in Slovenia, have been the subject of efficiency research only at primary healthcare level (Lamovšek et al., 2019; Kohl et al., 2019; Pelone et al., 2015). However, there are quite a few laboratory efficiency studies based on DEA worldwide. For example, a DEA analysis of the efficiency of twenty laboratories joined within Urmia University of Medical Sciences (Alinejhad et al., 2019), ten laboratories joined within Shiraz University of Medical Sciences (Taheri et al., 2017), and twelve non-medical laboratories joined within the Croatian National Institute of Public Health (Vitezić et al., 2017; Vitezić et al., 2019). A common finding of the aforementioned studies is that medical laboratories are generally technically highly efficient; however, Alinejhad et al. (2019) further observe their poor economic efficiency. Upon determining contact points of technology-related healthcare services, the study by Ozcan and Legg (2014) may provide us with an additional framework for the drawing up of research methodology in the light of applied technology. The DEA research of efficiency in healthcare is mostly input-oriented,[1] because it enables us to identify rational use of public funds more easily; this is also supported by systematic reviews of DEA research. In the review of the DEA research in healthcare, Cantor and Poh (2018) observe that as much as 79% of DEA research is input-oriented; similar is observed by Pelone et al. (2015) in relation to the primary level of medical care.

1 The DEA method can be oriented towards inputs or outputs. In input orientation, we assume constant outputs and thus greater control over inputs, which means that the amount of inputs can be reduced. However, if the DEA is output-oriented, we assume constant inputs; the number of outputs can change - increase. (Ozcan, 2008, p. 23).

In the light of the perspective of assessing the impact of quality standard introduction, it is important to analyse efficiency over a period of time. Using panel data and the Malmquist Productivity Index, we can determine the change in hospital productivity over time. The Malmquist Productivity Index indicates a change in total factor productivity from one period to another, due to the shift in the production possibility frontier and changes in efficiency (Coelli et al., 1998, p. 291). The Malmquist index can be divided into two components. When the value of the catch-up effect (M_U) and the shift in the production possibility frontier (M_T) is above 1, we can establish that there was an improvement in the technical efficiency or progress in technology in the observed year (Ozcan, 2008, p. 84). Dimas et al. (2012) monitored the technical efficiency and productivity of selected Greek hospitals over a three-year period. The study results reveal that hospitals can improve their performance more easily by introducing new technologies and not by better application of existing ones, which is supported with the increase in the expenditures of the analysed hospitals. Similarly, Fragkiadakis et al. (2016) analyse 87 hospitals in Greece within a specified time period. They have determined the change in efficiency over time by using the Malmquist index. In the above-indicated study, a panel analysis of the change in efficiency is divided into the change of pure technical efficiency and the change of scale efficiency. Furthermore, the finding that the size of the hospitals has a greater impact in determining their economic efficiency than in determining their process efficiency, is important for the study conducted on Slovenian laboratories. Li et al. (2014) analysed 12 medium-sized hospitals in Beijing. Using the Malmquist Index, they note an increase in the productivity of the analysed hospitals due to technological progress. Technical and pure technical efficiency stagnated or even decreased over the observed period. In the case of UK hospitals, Maniadakis and Thanassoulis (2000) identify changes in hospital productivity during the reform of the UK national health system, using the Malmquist Index. They observe that hospital productivity decreased in the first year after the reform, but then increased again. The productivity increase is mainly due to the improvement of allocation efficiency. They observe that productivity trends are largely dictated by technological developments that lead to an increase in expenditure. This also supports the view that it is easier for hospitals to improve efficiency by introducing new technologies than by making better use of existing ones. Similarly, the reform effects are analysed by Mitropoulos et al. (2018) in the case of Greek hospitals. Their results indicate that hospital productivity improved after the adoption of reforms. Productivity growth is attributed to the change in hospital efficiency and means improvement in management and operations. Moreover, sound management practices that have reduced the cost of medical consumables have also improved hospital productivity. Increased productivity due to investments in new technology is also observed by Sahin, Ozcan and Ozgen (2011) in the case of Turkish hospitals, and Yang & Zeng (2014) in the case of Chinese hospitals. In line with the above-indicated studies, we used the Malmquist index in our study to verify the change in technical efficiency due to quality standard introduction.

If we also consider the broader field of public sector, researchers in the field of public administration (municipalities and museums) in the Czech Republic noted that the introduction of quality standards don't have an impact on the higher efficiency of public service providers. For an in-depth interpretation of the results, they also used the quantitative Delphi methodology. Experts in the field of public administration emphasized that we must in addition to cost efficiency results also consider all other relevant factors, for example, the quality of the public services and satisfaction of clients (Plaček et al., 2020). Additionally, Plaćek et al. (2019), based on the DEA methodology, concludes that there is no significant difference in cost-effectiveness between municipalities that apply quality standards and those who do not. However, Wilford (2007) on the contrary argues, that there is some kind of link between holders of quality standards and higher organizational efficiency in the public sector. However, it is further noted that this perception should be interpreted with care because the holders of certificates of excellence and quality are already high performers. Thus, in most cases, the most efficient organizations also most often apply to different quality schemes.

3 Methodology

3.1 Data acquisition

Considering the criterion of carrying out all three types of laboratory tests (basic, special, and reference), we have managed to engage 20 laboratories which are involved in medical biochemistry, and operate at all three levels of healthcare in Slovenia, for the purpose of a comprehensive analysis. We analysed data of 3 medical biochemical laboratories at primary levels of health care (code P) and 17 medical biochemical laboratories at secondary (code S) and the tertiary level (code T) of healthcare in Slovenia. The process of data acquisition has been extremely difficult, mainly due to public unavailability of data, unregulated records, and the unwillingness of laboratories to participate. We have analysed data for the period from 2015 to 2017.

We ensured the homogeneity of the analysed units by only analysing the laboratories which perform all three types of laboratory tests. Thus, we did not include laboratories that perform, for example, only one group of laboratory tests. Also, Huang et al. (1989) in a study of the efficiency of healthcare providers in the primary level of health care concluded that the DEA analysis results can be useful despite some heterogeneity of DMU. Our analysed medical laboratories have a different scope of services, that is the reason that we included SE efficiency calculation in our research. SE results can help us to determine the appropriate (effective) range of services provided by laboratories.

We have obtained the data of two laboratories from abroad in order to make an international comparison of technical efficiency. We had difficulties obtaining data from abroad since in this case, there is not too much publicly available data. In order to use comparable laboratories, we needed data from laboratories that carry out all three types of tests (basic, special, and refer-

ence); however, we encountered different classifications in other countries. Moreover, foreign laboratories were not willing to participate in the study; we addressed the request to 15 foreign laboratories carrying out all three types of tests, which are comparable to the Slovenian accredited laboratories in size and have already introduced or were in the final stage of the quality standard introduction process. Only 2 out of 15 laboratories from abroad were willing to cooperate. Laboratories from Italy and Austria. Both laboratories are comparable to the largest Slovenian laboratory in the scope of services.

3.2 DEA method and determination of input and output variables

In order to evaluate the shift in the production possibility frontier in the case of the technical efficiency evaluation, we used a technical DEA model to try to answer the research question. In line with similar studies, we used the Malmquist index to evaluate the change over the time period. We used an input-oriented CRS[2] DEA model to identify changes in productivity, efficiency, and technological progress. Within the international comparison, we further defined the input-oriented VRS[3] model and evaluated the SE[4] laboratory efficiency. In order to rank the laboratories, we calculated the cross-efficiency[5] of the analysed units. An efficiency analysis was implemented using Frontier Analyst (Banxia), (Kendal, UK) and MedCalc (Panmun Education, Ostende, Belgium) software. According to the methodology of previous research (Taheri et al., 2017; Vitezić et al., 2017; Alinejhad et al., 2019; Ozcan and Legg, 2014; Lamovšek et al., 2019), we identified and used the following input and output variables:

- input: work as the number of recorded hours worked (L);
- input: capital as the total number of biomedical analysers (A);
- input: value of consumables, i.e. laboratory reagents and material (P);
- output 1 of laboratory activity: number of basic laboratory tests carried out (O);
- output 2 of laboratory activity: number of special laboratory tests carried out (S);
- output 3 of laboratory activity: number of reference laboratory tests carried out (R).

2 The CRS (constant return to scale) model assumes a proportional change in outputs relative to a proportional change in inputs. The result of the DEA CRS method determines the overall technical efficiency (Cooper et al., 2006).

3 In the VRS (variable return to scale) model, the change in output relative to inputs is disproportionate, and the production possibility frontier is determined as the envelope of linearly connected segments of the most efficient units. The result of the DEA VRS method determines the process efficiency (Banker et al., 1984).

4 The scale efficiency is a quotient between the CRS and VRS efficiency. The SE enables us to define how close to the process optimum size the observed unit is `(Førsund and Hjalmarsson, 2004).

5 Cross-efficiency is used to determine the average cross-efficiency evaluation of an individual unit (average by peers) based on the transfer of the weights of all the other analysed units to that unit. The cross-efficiency can thus also be used to objectively distinguish between 100% efficient DMUs, and consequently to rank these units (Doyle and Green, 1994).

The analysis thus includes all the relevant variables which determine the operation of medical laboratories in the field of medical biochemistry. The correlation method can be used to evaluate the importance of the selected input and output variables. An evaluation of the positive correlation between the variables used is thus the basis for the use of the DEA method. The use of Pearson's correlation coefficient requires a normal distribution of data; however, the researchers of DEA efficiency normally use it to show the correlation between the variables used (Vitezić et al., 2017; Wang et al., 2016; Došenovič, 2014). Based on the presented data, we observe a moderate to highly positive correlation between the input and output variables (0.616 to 0.944). This indicates the correct selection of the input and output variables.

4 Results

4.1 Results of the basic data analysis

Table 1 presents descriptive statistics of the analysed laboratories for all three years (2015, 2016, and 2017). A certain degree of heterogeneity of variables is observed. As weighted output/input ratios enter the DEA analysis, it is necessary to perform a Grubbs test for outliers for the output/input ratios of variables, to evaluate possible deviations in the data used. Since the Grubbs double-sided test requires the assumption of normal data distribution, we first examined if the data is normally distributed with a Shapiro – Wilks test, at a confidence level of P> 0.05. The Grubbs test was used only on data ratio sets that met the assumption P> 0.05. With the Grubbs test, we identified the T3 laboratory as an outlier in analysing R/L ratios in 2015 and 2017. We may conclude that the T3 laboratory has the highest proportion of reference laboratory tests among the analysed laboratories, which reflects the needs of the parent public health institution for reference laboratory tests. As previously indicated, the total weighted output ratios relative to the total weighted input ratios are included in the DEA analysis, which is why we did not exclude the T3 laboratory from the analysis.

Table 1: Common descriptive statistics for variables for all three observed years

	N	Min	Max	Average	Median	SD	25 - 75 P	Normal Distr.
L	60	5680	157746.00	42262.20	31355.00	34802.87	7458.00 to 51985.50	<0.0001
A	60	6.00	68.00	19.63	14.50	15.84	6.00 to 21.00	<0.0001
P	60	127143.00	4520071.00	883796.97	683130.00	881764.62	134683.00 to 1021110.00	<0.0001
O	60	49114.00	5616624.00	912666.73	501191.50	1214595.54	49985.00 to 991922.00	<0.0001
S	60	1869.00	826471.00	115770.47	84401.50	162162.51	2635.00 to 124435.00	<0.0001
R	60	1	111940.00	17110.25	11267.50	23972.17	1658 to 19463.50	<0.0001

Source: Own

4.2 Results of the Malmquist index for determining progress in laboratory technical efficiency after quality standard introduction

Based on other studies presented in the literature review (Chapter 2), the Malmquist index was calculated for all the analysed laboratories, in order to assess the impact of the quality standard introduction. The results of the Malmquist Index (M_0) (Table 2), the results of the change in technical efficiency (M_U), and the results of the shift in production possibility boundaries (M_T), are presented below. In order to present the effects of ISO accreditation, we present the results of the Malmquist Index in the case of the T1 and T6 laboratories, which were included in the ISO 15189 accreditation process, and which are holders of the standard as of 2017.

Table 2: Ranking of the analysed laboratories according to the descending Malmquist index

DMU	M_0	Ranking 2016	DMU	M_0	Ranking 2017
T3	1.2358	1	S10	1.1501	1
T2	1.2033	2	S2	1.0822	2
T4	1.1109	3	P1	1.0625	3
T1	1.0986	4	T2	1.0622	4
S1	1.0932	5	T4	1.0587	5
S2	1.0631	6	S3	1.0373	6
P1	1.0486	7	T6	1.0298	7
S3	1.0482	8	S1	1.0296	8
P2	1.0243	9	S11	1.0138	9
P3	1.0102	10	P3	1.0069	10
S4	1.0006	11	S8	0.9978	11
S5	0.9948	12	T1	0.9935	12
S6	0.9923	13	S9	0.9934	13
S7	0.9782	14	S7	0.9901	14
S8	0.9747	15	S6	0.9848	15
S9	0.9736	16	S5	0.968	16
T5	0.9101	17	T5	0.9398	17
T6	0.8965	18	S4	0.9282	18
S10	0.6923	19	P2	0.8852	19
S11	0.6741	20	T3	0.8286	20
Average	1.0012			1.0021	
SD	0.1373			0.0713	

Source: Own

This hypothesis requires verification of the T1 and T6 laboratory efficiency analysis before and after the quality standard introduction. We were interested whether changes in productivity are a consequence of a change in efficiency and technological progress as a result of the introduction of ISO 15189 accreditation. In 2015, both analysed laboratories applied for ISO 15189 accreditation; in 2016, the first pre-evaluations were carried out in the mentioned laboratories, and at the beginning of 2017, the final evaluation was provided. In 2017, the two laboratories already operated according to the rules set out by the ISO 15189 standard; at the end of 2017, they received the certificate for conforming to ISO 15189.

Upon detailed analysis of the ISO-accredited laboratory T1, we note that the laboratory is at the frontier of production possibility throughout the observation period. In 2016, the laboratory is ranked fourth M_o (1.0986); in 2017, it is ranked twelfth with a value of M_o (0.9935). In 2016, the mentioned laboratory shows technological progress and in 2017, it lags behind. In analysing the total number of laboratory tests carried out by the laboratory, we observe an annual increase in the number of laboratory tests carried out (5,994,555; 6,358,078 and 6,512,809). We note that in 2016, the laboratory carried out 162,865 more special tests than in previous year; however, in 2017, it carried out 42,226 fewer special tests than in 2016. It can be concluded that the proportion related to a basic laboratory test increase is much higher than the proportion related to the increase in special and reference laboratory diagnostics. The analysis of average material costs in relation to the total number of tests shows that the costs increase every year; however, from 2016 to 2017, they increased to a significantly greater extent (0.670; 0.675, and 0.694). Within the period from 2015 to 2016, the laboratory carries out a larger number of laboratory tests per working hour (38.57; 42.71); however, the number of tests per working hour decreases in 2017 (41.28). T1 Laboratory is the only laboratory in our analysis that operates as an independent organisational unit at institute level. If the laboratory carried out most of the laboratory test verification and validation processes in early 2017, this would explain the increase in material costs and the decrease in the number of tests carried out per hour.

In analysing the T6 laboratory, we note that the laboratory is never at the frontier of production possibility throughout the observation period. In 2016, the laboratory is ranked eighteenth M_o (0.8965); in 2017, it is ranked seventh, with a value of M_o (1.0298). In 2016, the laboratory productivity decreases due to lower efficiency M_U (0.8867). In 2017, it demonstrates an improvement in productivity M_O (1.0298) as result of improved efficiency. However, in 2017, the T6 laboratory technologically regresses, M_T (0.9624). The laboratory carries out specialised diagnostics in larger proportion - with regard to other analysed laboratories. In further analysis, we focus primarily on the analysis of the ratio of the number of special tests to the inputs used, due to the service model oriented towards special diagnostics. Throughout the analysed period, the T6 laboratory carried out the largest number of special tests in 2015 (70,414), and the fewest in 2016 (63,016). In 2016, the laboratory carried out fewer special tests per working hour than in 2015 (2.56; 2.33); in 2016, the

laboratory recorded higher material costs per special test carried out (7.21; 8.55). In 2017, the laboratory reduced the average material costs per special test (8.37), and again increased the number of special tests carried out per working hour (2.52).

We can establish that the technical efficiency of the T6 laboratory significantly deteriorated from 2015 to 2016 (0.63; 0.56), but then further improved in 2017 (0.60). In 2016, the laboratory shows higher costs of laboratory reagents and material than in 2015, despite a reduction in the number of all three groups of tests carried out. The medical laboratory accreditation process involves mechanisms for verifying the quality of laboratory test implementation in the laboratory test validation and verification process. The processes thus involve multiple control and repeated testing of various biomedical analysers, with an increased consumption of laboratory reagents and material. If the laboratory carried out most of the validations and verifications of laboratory tests in 2016, this could be the reason for a substantial increase in the cost of laboratory reagents and material. Moreover, employee workload increases during the accreditation process; however, it does not affect the higher number of laboratory tests carried out.

We can conclude that the technical efficiency of both laboratories does not increase with the introduction of accreditation.Within the selected time period, index values of the two laboratories observed do not show a significantly different trend compared to other analysed laboratories. Furthermore, the values of the calculated indexes for the two laboratories do not move the same way. Therefore, by using the Malmquist index, we cannot conclude from the DEA analysis that the technical efficiency of laboratories actually improves due to quality standards.

Due to the conclusion based on the results analysis, we wanted to verify the quality of one of the two laboratories using other indicators. We decided to use the TAT (Turnaround Time) indicator, which is considered by the majority as the most important indicator of quality. (Pati and Singh, 2014). The TAT quality indicator defines the proportion of samples with a commissioned test, analysed within a specific timeframe, according to the degree of urgency of test performance. A 60-minute upper limit is acceptable for tests with first degree urgency. Upon analysing the TAT indicator for two urgent tests (determination of troponin and serum glucose), we note that in 2015, at urgency level 1 (ASAP), 57% of all samples used to determine troponin[6] were analysed in the required time, and 79.1% in the case of glucose.[7] Upon analysing the same indicator in 2017, when the laboratory met the requirements of the ISO 15189 standard, we note that 61.8% of all samples used to determine troponin were analysed within the required time, and 88.1% of all samples used to determine glucose. A significant improvement in the value of the TAT indicator is observed. The results of the additional analysis confirm that a quality improvement is not necessarily linked to efficiency improvement. Rapid labo-

6 The test identifies the risk of myocardial infarction.
7 The test identifies the blood glucose value.

ratory diagnostics can indirectly reduce the cost of the overall medical treatment of patients, due to faster treatment and the reduced possibility of complications in the medical treatment of patients. Similarly, Cordero - Ferrera et al. (2013) note that it is important to include quality factors in the DEA analysis, as it further enables a more accurate interpretation of efficiency results.

4.3 Comparison of the efficiency of Slovenian laboratories with foreign laboratories

In order to analyse the impact of the quality standard introduction on efficiency, two laboratories from abroad - both holders of ISO 9001 accreditation and in the process of ISO 15189 accreditation (laboratories from Italy and Austria) - were included in the study. Both laboratories are comparable to the largest Slovenian laboratory in terms of the scope of services. The data set for the analysed year 2017 was thus increased by two units of foreign laboratories. For the international sample of laboratories, we used the Grubbs test to analyse the ratio of output/input variables for 2017. By increasing the sample, no outlier was detected.

Tables 3 and 4 show the CRS and VRS technical efficiency scores, which are supplemented with the calculation of scale efficiency and the ranking of laboratories according to cross-efficiency results. In order to evaluate the efficiency of Slovenian laboratories in comparison to foreign ones, we first analysed the technical efficiency of the Slovenian laboratories, since we were interested in the frontier of production efficiency in the case of the Slovenian laboratories. The inclusion of foreign laboratories enabled us to verify whether there is a shift, and in which direction of the production possibility frontier of the analysed laboratories.

The Slovenian biomedical laboratories in Table 3 show an almost twice as high inefficiency arising from the size of the units under consideration (SE) as process inefficiency (VRS), which is on average 7%. Based on the technical efficiency score of the medical laboratories, we can conclude that all laboratories that are CRS efficient (reach 1) - i.e. show no technical inefficiency - are also SE efficient. This means that they are of optimal size, i.e. they operate at the size level of optimal process. Most laboratories that show some degree of SE inefficiency should increase their size i.e. increase the size of their process in terms of increasing RTS[8] (return to scale). In our CRS analysis, the T1 laboratory most often (9 times) appears as a role model to the other analysed laboratories. In the VRS analysis, however, the T1 laboratory appears as a role model 4 times - the role of the lead laboratory is taken over by the S7 laboratory, which appears as a role model 8 times. The T1 laboratory is ranked first in terms of cross-efficiency.

8 If we wish to determine the return to scale (RTS), i.e. whether the RTS is ascending, descending, or constant, we need the sum of the weighted λ (lambda). If the sum of the weighted λ is less than 1, the analysed DMU shows ascending return to scale; in the opposite case, when the sum of λ is greater than 1, the analysed unit shows descending return to scale. DMU demonstrates a constant return to scale when the sum of the weighted λ equals 1 (Ozcan, 2008, pp. 47).

Table 3: Technical efficiency score of the Slovenian laboratories

DMU	Θ CRS	Cross-efficiency ranking	Θ VRS	Θ SE	RTS
T1	1.00	1	1.00	1.00	0
T5	1.00	2	1.00	1.00	0
S8	1.00	3	1.00	1.00	0
S6	1.00	4	1.00	1.00	0
S1	1.00	5	1.00	1.00	0
S2	1.00	6	1.00	1.00	0
S11	0.75	7	0.86	0.87	1
S9	0.89	8	0.97	0.91	1
S3	0.70	9	0.89	0.79	1
P1	1.00	10	1.00	1.00	0
T6	0.60	11	0.73	0.83	1
S5	0.65	12	0.78	0.83	1
T3	1.00	13	1.00	1.00	0
P3	0.77	14	0.78	0.99	-1
S7	1.00	15	1.00	1.00	0
P2	0.66	16	0.96	0.69	1
T2	0.72	17	1.00	0.72	1
S4	0.39	18	0.69	0.56	1
T4	0.81	19	0.87	0.92	1
S10	0.35	20	1.00	0.35	1
Average	0.81		0.93	0.87	
SD	0.21		0.11	0.18	

Source: Own

It may be concluded from Table 3 that 9 Slovenian laboratories included in the analysis are technically efficient and operate to an optimum range with respect to the set they are compared to. However, when two foreign laboratories are included in the analysis, the production possibility frontier diverts away from the analysed laboratories.

Table 4: International comparison of the technical efficiency of medical laboratories for 2017

DMU	Θ CRS	Cross-efficiency ranking	Θ VRS	Θ SE	RTS
AU	1.00	1	1.00	1.00	0
T5	1.00	2	1.00	1.00	0
S8	1.00	3	1.00	1.00	0
T1	0.91	4	0.95	0.96	-1
P1	1.00	5	1.00	1.00	0
IT	1.00	6	1.00	1.00	0
S1	1.00	7	1.00	1.00	0
S6	1.00	8	1.00	1.00	1
S9	0.89	9	0.97	0.91	1
S7	1.00	10	1.00	1.00	1
S11	0.65	11	0.72	0.90	1
S2	1.00	12	1.00	1.00	0
P3	0.77	13	0.78	0.99	-1
S3	0.56	14	0.66	0.84	1
P2	0.66	15	0.96	0.69	1
S5	0.59	16	0.71	0.84	1
T6	0.58	16	0.69	0.85	1
T3	1.00	18	1.00	1.00	0
S4	0.38	19	0.69	0.55	1
T2	0.50	20	0.92	0.54	1
S10	0.33	21	1.00	0.33	1
T4	0.40	22	0.56	0.71	1
Average	0.78		0.89	0.87	
SD	0.24		0.15	0.19	

Source: Own

It can be concluded (Table 4) that there was an unfavourable shift of the production possibility frontier, away from the analysed Slovenian laboratories.

The analysed laboratories now show 22% of total technical inefficiency, in roughly equal proportions of process and SE inefficiencies. Both the Austrian (AU) and the Italian (IT) laboratories are at the frontier of production possibilities under the assumption of both CRS and VRS technology. Both foreign laboratories show 100% SE efficiency, and now determine the optimum size in terms of inputs and outputs. The Austrian laboratory (AU) assumes the role of a leading role model, i.e. under the assumption of both CRS technology, it appears as a role model 11 times. However, under the assumption of VRS technology, it is in second place, as it appears as a role model 7 times.

The Slovenian laboratory T1, which in the previous analysis of Slovenian laboratories showed 100% process and SE efficiency, shows 9% of the total technical inefficiency in the international survey. The laboratory SE inefficiency is 4%, and the process inefficiency is 5%. Thus, in view of the decreasing return to scale, the laboratory process size should be reduced.

In order to rank laboratories objectively, we can use the cross-efficiency method. Considering the method of cross-efficiency, we can conclude that the Austrian laboratory is ranked first, the Slovenian T1 with the accreditation is ranked fourth, and the Italian (IT) laboratory sixth. The second accredited Slovenian T6 laboratory is ranked sixteenth; it was ranked only eleventh within the comparison of the Slovenian laboratories. It can be concluded from the above that quality standard introduction does not necessarily mean greater overall technical efficiency in the operation of laboratories. Therefore, the quality measured by using other indicators is also of utmost importance. Nevertheless, we can conclude that most accredited laboratories are ranked up to the sixth place, based on the cross-efficiency ranking. We observe that all laboratories ranked first are larger laboratories with an organisational structure that includes departments exclusively involved in quality, which represents an advantage over others, as no other major differences are detected. This could be the reason why the second Slovenian accredited laboratory is not ranked higher; namely, the laboratory is smaller and without an elaborated organisational structure.

5 Conclusion and discussion of results

In the analysis, we used the Malmquist Index to carry out an in-depth analysis of two laboratories with ISO 15189 accreditation. We note that the laboratory T1 is at the frontier of production possibility throughout the observation period. We observe a decrease in efficiency of the laboratory T6 in 2016 (- 7%), compared to 2015, and a re-increase in efficiency in 2017 compared to 2016 (+ 4%). We are aware that the processes of laboratory test verification and validation, required within the accreditation process, consequently increase the costs of laboratory reagents and material, and that greater personnel input is required within the accreditation process with regard to the preparation for the assessment. The mentioned fact may impair the technical efficiency of the analysed laboratories, since a greater amount of input fails to reflect in the quantity of produced product (the number of laboratory tests

carried out). This was especially the case with the laboratory T6. Similarly, Mitropoulos et al. (2018) establish that an increase in the costs of material can negatively impact on efficiency evaluation. The laboratory T1 demonstrates technical efficiency throughout the entire period considered; however, it also demonstrates a decrease in productivity and technological stagnation in 2017. Moreover, when analysing the TAT indicator for the laboratory T1, we observed a significantly improved indicator value, which indicates that quality improvement is not necessarily related to the current improvement in technical efficiency. However, rapid laboratory diagnostics, resulting from improved efficiency, can indirectly reduce the cost of the overall medical treatment of patients, mainly due to faster treatment and the reduced possibility of complications in the medical treatment of patients. The same has been observed by some other researchers (Zima, 2010; Dahlgaard and Dahlgaard, 2002).

The findings of the study are partly in line with the findings of other researchers, who also did not observe technical efficiency improvement in the renewal of processes or technology (Maniadakis and Thanassoulis, 2000; Dimas et al., 2012); however, this result may be due to the small sample of observed units, especially the group of accredited laboratories. The position of the Slovenian laboratories deteriorates with the inclusion of two foreign laboratories in the research of technical efficiency; however, the larger Slovenian accredited laboratory still remains highly ranked, in fourth place. On the other hand, not all the accredited laboratories rank first in the ranking based on cross-efficiency.

We can conclude that the laboratories which are the largest in terms of the scope of carried out services, are more likely to opt for quality standard introduction. In our analysis, the larger Slovenian T1 accredited laboratory, and the Austrian and Italian laboratories occupy the first 3 places in terms of the scope of carried out services. The indicated laboratories also have a more elaborate organisational structure, and specialised departments exclusively involved in the quality of work. Furthermore, we determined that the analysed laboratories demonstrate a decrease in efficiency in the phase of preparation for accreditation; their efficiency is again improved after the completion of the processes in this respect. This was especially the case with a small Slovenian laboratory.

Quality standards, with their requirements, have also a direct impact on improving the safety of healthcare workers. That is specifically expressed in the field of laboratory medicine since laboratory professionals are in constant contact with biological material that can be contagious. The important safety factor of healthcare professionals was thus particularly expressed in the outbreak of the Covid-19 virus pandemic in early 2020. Thus, the contributions of improved employee safety must also be taken into account when evaluating the efficiency of medical laboratories. The DEA method, as an element of an analysis of the efficiency of medical laboratories, also does not define the impact of the implementation of quality standards on the health outcomes. Consequently, successful health outcomes can thus have the effect of reducing treatment time and reducing the potential costs of health care activities, which is not taken into account in our DEA analysis. That is a reason why the

DEA method is not a satisfactory stand-alone indicator of efficiency for testing the quality of laboratory work, which opens space for further research in this area.

When interpreting DEA efficiency results it is also important that we take into account different scale of operations in medical laboratories as a limiting factor of reliability of DEA results.

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The 'Silent Guardians' in the Fight against Corruption: The Case of North Macedonia[1]

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ABSTRACT

Impartial public administration is a key gatekeeper against corruptive practices and the necessary condition for the process of democratisation. Yet, in the case of North Macedonia, there is an ongoing challenge in addressing the problem of politicisation of public administration. On one hand, the ombudsman holds the normative position to safeguard citizens in front of state administration bodies, to act upon the impartiality biases or other deviances of norms, and to annually report to the National Parliament. On the other hand, the parliament should be able to hold executives and institutions accountable for their actions and to act upon the ombudsman's recommendations. However, there is a limited understanding of the role that these two institutions can play in an effective fight against corruption as part of the democratisation processes. The purpose of the article is to examine the institutional gaps where the opportunities for corruption and social traps are encouraged. Based on theoretical, empirical as well as comparative observations, within single case method analysis, this article aims to examine the compliance of the theoretical fingerprints with the actual practice and provide a different angle on the institutional opportunities for social traps, in the context of unconsolidated democracies. The findings show that there is a causality between the institutional 'silent guardian' of the citizens and the prevalence of corruption. It also encourages further discussion on the factors that undermine the positions of the ombudsman and the parliament to take active engagement in rooting out the corruption from societies.

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Keywords: anti-corruption, democratisation, impartiality, North Macedonia, ombudsman, parliament

JEL: K42, K10

1 Introduction

There is an ongoing debate on the deterioration of the quality of democracy, notably present in the Central and Eastern Europe, commonly linked to the prevalence of corruption and the weak rule of law. (Guasti and Mansfeldova, 2018, pp. 9-21). These practices are especially evident in the case of Macedonia[2] as fragile democracy with ongoing threats of corruptive prevalence and lack of democratic sustainability. Moreover, a situation of state capture has been identified, following a political crisis during 2015, triggered by the wire-tapping scandal on high-level corruptive cases. (EU Progress Report, 2016, p. 9). One of the exemplified forms of the common concerns related to the corruption prevalence, is the weak law enforcement and the lack of impartial public administration. On the one hand, an effective and merit-based public administration has been recognized as a core pillar of the quality of governance and the necessary factor for consolidating democratic societies. On the other, the politicization of the public administration or the citizens' discrimination in public employment based on political grounds, shows to be an important feature behind weak anti-corruption strategies. Moreover, the lack of mutual trust between the citizens and other collective actors proved to inhibits the progress of law enforcement and rooting out corruption from political systems.

Nevertheless, relevant independent bodies, such as the Ombudsman with a mandate to monitor, detect, act and report on biases in public administration bodies or discrimination as experienced by the citizens, have remained under-acknowledged in the institutional set-up for prevention and repression of corruption. Additionally, the role of the national parliaments has as well remained under-acknowledged in the exercise of horizontal accountability as an important feature in constraining the power of executives and reducing the opportunities for abuses of power. Although the national parliaments as political and democratic institutions hold normative power to exercise democratic accountability and hold the Ombudsman accountable for their action, the relation between the Ombudsman and the parliament in addressing the corruptive practices and providing for consolidation of democracies, remains understudied. Hence, this paper aims to grasp the loci of the (frequent) deterioration of the democratization processes in the case of Macedonia and to zoom into the roles of the Macedonian Parliament, i.e. Assembly and the Ombudsman in addressing the deviations of norms related to *politicization of the public administration*, or discrimination in the public employment based on political ground. This approach follows the Rothstein' theoretical arguments

2 The constitutional name was changed to the Republic of North Macedonia. In the text is reffered as Macedonia.

on the use of the principle of impartiality in the exercise of the governmental power and draws perspectives from the institutional theories on the quality of governance, corruption and social trust linked to the key role of the impartial administration in the effective fight against corruption. (Rothstein, 2005, p. 24). It also draws arguments on the democratic theoretical approach in conceptualizing legitimation as a process of actual justification in providing for the exercise of democratic accountability, as one of the key pillars of embedded democracies (Wolfgang, 2004, 2019).

Following the analysis of the theoretical and empirical findings to be discussed in the next sections, this article suggests that both the parliament and the Ombudsman, in cooperation with other collective actors, can provide for a political system that is able to address the citizens' problems and create a political culture of accountability. This is important because the arguments presented in this article further engage with the discussion on the deterioration of democratization processes in Central and Eastern Europe, and encourage discussion on the role of the national parliaments and other independent and regulatory bodies in the fight against corruption, under the EU integration process. It does not, however, allow for definite conclusions concerning the factors that have an impact of these institutions in the system of check and balances, nor the factors that affect the individual choices, due to the limitation of this article.

2 The concept of social traps

In order to examine possible factors behind, this study takes the position of examining the opportunities for corruptive behavior as an obstacle for reaching control of corruption. In this regard, academics have argued that in the absence of public criteria, flow of information and transparency over the quality of procedures and regulations, corruptive behavior is 'invited' and initiated. For example, the political party leaders take the opportunities for non-distributive strategies over (influential) groups of people that can provide for winning elections and keeping their power in place as long it's possible. Such deviations take forms of clientelism, nepotism or patronage, reflected usually in an unequal distribution of goods or resources through social welfare programs (pensions systems, job opportunities in the public sector and whatever necessary for "buying votes" (Stokes et. al, 2012, pp. 14-16). These corrupt practices undermine the protection and the implementation of the collective strategies and allow individuals to further capture the public resources for private or third-party interest.

Therefore, the control of corruption is recognized to be the indispensable final stage of a successful process of democratization (Mungiu-Pippidi and Johnston, 2017, 2014). Countries which can learn how to take control of corruption epitomize countries with effective rule of law systems that are capable of providing legality, protection of human rights and safeguard of the social interest. Effective law enforcement and the ability of societies to empower people to accept the generalized moral norms and engage in en-

deavoring a political culture of resilience against corrupt practices is a necessary criteria for anti-corruption strategies to be considered successful. This would also amount as an indicator of exercising democratic accountability in practice and meeting the standard of representative democracies. The moral costs indeed have been identified as „expression of internalized beliefs attributing positive value to the respect of laws, and has been conceptualized as an informal institutional structure of compliance with legal norms regulating the conduct of public and private agents" (Della Porta and Vannucci, 2005, p. 2). In this regard, the anti-corruption laws are said to be enforced by high moral costs exercised as informal sanctioning mechanisms based on cultural codes and values and the actors'belief in the functionality of the system: that sanctions and legal prosecutions can sustain and guarantee the rule of law and the principle of legality and predictability. Consequently, the respect of the formal institutions and the rules of the games provide for creating a political culture of account giving that can resist deviations of norms in all spheres of the society and enable empowerment and engagement of the citizens in maintaining the culture of high moral standards. When actors or elites in the allocation of rights and duties violate procedures, benefits and obligations, and the laws and procedures are manipulated, for unduly influence on the rules of the game, citizens are entrapped in the vicious cycle of corruption, the law enforcement is ineffective and the legitimacy of the state activities is jeopardized (Kaufmann, 2008; Rothstein, 2011; Kurer, 2005, p. 231).

Moreover, in line with Olsen and Rothstein' arguments, these concepts are not considered as inherited or culturally determinate properties. As such, they are exposed to change, based on the interactions between the institutions, the public servants and the individuals (citizens). (Olsen, 2010, p. 159; Rothstein, 2005, p. 129). Consequently, the joint and mutually inter-dependent cooperation can produce or destroy the mutual, i.e. social trust that can reduce or provoke the transition *into a social trap*. Social trap, on the other hand, is defined as 'situation where individuals, groups or organizations are unable to cooperate owing to mutual distrust and lack of social capital, even where cooperation would benefit all' (Rothstein, 2005, pp. 1-22). The common situation of social trap is exemplified, but not limited, by frequent anchors of the citizens' mistrust in the administrative and democratic institutions, in form of weak law enforcement, disengagement from cooperation with others, or with the society in general. Hence, social trust, as argued by the institutional theorists, can also affect the interpretations and consequently, the political culture of accountability.

2.1 The principle of impartiality in representative democracies

The quality of impartial and professional public service affects the everyday life of the citizens. First, the administrative decisions provide for quality administrative services under which every person should be treated on fair and equal terms, and it's not discriminated in exercising its rights in contact with the administrative bodies. Second, transparent and open administrative decisions provide opportunities and equal access to merit-based job positions that are

not pre-determinate by political affiliation. Scholars have argued that "if a public authority has a reputation for making the right decisions in the first place, this will generate public trust in the government and reinforce the legitimacy of administrative decision-making" (K.J. de Graaf et al., 2007, pp. 1-10). Hence, 'the legal quality of administrative decision-making is therefore of primary importance to the individual citizen and the public at large. It is an important element in the administration of justice by public authorities and it is important in upholding the credibility and sustainability of the government as a whole.' (Ibid.) In this regards, impartial public administrations can act, both as a guardian against deviations of norms, i.e. abuses of public power for public gains and against social traps. On a contrary, politicized public administration indicates risks of social traps or citizens' disengagement in the law enforcements 'as forms of everyday resistance to ineffective governance of state institutions and reactions to large-scale political corruption' (Ledeneva, 2011, p. 12).

Independent and regulatory bodies such as the Ombudsman, but also State Audit, State Commission for Prevention of Corruption etc. have a mandate to gather and report on relevant data, of biases, deviations and administrative malpractices on national, local and municipal level in order to justify the exercise of its normative powers, drawn from the citizens. Citizens indeed have their legal right to express their experiences with shortcomings or malpractices in administrative decisions, inability to access public information or threats to their civil rights. Most common public forum in representative democracies where or when the scrutiny process on the annual reports of these institutions is exercised, is the national parliament. In most of the political democratic systems the Ombudsman and the other independent bodies are appointed and held accountable by the national parliaments, based on semi or annual results.

When seeking to account of the quality of decision-making, democratic processes and respect for procedures, democratic theory' scholars have drawn on the concept of *legitimation* as relation between actors that comprise both attributes by the institutions and the moral agents and as a process of *actual justification* through which political rules and procedures are legitimized (Kneip and Merkel, 2018, p. 6). This type of justification also stands as a mechanism for account giving and gives access to the exercise of power relationships, empowered by citizens. When an actual form of legitimation and account-giving between these institutions is in place, the flow of information contributes to the transparency of governmental activities, with a tendency to diminish the concentration of power. Such practices stand as a form of horizontal accountability, by which the relationships between actors, institutions and decision-makers become more visible, reducing the possibilities for capturing institutions for private interest (Scott, 2014, pp. 472-487; Merkel, 2004). When effective, accountability processes have an integrative effect and are conducive to intellectual and moral self-development as well as self-government (Ibid.) As institutional scholas have also argued, „they ameliorate the moral qualities of individuals and society through the internationalization of a democratic and civil ethos, improve communication, learning, and epistemic quality; contribute to power-equalization and political equal-

ity" (Olsen, 2014). Consequently, the politics of accountability involve both the pursuit of accountability within the accountability regime and efforts to change established regimes (Waren, 2014).

2.2 Research question and research methodology

This article therefore asks how the process of account giving affects ineffective law enforcement in anti-corruption strategies. First, it takes the assumption that the deviances in the employment practices in public administration bodies affect the citizens' trust in the political system and the situations of social traps. Second, it takes the assumptions that the account giving between the Ombudsman as an independent body that reports on such deviances and the national parliament as an institution that represents the citizens' interests, affects, the culture of political accountability and the process of democratization. To examine the possible causality, the article first explores the institutional framework of the Ombudsman and the Assembly (the national parliament) and the conditions of account giving. By taking qualitative within single case study approach, the first methodological step includes an overview of the normative mandates of both institutions as evident in legal and institutional documents: Law on the Ombudsman, the Law on the Assembly, the Constitution, the Rule of Procedures, etc.

Second, to unpack the conditions of account giving, a comprehensive overview of the Ombudsman annual reports for the period of 2001-2016 is applied, by using a systematic approach, focusing on the deviations in the employment, based on political grounds as reported by the citizens in the annual reports. A sample of 14 annual reports was studied. Then, two types of empirical evidence were listed: *pattern evidence* based on the most common data as reported by the Ombudsman in the period from 2001 to 2016 and *sequence evidence*: showing the temporal evidence on two key events that have been identified as critical junctures, both for the Ombudsman and the national parliament, i.e. the Assembly. The first critical juncture is identified in 2003 when the Constitutional amendments have been introduced and the Ombudsman as an institution expanded its competences to address cases of discriminations and biases in the principle of impartiality, fairness or legality. The second critical juncture is identified in 2015 when the European Commission tasked a group of independent senior rule of law experts to prepare a report and concrete recommendations, which fed into the Commission's "Urgent Reform Priorities", in light of the revelations in the wiretaps scandal, in summer 2015.[3] The same senior rule of law experts prepared a second report, in 2017, assessing implementation of their previous recommendations and providing guidance to the new government. This was the time when European Commission have took different step in the case of an EU applicant state and was the time when the role of the regulatory and independent bodies, including the

3 During the period under review, January 2015 to January 2017, Macedonia has been engulfed in a political crisis that began when the leader of the opposition released wiretapped material revealing widespread corruption and egregious abuse of power within the government. The report outlined a set of urgent reform priorities comprising the main points in the EU agenda for Macedonia. (BTI, Macedonia country report, 2018).

one of the Ombudsman, has been acknowledged as key actor in meeting the shortcomings in the rule of law and the fight against corruption.

Scholars have identified that during critical junctures, the political decision-making, the initiatives for political mobilization and coalition formation, and the strategic interactions between key actors, are likely to be directly influenced by multiple and contradictory political pressures of varying strength, which, given the generalized uncertainty, are likely to be ambiguous and to change rapidly (Capoccia, 2015, pp. 147-179). Political actors, therefore, have substantial leeway to choose which pressures to yield to, and which instead to resist, in deciding their best course of action (Ibid.) The critical junctures are also important features for analyzing the actors' actions that (might) have been taken and contributed for different institutional path development towards a change of political regimes.

Hence, to complement the qualitatitative analysis, a comprehensive overview of the annual reports of the National Assembly for the period from 2001 to 2016 is also applied, as well as analytical method approach of the available minutes of meetings or stenograpic notes for given period. The access to data to the minutes of meetings of the relevant working bodies or releavant Inquery Committees concerning the process of legitimation or actual justification is inconsistent. The public disscussions that have taken place on regular plenary sessions are analysed, with some inconsistency in the dates/years of analysis. A sample of 26 documents was studied and comparative method of analysis was applied. The analysis was focused on the disscusions on the discrimination on political ground as indentified in the Ombudsman reports. Most of the documents were available in English, while some official documents were only available in Macedonian language, and therefore the findings have been translated in English language. To complement the scope of analysis, additional empirical evidences on corrupt administration practices related to discrimination in public employment based on political ground were drawn from OSCE/ODIHR elections monitoring reports, the EU Progress reports and other findings of international and national institutions, related to corrupt administrative practices, prior and after the period of the critical junctures.

In the dissussion section, the theoretical fingerprints drawn from the institutional and democratic theoretical approach, are analyzed from the perspective of the empirical findings. The methodological approach for this paper follows the tradition of 'explanation through interpretation' in the Weberian sense[4] aiming to elaborate on the causalities between observed theoretical fingerprints and the actual empirical findings. The outcome seen as democratic deterioration and ineffective prevention of the opportunities for corruption is indicated in the secondary literature. Macedonia as an EU candidate country is a typical case of a fragile democracy. According to the Bertelsmann Stiftung's Transformation Index (BTI) published in 2018, Macedonia has reached limited transformation in the democratization process and

4 Social science in this view 'is a science concerning itself with the interpretative understanding of social action and thereby with a causal explanation of its course and consequences' (Weber, 1978, p. 4).

is identified as defective democracy rather than consolidated democracy, reaching deterioration in the democratization process (BTI, 2018, p. 11). That said, an analysis is proceeds in the next section.

3 Results: the competences of the Ombudsman and the Assembly

3.1 The competences of the Ombudsman

The Ombudsman is an independent and self-governing body, regulated under the Constitution since 1991 (The Ombudsman Law, 2003, Article 3). The Ombudsman protects the constitutional and legal rights of citizens when there have been violations by state administration bodies or other bodies and organizations with public mandates (Constitution, 1991, Article 77). The Macedonian Parliament adopted the first Law on the Public Attorney (Ombudsman) in 1997. Relevant critical juncture for the development of Ombudsman in this period is the adoption of the Ohrid Framework Agreement in 2001.[5] Following the constitutional amendments upon the Ohrid Framework Agreement, the Ombudsman Law was amended in 2003 by which the institution was decentralized and six regional offices were established (Official Gazette of RM, 2003, No. 60).

According to the Constitution and the Ombudsman Law, the Ombudsman is accountable to the Macedonian Assembly by the mechanism of ex-ante and ex-post scrutiny. The Ombudsman is elected by the Assembly upon nomination, and is accountable to the Assembly, by reporting with annual report in a public session attended by representatives of the Government (The Ombudsman Law, 2003, Article 5; 2009, Article 36). The annual report is a public document and contains the Ombudsman's findings regarding the level of respect for the human rights and freedoms of citizens, a description of the main problems, statistical data, information on processed and ongoing complaints, a description of specific cases of violations, as well as a report of the other activities of the Ombudsman (Rules of Procedure of the Ombudsman, Article 56). Submitting its findings to the Assembly accounts for exercise of democratic horizontal accountability and the reports should be scrutinized in sessions with Government representatives (Assembly of the Republic of Macedonia, 2014, p. 209).

The Ombudsman may also submit special reports to bodies within local government. The Ombudsman is obliged to handle complaints conscientiously, impartially, efficiently and responsibly (The Ombudsman Law, 2003, 2009, Article 7). The Ombudsman's office may initiate procedures at its own initiative if it assesses that the constitutional and legal rights of citizens are violated or if the principles of non-discrimination and equitable representation of community members in the bodies (The Ombudsman Law, 2003, 2009, Article 13).

5 This agreement was established, between political parties representing ethnic Macedonians and ethnic Albanians, after the inter-ethnic conflict which occurred the same year.

3.2 The parliamentary oversight framework

The Assembly on the other hand, performs legislative, representative and oversight role. As a regulated system of parliamentary democracy, the powers of the executive, the legislature and judiciary are separated and the executives are accountable to the Assembly (Constitution of the Republic of Macedonia, 1992, Article 92; 2005, 2019).[6]

The oversight functions of the Assembly are regulated with the Constitution, the Law on Assembly and the Rules of Procedures of the Parliament and several means are available for executing the normative power of holding executives accountable of their performances in the protection of the public interest. Important feature of the normative functions of the Assembly is the oversight over the actions of the Government administration: Parliament may ask for reports and information from those ministers and officials who are responsible for the work of administrative bodies, or on matters within the scope of the respective ministries' competencies. More precisely, they can ask them to submit reports on enforcement and implementation of the law or other particulars at their disposal. The state administration bodies perform their duties autonomously and on the basis and within the framework of the Constitution and laws, being accountable for their work to government (Article 96 of the Constitution).

An important means for this type of parliamentary scrutiny are: 1) Oversight (Committees) Hearings: the government's accountability to the parliament is brought into play by holding hearings in committees. 2) Inquiry Committees set up for any domain or any matter of public interest (Article 76 of the Constitution, Official Gazette, 2013). The Assembly can also set up a permanent committee of inquiry for the protection of the freedoms and rights of citizens. The findings of the committee form the basis for any initiation of proceedings to ascertain the answerability of public officials. The oversight hearings as a control mechanism in the case of Macedonia were introduced under the Law on the Assembly, in August 2009. Any relevant working body can initiative oversight hearing (RoL, Article 21: (1). The working body can decide to hold an oversight hearing with the majority of the votes from the present members and with at least one third from the total number of members (RoL, 2009, Article 22). Oversight hearings are held in order to obtain information and expert opinion about the creation and implementation of new policies, enforcement of laws and other Governmental activities of the state administration bodies (IPU, 2016). During the oversight hearing, the respective working body can invite authorized representatives of Government or state administration bodies at the session and ask them to provide information and explanations regarding the subject of the oversight hearing. The working body can also ask the authorized representatives to submit the requested information, opinions and positions in writing, at least three days before the session of the respective body is held. During the oversight hearings, information is required,

6 The Assembly is comprised of 123 MPs elected for four-year mandates by a proportional representation system.

if necessary, to harmonize or clarify concrete issues and facts. Moreover, each parliamentary group is entitled to expert advice and a separate office, according to the number of Members of the Assembly in the group (Rules of procedures, Article 22 and 33). As regulated with Article 104 of the Rule of Procedures, minutes shall be kept from parliamentary sessions. After the end of the oversight hearing, the working body submits a report to the Assembly, which includes the essence of the presentations, and can propose conclusions to submit to the Government.

The Inquiry Committee, on the other hand, is a mechanism that ensures an ex-post control over the Government and other institutions that accountable to parliament, i.e. the Assembly. An inquiry committee is a body, which can be established by a decision of the Assembly to undertake the function of political control in all areas and all matters of public interest. Proposal for the establishment of an inquiry committee can be submitted by at least 20 MPs. An exception to this rule is the Committee for Protection of Civil Freedoms and Rights, which is a standing inquiry committee. Terms of reference and composition of inquiry committees are specified by the decision for establishment, whereby presidents of inquiry committees by the rule are from among the MPs from the opposition parliamentary groups. Inquiry committees are formed to establish facts and situations related to controversial matters, which are under the competence of ministries and other state authorities. An inquiry committee has a task to inspect the documentation, make an analysis of each separate event or case and present the findings in front of the Assembly. Inquiry committees cannot have investigative and other judicial functions. However, the findings of the inquiry committees may be the base to initiate a procedure to call to account the holders of public office (Rules and Procedures of the Assembly of RM, 2008, 2010, 2013). In 2008, the Macedonian Assembly has an established Standing Inquiry Committee for Protection of Civil Freedoms and Rights, in reference to Article 26 of the Constitution and the Decision for establishing working bodies in the Macedonian Assembly from 26 June 2008. The Assembly has, however, no specialized anti-corruption commission (Constitution of RM, 1992, Article 76.159).

3.3 The principle of impartiality in public administration

A professional, competent and impartial public administration has been identified as one of the key factors behind effective anti-corruption strategies and law enforcement. The employees of the public sector are obliged to perform their activities conscientiously, professionally and efficiently in an orderly and timely manner by law and Constitution. Civil and public servants are obliged to perform their jobs impartially, without being influenced by political parties, their own political beliefs or personal financial interests, and are obliged to protect the reputation of the public sector (Code of Ethics of Public Servants, 2011, Article 139). Public sector employees may not participate in election campaigns or in other public events of a similar nature during office hours.

The principle of legality and the principle of equality is also regulated under the Law on Preventing Corruption. (1) Every citizen has the right to an equal

approach in the performance of the matters of public interest and to equal treatment on the part of persons carrying out public functions, without being the victim of corruption. (2) Every citizen has the right to a free appearance on the market and to free competition, without fearing that he may be the victim of monopolistic or discriminatory behavior, which is the result of corruption (Law on Prevention of Corruption, 2002, 2004, 2006, 2008, 2010, 2015). These principles have shown to be crucial for an effective fight against corruption.

In order to create independent, professional and impartial public administration, politically unbiased and based on the principle of competence and merit in recruitment, the Constitution and the legal framework have stipulated criteria for recruitment and promotion in public administration, which should provide for its professionalism and expertise. Hence, the competences of the public administration are regulated under the Constitution and the relevant legislation stipulate the enforcing law, monitoring the situation in the area they are established for, giving initiatives, drafting regulations, settling with administrative affairs, and performing administrative oversight. Macedonia has developed a legal and institutional framework to guarantee the civil and political rights of citizens and provides for fundamental democratic processes (Law on Public Sector Employees, 2014, 2016). Nevertheless, most of the citizen's complains as reported by the Ombudsman annual reports in the period from 2001 to 2016 are related to biases in the labour relations and discrimination on political ground, followed by complaints from the discrimination in the judiciary and the exercise of their legal rights in the front of courts.

4 Discussion

4.1 Discussion on the Ombudsman reports' findings

The document analysis and the Ombudsman reports for the period from 2001 to 2016, has identified several patterns of deviances in exercising power by administrative bodies. Citizens' complaints to the Ombudsman during 2001 to 2004/5 are related to the labour relations, a particular problem with labour relation stopped on the grounds of technological surplus (Ombudsman Annual Report, 2002, p. 4). This period in the process of privatization set a framework of building a new path for edification of the inter-institutional system and integrity system that would be able to address the citizens complains as experienced in practice. However, as evident in the Ombudsman report in 2002, the taken initiatives to address the citizens complains did not deliver the required outcomes. Namely, the Agency of the Republic of Macedonia for Privatization confirmed the allegations for unlawfulness in the procedure of transformation of the public property. The Ombudsman sent a complaint to the Public Attorney for annulling the procedure for privatization. Yet, the recommendation, for unclear reasons and without any arguments was not accepted (Ombudsman Annual Report, 2002, pp. 4-12). This type of lack of institutional cooperation and lack of actions of the state bodies to the Ombudsman requests is evident in the following period.

The information on the employment discrimination on the political ground, has become even further evident in the Ombudsman report in the period from 2003 to 2016. In 2003, the Ombudsman reported on "drastic increase in the number of complaints in the field of labour which shows that the practice of so-called "party retaliation" continues after the conduct of any elections. This was particularly pronounced in the field of education and child protection institutions, both in the selection of candidates for employment and in and in the transformation of employees' employment from indefinite to indefinite contracts.

In 2005, the Ombudsman continued with the practice of taking actions against corrupt practices. As reported, the Ombudsman took respectively disclosure of three judges for unprofessional and unethical working. The Ombudsman reaction has recognized as "the brightest event" in the fight against corruption in 2005 in the cooperation corruption barometer, in which were included 19 Chief in Editors of national media (Annual Report, 2005, p. 33). "The frequent illegal and tolerant passive attitude by the local authorized bodies and officials caused by personal interests or political influences" continued to be reported as practice in the upcoming years. In, 2007 the Ombudsman reported, "This situation creates justified revolt and dissatisfaction of citizens and their disbelief in the institutions, most of all in the higher officials in charge" (Ombudsman report, 2007, p. 38). During the course of procedures for appointing, in which the process was conducted according to the Law on working relations, the problems mainly referred to appointing an employee to a position, which was not in accordance with his/her professional background. (Ibid.) Once again, "typical cases referring to a violation of the right to working relations in conducting employment procedures at the state administration bodies, the unjustified reassigning, termination of the working relation, expressing dissatisfaction for calculated lower unemployment benefit, unrealized right to annual leave etc." were also reported in the Ombudsman Annual report (2009, p. 41). The citizens continued to complain "on violation of the equality right during employment procedures at the municipal administration, as well as violation of rights to working relation, according to them on political grounds (2010, p. 85). Moreover, the Ombudsman reported that additionally "another worrying fact is spread in other areas where it is decided on citizens' rights and selective approach is evident as well as unequal treatment in approaching justice." (Ombudsman report, 2010, p. 90). On this ground, the Ombudsman suggested the employment of state servants to be liberated from any influences on a political basis as it directly concerns the quality, professionalism and responsibility in the execution of their work and certainly in the realization of citizens' rights (Ombudsman report, 2011, p. 35).

During this period of time, the international OSCE/ODIHR monitoring missions prior or during elections have also reported on common allegations concerning threats to the public sector workers for losing their jobs, threats that pensions or social benefits would be withdrawn if their recipients choose not to support the party in control at the local or national level etc. (OSCE/ODIHR reports, 2004, 2006, 2009, 2011, 2014, 2017). All of these threats served as

evidence of politicization of the civil service. Moreover, in 2010, the Government made a decision to change the status of 5,000 full-time employees, lacking transparency and objectivity of the decision, despite the EU criticism and expert opinion that such a procedure violates all principles of transparency, fairness and merit (CUP Report, 2017, pp. 8-9). Withal, the OSCE survey data has also revealed that citizens believe that there is the highest level of corruption (62.8%) in the recruitment and career advancement in public administration (OSCE, 2012, p. 147).

During this period, the Ombudsman has continued to call for active participation of the Assembly in holding executives accountable, to pushing for control over these occurrences, while alarming about the partisanship of the institutions (Ombudsman reports, 2004, pp. 3-10; 2017). If such practices took place, this would have been considered as taking a new path towards a political culture of accountability or breaking patterns of the vicious cycle of misdoings.

In 2013, the Ombudsman has also raised the concerns that the conclusions of the Assembly, which should have obliged the Government and other bodies and organizations with public authority, to comply with the requests. Rather, it has reported that the decisions and Ombudsman's interventions have remained only declarative and rare, lacking compliance and respect to the normative conditions by the relevant bodies (Ombudsman report, 2013, p. 22). On this occasion, the Ombudsman has reported on the non-cooperative attitudes by the Public Prosecutor's Offices, the Basic Public Prosecutor's Office for Organized Crime and Corruption (Ombudsman report, 2013, p. 66), the Administrative Court (Ombudsman report, 2014, p. 65) and other institutions. The largest number of complaints received on the Ministry of interior occurred in 2015, the same year when the corruptive scandal, on the wire-tapping materials, was revealed in the public. That said, 2015 was also another event of a critical juncture when the Urgent Priority Reforms were issued. In the next section, we will examine the process of actual justification through the national parliament.

4.2 Legitimation or the process of actual justification through the national parliament

In the period from 2001 to 2008, the data analyses on the available Minutes of Meetings/ Stenographic Notes and the annual parliamentary reports have identified few patterns in the process of actual justification. First, there has been some awareness among the parliamentarians on the need of institutional cooperation between the Ombudsman and the other state bodies on the findings, including the data on the politicization or discrimination in the employment-based on political grounds. There is also awareness of more effective engagement of the parliament in exercising its normative power to demand from the state bodies to respect the requirements by the Ombudsman. In this period, the Ombudsman Annual Reports are discussed by the Commission for Political System and occasionally, the Commission has been

inviting representatives from ZELS, local communities, academics and experts in their respective fields (Assembly annual report, 2002 - 2003, p. 64).

During the discussion of the Ombudsman annual report from 2003, few parliamentarians raised the issue on the biases of the impartiality by the public authorities and public servants. It was also suggested, "there is a need of much broader elaboration of the necessary activities and behaviours that public officials should have, in line with their duties to respect and exercise human rights and freedoms in the Republic of Macedonia, rather than to formally adopt the report" (Stenographic notes, 2004, p. 71). However, it was decided that "given our time is limited, and since this is a comprehensive report that touches on virtually all spheres, all areas of social life, we should make an effort to skip these topics." (Ibid.). Moreover, it was stated that the fact that 75% of complaints are disregarded and the fact that none of the summoned officials has responded to the Ombudsman's indications, diminishes the confidence in this important institution" was concluded during the sessions (Minutes of the meeting, 2004, p. 49). Yet, there is no record on the follow-up of these recommended measures or conclusions.

That said, due to the repetition of these similar patterns of scrutiny, the analysis has found that the discussions on the Ombudsman reports lacked consistency and quality in the performance of actual justification. During the presentation of the Ombudsman Annual report in 2004, at the 97 Parliamentary Session, held on May 31, 2005, the Ombudsman has called on the need of increased action by the MPs, by evaluating how laws are applied, rather than to perform a technical exercise of a formal adoption of the reports. During the regular plenary sessions, the Ombudsman has addressed the problems concerning the citizens' complaints on employment based on party affiliation. These practices of facades of legitimation continued in the following period, and yet the regulations under the Rules of Procedures that would improve the time-frameworks, or the rules that can introduce quality to the debate, did not change. Some of the MPs have recognized the negative long-term impact of such practices, as on the forthcoming youth "brain-drain" (51 regular Plenary Session, 10 April 2009). Yet, these discussions were followed by another formal adoption of the annual report.

The lack of normative compliance of the state bodies to the Ombudsman complains and initiatives to the Agency for public administration reacted upon, remained constant. Nevertheless, the formality of the public discussions has continued in the following years, with limited use of the oversight means. Although the Standing Inquiry Committee for Protection of Civil Freedoms and Rights was established in 2008 with a duty to exercise quality discussion on the Ombudsman findings and support the capacities of exercising oversight in the protection of human rights and freedom, in the following period from 2014 and 2015, remained completely silent. During the period from 10 May until 31 December 2014, 1 January to 5 March 2014 and from January 1 2015, to December 31, 2015 the Standing Inquiry Committee for Protection of Civil Freedoms and Rights did not hold any sessions (Annual Report, 2014,

p. 87; 2015, 2016). Much of the institutional theory critique on the social trap is evident in the Ombudsman reports for the period of 2013-2016 as well, before and after the peak of the political crisis in 2015. That said, the indicators of corruptive practices in form of the politicization of public administration and the unequal access to justice, i.e. biases of the principle of impartiality, have continued to be raised in the Ombudsman annual reports (Ombudsman annual report, 2014, p. 72). During this period, the analysis of the EU Progress reports on the democratization progress of the country, show that the European Commission has been identifying the lack of significant efforts in ensuring transparency, professionalism and independence of the public administration, in particular respect for the principle of merit-based employment that are not subject to political influence, together with the principle of equitable representation (EU Progress Reports, 2003-2014). However, there is also a lack of sufficient acknowledgement of the normative and legal need of compliance among the Ombudsman, the National Assembly and the other regulatory and independent bodies, concerning the strengthening of the rule of law and the implementation of anti-corruption strategies.

On 9 February 2015, a wire-tapping scandal was revealed, and the main opposition party accused the government of having been involved in widespread illegal surveillance of the private communications of political actors and state officials (European Commission, 2015, pp. 6–7). With the introduction of the Urgent priority reforms, based on the rule of law experts' fact-finding mission in the country in 2015 and 2017, the i.e. Priebe report, the EU has called the institutions for ensuring legal sanctioning of non-compliance with the requirements and recommendations of independent bodies and has called on cooperation between the public authorities and the Ombudsman, acknowledging the role both of the Ombudsman, the parliament and the other regulatory bodies in addressing the rule of law shortcomings and the fight against corruption, as a necessary conditions for the process of democratic consolidation.

The initiative of the European Commission, with i.e. Priebe reports to stress the normative position of the Ombudsman and the need for in-depth cooperation with the Parliament, the judiciary and other state bodies, also introduced the possibility for acknowledging the need of legitimation as a process of actual justification in delivering an actual act of account-giving. A break of patterns in this regard, would amount for breaking a situations of mutual mistrust, introduction of standards for higher moral costs and development of political culture of accountability. However, the formal character of the public debates of the Ombudsman reports revealing data on biases on laws, corruptive practices, ineffective rule of law and discrimination in the employment on political ground have continued upon the period of issuing the Urgent Priority Reforms, with some changes in the level of Governmental engagement in the follow-up recommendations to the responsible institutions. Yet, the use of the normative oversight means for challenging the social traps or systemic corruption, remains under-acknowledged, both on national and EU level.

5 Conclusion

This article has demonstrated that the independent role of the Ombudsman as a key guardian of the human rights has a crucial role in understanding the citizens' concerns and the lack of trust in the political system, seen as a necessary condition for effective law enforcement of anti-corruption strategies. The Parliament, on the other hand, serves as the guardian of representative democracy, but also as the impetus of the quality of democracy when legitimacy is drawn from its citizens if the principles of equality and legality are respected. This paper found that the consolidation of democracy requires an actual process of parliamentary oversight and control of the work of the administrative bodies through the process of democratic legitimation and account giving.

That said, when the relation between actors is compromised as a result of unjustified or hidden actions that benefits 'the few' rather than 'the many', for unduly influence on *the rules of the game*, the trust between actors is broken and actors end up in *situations of social traps* (Kaufmann, 2008; Rothstein, 2011; Kurer, 2005, p. 231). In this type of situation of mistrust there is loss of beliefs that the "others" will follow the rules of the game, or that rules and procedures are equally applicable to all. (i.e. equal access to justice). That said, the problems of social trust are seen in the citizens' mistrust in democratic and administrative institutions. Hence, the complaints on discrimination in employment based on political grounds further disengage the citizens from the society or they start to accept the corrupt political system as part of the game. In this regard, this article recognize the 'silent treatment' of the citizens' complains as reported to the Ombudsman, as an act of everyday resistance to ineffective governance of state institutions as well as a trigger for compliance with the "corrupt system" (Ledeneva, 2011, pp. 318-320).

This article identified that the Ombudsman hold normative power to report on deviances and malpractices as discrimination in employment, access to justice etc. However, as an independent body cannot stand alone, if a system of institutional cooperation and the political accountability is not well established. Hence, although the Ombudsman has potential to actively engage in rooting out corruption, it is up to the Parliament as democratic institution to exercise actual legitimation, increase the quality of scrutiny and oversight, and start establishing culture of democratic accountability. Constraining the power of executives and reducing the opportunities for corruption requires collective actions, and no single body, such as the State Commission for prevention of Corruption or the State Audit as well, can stand alone in the process. That said, the actual exercise of democratic accountability is a necessary condition for pursuing effective process of democratization and actual exercise of horizontal accountability in democratic political systems.

However, this article has shown that in the case of Macedonia, the exercise of the normative means of account giving or acknowledgment of the citizens complains of the system, had gradually eroded in the period from 2001 to 2016. Moreover, up to 2017 and 2018, the Assembly had taken none or limit-

ed follow-up measurements or actions to create public pressure to the state bodies which refused to cooperate with the Ombudsman, or call the Government on accountability based on the findings as reported by the Ombudsman. This lack of actual exercise of democratic accountability created facades of legitimation, under which the vicious cycle of corruption continued to develop into sophisticated forms such as state capture, and engage the citizens in the corrupt system and social mistrust.

Based on the presented discussion, this article has tested the theoretical observations from the democratic and institutional theory perspectives, and find that the quality of democracy and the process of democratization is affected by the absence of exercise of horizontal accountability, as regulated under the specifics of the political system. As a necessary condition for taking control over corrupt practices in the Governmental administration, the oversight means can contribute to the increase of transparency and flow of information between actors, institutions and individuals, and create conditions for actual account giving as well as to re-connect with the citizens. That said, reaching an impartial and professional public administration is a demanding and complex process that can start with breaking patterns of situations of social trust. As evident from the findings, in the case of Macedonia, there is a lack of parliamentary scrutiny over Ombudsman report(s) and second, there is insufficient understanding of its impact on the prevention of corruption, in forms of reduced impartiality, administrative malpractices or politicization of administration. That said, Parliament and Ombudsman are failing to bridge their competences and mandates in inter-institutional cooperation that can contribute to the prevention of corruption, nepotism, clientelism or state capture. These arguments can confirm that account giving affects the ineffective law enforcement in anti-corruption strategies. In fragile democracies, the risks to quick transitions to situation of social traps, and high corruptive practices, are still ongoing, and the indicators of the respect of the civil rights should be taken very seriously. As long as the respect of the civil rights is in decline, rather than in progress, as evident in the case of Macedonia or other countries in the CEE, no progress in the fight against corruption is likely to be expected.

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The EU's Consular Protection Policy from the Administrative Law Perspective

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ABSTRACT

The European Administrative Space has grown into a multi-level administrative structure characterised by the horizontal and vertical cooperation of all its levels. The sole executive responsibility of Member States' administrations has been substituted by cooperative networks of direct and indirect level authorities due to the growing number of composite procedures. Thus, consular protection policy has evolved from an intergovernmental regime to a special European administration field. The multi-level institutionalisation of the execution and evaluation of European policies is a coherent system compared to the obligation de résultat of the Member States once associated with the implementation of the acquis. Therefore, the article examines what constitutes European administration in this and other policy fields and what represents its structural and procedural law sides. The EU consular protection policy as such is a unique policy at the crossroads of international law, domestic law and different level of EU law. Europeanisation of a certain policy often means a sort of harmonisation of substantial law; however, in case of consular protection, it is not targeted. Consular protection policy is Europeanised in structural and procedural aspects under the auspices of fundamental right protection and ends up in the creation of the European administration for the policy. The article thus highlights the process of establishing European administration and calls attention to possible problems of legal application while offering theoretical bases to eliminate them.

Keywords: *EU law, European administration, EU citizenship, consular assistance, administrative cooperation, soft law*

JEL: K10

1 Introduction: from intergovernmentalism to the establishment of European administration

The Maastricht Treaty declared among EU citizenship rights that "[e]very citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State (...)" (Maastricht Treaty, art. 8c al.1).

Given the strong political and international public law frames of consular relations of a State, the policy entirely belonged to the intergovernmental second pillar the European integration. As the Member States were also called to adopt „the necessary rules among themselves and start the international negotiations required to secure this protection," (Maastricht Treaty, art. 8c al. 2) the Council members, in fact in the form of a simplified treaty, decided upon the most important situations when consular assistance is required for each other's citizens (95/553/EC Decision, art. 5.) according to the consular law of the requested consular authority's domestic law (Poptcheva, 2014, pp. 171-173). Then, a common format for emergency travel document (96/409/CSFP) was also introduced to facilitate the proceedings, but the harmonisation of consular law was not (and could not be) aimed; the obligation required only equal treatment and casual cooperation to that end was settled in guidelines,[1] that is soft law (cf. Ştefan, 2017, p. 203).

Elementary changes entered into force by the Lisbon Treaty when the EU Charter strengthened the right to get consular assistance as a fundamental one (EU Charter, art. 46) among others that guarantee procedural rights (see esp. EU Charter, art. 7; 8; 21, 33(1), 41; 42; 47) when EU law is applied in their cases. It also established new EU legislative competence to regulate coordination and cooperation to the evaluation of TEU Art. 23, which has launched a new era in European consular protection policy. Based upon it, Council Directive (EU) 2015/637 of 20 April 2015 (Directive 2015/637) entered into force on 1st May 2018 and Council Directive 2019/997 of 18 June 2019 on the new emergency travel document have opened the gate for significant issues of European administration of consular protection: (a) structural law dimension by incorporating the consular protection policy under the room of direct level of administration and also (b) procedural law aspects of service as the result of a cooperation mechanisms among primarily consular authorities of the Member States but potentially complemented by other actors. In addition, all new provisions shall be interpreted without prejudice to Member States sovereignty over the domestic normative content of consular protection and their international relations with third States' procedural and structural law. (Directive 2015/637, art. 7.2; Directive 2019/997, art. 7. 1. (d), (e); 2 (c)) The

1 *See,* Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5 November 2010.; Guidelines for further implementing a number of provisions under Decision 95/553/EC. Brussels, 24 June 2008, 11113/08, PESC 833 COCON 10.; Guidelines on consular protection of EU citizens in third countries. Brussels, 5 November 2010, 15613/10. COCON 40 PESC 1371.; Guidelines on Consular Protection of EU Citizens in Third Countries. PESC 534 COCON 14 10109/2/06 REV 2 Brussels, 16 June 2006.

major motive behind the policy and all its development is to better serve citizens while it is building up as an area of European administration must catch up with the requirements of the rule of law. During the past decades, the normative background was rather soft law (Verdier, 2009, p. 167; Senden, 2005, p. 82), although the requirements *vis-à-vis* European administration is clear: it shall be based on the rule of law.

2 Role of rule of law: questions to be answered

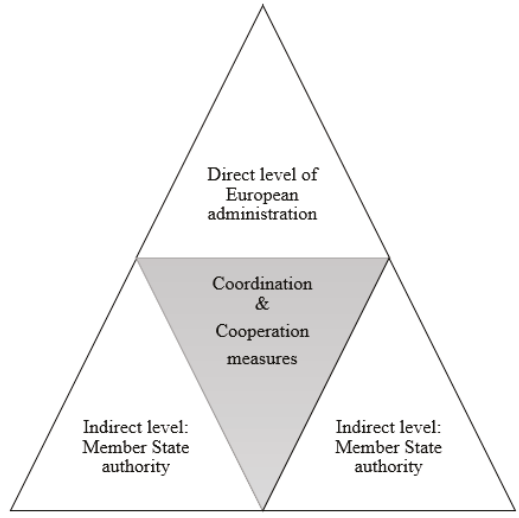
International institutions should be understood as concretizations of general principles of public law formulated in the tradition of liberal constitutionalism and adapted to the structures and requirements of multilevel systems (von Bogdandy, 2008, p. 1921). Under this interpretation and its own objective to „have the support of an open, efficient and independent European administration" (TFEU, art. 298 al. 1), the EU's attachment to the principles of the rule of law requires to establish its administration also to be in conformity with its elements.

Being one of the major values, it is an „umbrella principle with formal and substantive components or sub-principles" (Pech, 2009, p. 53.) originated from the traditional principles recognized throughout the national legal orders of its Member States: legality, legal certainty, confidence in the stability of a legal situation, and proportionality (von Danwitz, 2014, p. 1314). The list is not exhaustive, and as there is not inclusive interpretation on the rule of law, theoretical analyses seeking for the administrative law standards support an exhaustive approach which also, add non-discrimination; the right to a hearing in administrative decision-making procedures, interim relief, fair conditions for access of individuals to administrative courts, non-contractual liability of the public administration to core elements of the rule of law. Basically, the main administrative law principles subtracted and accepted as standard are reliability and predictability (legal certainty); openness and transparency; accountability; and efficiency and effectiveness (SIGMA 27, 2009, p. 8; Bauer and Trondal, 2015, p. 10; see also different definitions in Møller and Skaaning, 2014, pp. 1627). These are legal principles whose main function is the attribution of the binary qualification of legal/illegal in the light of overarching values and ignoring them leads to the loss of legitimacy (von Bogdandy, 2008, p. 1912), no matter which level of European administration is on a charge, they shall be respected, and they shall prevail. Direct and indirect administration form relatively separated organisational systems with their own institutional norms and are mainly connected via governance issues but the number of policies that requires daily and constant cooperation is growing, although the interaction sphere is out of the scope of legislation and comprehensible practice that may give rise to codification, as highlighted in the ReNEUAL Model Rules work (ReNEUAL Model Rules Book VI, p. 265-266). Meanwhile, the system formed by the two levels also assumes the principle of administration through law, which means that public administration ought to discharge its responsibilities according to law (SIGMA 27, 1999, p. 9).

Therefore, when the implementation of the EU policies and application of EU law are viewed through the prism of rule of law, it shall be examined in a (a) functional perspective to see if rights and policy objectives can be pursued and balanced against each other; (b) an organisational perspective to check that institutions and bodies are equipped with means to pursue the tasks; (c) a procedural perspective to detect if the core values and rights are fulfilled and realised through procedural provisions and forms of act; and (d) an accountability perspective to verify if acts are reasoned and justified, and that there are proper review and control of activities (cf. Hofmann, 2012, p. 4).

The European administration relies on two levels: on a direct one with the competent institutions and organs of the EU and the indirect one that encompasses the Member States' administration to execute the acquis. The two levels are connected with a link that depends on the Europeanisation of the policy and the legislative competences of the EU (vertical relationship) that empowers direct level with structural influence above the indirect one. It is completed with the necessary teamwork connection of the competent national authorities of Member States (horizontal relationship) proceeding in the same composite procedure. Institutional and procedural law questions are revealed to determine the relationship among the actors which often regularize in a different type of networks (Corkin and Boeger, 2014, p. 223) that influences jurisdiction and applicable law issues and this way the enforceability of the right embodied in article 46 of the EU Charter. [see figure no. 1.]

Figure 1: Schema of European administration



Source: Own.

Cooperation and coordination measures adopted under the new regime to facilitate consular protection for unrepresented EU citizens should enhance legal certainty as well as efficient cooperation and solidarity among consular authorities (Directive 2015/637, preamble (4)).

The vertical and horizontal relationship of the actors basically relies on non-binding instruments or simply decided upon ad hoc basis. Therefore, the aim is to reveal if it can fit into a rule of law determined concept of European administration or not. To that end, first, the administrative law aspects of rule of law shall be seen clearly and then, by analysing the current legal regime including fundamental rights, procedural and institutional law, statements can be made on its status. In the point of view of citizens, the measures and the administrative procedural guarantees stand in the centre. For consular protection procedure, the consular law of the requested authority's State is to be applied, although the previous phase is currently non-transparent, and only soft law guidance are available which seriously challenge the possibility to rely on them as an obligation or to invoke them (see, Trubek et al. 2005, p. 2; cf. Ştefan, 2017, p. 203 and pp. 21626) although according to the rule of law requirements including the right to good administration (EU Charter, art. 41), the person shall enjoy a set of procedural guarantees.

Legal literature is also reticent on this issue as administration and the administrative procedure of consular protection, although it is an administrative service, is still a basically domestic issue, but the success of the evaluation of EU law lies in administration applying common constitutional principles (Lisbon Special European Council, 2000, para. 9 and 17; Drechsler, 2009, pp. 7-10) wishes to expand the scope to that end, although it does not answer significant jurisdictional and responsibility questions.

3 Findings on the European administration of consular protection

3.1 Structural concerns of coordination and cooperation – rule of what?

Consular protection in third States under the auspice of EU law is, in fact, a multi-level European administrative organisation (Dezső-Vincze, 2012, p. 490; Heidbreder, 2009, p. 5; Torma, 2011, p. 197; Kárpáti, 2011, p. 234; Koprič et al., 2011, pp. 1545-1546; Curtin and Egeberg, 2013, pp. 3032; cf. Hofmann, 2009, p. 45) with composite administrative procedures (von Bogdandy and Dann, 2008, p. 215) whose normative is marked by the rule of law challenges.

Speaking about the European administration of consular protection under article 23 of TFEU/article 46 of EU Charter, the horizontal and vertical cooperation of the competent organs and authorities shall be examined as the consular policy of the EU is based on it. In a basic case, the unrepresented EU citizen has the right to turn to any available Member State's consular authority for assistance. The authority at site contacts the responsible authority of the alleged State of nationality to check the identity and leaving space for the national authority to proceed; the foreign consular authority proceeds the case only if the Member State of nationality cannot or will not do it. The financial background of the procedure depends on the consular law of the jurisdiction,

then it is the issue of the concerned Member States and the Member State of nationality and its own national. In case of a crisis, that is natural or industrial catastrophes, terrorist attacks or any kind of situation when a mass of the EU citizens needs consular assistance on the territory of a third country, the supranational level of the European administration directly appears with the Commission as its vice-president, the HR/VP is responsible for foreign policy, including crisis management mechanisms (TEU, art. 26 (2); EEAS Decision, art. 4 (3) a)). The identity check round may be put aside due to necessity and time loss, although other cooperation forms appear if there are other represented Member States at the site, if there is an appointed Lead State among the represented Member States (Lead State Guidelines, art. 2.1-2.4) and the delegations of the EU displaced in the third State, which are hybrid administrative constructs that combine diplomatic and operational tasks, such as development cooperation and trade (Helly et al., 2014, p. 9; see also Reynaert, 2012. pp. 207-226) but have no competence to provide consular protection, appears, along with the competent units of the EEAS, which is a functionally autonomous body under the direction of the HR/VP (EEAS Decision art. 1.2; Lequesne, 2015, p. 36; Gatti, 2016, pp. 105190) to support consular authorities' work (Directive 2015/637, art. 10-11; 13).

To describe the institutional relation of them, it shall be highlighted first, that none of the supranational organs are neither entitled to perform authority acts nor to pursue consular protection. The cooperation of the competent institutions and organs is mainly based on coordination. Horizontal coordination is carried out at two main levels. The first one is a direct administrative level, where the coordination of all the foreign policy issues is the responsibility of the HR/VP (TEU, art. 26 (2)) assisted by the EEAS, which also has its own coordination system among its different divisions. (EEAS Decision, art. 4) The second level is the forum of the site. In situ coordination has three main potential actors each of them having their own coordination mechanism. The first actor responsible for coordination is (a) the local EU delegation in a complementary role (Austermann, 2014, p. 57). The second one is (b) the group of represented Member States who shall closely cooperate with each other and with the delegation and other potential bodies of the Commission (Directive 2015/637, art. 10.1; 11). In case of more represented one, a Member States can take on the role of the Lead State on a voluntary basis under conditions laid down in a guideline, but without defining legal tools to that end (Lead State Guidelines, intro. (2); (5)). Close cooperation in this context means sharing of information to ensure efficient assistance for the unrepresented citizens and coordinating contingency plans among themselves and with the EU delegation to ensure that unrepresented citizens are fully assisted in the event of a crisis (Directive 2015/637, Preamble (2), art. 13). Further details, like the assignment of one responsible actor to manage the process of an evacuation, for instance, and deal with the involvement of the EU capacities, is the subject of further intergovernmental negotiations of Member States (Directive 2015/637, preamble (19), art. 7 (2)-(3)). In addition, such negotiation does not create a right to give orders for the delegations or in reverse, nor does subordinate consular authorities to the EU organs in the system.

Upon request by Member States' consular authorities, the delegations support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis (EEAS Decision art. 5(9); Helly et al., 2014, pp. 810). They can also request to be supported by existing intervention teams at the EU level, including consular experts, in particular, from unrepresented Member States, and by instruments such as the crisis management structures of the EEAS and the Union Civil Protection Mechanism (Directive 2015/637, art. 13 (4); UCPM Decision, art. 16.17; Gestri, 2012, p. 118). The Member States concerned should, whenever possible, coordinate such requests among each other and with any other relevant actor to ensure the optimal use of the Union Mechanism and avoid practical difficulties on the ground. The Lead State, if designated, should be in charge of coordinating any support provided for unrepresented citizens (Lead State Guidelines, 2).

To describe the relationship between the different levels and various actors of the European administration of consular policy, the words 'coordinate' and 'support' are often used. Even if none of these words are defined by any normative texts, they must not expressis verbis suggest obligation. The aim is to synthesize efforts but without the coercive force of persuasion or direct order to make obligations, although accountability, predictability, and common understanding are presumed (Lequesne, 2015, p. 46).

The system of European administration on consular protection lacks the classical hierarchical structure of state administration and vertical coordination is regulated by decision only in the case of the EEAS and its delegations. According to the relevant legal and non-legal acts of the EU acquis, none of the EU institutions or other bodies is entitled to give direct orders to consular authorities of Member States. It would reduce their autonomy and their consular tasks. The consular authorities stay under the direction of their domestic superior authority, although the Member States' authorities should closely cooperate and coordinate with one another and with the EU, in particular, the Commission and the EEAS, in a spirit of solidarity (TEU, art. 2; cf. TFEU 222 1 (b); Solidarity Decision, art. 4; 5; Chronowski, 2017, p. 35, see also: Klamert, 2014, p. 3541).

Under these general principles, in the absence of harmonisation in material rules on foreign policy and consular protection, would vertical cooperation have an indirect impact making the EU organs a coercive power on external Member State organs? The principle of loyal cooperation might urge effective execution and evaluation of a fundamental right of citizenship to overrule the shortage on organisational rules but, in the meantime, neither the implementation of foreign policy, nor the charter may extend the field of application of the EU law or establish any new power or task for it, or modify powers and tasks as defined in the TEU-TFEU. The rules for the EEAS and foreign policy may not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of the EU foreign policy, national diplomatic service, and relations with third countries (14. Declaration to the Treaties, EU Charter art. 51 (2); TEU, art. 40 (1); EEAS Decision,

article 4 (3) (a); cf. TFEU, art. 352. see, Dashwood, 2009, p. 43). Meanwhile, many debates support the expansion of the delegations' competency to take over some administrative functions for example to issue Schengen visa and to ensure some basic consular protection measures (Balfour and Raik, 2013, pp. 3738). In the name of the subsidiary principle and the constitutional allocation of competences in the Treaties along with financial and institutional simplification prospects, the smaller States welcome the idea and would happily save some money with closing their consulates or being represented by the EU delegation where they were not before, but absolutely rejected by the dominant large States which are afraid of losing the rest of their external sovereignty and political interests by such a step (Lequesne, 2015, pp. 48-49; Whitman, 2015, p. 25). However, it shall be noted that all EU norms are pacta tertiis for third States, therefore consular protection can be practiced for non-nationals, that is on behalf of another State, upon appropriate notification to the receiving State, unless the receiving State objects (VCCR, art. 8), so for the sake of efficiency, according to Directive 2015/637, Member States are responsible to undertake the necessary measures in relation to third countries to ensure that consular protection can be provided on behalf of other Member States. In contrast, Directive 2019/997 empowers delegations to negotiate with third State the acceptance of the common EU format travel document and handle the specimens (Directive 2019/997, art. 13), so this consensual step at the drafting of the new rules for effectivity, in respect of proportionality and subsidiarity principles, is an approach towards the logical burden-sharing.

Summing up, the lack of transparent and pre-defined rules of institutional relationship is seems to show inconsistency with the requirements of rule of law and the gaps of rules may lead to jurisdiction problems and procedural consequences in the view of the responsibility of authorities and the evaluation of fundamental citizenship rights.

3.2 Procedural concerns of cooperation – rules towards '*l'état de droit*'

In the view of the beneficiaries of the European consular protection policy, first, it shall be noted that an equal treatment clause is proclaimed (Poptcheva, 2014, pp. 171-173) but no harmonisation of consular law has been aimed, simply because of the lack of competences to do so. The relevant legal norms of the second pillar were not recognized as part of the EU legal order as they were adopted on an inter-governmental ground. Meanwhile, as acquis communautaire, they were to be respected, although they could never overcome the diversity of national regulations and foreign policies (CARE Final Report, 2010, pp. 2425). Later, the Lisbon Treaty brought major changes including new competencies to facilitate consular protection in the form of the directive with cooperation and coordination measures, but basically, the nature of assistance and the applied measure depends solely on the consular (domestic) law of the requested consular authority's Member State in each situation. Therefore, there is no uniform consular assistance service and no uniform pro-

cedural law either, although the general scenario in case of a request is now settled, ie. how the Member States' diplomatic and consular authorities shall closely cooperate and coordinate with one another and with the EU organs to ensure the protection of unrepresented citizens (Directive 2015/637, art. 10). It is essential to highlight the fact that in case of distress, the obligation of the Member States is to give assistance, but not even a common emergency travel format cannot overrule consular law of Member States, if the authority is not empowered to issue such documents by their own domestic law.

The new regime introduced by Directive 2015/637 is based on solidarity, non-discrimination and respect for human rights and it refers to EU citizenship as a fundamental status and the rights inherent as special ones (Directive 2015/637, preamble (1)-(3)). However, it aims no intervention in international relations, the task to make consular protection of non-nationals possible are addressed to Member States. Meanwhile, details are not discussed, although the requirement of a proper administrative service for EU citizens is resulted from basic values of the EU concerning administrative procedures which shall be also evaluated, inter alia, the right to good administration, in case of breach of law the right to legal remedy, and also the right to respect of family life and the right to protection of personal data, which are priorities of the Directive 2019/997 (Directive 2019/997, preamble (22)). All are enlisted among the fundamental rights placed among primary sources of EU law (TEU art. 6 (3)) and although there are some concerns whether they are superior or not to other primary sources (Ziller, 2014, p. 347), it is undoubted that they are normative to all foreign services of the Member States that executes the EU's consular protection policy (EU Charter, art. 51.1). In addition, compared to the regime of Decision 95/553/EC, in the view of citizenship rights, the consular protection shall be provided to those family members as a derivative right, "who are not themselves citizens of the Union, accompanying unrepresented citizens in a third country, to the same extent and on the same conditions as it would be provided to the family members of the citizens of the assisting Member State, who are not themselves citizens of the Union, in accordance with its national law or practice" (Directive 2015/637, art. 5).

One may ask if it is compatible with the rule of law that in the territory of a third State, the same EU citizen and its accompanying family member may get different administrative services due to the different consular laws of Member States. The consular authority of Member State 'A' may ensure a higher level of assistance, the 'B' would refuse to ensure the service for the family member, while 'C' could cost three times more than the other one, although formally, all of them are consistent with the core provisions of the consular protection policy of the EU. The possible diversity of the content and the personal scope of service are aggravated by differences in other aspects of the service like pre-conditions, for example, there are states who insist on submitting a police report to prove the loss of passport while others do not require such a document. The fee of the service is also a key factor in this context as the Directive 2015/637 impose provisions only on the scenario of reimbursement and mutual solidary between Member States (Directive 2015/637

(26)-(28), art. 14-15; annex I-II) and the EU ETD Proposal declares that States shall collect from the applicant such charges and fees as would normally be levied by them for issuing an emergency passport, although currently, it varies from 1,55 to 150 EUR (ETD Presidency reflection paper, pp. 910). Such differences may be eliminated by practical arrangements, local agreements and workshare agreements which would have significance mainly among the represented Member States within the same third States although some sort of standardisation would definitely serve a balanced service and predictability and reduce the chance of forum shopping. From the point of view of Member States, they formally do not violate their obligation of equal treatment, however, the lack of proactive steps towards workload share may reveal questions concerning the effect of rights (Rasmussen, 2017, p. 279).

In a particular third State, several Member States can be represented offering a variety of choice of forum for non-represented individuals as according to the directive in question, the individual has the right to turn to any of them.[2] This may create forum shopping and an unequal burden on the chosen Member State. Here it is essential to reveal that being unrepresented means having no available representation in time and/or distance, so even if an EU citizen's nation-State is represented in a particular third State, it does not automatically mean that he/she is represented; the consular authorities shall take into account the circumstances of each particular case (Directive 2015/637, preamble (8)). The workload share arrangements shall be beneficial to citizens since they allow for better preparedness to ensure effective protection. Member State consular authorities that receive requests for protection should assess (a) whether, in a specific case, it is necessary to provide consular protection or (b) whether the case can be transferred to the embassy or consulate which is designated as competent according to any arrangement already in place. According to the present regime, Member States should notify the Commission and the EEAS of any such arrangement, which should be publicised by the EU and the Member States to ensure transparency for unrepresented citizens (Directive 2015/637, preamble (10)). These arrangements are either non-existents or the transparency is missing as on the Commission's designated website, no such information seems to be available for EU citizens.[3] Even if in each and every third State there is an agreement of cooperation, the level of service stays colourful in different third States, although the harmonisation or standardisation of service is not aimed, while the clear, predictable and transparent administration of consular protection is not simply a desire but an obligation deriving from general administrative principles of EU law. As a general principle, the functioning of the EU is based on the rule of law, therefore good administration means that the institutions, bodies, offices, and agencies of the EU in carrying out their missions, shall have the support of an open, efficient and independent European administration (TFEU, art. 298 al 1). Thus, good administration 'must be ensured by the

2 To see the available representations, visit: https://ec.europa.eu/consularprotection/content/home_en (20.10.2019.)

3 See, Consular Protection, https://ec.europa.eu/consularprotection/content/home_en (20.10.2019.)

quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible' (CM/Rec(2007)7, pp. 3-4; TEU art. 2; Pech, 2009, pp. 53-57). Therefore, the scenario stating that the assisting Member State and the unrepresented citizen's Member State of nationality should be able to agree on detailed arrangements for reimbursement of costs of consular protection within certain deadlines (Directive 2015/637, preamble (26)-(28); art. 7) shall also correspond to general provisions on citizenship procedural rights. Directive 2019/997 does not bring an innovation in this field, it also emphasises that Member States that receive an EU ETD applications should assess it on a case by case basis, whether it is appropriate to issue the EU ETD or if the case should be transferred to the embassy or consulate which is designated as competent under the terms of any arrangement already in place (Directive 2019/997, preamble (7)). A crisis may justify flexibility and increase the level of discretion by the authority, although such power must also have clear legal boundaries and be subject to several constitutional and administrative law standards, such as objectivity and consistency in application (SIGMA 27, 1999, pp. 8-14; Ponce, 2005, pp. 553–554), too, just as it is provided by the current regime: in the view of administrative procedural requirements "[t]o fill the gap caused by the absence of an embassy or consulate of the citizen's own Member State, a clear and stable set of rules should be laid down. Existing measures also need to be clarified to ensure effective protection" (Directive 2015/637, preamble (7), emphasis added by Author).

Meanwhile, compared to Directive 2015/637, Directive 2019/997 already recognized that along respecting competency limits, (cf. EU ETD Proposal, preamble (9)) it is necessary to avoid fragmentation and resulting in decreased acceptance of emergency travel documents issued by Member States to unrepresented citizens, be better achieved at the EU level. Therefore, in addition to the Member State roles and responsibility centric Directive 2015/637, Directive 2019/997 empowers the EU delegations in third States to notify the Third State authorities about the EU emergency travel document issuing practice and handle the specimens and negotiate to enhance is recognition (Directive 2019/997, preamble (18); art. 13). It also establishes generally accepted ICAO safety measures to increase the international acceptance of the EU ETD (Directive 2019/997, art. 8. 2-3.; annex II) An internationally accepted form of travel document serves better its recipients and reduces the risk of rejection at border control while the recognition of the EU as unity may also be achieved.

In the view of the principle of good administration, Directive 2019/997 seems to give the chance for a transparent, reliable and predictable service without prejudice to the domestic laws of Member States. In contrast, with the pure scenario ie. listing the procedural steps in case of a submitted request for consular assistance of a non-represented citizen, the Directive 2019/997 contains exact deadlines for each phase of the procedure (Directive 2019/997, art. 4). Without any interference to domestic laws, the EU ETD is willing to overlap the inter-national procedural phase that used to be ignored due to competency issues and was a marginal subject of soft law guidance. As for procedural guarantees, Directive 2019/997 also remains silent, although the general principles

of EU law including the EU Charter provisions stand as background. Among the most related ones, the right to good administration shall be discussed.

Being an umbrella right as a collection of procedural requirements, its elements are not unknown for democratic administrative procedure codes of Member States, however, domestic law does not extend to horizontal and vertical procedural stages, so the effective application of these rights may be questioned in these phases. Jurisdiction issues and legal remedy options would be crucial and not just for EU citizens, but also for family members. The substantial part of their consular protection rights is even more unpredictable, although the same procedural background could create a sort of unity. Under the right to good administration, the family member is also entitled to the same procedural guarantees given the fact that it enables every person and not just EU citizens. All in all, even in the lack of administrative procedural law code, the EU Charter provisions serve as general background for administrative procedures, although their application and enforcement may challenge the procedure in time and costs. The cooperation mechanism should be based on legally binding sources to make the procedure predictable and transparent with clearly defined tasks and competences, aspects of responsibility, applicable law and finally: supervision and legal remedy (EU Charter, art. 47; Model Rules, VI-3.; Varga Zs, 2014, p. 547). Currently, these requirements are fulfilled only partially.

It is necessary to establish a simplified procedure for cooperation and coordination between the assisting Member State and the unrepresented citizen's Member State of nationality but at the same time, it is crucial to maintain a sufficient flexibility in exceptional cases. In crisis situations, the assisting Member State should be able to issue EU ETDs without prior consultation of the Member State of nationality. In these situations, the assisting Member State should notify the Member State of nationality as soon as possible of the assistance granted on its behalf to ensure that the Member State of nationality is adequately informed (Directive 2019/997, art. 4.6). Again emphasized, in case of practicing discretionary power, the authorities are also engaged within the rule of law, therefore, the limitations and the modes of discretion shall also correspond to the same values and same procedural guarantees, including the availability of legal remedies. The EU Charter does not establish any new power or task for the EU, or modify powers and tasks defined by the Treaties (EU Charter, art. 51.2), but to establish the background for the evaluation of the content of the EU Charter as well as the content of any rights issuing from EU norms is the duty of Member States. Therefore, the existing powers to create regulations of administrative cooperation (TFEU, art. 197) and further cooperation and coordination directives to facilitate consular protection (TFEU, art. 23 al 2) are also available to further common steps and in case of the latter, to establish in domestic legal order the necessary modifications to meet such requirements as the details of consular protection and its procedures are regulated in many ways (CARE report, 2010, pp. 580-585). The effective implementation of the above-mentioned provisions (duty of consistent interpretation or 'indirect effect') requires positive action (Chalmers and

Tomkins, 2007, pp. 381-394; Klamert, 2014, pp. 125-138). "In the absence of EU rules on the matter, it is for 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 (…)" (Case C-3/16, point 43).

All in all, it seems that upon the fundamental rights implications and their effective implementation to a better administrative service under the auspice of rule of law, the development of the policy seems to be dynamic and Member States shows a willingness to accept measures in secondary legal source to that end, as it is shown by the existence of Directive 2019/997.

4 Concluding remarks

Consequences seem logical and obvious, but it shall be noted that domestic administrative law does not expand beyond their territorial scope and the EU has restricted legislative competences which is different in diverse policies, although administrative cooperation measure in the form of regulation has gained legacy since the Lisbon Treaty but measures taken upon these provisions shall not result as prejudice on national administrative laws (Lisbon Treaty, 76/D; TFEU 197). This latter condition is clearly a limitation on the legislator. In addition, it shall be noted that even if there are relevant principles, they cannot create competence and cannot be substituted for missing empowerment provisions as measures taken at the EU level must also comply with the principle of subsidiarity (McDonnell, 2014, p. 66). Principles fill the legal gaps and direct interpretation to achieve the common goal: evaluation of the EU goals, therefore, the rule of law is the encompass in European administration when the balance between the proper and effective execution of the acquis and Member State sovereignty is at stake, and rule of law is also the motor that keeps the legal development in action.

The European administrative organisation is a multilevel structure with different networks of authorities in different policies (Terpan, 2013, pp. 33-34) and being the major value in the EU, the rule of law shall be motor of it. The EU is based on the transfer of power from the Member States and the main cohesive force for all the policies among the levels of European administration is coordination at the supranational centre but basically the authority power lies in Member States' authorities. It is also true for the European consular protection structure. The policy itself is at the crossroad of common foreign and security policy, citizenship and fundamental rights protection and also concerns public administrative law and the cooperation of authorities at the horizontal and vertical levels. The challenging part is the vertical relationship of the actors. In fact, at the local level, only delegations are under the effective direction of the HR/VP and the president of the EEAS, who both represent the EU interests, but the consular tasks are performed by the consular authorities of Member States because of they are empowered to do so, however, these latter category falls outside their scope. Sincere cooperation, loyalty, and solidarity together with coordination are important functional principles of

European administrative structure but principles cannot create competence and cannot provide a direct legal basis for a measure at the EU level. Indeed, principles primarily indicate how a competence should be used, and therefore they guide those who fulfil obligations. Therefore, the insufficient provisions on inter-institutional relations can basically challenge the consistency with the rule of law and a proper functioning under its auspice. In another aspect, from the beneficiary side, creating a basis for a better administrative service with a more coherent, transparent and reliable legal framework than in the previous regime is essential not only in the effectivity of consular protection policy of the EU but in the development of normative rules of European administration: in an organisational as well as a procedural aspect. The development of the normative rules of consular protection policy of the EU clearly shows a certificate for this aspect. By involving the Commission and its related organs to perform external policy tasks justified by subsidiarity and proportionality principles, the organisational structure of a once purely domestic area of external administration, the consular protection, the European administration is growing. Meantime, its normative background is also developing as the intermediate phase, the connection of vertical and mainly the horizontal cooperation is currently purely regulated by predictable and transparent binding secondary sources. In consular protection issues it is also framed by soft law, therefore the entry into force of the Directive 2019/997[4] will mean a quality change and a step towards a better administrative service which is closer to the principles and requirements of an "open, efficient and independent European administration" (TFEU, art. 298.1) and to the legitimate expectation of every person who shall enjoy all the guarantees evolved in the right to good administration and other benefits of the EU Charter. The drafting of this directive proposal calls the attention to the importance of effectivity which is essential for the proper functioning of the EU, while the insurance of benefits related to the European Union citizenship urges Member States to increase Europeanisation in certain issues, while it is also recognized that the neglected phase of horizontal interaction of the competent authorities shall be regulated in binding secondary sources of EU law. The die is cast, the path is given, the first steps are taken; the rule of law principle further serves as a compass.

4 Member States shall adopt and publish, by 24 months of the adoption of the additional technical specifications the laws, regulations and administrative provisions necessary to comply with Directive 2019/997. They shall immediately communicate the text of those provisions to the Commission. They shall apply those measures from 36 months after the adoption of the additional technical specifications. (Directive 2019/997 art. 19.)

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Arbitration in Administrative Affairs: The Enlargement Scope of *Ratione Materiae* in Portugal

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ABSTRACT

The purpose of this article is to address the question of arbitrability of administrative conflicts, generally and as characteristic of Portugal. Although the use of arbitration in conflicts where public entities intervene in private relationships is usually allowed, European legislatures commonly consider administrative disputes as a type of controversy excluded from arbitration. It is indeed easy to raise strong arguments against alternative dispute resolution when public administration is implicated. Nevertheless, none of the objections usually raised seems to be unbridgeable. Consequently, the article aims to critically analyse the main arguments against the power of arbitrators to rule on public conflicts. Presently, the Portuguese law allows administrative arbitration in a wide range of areas, from conflicts relating to administrative contracts to conflicts over the legality of administrative authority acts. The assessment of this regime makes it clear that the enlargement of the objective scope of administrative arbitration has to be accompanied by rules, which offer a response to the specific requirements of administrative law and a safeguard of public interest. In this sense, the analysis offers a critical review of the solutions of Portuguese law, which can be also used in comparable legal regimes of other European countries.

Keywords: *alternative dispute resolution, administrative arbitration, arbitration procedure, objective arbitrability, Portugal*

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1 Brief introduction

This text addresses the boundaries of the arbitrability *ratione materiae* of conflicts in which public administration is involved, based on the analysis of the

Portuguese legal system. We intend to approach the use of arbitration, as a conflict resolution tool usually resulting from an agreement between the parties to submit the conflict to the appreciation of private arbitrators instead of State tribunals, to relations involving Public Administration, especially when acting under administrative law.

In continental European legal systems, it is commonly accepted that administrative disputes constitute a type of controversy generally excluded from arbitration. The French Civil Code, for instance, prohibits public entities to resort to arbitration (article 206).[1] Nevertheless, a total denial of the possibility of arbitrating conflicts in which public entities are involved is not a common option of European legislators, who usually choose to consider this option in a limited number of situations only. In particular, in conflicts where public entities intervene in private relationships and also as regards international and contractual relationships (Hanotiou, 2010, p. XIV; Graaf et al., 2014, p. 590–591).

The reasons for considering the arbitration path in administrative disputes are common to other forms of arbitration: the need to speed up the settlement of disputes and to ease the workload of state courts (Alfonso, 2008, p. 12; Patrikios, 1997, p. 57) ; the necessity of expertise and flexibility of procedure; and the wish for more efficiency. Furthermore, the idea of a dialogue-based relationship between public administration and individuals seems to favour alternative dispute resolution (Benvenuti, 1996, p. 27–76; Trayter, 1997, p. 76).

However, the power of private arbitrators to rule on public conflicts, that is to say, conflicts arising in the context of authority-based legal relationships, is quite controversial and normally considered "off-limits" in what regards the possibility of an arbitral appreciation.

Three main reasons are always invoked against arbitration in these matters. One can say that (1) state courts would be diminished if public entities were to substitute them for a form of private justice (Renders and Bombois, 2010, p. 54; Domenichelli, 1999, p. 45), (which can be even more contradictory in judicial systems of administrative litigation). Additionally, (2) state courts could be said to have the monopoly to judge public administration (the judgement of public administration is reserved to state jurisdiction) (Montalvo et al., 2004, p. 63; Bolado, 2010, p. 355; Nabais, 2010, p. 86). And, (3) one can argue that public power is a non-disposable power and cannot, therefore, be handed over to private judges (Trayter, 1997, p. 85; Moreno, 1998, p. 74). In short, it is legitimate to distrust arbitration in this type of conflicts and it is very easy to raise strong arguments against dispute resolution by means of arbitration when public administration is implicated (Greco, 1999, p. 167).

Still, none of the arguments mentioned above seem to be unbridgeable, depending, first of all, upon constitutional options. If the Constitution reserves the judgement of conflicts resulting from administrative activities to State

1 A rule which, nowadays, knows some exceptions, namely a law approved in 1986 which allows the State and local authorities to insert an arbitration clause in contracts celebrated with foreign entities regarding projects of national interest (see Delvolvé, 2010, p. 195; Ducarouge, 1996, p. 88).

tribunals, as the Spanish Constitution of 1978 (article 106 (1)) and the Belgium Constitution (article 160) (Tornos, 2010, p. 202; Renders and Bombois, 2010, p. 94) seem to do, we clearly stand before an unbridgeable obstacle to arbitration of administrative conflicts. Otherwise, the remaining objections referred above are bridgeable. In this sense, the text analyses the current Portuguese legal regime (some may say a very *avant-garde* one), one of the systems which evolved the most in administrative arbitration in the context of European legal regimes, opening a wide range of administrative conflict situations to arbitration and, consequently, trying to solve the apparent conflict between arbitration and public law. Both the legislative evolution of that system and the discussions at doctrinal level reflect the initial objections to the extension of administrative arbitration. Rather than focusing on the admissibility of this extension, though, the truth is that presently the discussion is centred in the rules of the respective regime, in order to safeguard the respect for the fundamental principles of public law.

We therefore consider that the analysis of the evolution of administrative arbitration in Portugal presents itself as an interesting case study for an eventual replication of the regime in other systems.

This evolution was only possible in Portugal because of the existence of a constitutional position that was not contrary to administrative arbitration, and this is where we need to begin, followed by the appraisal of the scope of application of the referred institute.

2 Methodology

The text intends to address the delimitation of the arbitration scope in administrative legal relations by looking at the way in which the Portuguese system widened arbitration's field of application in that matter.

In this view, the matter will be approached from a strictly normative perspective, analysing the legitimacy of the solutions established in that system in the light of the fundamentals of public law.

Over the last years, normative evolution of arbitration within that framework has tried to respond to the main doctrinal objections to the way in which the determination of the arbitrability of administrative matters took place for a long period of time. The normative analysis is therefore accompanied by an appreciation of both the main impediments highlighted by authors and the solutions proposed, with the conclusion that the Portuguese case presents itself as a model capable of identifying the obstacles to the widening of arbitration in the context of public law.

On the other hand, there is no existing base for the collection of general data on arbitral decisions, since the provision of the Code of Procedure of Administrative Tribunals (article 185.º-B) that imposes the publication of the arbitral awards is yet to be concretized. However, it is true that some institutionalized centres have a transparency policy that allows the collection of some infor-

mation and based on these data we will make a short empirical balance of administrative arbitration in Portugal.

3 Results

Based on both the analysis of the Portuguese system and the arguments that sustained the enlargement of administrative matters subject to arbitration, we believe that, in systems where judicial control of administrative activity is not reserved to State courts, arbitration of administrative matters is, as a rule, admissible. If arbitration is not seen as an institute of contractual nature and its jurisdictional nature is accepted, what needs to be confirmed is whether the Constitution of each State limits private jurisdictional activity. Otherwise, it is for the legislator to determine the range of matters to be appreciated by arbitral tribunals and to find a coherent regime that does not need to be submitted to the criterion of the disposability of the legal relationship. The advantages of the arbitration path in administrative disputes are common to other forms of arbitration, specially the ability to speed up the resolution of conflicts and to ease the workload of State courts and to provide expertise.

On the other hand, notwithstanding the favourable position towards administrative arbitration and the defence of the inexistence of absolute limits to the arbitration of public conflicts, the truth is that the widening of administrative matters' arbitrability performed by the Portuguese system has revealed that the common regime of voluntary arbitration cannot be applied blindly and that some adaptations must be foreseen to give a response to the specific requirements of administrative law and the safeguard of public interest. It is clear that the features of the relations between individuals and public entities can bring additional difficulties to the use of arbitration.

4 Discussion

4.1 The Portuguese constitutional position regarding arbitration: the inexistence of a state jurisdiction monopoly in the judgement of public administration

One might safely say that the Portuguese Constitution of 1976 holds a very favourable position regarding arbitration (Miranda and Medeiros, 2007, p. 17).

In the Portuguese Constitution, since its first revision approved in 1982, arbitration is expressly qualified as a type of jurisdiction and arbitral tribunals as a kind of court.[2]

2 Thereby clarifying any doubts on the legal nature (contractual or jurisdictional) of arbitral tribunals' activity – in this sense, see various decisions of the Portuguese Constitutional Court, for instance Decision 311/2008, P 753/07 and Decision 230/2013, P 279/2013, available at www.tribunalconstitucional.pt.

Insofar as no rule can be found in the constitutional text nor in its preparatory work which prevents administrative arbitration, arbitral tribunals can also be an alternative to administrative courts (not only to civil courts) and, in this sense, an arbitral tribunal can conduct the judicial review of administrative activity. In fact, the Portuguese Constitution does not reserve the control of administrative activity to state jurisdiction, and therefore it is difficult to maintain the existence of a state monopoly in the judgement of administrative disputes. Reserving the appreciation of administrative conflicts to administrative courts is considered to aim solely at distributing matters between civil courts and State administrative courts. Therefore, it is common ground that administrative arbitration is constitutionally accepted and that public entities may agree on submitting conflicts in which they are involved to arbitration, thereby putting aside one of the main objections to administrative arbitration.

Therefore, the key question is now the determination of the types of conflicts to be subjected to the judgement of arbitrators. Over the last years, there has been a considerable increase in the types of conflicts that may be subjected to arbitration.

4.2 The objective arbitrability of administrative disputes in the Portuguese regime

4.2.1 Brief historical background of the legal solutions prior to 2002 and critical review of their cornerstones: the limit of legal relations' disposability

In the Portuguese legal system, arbitrators were traditionally limited as regards ruling on particular kinds of administrative claims.

The first Portuguese Voluntary Arbitration Law (LAV) applying to civil conflicts did not establish which administrative disputes could be solved by means of arbitration[3] and, before the entry into force of the Administrative and Tax Courts Statute of 1984 (ETAF – Decree-Law 129/84, of 27 April), there was also no general administrative rule regarding administrative arbitration. However, some special rules provided for arbitration, namely in what respects the regulation of some types of contracts (v.g. Decree-Law 48 871, of 19 February 1969). Moreover, dominant jurisprudence and legal scholarship considered the inclusion of arbitration clauses in administrative contracts, in general, rightful (Correia, 1995, pp. 231-236), in line with a general tendency among European systems (Moreno, 1998, p. 84).

In 1984, the ETAF validated arbitration over claims respecting public liability and administrative contracts (article 2(2)). The reason underlying this option was that, in those matters, public entities could settle and, consequently, their rights could be qualified as disposable rights, and that was the criterion

3 Article 1 (4) of Law 31/86, of 29 August, determined that "the State and other legal persons in public law may enter into arbitration agreements, if authorized by special law or if the object of these disputes are related to private law relationships".

upheld by several authors and foreseen in arbitration law for determining the issues subject to arbitration (Caetano, 2010, p. 1285).

Yet, it was not allowed to submit matters related to public authority, to administrative acts, to arbitration. The main argument against the arbitrability of these issues was the non-disposability of public power (Correia, 1995, p. 234), as supported by several authors (Delvolvé, 2010, p. 202; Jarosson, 1997, p. 20; Caetano, 2010, p. 1285). When a public entity adopts an administrative act, it is exercising a power legally bound and therefore not submissible to arbitration (Graaf et al., 2014, p. 591).

In our opinion, this does not seem to be an undisputable argument, though.

The criterion of the disposability of the relationship cannot be applied to administrative relations in the same way that it is applied to private relations. Public entities are always governed in their action by the principle of legality, not only in their exercise of authority powers. In this sense, even when they enter into a contract, both the law and public interest limit public entities. Moreover, nowadays, in the Portuguese legal system, an administrative act can be replaced by an agreement between the public authority and the private entity. So, authority acts and administrative agreements are, to a certain degree, interchangeable instruments of public action (Gonçalves, 2013, pp. 790-791).

Also, the fact that, in the Portuguese system, it was admissible for an arbitral tribunal to incidentally appreciate the validity of administrative acts in matters related to contracts and public liability (for instance when an administration's harmful action stems from the adoption of an administrative act) reveals the incoherence of the regulatory solution as established at the time.

Furthermore, establishing an association between the relationships upon which public entities can settle and conflicts that can be considered by an arbitral tribunal is not, in our opinion, the right way to go. The object of a settlement agreement is the disputed situation itself and, therefore, when public entities are involved, the administrative legal capacity to undertake legal obligations or renounce to legal positions must be scrutinized. On the other hand, when referring a conflict to arbitration, the parties request a third party to determine the law applicable to the contested situation. Consequently, the object of an arbitration agreement is the waiving of judgment by a state court and not the material legal situation (Renders and Bombois, 2010, p. 74; Portocarrero, 2015, pp. 304-305).

This is why we have to consider that a settlement agreement and an arbitration agreement are not comparable, and that the former should not be used to assess the validity of the latter.

In addition, and denying the contractual nature of arbitrators' activity, we can state that, as long as arbitrators are limited to ruling according solely to the law, public entities will not hand over their power to arbitrators – they will simply ask them to apply the law to the particular case, as a state court would do. Consequently, arbitrators will play a role similar to state judges.

In sum, the threshold of the disposable/non-disposable relationships mentioned above, usually used as an argument to exclude arbitration from public authority-based relations, is not acceptable as a criterion for determining the matters to be subjected to arbitrational appreciation.

4.2.2 Portuguese current legal regime of administrative arbitration scope *ratione materiae*

The truth is that, nowadays, Portuguese law allows administrative arbitration in a wide range of situations.

According to article 180 of the Code of Procedure of Administrative Tribunals (CPTA – Law 15/2002, of 22 February), arbitration may be used in cases related to non-contractual public liability and contracts (article 180 (1) a) and b)), but it is also possible to submit to private arbitrators the appreciation of the legality of administrative acts (article 180 (1) c)). Let us analyse each of these matters.

4.2.2.1 Arbitration over the validity of administrative acts

This legal solution that allows the arbitrational appreciation of administrative acts is the result of a process that began in 2002, when the CPTA was approved. The original wording of article 180 had some positives and negatives. The first ones included the provision for the openness of the arbitration path for the assessment of administrative acts relating to contract performance. Whereas the differentiation between acts performed by the co-contracting public entity that assumed the nature of administrative authority acts and other declarations was not clear, the solution of "article 180 (1) a) prevented the uncertainty regarding the distinction from resulting in uncertainty regarding the possible openness of the arbitration route even when there was an arbitration clause relating to the performance of the contract".[4]

However, concerning the possibility of proceedings before an arbitral tribunal to appreciate the validity of an administrative act, article 180 (1) c) did not provide a straightforward solution. Its original wording laid down the arbitration option with respect to acts that could be "revoked other than on grounds of their invalidity". This text was anything but clear. Seemingly, the criterion underlying the rule was once again the right to dispose of the relationship. Disposability resulted, in this case, from the discretionary power inherent to the act issued (Caupers, 1999, pp. 8-9; Leitão, 2002, p. 401; Freitas, 2007, p. 364; Otero, 2009, pp. 88-89), a thesis supported by foreign legal doctrine as well (Moreno, 1998, p. 102, pp. 109-111; Domenichelli, 1998, p. 246). If the administrative body was able to revoke the act based on its merit or convenience, that act was, to some extent, in the administration's disposability.

4 R. Medeiros, and M. Portocarrero, Administrative Arbitration, in Alexandra Correia, André Fonseca, et. al. *International Arbitration in Portugal*, about to be published. In some legal systems where it is possible to submit to arbitration conflicts regarding administrative contracts, scholars argue that the *actes détachables* theory should not be an obstacle to arbitration ruling on the subjective effects of those acts (contractual or pre-contractual liability for instance) – see D. Renders and T. Bombois, 2010, p. 68.

Many questions emerged from this text, which is why we need to critically analyse it. The main issue pertains to the nature of the discretionary power. When the legislator leaves to the administration's discretion the search for the best solution in a particular case, it does not allow the public entity to delegate its discretionary power to arbitrators. Discretionary power belongs solely to administrative entities. Therefore, the law should exclude arbitrators from examining the discretion of administrative acts, as supported by some authors.

In line with this view, Decree-Law 10/2011, of 20 January, came into force, regulating tax arbitration. This new law expressly allowed arbitrators to rule on conflicts involving authority powers for the first time, enabling arbitration over the legality of administrative acts.[5] A new paradigm was established (Almeida, 2017, p. 519).

Following this precedent, in 2015, a legislative amendment to the CPTA was passed.[6] This revision provided the possibility of challenging an administrative act in an arbitral tribunal, unless otherwise specified by law (article 180 (1) c)).

This was clearly an innovative legal solution. In this sense, an arbitral tribunal can quash an administrative act unless the legislator decides otherwise. Presently, there is no expressed legislative limit yet. In our view, though, in accordance with the principle of effective judicial protection, arbitral tribunals should not be responsible for appreciating all acts where it is impossible to gather all interested parties' agreement as regards the exemption of the appreciation by the State court, namely because these acts interfere with public interests related to the community in general.

4.2.2.2 Arbitration related to contracts and public procurement

As we have already seen, article 180 (1) a)) enables the concomitant appreciation of an administrative contract and the administrative acts taken, for instance, in the context of this contract performance. This means that, apart from the traditional judicial requests for the appreciation of an administrative contract's validity, interpretation and performance, it is also possible to, nowadays, ask arbitrators to appreciate "*Declarations of the public contracting party on the performance of the contract that result in: a) Orders, directives or instructions in the exercise of the powers of management and supervision; b) Unilateral modification of clauses relating to the content and method of performing the provisions set out in the contract due to reasons of public interest; c) Application of the sanctions set out for non-performance of the contract; d) Unilateral termination of the contract; e) Assignment of the co-contracting party's position in the contract to a third party*" (Article 307(2) of the Code of Public Contracts (CCP) – the so-called contractual administrative acts).

5 However, this possibility was limited to a specific institutionalized arbitration centre – the Administrative Arbitration Centre (CAAD) – article 4 (2) Decree-Law 10/2011, of 20 January.

6 Decree-Law 214-G/2015, 2 October.

An arbitral tribunal may, thus, annul (or declare void) an administrative act performed in the context of a contractual relationship and appreciate the validity, the interpretation and the performance of the contract.

Also as regards issues related to public procurement, article 180 (3) of the CPTA provides the possibility to refer claims regarding administrative acts taken in the context of the formation of public contracts to arbitration.

In this sense, article 180 (3) establishes that challenging an administrative act related to the formation of contracts may be the object of arbitration under the terms of the Code of Public Contracts (Decree-Law 18/2008, of 29 January). The co-contracting public entity may provide for arbitration in the tender programme. Article 180 (3) also requires the provision to foresee procedural rules in compliance with the urgency required for the formation of certain types of contracts, such as public works contracts, public works or public service concessions, acquisition or leasing of movable goods, and acquisition of services. The reason underlying the legal regime is obvious: these arbitration proceedings must comply with the requirement of urgency of the Directive of review procedures in the award of public contracts (Directive 2007/66/EC of the European Parliament and of the Council).

However, not all issues regarding public procurement can be solved by arbitrators. Article 180 does not allow administrative arbitral tribunals to appreciate administrative regulations. Therefore, disputes regarding tender documents cannot be allocated to arbitration.

4.2.2.3 Disputes related to public liability

Article 180 (1) b) of the CPTA establishes that it is possible to constitute an arbitral tribunal to appreciate conflicts related to non-contractual liability in the context of administrative relationships. Being an alternative to administrative courts, administrative arbitration may concern disputes involving the liability of public entities and private persons if the harmful act or omission has been adopted or overlooked in the use of a public power.

Nevertheless, the arbitration path cannot be adopted when liability results from the exercise of political, legislative or jurisdictional functions (article 185 (1)).

4.3 The need to adapt traditional arbitration rules

This widening of administrative matters' arbitrability performed by the Portuguese system has revealed that some adaptations to the common regime of voluntary arbitration must be foreseen to respond to the specific requirements of administrative law and the safeguard of public interest.

In this sense, the CPTA has set out some specific rules to be applied in administrative arbitration.[7]

7 Recently, a proposal has been presented for an Administrative Arbitration Law – see Ana Celeste Carvalho, et. al., 2019.

4.3.1 The arbitration agreement

As a rule, arbitration has its origins in a contract and, therefore, the arbitration agreement only binds the parties involved – opposing parties must agree on settling the dispute through arbitration. Taking into account the fact that very often an administrative decision affects several subjects in different ways, Article 180 (2) of the CPTA requires the acceptance of the arbitration agreement by interested counterparties in order to regularly constitute the arbitral tribunal. By opposing party, we mean any person who has an interest in the maintenance or annulment of the administrative act, a universe that can be very large in this particular case. It is indeed very difficult to define the circle of interested counterparties. Moreover, one can question if there is the need of an express acceptance of the arbitration agreement by the counterparties or if a tacit declaration is sufficient for the arbitral tribunal to be regularly constituted. Drawing a parallel with the procedural regime, it could be argued that if the affected party does not say anything when notified for the constitution of the arbitral tribunal, it may be considered that it does not object, but this solution is not legally determined.

When we consider pre-contractual proceedings, for instance, challenging a pre-contractual administrative act requires bringing the claim against the public entity but also against the other bidders.

In this respect, it is important to refer a rule recently introduced into the Code of Public Contracts (CCP). According to article 476 of the CCP, the contracting authority can decide in the procurement documents that future conflicts regarding the contract (or related administrative decisions) be necessarily submitted to an arbitration centre and, consequently, tenderers must present a declaration of acceptance of arbitration. This was the way the legislator found to guarantee the acceptance of all parties in the tender. Yet, if considered as a requirement of the proposal, its legitimacy is quite doubtful, which is why, currently, it is being discussed if this rule introduces a mandatory arbitration decided by the contracting authority or a proposal of arbitration agreement (Serrão, 2018, pp. 979-981).

4.3.2 The need for transparency

Another rule usually associated with the arbitration regime is the secrecy of arbitration proceedings. In this respect, it is important to stress that public activity must comply with a transparency principle. There is, therefore, the need to adapt administrative arbitration to this principle and ensure the public accountability of the Administration.[8]

In this regard, article 185-B of the Code of Procedure of Administrative Tribunals determines making arbitration awards public – "*res judicata decisions delivered by arbitral tribunals must be published by computerised means, on a database organised by the Ministry of Justice*" – and additional steps in that

8 In the French legal system, it has been already proposed to make administrative judgements public – Pierre Delvolvé, 2010, p. 218.

direction (disclosure of all of the documents in the court's files, for instance) have been advocated.[9]

Recently, an amendment to the CPTA was passed (Law 118/2019, of 17 of September) that adds a new paragraph 2 of Article 185-B, which establishes that "*arbitral awards can only be enforced after they have been deposited, by the arbitral tribunal, with any elements capable of identifying the person or persons to whom they relate having been duly erased, with the Ministry of Justice for computerised publication, in the terms to be defined by a decree of the member of Government responsible for the area of justice*".

This norm, notwithstanding its primary aim to assure transparency, is complicated in what concerns its application because of the difficulty in guaranteeing that all arbitral decisions are communicated, particularly regarding ad-hoc arbitrations. This has led some authors to propose that the appreciation of the legality of administrative acts be limited to institutionalized arbitral tribunals.

4.3.3 The preference for institutionalized arbitrations

Article 476.º of the CCP, already referred above, seems to impose the use of institutionalized arbitration centres. Underlying this option is the idea that institutionalized arbitration can provide a higher degree of reliability. Granting private arbitrators the power to appreciate authority acts has to be accompanied by measures that insure similar guaranties to state courts. This is why arbitrators must offer adequate guarantees of objectivity and impartiality and provide expertise, characteristics which arbitration centres may monitor more easily. Some authors defend that the power to rule on the validity of administrative acts should only be assigned to arbitrators previously certified according to strict criteria.[10]

The truth is that some of the adaptations proposed above will be more easily implemented and their compliance controlled if arbitration takes place in the context of institutionalized centres, which is the reason for the justified preference for institutionalized arbitration centres.

4.3.4 Prohibition of ruling according to equity

A norm recently introduced in the CPTA – article 185 (2) – explicitly prohibits the recourse to equity when ruling on disputes in which the validity of administration activity is challenged: "*in disputes on matters of legality, arbitrators decide strictly in line with the established law, and may not* (…) *judge according to equity*". By referring to *matters of legality*, it appears to be the legislator's intention to limit this prohibition to disputes related to the validity of administrative acts, discarding the possibility of arbitrators having a say in what respects merit, discretion and administrative action, as referred above.

9 The proposal of an Administrative Arbitration Law mentioned before foresees that the arbitral proceedings are public (article 13 of the proposal).

10 The presented proposal of an Administrative Arbitration Law foresees criteria to designate administrative arbitrators that are similar to the regime established in the Tax Arbitration Law. Recently, an amendment to the CPTA was passed (Law 118/2019, of 17 September) that provides for the mentioned criteria.

Nevertheless, one can wonder whether the same rule should be applied to all arbitral proceedings in which the legality of either an administrative act or an administrative contract is at issue.

It is worth mentioning the rule established in the Belgian legal system that provides that, when a public entity is involved, the arbitral tribunal can only rule in strict accordance with the law, unless otherwise established in particular rules.[11]

4.3.5 The role of the Public Prosecutor

In addition to its subjective function of guaranteeing citizens' rights, administrative litigation of continental systems maintains, to some extent, the objective function of controlling public legality. In this sense, in the Portuguese administrative litigation system the role of Public Prosecutor is very important. He may, for instance, propose the annulment of administrative acts, allege vices of the act different from those claimed by the author of the action and appeal autonomously against a jurisdictional decision in order to guarantee the legality of the administrative act (articles 55 (1a), 85 and 141 CPTA).

The question is whether the Public Prosecutor should have some kind of power to intervene in the arbitral process. We believe that two fundamental issues need to be pondered. Firstly, it would be difficult to defend the intervention of the Public Prosecutor in a jurisdictional process that corresponds to a private equivalent to State justice. How would it work? Secondly, we believe that, in systems like the Portuguese, where the Public Prosecutor has active procedural legitimacy to propose the annulment of administrative acts, for example, he maintains that legitimacy regardless of the arbitral agreement. It could thus be argued that, when aware of an illegality, the Public Prosecutor maintains the possibility to propose the action in State courts.

4.3.6 Appeal

Another very important aspect of the administrative arbitration regime concerns the possibility of parties renouncing the appeal against the arbitral decision with State tribunals, which in the case of administrative conflicts will necessarily mean that a part of the conflicts in which Public administration is involved is no more fully controlled by State tribunals. Although there may not necessarily exist a State monopoly in what respects the control of administrative activity, the possibility of State courts not having the opportunity to control arbitral awards unless the affected parties agree with it does not seem to safeguard public interest correctly.

The solution found by Portuguese law was a mitigated solution, guaranteeing that in certain circumstances there is always the possibility to appeal, particularly in case the arbitral decision is *in opposition, as regards the same fundamental point of law, with a ruling issued by the Central Administrative Court*"

11 Renders and Bombois, 2010, p. 143, Tanquerel and MacGregor, 2010, p. 207, advocate that an arbitration clause that allows judgment according to equity are inadmissible in the Swiss legal system.

or "*when at issue is the appreciation of a fundamental point of law which, given its social or legal relevance, is of fundamental importance, or when the action is clearly necessary for a better application of law*" (article 185-A (3) CPTA). This seems a balanced solution that assures that, if arbitral awards contradict State tribunals' decisions, there is always the possibility to appeal.

4.4 Balance of administrative arbitration in Portugal

Making a balance of administrative arbitration in Portugal is not an easy task. As mentioned above there is no existing base for the collection of data on arbitral decisions since the provision that imposes the publication of the arbitral awards on a database organized by the Ministry of Justice is yet to be concretized.

However, some institutionalized centres, such as the Administrative Arbitration Centre (CAAD), have a transparency policy that allows the collection of some information. This centre, for instance, takes on average 4 months to issue its resolutions, which is manifestly quicker than State courts, which face an evident slowness crisis in Portugal (Silveira, 2018).[12]

The Centre also possesses a fees policy lower than the judicial fees in force, which allows for a cheaper justice.[13]

It should be noted that, in the case of tax administration, the success of tax arbitration has led to a special programme, instituted by law, of (voluntary) migration of processes from State tribunals to tax arbitration tribunals constituted within CAAD (article 11 Decree-Law 81/2018, of 15 October).

In this sense, and always taking into account the necessary adaptations referred above, administrative arbitration seems to show a positive path in the Portuguese legal system.

5 Conclusion

Arbitration in general presents advantages also valid for administrative arbitration, namely more flexibility, more celerity and, sometimes, fewer expenses. It can contribute to ease the workload of state courts in countries that face a slowness crisis of administrative courts.

In our opinion, and as it results from the discussion above, there are no unbridgeable obstacles in what respects the widening of administrative arbitration unless by expressed constitutional option.

Yet, it is necessary to assure the correct and due adaptation of arbitration rules to the safeguard requirements of public interest, particularly in what

12 Silveira, J. T. (2018). The CAAD Regulation establishes the maximum time limit of six months for the delivery of the arbitral award (article 25). At <https:// www.caad.pt/files/documentos/regulamentos/CAAD_AA-Regulamento_Arbitragem_Administrativa_2020-01-23.pdf>, accessed 15 January 2020.

13 See https://www.caad.pt/files/documentos/regulamentos/CAAD_AA-Tabela_Encargos_Processuais_2019-12-12.pdf, accessed 1 January 2020.

concerns transparency, arbitrators' impartiality and competence and prohibition of ruling according to equity in matters of legality of administrative action.

Given the difficulty of assuring the intervention of the Public Prosecutor in the arbitral process, arbitration will hardly ever control objective legality – that control remains the responsibility of the State. Therefore, it is necessary to assure mechanisms to control arbitral awards, at least in cases of express conflict with State courts' decisions.

In sum, the Portuguese legislator has provided some special rules applicable to administrative arbitration in order to try to respond to the specifics that the enlargement of its scope *ratione materiae* seems to require.

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Povzetki (*Summaries in Slovenian Language*)

1. Dostop do najvišjih upravnih sodišč: med pravico posameznika biti slišan in pravico sodišča do obravnave izbranih primerov

Wojciech Piątek

Obravnava spora na sodišču v razumnem roku je eden ključnih pogojev za obstoj učinkovitega sodnega sistema, ki jih nalagajo evropsko pravo in nacionalni pravni redi. Omenjeni pogoj pa je v nasprotju s pričakovanji posameznikov, da sodbe nižjih sodišč izpodbijajo na sodiščih najvišje stopnje. Namen članka je proučiti vprašanje vrednot, ki bi jih zakonodajalci morali upoštevati pri urejanju dostopa v upravnih zadevah do najvišjih sodišč. Analiza temelji na primeru avstrijskega in poljskega pravnega sistema. Obe državi poznata dvostopenjsko upravno sodstvo, vendar se pogoji dostopa do vrhovnih upravnih sodišč razlikujejo. Na Poljskem je dostop glede na ustavno načelo dvostopenjskega sodnega postopka neomejen, v Avstriji pa je zadevna pravica omejena na primere širšega interesa, torej ne zgolj v interesu posamezne stranke v postopku. Analiza normativnih posledic obeh rešitev vodi k ugotovitvi, da postopkovne omejitve v zvezi z dostopom do najvišjih sodišč krepijo njihovo vlogo pri ohranjanju enotnosti sodne prakse in zagotavljanju visokega standarda njene razlage. Sistem brez omejitev ne zagotavlja odločanja o konkretnem sporu v razumnem roku in ga zato ni moč šteti za učinkovitega.

Ključne besede: upravna sodišča, dostop do sodišča, sodno-upravni postopek, učinkovitost pritožbe in sodnega varstva, Avstrija, Poljska

2. Sodni nadzor nad upravnimi postopki na nacionalni ravni v skladu z Listino o temeljnih pravicah in splošnimi načeli prava EU

Mihaela Vrabie

Namen članka je ugotoviti, kdaj so nacionalni organi v okviru upravnih postopkov, ki se izvajajo v državah članicah EU, dolžni spoštovati temeljne pravice EU. Prav tako članek stremi k opredelitvi pravnih sredstev, ki so v okviru sodnega nadzora na voljo na nacionalni ravni v primerih, ko nacionalni organi kršijo temeljne pravice EU, zagotovljene z Listino o temeljnih pravicah ali kot splošna načela prava EU. S tem namenom se v pričujoči študiji pojasnjuje vpliv pravno zavezujoče Listine EU na javno upravo v državah članicah ter področje uporabe Listine EU na nacionalni ravni. Obravnava se tudi razliko med temeljnimi pravicami EU, ki jih zagotavlja Listina EU, kot osnovnim pravom EU in temeljnimi pravicami EU kot splošnimi načeli prava EU. V zvezi s pravnimi sredstvi, ki so na voljo nacionalnim sodiščem, študija opisuje učinke prava EU (primarnost

prava EU, neposredni učinek, neposredna uporaba) na temeljne pravice EU in ukrepe, ki jih lahko sprejmejo nacionalna sodišča, kadar delovanje nacionalnih upravnih organov ni skladno s temeljnimi pravicami EU. V članku so na koncu predstavljene najpomembnejše ugotovitve glede sodnega varstva temeljnih pravic EU na nacionalni ravni, zlasti z vidika pravice do učinkovitega pravnega sredstva in nepristranskega sodišča, kot jo določa 47. člen Listine EU.

Ključne besede: Listina EU o temeljnih pravicah, splošna evropska načela, primarnost prava EU, pravica do dobre uprave, pravica do učinkovitega pravnega sredstva, sodni nadzor

3. Načelo *ne bis in idem* v davčnem pravu: evropski in italijanski okvir

Stefania Lotito Fedele

Na nacionalnem in nadnacionalnem pravnem področju je potreba po obravnavanju načela *ne bis in idem* utemeljena z naraščajočim zanimanjem, ki ga zbujajo najnovejša stališča evropskih sodišč. To načelo prepoveduje ponovno sojenje o isti stvari vsem, ki so bili v predhodnem sodnem postopku že oproščeni ali obsojeni. Obenem je postalo tudi temeljna pravica, zapisana v Evropski konvenciji o človekovih pravicah in Listini EU o temeljnih pravicah. Zanimanje za to vprašanje izhaja tudi iz potrebe po razumevanju, ali se lahko glede na opredelitev kazenskih dejanj in davčnih prekrškov pristop italijanskega pravnega sistema – ali kateregakoli drugega podobnega nacionalnega reda – šteje za skladnega z evropsko davčno zakonodajo in sodno prakso. Razprava o evropskem pravnem prostoru tako zahteva ponoven razmislek o konceptu kaznovalne pristojnosti, ki naj temelji na »solidarnosti«. Država se lahko šteje za odporno na represivne zahteve od zunaj, vendar mora dejavno sodelovati pri varovanju lastnih garancij. Tradicionalno samoreferenčno pojmovanje kazenske represije, učinkovito povzeto v izrazu »kaznovalna suverenost«, nadomešča zamisel o pristojnosti, ki izhaja neposredno iz načela vzajemnega priznavanja. Po tem scenariju je v ospredju zaščita posameznika pred morebitnim podvajanjem kazni za isto stvar v različnih državah. Zato je treba istočasno ukrepati na dveh ravneh: iskati rešitve za morebitne spore o pristojnosti (prepoved konkurenčnega pregona za isto stvar) ter v vsaki državi članici tujcu, ki mu je bilo že sojeno, zagotoviti prekluzivni učinek (*ne bis in idem*), da velja zaupanje v že odločeno, čeprav v drugi državi.

Ključne besede: evropska davčna zakonodaja in sodna praksa, Italija, načelo ne bis in idem, davčna uprava

4. Razumevanje razlik med enakovrednimi modeli javnega upravljanja

Mirko Pečarič

Javne uprave se spremembv družbi lotevajo na različne načine in z različnimi reformami. Te temeljijo na različnih modelih upravljanja, ki se uveljavljajo

v domačem okolju ne glede na lokalne specifike. Potreba po orodju, s katerim bi idealne tipe modelov upravljanja prilagodili nacionalnim ciljem, je v času naraščajoče kompleksnosti vse bolj izražena. Ker se podatki kot taki odražajo v številnih predpostavkah, se v članku za njihovo zbiranje predlaga Ashbyjevo raznolikost, s pomočjo katere se lahko bolj približamo uspešnemu upravljanju ciljev. Po drugi strani se za opredelitev potreb uporabljajo Douglasov mrežni in skupinski model, organizacijska strategija, struktura in postopek Milesa in sodelavcev ter Hofstedejeve dimenzije kulture. Čeprav se javni organi zavedajo vpliva, ki ga ima oz. imajo kultura oz. vrednote na modele javne uprave, države pri svojih odločitvah to le posredno upoštevajo. V članku se poudarja, da je treba nekatere vrednote neposredno vključiti v modele upravljanja skladno z njihovimi kulturnimi ozadji. Slednja so vedno prisotna pri predpostavkah odločitev (ki slednjim dajejo okvir in težo), ki jih uspešen upravljavec ne bi smel zanemariti.

Ključne besede: modeli javnega upravljanja, dimenzije kulture, javna uprava, reforme, stranski učinki, univergenca

5. Reforma javne uprave v Bolgariji: usmerjena od zgoraj navzdol in vodena od zunaj

Emilia Zankina

Članek proučuje reformo javne uprave v Bolgariji in glavne dejavnike, ki so oblikovali časovnico in dinamiko reform. Reforma javne uprave je analizirana s petih ključnih vidikov: preglednost in odgovornost, uslužbenski sistem in upravljanje s človeškimi viri, zagotavljanje in digitalizacija javnih storitev, organizacija in upravljanje vladnega sektorja ter usklajevanje in izvajanje političnega odločanja. Na dinamiko reform in politične odločitve v primeru Bolgarije vplivajo predvsem štirje dejavniki: specifične politične odločitve vladnih elit; zunanji vpliv EU in nacionalne dediščine ter pomen institucij in mehanizmov reform. Za ponazoritev teh dejavnikov se v članku analizira tri politične pobude, tj. e-upravo, zmanjševanje upravnih bremen in reformo uslužbenskega sistema. Članek zajema longitudinalno analizo in kvalitativni pristop k študiji primerov z uporabo letnih poročil o stanju v javni upravi v obdobju 2001–2018, pregled dokumentov evropskega semestra 2011–2017, pregled pobud za reformo javne uprave v obdobju 2005–2018 in intervjuje z javnimi uslužbenci. Prizadevanja za reformo so bila usmerjena od zgoraj navzdol, vodena od zunaj, potekala pa so v več krajših časovnih intervalih. Rezultati potrjujejo predhodne ugotovitve, da je Bolgarija med tistimi državami EU, ki dosegajo najslabše rezultate na področju reforme javne uprave, saj se še niso otresle komunistične dediščine, soočajo pa se tudi z visoko stopnjo korupcije in politizacije. Bolgarski primer poudarja več pomembnih spoznanj: pomen politične volje in politične dinamike za rezultat reformnih prizadevanj; pomen zunanjega pritiska in financiranja; težave pri odpravljanju dolgoletne dediščine v upravnih tradicijah; in omejitve pristopa od zgoraj navzdol, ki zavirajo trajnost reformnih prizadevanj.

Ključne besede: reforma javne uprave, Bolgarija, e-uprava, zmanjševanje upravnih bremen, uslužbenski sistem

6. Pomen praks javnega upravljanja za poslovno raziskovalno-razvojno dejavnost v EU

Dejan Ravšelj, Sabina Hodžić

Javni sektor in javno upravljanje imata ključno vlogo v sodobni družbi, ki sledi družbenim potrebam. Zato ni presenetljivo, da se v zadnjem desetletju dobro upravljanje pogosto uporablja za razlago gospodarske uspešnosti in dobrega počutja družbe. Poslovni sektor pogosto deluje kot kanal, preko katerega javno upravljanje vpliva na gospodarsko uspešnost, vendar v obstoječi literaturi o tem ni veliko zapisanega. Tako je tudi vloga javnega upravljanja pri spodbujanju raziskav in razvoja v poslovnem sektorju v EU še precej neraziskana. Namen članka je torej razložiti medsebojno delovanje javnega in poslovnega sektorja v mednacionalnem okolju s proučevanjem razmerja med različnimi praksami javnega upravljanja in poslovno raziskovalno-razvojno dejavnostjo. Ta namen bo dosežen z uporabo multiple regresijske analize na naboru presečnih podatkov držav članic EU. Empirični rezultati kažejo naslednje. Prvič, razkrivajo, da javna uprava v EU v glavnem temelji na neo-weberjanski državi in ne na sodobnih praksah javnega upravljanja, kot je novi javni management. Drugič, razkrivajo, da imajo prakse javnega upravljanja pomembne posledice za poslovno raziskovalno-razvojno dejavnost. Tako dokazujejo, da nepristranskost, odgovornost in učinkovitost krepijo poslovno raziskovalno-razvojno dejavnost v EU, medtem ko jo zaprtost slabi. Ugotovitve prispevka so še posebej koristne za sodobne vlade in politične odločevalce, da v prihodnosti vzpostavijo ustrezno javno upravljanje in politične prakse.

Ključne besede: poslovni sektor, EU, neo-weberjanska država, novi javni management, javno upravljanje, raziskovalno-razvojna dejavnost

7. Učinkovitost medicinskih laboratorijev po uvedbi standardov kakovosti: analiza trendov v izbranih državah EU in študija primera iz Slovenije

Nejc Lamovšek, Maja Klun

Merjenje učinkovitosti in uspešnosti v javnem sektorju ima v literaturi dolgo tradicijo. Za proučevanje učinkovitosti posameznih enot javnega sektorja je pogosto uporabljena metoda analiza ovojnice podatkov (DEA). Slednja se uporablja tudi v zdravstveni dejavnosti, vendar so raziskave njenih posameznih delov redke, zlasti kar zadeva ocenjevanje laboratorijske dejavnosti. V tem članku se metoda DEA uporablja za merjenje učinkovitosti biomedicinskih laboratorijev in sprememb ob uvedbi standardov kakovosti. To je prvi primer proučevanja sprememb tehnične učinkovitosti v zvezi z akreditacijo ISO standardov. V članku je predstavljena analiza učinkovitosti slovenskih medicinskih laboratorijev glede na pridobljeni standard kakovosti ter podana primerjava slovenskih medicinskih laboratorijev in dveh laboratorijev iz sosednjih držav, Avstrije in Italije. Rezultati kažejo, da uporaba metode DEA in indeksa Malmquist ne kaže na izboljšanje tehnične učinkovitosti akreditiranih laboratori-

jev, vendar pa kazalniki kakovosti kažejo višjo kakovost opravljenega dela. Primerjava slovenskih in tujih laboratorijev kaže na visoko tehnično učinkovitost akreditiranih laboratorijev, saj so najvišje uvrščeni; vendar znanje laboratorijev kaže, da obstajajo tudi drugi razlogi za takšno uvrstitev. Rezultate raziskav je mogoče uporabiti na primerljivih območjih in državah.

Ključne besede: medicinski laboratoriji, standardi kakovosti, ISO, učinkovitost javnega sektorja, Slovenija, metoda DEA

8. »Tihi varuhi« v boju proti korupciji: primer Severne Makedonije

Emilija Tudjarovska Gjorgjievska

Nepristranskost javne uprave je pomemben branik pred koruptivnim ravnanjem in nujen pogoj za proces demokratizacije. Kljub temu se Severna Makedonija še vedno sooča s politizacijo javne uprave. Po eni strani varuh človekovih pravic na normativni ravni ščiti državljane v razmerju do organov državne uprave, ukrepa v primeru pristranskosti ali drugih odstopanj od norm in letno poroča parlamentu. Po drugi strani bi moral biti parlament v poziciji, da mu funkcionarji in institucije odgovarjajo za svoja dejanja, in ravnati po priporočilih varuha človekovih pravic. Vendar pa je razumevanje vloge, ki jo imata lahko omenjeni instituciji v učinkovitem boju proti korupciji v okviru procesov demokratizacije, omejeno. Namen članka je proučiti institucionalne vrzeli, ki ponujajo priložnosti za korupcijo in družbene pasti. Na podlagi teoretičnih, empiričnih in primerjalnih opažanj v okviru analize posameznih primerov se želi v članku proučiti skladnost teorije z dejansko prakso in zagotoviti drugačen pogled na institucionalne priložnosti za družbene pasti v kontekstu nekonsolidiranih demokracij. Ugotovitve kažejo, da obstaja vzročna povezava med institucionalnim »tihim varuhom« državljanov in razširjenostjo korupcije. V članku se spodbuja tudi nadaljnjo razpravo o dejavnikih, ki spodkopavajo prizadevanja varuha človekovih pravic in parlamenta za aktivno vključevanje v odpravo korupcije v družbah.

Ključne besede: boj proti korupciji, demokratizacija, nepristranskost, Severna Makedonija, varuh človekovih pravic, parlament

9. Politika konzularne zaščite EU z vidika upravnega prava

Erzsébet Csatlós

Evropski upravni prostor se je razvil v večstopenjsko upravno strukturo, ki jo zaznamuje horizontalno in vertikalno sodelovanje vseh njegovih ravni. Zaradi vse večjega števila kompozitnih postopkov so izključno izvršilno odgovornost uprav držav članic nadomestile sodelovalne mreže organov neposredne in posredne ravni. Tako se je tudi politika konzularne zaščite iz medvladnega režima razvila v posebno evropsko upravno področje. Institucionalizacija izvajanja in vrednotenja evropskih politik na več ravneh je koherenten sistem, ki

se razlikuje od zavezanosti držav članic k doseganju rezultatov, nekoč stalnice pri izvajanju pravnega reda EU. V članku se zato proučuje, kaj predstavlja evropska uprava na tem in drugih političnih področjih ter kateri so njeni strukturni in procesnopravni vidiki. Politika konzularne zaščite EU kot taka je edinstvena politika na stičišču mednarodnega prava, notranjega prava in različnih ravni prava EU. Evropeizacija določene politike pogosto pomeni nekakšno uskladitev materialnega prava; vendar v primeru konzularne zaščite ni ciljno usmerjena. V okviru varstva temeljnih pravic je politika konzularne zaščite evropeizirana z vidika strukture in postopka in na koncu oblikuje evropsko upravo za to področje. Članek tako izpostavlja postopek vzpostavitve evropske uprave in opozarja na možne težave pravne uporabe, ponuja pa tudi teoretične podlage za njihovo odpravo.

Ključne besede: pravo EU, evropska uprava, državljanstvo EU, konzularna pomoč, upravno sodelovanje, mehko pravo

10. Arbitraža v upravnih zadevah: razširitev obsega *ratione materiae* na Portugalskem

Marta Portocarrero

Članek obravnava vprašanje arbitrabilnosti upravnih razmerij, tako na splošno kot značilno za Portugalsko. Čeprav je uporaba arbitraže v sporih, v katerih javni subjekti posegajo v zasebna razmerja, običajno dovoljena, evropski zakonodajni organi upravne spore običajno obravnavajo kot vrsto sporov, kjer je arbitraža izključena. Kadar gre za upravna razmerja, vsekakor ni težko postaviti trdnih argumentov proti alternativnemu reševanju sporov. Vendar pa se noben od običajno uveljavljenih ugovorov ne zdi nepremostljiv. Zato je cilj članka kritično analizirati glavne argumente proti pristojnosti arbitrov za odločanje v javnopravnih sporih. Trenutno portugalsko pravo dovoljuje upravno arbitražo na najrazličnejših področjih, od sporov v zvezi z upravnimi pogodbami do sporov glede zakonitosti aktov upravnih organov. Ocena te ureditve jasno kaže, da morajo širitev objektivnega obsega upravne arbitraže spremljati pravila, ki odražajo posebne zahteve upravnega prava in ščitijo javni interes. V tem smislu analiza ponuja kritičen pregled portugalskih pravnih rešitev, ki jih je mogoče uporabiti tudi v primerljivih pravnih režimih drugih evropskih držav.

Ključne besede: alternativo reševanje sporov, upravna arbitraža, arbitražni postopek, objektivna arbitrabilnost, Portugalska

AUTHOR GUIDELINES

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SPECIAL CALL 2020 FOR REVIEW/SURVEY ARTICLES

Like many other fields of science, public administration is experiencing an increasing need for survey – or often also referred to as review – articles that would provide comprehensive overview of selected topics. There are numerous reasons for this need, mostly related to the enormous growth of the published papers and articles and simultaneous increase of the diversity of topics covered. The diversification of topics might seem beneficial, since it causes the decrease of the number of articles per topic. However, even the most narrow, specific topics attract attention of many researchers and are being covered by dozens of articles. Thus, even experienced researchers, not to mention practitioners in public administration, experience hard time getting a quick overview of the state-of-the-art in the domain of their interest.

To address these issues, CEPAR issues this special call for review/survey articles. In contrast with the usual research articles published in CEPAR, that report upon novel research results and findings, review/survey articles are expected to **provide comprehensive reviews of existing results and findings** related to **a selected relevant topic in the field of public administration**. A comprehensive review should provide a well structured, taxonomical overview of the recent literature related to the topic by **identifying and synthesising main directions and findings of the state-of-the-art studies** as well as **outlining promising venues of the most recent and further research**. A good review article can try to identify novel, previously undocumented relationships among the articles on the selected topic too and therefore allow not only overview but also better understanding of the state-of-the-art.

The target audience for the call include **both, senior researchers** having long-term perspectives and **junior researchers**, i.e., recent graduates that have, sometimes together with their supervisors, performed comprehensive literature reviews on the topics of their theses. Especially for the later, publishing a review article might be a way towards establishing a notable presence in the wider community of researchers in the field of public administration.

Some possible topics that seem relevant regarding CEPAR scope and public administration trends include, but are definitely not limited to, the following administrative subfields:

- collaborative or network governance, co-creation and/or co-production, coordination,
- transparency and participation in public governance,
- digitalisation of public administration, smart governance,
- policy design in general or in selected sectors, its implementation and evaluation,
- agility in public administration organisations: teams and civil servants,

– innovation and sustainability in public governance,
– PA education and research.

While the review/survey articles are expected to follow their **own structure**, not necessarily aligned with the structure recommended for research papers, all the **other CEPAR guidelines for preparing and submitting the manuscript**, including the IMRaD scheme, length limit and formatting, apply in full. Consequently, the respective articles will be categorised as original scientific papers, and can also expect a significant level of citations.

This special call has no deadlines, although we would especially like to encourage submission and publication of review/survey articles in the envisaged issues to be published in spring and autumn issues in **2020**.

Further information on CEPAR can be found at www.cepar.si or via cepar@fu.uni-lj.si