SEMI-ANNUAL SCHOLARLY LEGAL JOURNAL
OF COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

BRATISLAVA LAW REVIEW

Vol 5 No 2 (2021)

ISSN (print): 2585-7088
ISSN (online): 2644-6359
EV: 5519/17
DOI: 10.46282/blr.2021.5.2

EDITORIAL OFFICE
Executive editor:
Olexij M. Meteňkanyč

Junior executive editors:
Adam Köszeghy
Adam Máčaj
Terézia Švédová

CONTACT
Comenius University in Bratislava
Faculty of Law
Šafárikovo nám. 6
811 00 Bratislava
Slovakia
blr@flaw.uniba.sk
IČO 00 397 865

Published twice a year by Comenius University in Bratislava, Faculty of Law
print and online:
https://blr.flaw.uniba.sk
https://doi.org/10.46282/blr

Volume 5 Issue 2 was published 30th December 2021

ABOUT THE JOURNAL

Bratislava Law Review is an international legal journal published by the Faculty of Law of Comenius University in Bratislava, Slovakia (till the end of 2019 it was published by Wolters Kluwer in cooperation with the Faculty of Law of the Comenius University in Bratislava). It seeks to support legal discourse and research and promote critical legal thinking in a global extent. The journal offers a platform for fruitful scholarly discussions via various channels – be it lengthy scholarly papers, discussion papers, book reviews, annotations, or conference reports. Bratislava Law Review focuses on publishing papers not only from the area of legal theory and legal philosophy but also other topics with international aspects (international law, EU law, regulation of the global business). Comparative papers and papers devoted to interesting trends and issues in national law that reflect various global challenges and could inspire legal knowledge and its application in other countries are also welcomed.

The Bratislava Law Review has adopted multidisciplinary and interdisciplinary, but also cross-disciplinary coverage. This is also the reason why members of the Bratislava Law Review Editorial Board are experts both in legal sciences and legal practice as well as in related disciplines – to ensure cross-cutting knowledge throughout all legal sciences, branches, and fields of law. The Editorial Board consisting of foreign scholars and experts in the above fields, as well as a double-blind external peer review, provide a guarantee of the high standard of the contributions published. In this way, the Bratislava Law Review hopes to provide space for presenting a diversity of opinions and approaches to up-to-date legal issues and problems, aiming in this way to contribute to an overall rise in standards of legal science in the CEE region.

SECTION POLICIES

Studies are peer-reviewed papers bringing extensive, deep and comprehensive analyses of international law, European law, legal theory, philosophy, legal history, or comparative law. If covering national jurisdiction, they shall have solid comparative importance. Studies shall have a length of 36000-72000 characters (except the title, abstract, tables, figures, and references list).

Articles are peer-reviewed papers bringing deep and comprehensive analyses of international law, European law, legal theory, philosophy, legal history, or comparative law. If covering national jurisdiction, they shall have solid comparative importance.

Articles shall have a length of 20000-28000 characters (except the title, abstract, tables, figures, and references list).

Discussion papers usually cover one or several particular legal regulation and **commentaries** shall provide insight and evaluation of selected legislation or case law Both discussion papers and commentaries are peer-reviewed. Commentaries and discussion papers shall have length of 10000-15000 characters (except title, abstract, tables, figures, and references list).

Reviews shall bring notices and information on scientific publications. They are not subject to peer-review. Reviews shall have length not exceeding 9000 characters (except title, abstract, tables, figures, and references list)

Reports shall bring notices and information on scientific publications and scientific events. They are not subject to peer-review. Reports shall have length not exceeding 9000 characters (except title, abstract, tables, figures, and references list)

Special sections contain peer-reviewed studies and articles. Topic of special section and selection of papers is suggested by guest editors who also recommend authors and their papers, and it is usually outcome of particular research group or research task. Obviously, special section status does not relieve papers from standard review procedures and the criteria are the same as the criteria for studies and articles.

INSTRUCTIONS FOR AUTHORS

Publishing with the scientific journal Bratislava Law Review means publishing with the Faculty of Law of Comenius University in Bratislava, the oldest and leading law school in Slovakia.
The Journal seeks to publish original research papers that make a significant contribution to all fields of law, in particular European, comparative and international law. To achieve the aim of the journal, we encourage authors to submit significant articles from all other branches of law and legal scholarship that can help shape the everchanging legal knowledge in the area of Central and Eastern Europe and in particular the V4 countries and Danube region. Book reviews, annotations and various legal and scholarly reports are also accepted for publication. Bratislava Law Review is committed to support the growth of new generation of researchers and scholars in all fields of legal studies and the journal therefore accepts also junior researchers´ papers (particularly students enrolled in Ph.D., JSD and equivalent study programmes).

The papers shall be submitted directly via journal's webpage which enables authors to follow editorial process

All papers are subject to an anti-plagiarism check via iThenticate.
The paper shall be written and submitted in the standard editable format of text editor (e.g. doc, docx, rtf). The authors are expected to deliver the proposed articles in correct English (British standard).
Each study and scientific article shall contain an abstract which summarizes the research aims of the paper, the structure of the paper as well as outlines conclusions. Keywords shall enable enhancing searchability of the papers and grouping papers of similar topics, so we suggest choosing, on the one hand, keywords general enough, on the other hand, precise enough to characterize the paper properly. Jurisdiction and area of law shall be included in key words. We kindly ask potential authors to respect quotation standards of Author-Date System (APA Style). References should cover solely the items referred to or cited in the text, no papers cited from a secondary source should be included in the references. In each reference item, the author must include its assigned DOI (if applicable). Detailed guidelines for authors can be found on the journal's webpage.

Submissions are free of charge.

Authors, reviewers, and editorial team shall follow the Editorial Ethics and the Code of Conduct published on the journal's webpage.

Since the editors wish to achieve plurality of academic discussion within the journal, more than one paper by the same author will not be published in the same volume; this rule does not apply to reviews and reports.

Forthcoming issues:

2022, volume 6, issue 1
Deadline for submission of papers: 15th March 2022
Review procedure and editing process: March-June 2022
Foreseen date of publication: June 2022

2022, volume 6, issue 2
Deadline for submission of papers: 15th September 2022
Review procedure and editing process: September-November 2022
Foreseen date of publication: December 2022

TABLE OF CONTENTS:

ARTICLES

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

METHODOLOGY OF EFFECTIVE SEIZURE AND THE CONFISCATION OF THE CRIME ASSETS / Marek Kordík, František Vojtuš

doc. JUDr. Marek Kordík, PhD., LL.M.
Associate Professor
Comenius University in Bratislava
Faculty of Law
Department of Criminal Law
Criminology and Criminalistics
Šafárikovo nám. 6
810 00 Bratislava; Slovakia
marek.kordik@flaw.uniba.sk
ORCID: 0000-0002-4290-8354

mjr. Mgr. Ing. František Vojtuš, PhD.
Police investigator
National Counter-Crime Unit
National Criminal Agency
of Presidium of Police Force
Račianska 45
812 72 Bratislava, Slovakia
frantisek.vojtus@gmail.com
ORCID: 0000-0002-1912-4666

This work was supported by the Slovak Research and Development Agency under the Contract no. APVV-19-0102.

Abstract: *The paper deals with the methods of seizure of property in criminal proceedings and with the individual institutes that may be used for this purpose. This is a form of vademecum of the financial investigation, which is currently one of the priorities of criminal policy. The paper responds to the latest development of the decision-making activities of the courts and tries to point out to certain stereotypes that are already outworn by the decision-making activities in selected decisions.*

Key words: *seizure of property; seizure of a victim claim; effectiveness; antimony laundering; confiscation; financial investigation, Criminal law*
Suggested citation:
Kordík, M., Vojtuš, F. (2021). Methodology of Effective Seizure and the Confiscation of the Crime Assets. *Bratislava Law Review*, 5(2), 9-22. https://doi.org/10.46282/blr.2021.5.2.256

Submitted : 23 August 2021
Accepted : 27 October 2021
Published : 30 December 2021

1. INTRODUCTION

The main purpose for cross-border organized criminal groups is a financial gain. This should determine the willingness and possibilities of authorities to search, seize and confiscate the proceeds of crime. The effective prevention should be achieved not only by seizing the proceeds of crime but should be extended also to any property deriving from activities of a criminal nature. Organised criminal groups conduct their activities across the borders acquiring assets in other Member States other than seated as well in third countries. The effective financial investigation requires international cooperation on assets recovery and mutual legal assistance.[1]

[1] Rec. 1 and 2 of Directive 2014/42/EU of the European Parliament and the European Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

Money laundering is a global serious anti-social problem and a criminal activity performed as a service through countless channels and schemes, At the same time, it cannot be treated effectively without close and trustful cooperation. It is necessary for all stake holders to create an efficiently functioning system of legislative, technical and organizational-personnel tools (European Commission, 2019, p. 2).

This includes mainly a pro-active engagement of the non-LEA[2] actors such as the financial institutions and DNFBPs[3] in the operational priorities, therefore, to assist agencies to the greatest extent possible, as well as to understand trends and emerging threats from a more strategic perspective. One of the possibilities, according to the Wolfsberg Group is Public-Private Partnerships (PPPs) as a key component of an effective AML/CTF regime (cf. Šimonová, Čentéš, and Beleš, 2019; The Wolfsberg Group, 2020).

Mutual trust between the parties needs to be based on the principle of cooperation, coordination, communication and protection of interests.[4] At the same time, it should demonstrate a high level of professionalism with self-reflection and objective approach (see The Financial Action Task Force, 2013, pp. 26–37, 2016),[5] including regular meetings and information sharing not only between FIUs and the financial institutions, but also Criminal Police, investigators and prosecutors, or their governing bodies should take part in the sessions.

The effective Anti-Money Laundering System is not a LEA assessment nor should be used solely for their purposes. It has to be addressed to a wide range of subjects, ranging from intelligence services, law enforcement bodies, courts, supervisory bodies through policymakers to private sector. It focuses significantly on the powers of the private sector and should be taken onboard with highest possible importance. The effective AML system consistently and continuously reflects all the elements of the methodology being available to sector experts and private sector representatives.

The result of the country's overall ML vulnerability is determined by the level of measures in the fight against money laundering and the effectiveness of these measures. The determinant of the weaker country ability to fight against money laundering is its level of searching the fruits of crimes, the level of money laundering prosecution including the quality of issued judgments and the environment for the seizure and confiscation of fruits of crimes.

The successful seizure of criminal assets is determined by interdisciplinary, proactive and public-private joint approach in financial investigation.

The importance of financial investigations has been highlighted in the EU Policy Cycle for organized and serious international crime the European Multidisciplinary Platform Against Criminal Threats (EMPACT). Criminal finances, money laundering and assets recovery (CFMLAR) were chosen by Member States as a new horizontal priority with a dedicated four-year Multi-Annual Strategic Plan (MASP). Pointing out to the cooperation and the cycle information flow, the EU emphasizes the improvement between:

[2] Law enforcing Agencies, e.g., Police, Customs, Intelligence service, Prosecution Office.

[3] Designed Non-Financial Business and Professions.

[4] A good example of the cooperation between the LEA and the private sector- ICT operators shall be a legal interception agenda, including data retention, if possible. The sessions are on the regular basis, the rules for cooperation are set in advance by law and specified usually by the cooperation memorandum including the costs and way of delivery. Current status of the cooperation between the LEA and the financial institutions within the area of financial investigation is more or less restricted to the request (online, electronic or paper) for the account details including balance and history. Deeper credit and risk analyses, outcomes of the Due Diligence and Know Your Customer verification processes are usually not shared with the LEA.

[5] See recommendation 3-7, 30-31 of the FATF recommendations.

- FIUs of different Member States,
- FIUs and private sector entities (European Commission, 2019, p. 20) required to report suspicious transactions (STRs)
- different LEA,
- tax authorities and law enforcement authorities,
- FIUs and law enforcement, tax and customs authorities at national level,
- financial institutions and law enforcement authorities

2. CURRENT STATUS

Recognizing the importance of the "follow the money approach" to tackle financial aspects of organized crime and understanding that such an approach requires coordinated measures in a wide array of interrelated areas.

The risk assessment performed by the European Union itself shows that the EU internal market is still vulnerable to ML risks. Money laundering transactions, which may show up in various methods, are intended to replace the identity of the criminal proceeds[6] with the purpose of pretending to be legitimate assets at some point and to allow the criminals to enjoy the profits of their previous crimes[7]. These are somehow the distinguishing criteria from the terrorism financing, when using the same methods vice –versa lead to the dirtying the legal money to support the terrorist activities by hiding their purpose of use. The study further deals only with the money laundering (Borlini and Montanaro, 2017, p. 1017).[8]

Laundering may take place in several stages:

- Placing: The physical placing of the proceeds – i.e., placing in the financial system
- Disguising: Separation of the proceeds from their source through (financial) transactions in order to hide the audit trail and achieve anonymity
- Integration: Retransfer of funds to a person's property domain in a form where the proceeds have been converted into funds that appear to be legitimate (Stessens, 2000, pp. 82–83).

In the EU Member States, the first attempt to harmonize the criminalization of the money laundering was done on 28th October 2001 by the Council Framework Decision 2001/500/JHA (3) lays down requirements with regard to the criminalisation of money laundering.

As far the Framework Decision was not comprehensive enough and the actual penalisation of money laundering was not sufficiently robust to effectively fight money

[6] Property means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets.

[7] So called predicative offence, what means any kind of criminal involvement in the commission of any offence punishable, in accordance with national law, by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal systems, any offence punishable by deprivation of liberty or a detention order for a minimum of more than six months. Art. 2 of Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.

[8] Notwithstanding their differences, international and domestic legal tools jointly deal with these criminal offences. This policy choice is often driven by efficiency considerations. It requires interdisciplinary approach and "horizontal strategy" including criminal law, administrative law, and public international law. Moreover, both crimes anticipate the engagement of financial institutions for illicit purposes and performed similar techniques.

DOI: 10.46282/blr.2021.5.2.256

laundering across the Union and results in investigative gaps and obstacles[9], it has been replaced by current Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (hereinafter as "the Directive"). The EU Member states need to be compliant with the provisions of the Directive until 3rd December 2020.

The EU member states may, via the Criminal Code, the Criminal Procedure Code, include the AML legislation, too. The provisions of the penal codes usually include the provisions allowing the law enforcing authorities to freeze or confiscate the fruits of crimes. Ensuring the effective investigation can be facilitated by using the same tools as combating organized crime or other serious crimes that are available as stipulated by Article 9 and 11 of the Directive.

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (hereinafter as "Directive 2014/42/EU") harmonizes the recovery, seizure and confiscation of criminal assets by laying down minimum rules for the freezing and confiscation instruments. Member States should, as a minimum standard, ensure the freezing and confiscation of the proceeds of crime in all cases provided for in Directive 2014/42/EU. Member States should deeply consider enabling civil confiscation, if the initiation of the criminal proceeding is not permissible or its continuity is not possible, including the cases where the offender has fled. As requested by the European Parliament and the Council in the statement accompanying Directive 2014/42/EU, the Commission will submit a report analysing the feasibility and possibility of the benefits on future harmonization on the confiscation of property including in absentia convictions. Such analyses will take into account the differences between the legal traditions and systems of the Member States.[10]

Under Article 4.1. of Directive 2014/42/EU the Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of the proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.[11]

Where confiscation as required above is not possible, Article 4.2. of Directive 2014/42/EU due to the subjective reasons on the perpetrator´s side (illness, etc.), Member States shall take the necessary measures to enable the confiscation of proceeds in cases where criminal proceedings have been initiated regarding a predicative criminal

[9] Rec. 4 of Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.
[10] Rec. 16 of Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.
[11] Art. 4.1. of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

offence.[12] Very important tools introduced by Directive 2014/42/EU have been the extended confiscation[13] and the confiscation from the third party.[14]

The first part of the compliant implementation of the tools presented is to check whether specific AML/CTF criminal law provisions are formally met, or that all elements of the criminal law tools required by the Directive and Directive 2014/42/EU (hereinafter as "the Directives") are in place.

On the other hand, the purpose of the evaluation of the effectiveness is to provide an objective insight of the whole national AML system and how it can handle the threats and risks of the money laundering. Assessing effectiveness of the tools anticipated by the Directives requires additional examination as to whether, or to what extent defined goals and outcomes are being fulfilled, i.e., whether the key outcomes of an AML system, in compliance with the FATF Standards (The Financial Action Task Force, 2016),[15] are being effectively implemented to (Borlini and Montanaro, 2017, p. 1017; Stessens, 2000, pp. 15–18):[16]

- improve the focus on outcomes;
- identify the extent to which the national AML tools are fitting to the goals of the FATF standards;
- identify any systemic vulnerabilities; and
- enable the state and its stakeholders to prioritize measures to improve their system.

AML response is a kind of supranational nature. It is worth saying that the EU AML system is as strong and effective, as the member state (national) AML systems are (in)effective.

For the evaluation of effectiveness, the adopted approach should focus on (Muller, Kälin, and Goldsworth, 2007, pp. 18–19; The Financial Action Task Force, 2013a, pp. 39–41, 2013b):

- How strong the political commitment to fight against the ML is (The Financial Action Task Force, 2013b, pp. 95–98, 133–134).[17]

[12] Art. 4.2. of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

[13] Under Art. 5 of Directive 2014/42/EU: "*Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct*."

[14] Under Art. 6.1. of Directive 2014/42/EU: "*Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value*."

[15] See recommendation 26, 27 and 28 of the FATF recommendations, FATF, 2016.

[16] See for more in-depth analyses examining the relationship between the hard law and the soft law.

[17] See Immediate Outcome 1. Depending on the risks identified, authorities should strengthen their risk understanding of serious ML threats, vulnerabilities of beneficial ownership. The AP should include provisions about the risk-based allocation of resources. The policy measures should be more granular in providing concrete measures to mitigate the risks and be better structure. Ensure a high-level political commitment in supporting AML policy development and in facilitating strategic and operational coordination. Strengthen the operational coordination mechanism to become more effective not only vertically but also horizontally.

DOI: 10.46282/blr.2021.5.2.256

- How the Member state uses the accessible information sources (The Financial Action Task Force, 2013b, pp. 95–98, 113–115, 133–134);[18]
- How the relevant authorities co-operate, and inline activities to combat the ML act (The Financial Action Task Force, 2013b, pp. 95–98, 113–115, 133–134).[19]
- How money laundering cases are investigated; prosecuted; and the judicial authorities apply effective sanctions to the convicted (Čentéš and Beleš, 2018; The Financial Action Task Force, 2013b).[20]
    - This includes parallel financial investigations and money laundering cases with predicative offence committed outside the jurisdiction of the ML case,
    - Investigating and prosecuting independent money laundering cases.
    - Investigation, prosecution, conviction, and sanctions are working coherently to mitigate vulnerability of the system for money laundering.
- How and to what extent the confiscation measures of the proceeds of crime (including foreign property) deprive the person of the property or of an equivalent value (The Financial Action Task Force, 2013b, pp. 118–120).[21]

[18] See Immediate Outcome 5 and partially Immediate Outcome 6. Conclusion, how the FIU analyses disseminated to the investigating authorities are used and to what extent the information initiate the criminal proceeding and to what extent the information sources mentioned further are available to the investigation disposal:

- Information from a credit register that is accessible to banks (most banks use this information in particular when assessing clients before applying for a loan, or refinancing credit or the occurrence of outstanding payments).
- Information from the Social Insurance Agency (which is used in particular when assessing clients applying for a loan; banks obtain information about the amount of the monthly salary of the client or information on the employer who pays compulsory payments for the employee),
- Information from the Land Registry,
- Internal client history information (account statements, past bank product applications, existing products provided, "black" and "grey" lists, questionnaires for bank products, KYC questionnaires prior to establishing a business relationship, and during a business relationship, etc.) - internal information,
- Some banks have their own internal systems into which they deposit preliminary information on specific transactions (when depositing cash in a larger volume, a note on origin of funds will be entered to the system if the client responded to the question of the bank's employee, etc.),
- Information from freely available sources (social networks, Slovak Commercial Register, Trade Register of Slovak Republic, FOAT, information on economic results of business entities and companies, e.g., www.finstat.sk, etc.).
- IT tools for KYC: databases of ownership structures, databases of sanctioned persons, PEPs databases, systems for identifying social and economic links and relations, etc.

[19] See Immediate Outcome 6 and partially Immediate Outcome 5. Efficient information systems for managing information flow, files and documents and then obtaining relevant statistical data. From the horizontal point of view, interconnection between FIU, police, prosecution and court systems.

[20] See Immediate Outcome 7. Specialization in the field of detection of the legalization of proceeds of criminal activity, especially dealing with the so-called financial investigation. Systematic preparation of law enforcement authorities, including courts in the area of money laundering and property seizure. See Recommendation 30 and 31 and Immediate Outcome 7.

[21] See Immediate Outcome 8. This should lead to the sufficient seizure and confiscation of proceeds and income of criminal activity (and the compensation for property damage or economic damage). The success of this measure is determined by the effectiveness of the financial investigation, from the property profiling of the perpetrator to the application of provisional property measures. In case the financial investigators fail to identify all property items that belong to the perpetrator, this failure will unavoidably restrict the scope in which property forfeiture can be applied by the court.

- Confiscation includes proceeds recovered through judicial or administrative processes include false cash and goods disclosures or declarations and restitution to victims
- The country manages seized or confiscated assets including cooperation with other countries.

3. THE RULE OF LAW PRINCIPLE

When considering the recovery legislation anticipated by the Directives, it can be concluded that an equilibrium needs to be found between the interests of society and the rights of the convicted person and bona fide third parties.

It needs to be assured that the proceeds or assets are confiscated only on the basis of a final court decision in the proceedings in which proofs are collected about the assets and their origin, with the possibility of participation of all persons whose property interests may come into question and with provided protection of such interests, including bona fide third parties to whom court protection of their rights is always provided.[22]

When it comes to the validity and effectiveness of recovery and confiscation decisions when made in regular criminal proceedings, this will depend on the decision on the merits including its quality and persuasiveness.

On the other side, it needs to be ensured that the accused (perpetrator) or other person does not remove the proceeds of a crime or other criminal assets from the reach of the law enforcement authorities and courts, in order to confiscate successfully by imposing the appropriate sentence or a protective measure or to secure the victims claim.

In the case of seizure (securing seizure) of proceeds of crime or any other thing, the provisions of the Codes of Criminal Procedure may apply. The effective tools to withdraw the criminal assets from the economic system shall include i.e., the provisions:

- on securing the victim's tort claim
- on securing the execution of the assets confiscating sanctions.

Regarding the issue of confiscation of assets and securing the victim's claim, it should be noted that such competence shall be granted to the prosecutor or the court, as the judicial authorities. The competence of the police should be as a law enforcement authority in the investigation of the criminal assets and its factual seizure. Further, the administration of seized assets may also be within the competence of the Police when the Asset Management Office is not established or if the Asset Management Office is part of the police structure.

Criminal law provisions related to the seizure of items and assets should recognize also if this is done (Stessens, 2000, p. 29):[23]

- for evidentiary purposes, or
- for further confiscation.

While the first one is justified by the necessity of proving particular information, version or hypotheses important for the criminal proceeding, and therefore it shall be seized unless the purpose of its seizure has been fulfilled, the latter one shall be considered as an intrusion into the accused´s or third person´s property rights and therefore the criteria of legality, legitimacy, proportionality need to be observed.[24]

[22] Article 47 of the Charter of Fundamental Rights of the European Union 2012/C 326/0.
[23] For more in-depth view see Ibid, p. 29-38.
[24] ECtHR, Zschüschen v. Belgium [dec.], app. no. 23572/07, 1 June 2017.

DOI: 10.46282/blr.2021.5.2.256

The corner stone of successful confiscation is the resolution of burden of proof. A confiscation of the crime assets is based on the understanding that the owner or principal cannot reasonably explain the difference between his/her legal income and the value of assets as a beneficiary owner, often called as a reversed burden of proof (Stessens, 2000, p. 29). This concept suffers from constitutional compliance since it anticipates the perpetrator to prove his/her innocence. Due to this risk it has been replaced by the concept of "unexplained wealth"[25] or "gross disproportion"[26] that shall be defined as the court satisfaction that there are reasonable grounds for suspecting that the known sources of the lawfully obtained income available to the person[27] would have been insufficient to enable him or her to obtain the property.[28] This may include the factors such as the evidence of a person's status as a state employee and the unlikelihood that, as such, his legitimate income would have been sufficient to generate funds used to purchase the Property. Secondly, although there was evidence that he had been involved with companies and property transactions, it was not such as to come close to undermining the reasonable suspicion that such income would have been insufficient to fund the purchase of the Property.[29]

It is not a violation of the presumption of innocence if the LEA demands the confiscation of the property of a person who is in a "significant gross disproportion" with his legal income, if this is duly proven in the proceedings and at the same time the person has not explained its origin in any reasonable way. The Constitutional Court also deals with the nature of these proceedings in the decision and interestingly states that this is not a repressive institute, which should be subject to the principles of punishment, but a special procedure that is preventive. Its purpose is to prevent illegally acquired property from being mixed in the economic system with legally acquired values. Which is fully in line with the interests of a state protected by criminal law.[30]

4. SEIZURES BY PURPOSE

4.1 Seizure of movable assets and property to secure the victim's compensation

The victim who suffered material or immaterial damage as a result of the committed crime shall be entitled to compensation for the damage by the convicted. For this purpose, it is possible to secure the property, property rights of the accused solely for the purpose to secure the victim´s claim for damages. At the same time, securing the victim's entitlement also constitutes a method of drawing off proceeds from the crime. Seizure may be possible not only at the property or property rights of the accused, but also at the property of a legal person where the accused has a share. Satisfying the victim's tort claim is also a way of depriving the perpetrator of the assets. It has to be prioritized over the imposition of the confiscation sanctions (Dion, 2015, pp. 432–433).

The actual conditions under which the victim's tort claim can be secured should incorporate the legal prerequisite for it is a reasonable concern that a compensation of a victim's claim will be endangered or obstructed. The extent to which the claim can be seized should be equal and limited to the likely amount of the damage caused. This

[25] United Kingdom, Zamira Hajiyeva v. National Crime Agency [2020] EWCA Civ 108.
[26] Germany, Federal Constitutional Court, M., 2 BvR 564/95 (14 January 2004).
[27] It should be noted that as for this particular person, she was considered also as a politically exposed person (PEP) as a relative of a state official. See para. 33 and 37 of United Kingdom, Zamira Hajiyeva v. National Crime Agency [2020] EWCA Civ 108.
[28] Para. 37 of United Kingdom, Zamira Hajiyeva v. National Crime Agency [2020] EWCA Civ 108.
[29] Para. 42 of United Kingdom, Zamira Hajiyeva v. National Crime Agency [2020] EWCA Civ 108.
[30] Germany, Federal Constitutional Court, M., 2 BvR 564/95 (14 January 2004).

should be applied in the context of proportion according to which seizure must be restricted if it proves unnecessary to the extent it was ordered. In practice, such a situation may arise for example if the amount of the actual damage caused is reduced, e.g., after expert examination, return of the case, partial compensation of the accused, etc. In such a case extent of the seizure should be appropriately limited (Reuter and Truman, 2004).

If so, the victim´s claim should have been secured within:

- the property of the accused (included the share of the property co-owned by the accused),
- the property rights of the accused in a legal person in which the accused has a share;
- the property rights of the legal person in that the accused is a statutory body, a member of a statutory body, a member of another body, a proxy, a head of a foreign branch, if there is a justified suspicion that the offense that is prosecuted was committed by the accused on behalf, for the benefit of that legal person (business shares of the accused,
- property rights of a legal person in which a legal person in which the accused has a direct or indirect ownership or is a statutory body, a member of a statutory body, a member of another body, a proxy, or the head of foreign branch, if there is a justified suspicion that the prosecuted offense committed by the accused was committed on behalf, for the benefit of that legal person (any property share on the assets of the company),
- other property rights of the accused.

Under the property of the accused it needs to be understood everything in the possession of the accused. These include, in particular, movables, immovable property, ownership interests in such matters, as well as claims and other property rights. Other property rights of the accused are all rights of the accused valued in money. These include in particular claims and their accessories, rights to fruits of the contracts, trademarks, designs, licenses, copyrights and the company shares (Stessens, 2000, p. 29).[31]

Seizure of the accused´s property should have been taken only by the judicial decision which should also contain an exact specification and identification of the property. Further, it shall state a ban for the accused or legal person to dispose with the seized property and the property rights. The negative definition in relation to the possibility of securing the claim of the victim should exclude e.g., a claim for the return of unjust enrichment, a claim already initiated in civil proceedings, the claims of the accused for paying a salary or similar, payments of sickness insurance and social security benefits.

The judicial authority should decide on seizure of the accused´s property based on the application of the prosecutor, the victim or the non-governmental organization. It is questionable wheatear the judicial authority should have secured a victim´s claim ex *offo*.

If the decision constitutes just the legal title of freezing, not its factual execution, it is always more appropriate to secure it prior to the issuance of the search orders or together with the search orders at the latest. Further, it is advised that the search order in its justification refers to the particular judicial decision securing the victims claim or at

[31] For more in-depth view see Ibid, p. 111-112.

least it should include a detailed description of the property accompanied by the purpose for its search laid in the securing the victims claim (Richards, 1999, pp. 194–199).

In the preliminary proceedings, it is assumed that an investigator has a broader view of the case, the property of the accused. Therefore, the investigator should notify the prosecutor to consider the need to seize the accused's property for the purpose of securing the claim of the victim, by the following effective tool (Richards, 1999, pp. 205–212):

- to secure the assets from the intellectual property right at the Registration Authority
- house search, personal search and search of other premises and parcels
    - to secure cash, valuables, movables and physical non-booked bonds and securities
    - securing electronic money, credits, cryptocurrencies to satisfy the claim of the victim
        - if the investigator prepares to carry out home searches, searches of other premises and parcels, personal search for a predictive offense, it is advisable to include in the request for the warrant specifically the purpose of carrying out the searches to secure the victim´s claim.[32]
- Securing the bank accounts incl. funds additionally received to the bank account, including accessories.
    - The order, delivered to the bank, should be justified and if, at the time of the decision on the seizure, the amount to which it relates may be quantified, it shall be stated in the relevant currency.
    - At the same time, it is the duty of law enforcement authorities (in particular the prosecutor in pre-trials) to ensure the protection of such seized assets, e.g. also by cancelling their seizure and imposing an obligation on the accused to transfer them to another financial institution, or to impose, for example an obligation for the accused to deposit the funds if the bank has a liquidity problem and is at risk of becoming bankrupt.[33]
- Securing booked bonds and securities at the Registration authority.[34]

[32] If, for objective reasons, the Prosecutor's resolution to secure the victims claim cannot be obtained before or at the same time as the search warrant (it is not possible to determine in advance individual things to secure the claim of the injured party). to secure things up to the amount of damages claimed by the injured party. Subsequently, it is necessary to secure these matters as important for the prosecution and additionally ask the prosecutor to issue a resolution to the specified extent to secure the cases in the required amount. If additional items are found during the searches other than those specified in the warrants, these items cannot be seized without issuing a new order or warrant. It is necessary to ask the person to voluntarily release the case. The exception would be if their seizure would be necessary for reasons of protection of life and health or other public interest.

[33] Slovakia, Constitutional Court of the Slovak Republic, III. ÚS 117/06 (23 August 2006).

[34] The system of securities usually is:
a) shares,
b) temporary letters;
c) units,
d) bonds
e) certificates of deposit,
f) treasury bills
g) passbooks
h) coupons

4.2 Seizure of property and items for the purpose of forfeiture or confiscation

In order to execute the property confiscation sanction not to bypass or obstruct the execution of the sanction, it is necessary to ensure that the accused does not remove it from the reach of law enforcement authorities and courts under the conditions laid down in the Code of Criminal Procedure. The property belonging to the accused should only be seized by the judicial authority during the pre-trial proceedings.[35]

As for a decision to seize property, it should be met under the rule of law, namely: expectation of imposition of a forfeiture sentence and/or specific intent to obstruct the sanction. The latter condition may impose heavy burden of proof on the LEA that may jeopardize factual seizure not proving the actual intent to observe the future sanctions (Richards, 1999, pp. 205–212).

Seizure for the purpose of the forfeiture of the property shall be possible if the accused is prosecuted for an offense for which, due to the nature and severity and the accused's circumstances, the forfeiture can be expected. Such seizure is carried out by the court and during the pre-trials by the prosecutor. The seizure shall be carried out solely for the purpose of execution of the penalty. In the event that this item or part of the property is not attainable, or if it is mixed with other property and cannot be separated, the so-called forfeiture of the comparable substitute belonging to the offender, should be performed.

The Code of Criminal Procedure does not specify when a police officer should demand the seizure of property, however, it is always preferable to do so before the actual execution of the seizure act (surrender, seizure, search warrant, etc.), preferably at the same time as administering the order or consent to the searches. That decision constitutes the legal title of seizure of those cases or property for the purpose of execution of the sentence. While it is commendable the order or consent cross- refers to the resolution on the seizure of property (Richards, 1999, pp. 213–217).

In general, it can be stated that the seizure covers the entire property of the accused as well as the property and items acquired by the accused after the seizure. However, it does not apply to the property and items not legally subjected to the forfeiture of property. For property or the items in co-ownership, the forfeiture may relate only to the share, coming from the criminal assets. The proceeds of crime may not become part of the joint ownership of spouses.[36]

As a tool interfering into the rights, it must always be justified by the facts, both in relation to the entity whose funds or things or assets are seized as well to the specific act for which prosecution is being conducted.

i) bills of exchange;
j) checks;
k) traveller's checks,
l) consignment notes;
m) storage certificates,
n) storage bonds,
o) goods consignment notes,
p) cooperative unit certificates,
r) investment certificates,
s) deposit receipts,
t) certificates according to a special regulation,
u) another type of security which is declared by a special regulation as a security.

[35] Art. 47 of the Charter of Fundamental rights of the European Union 2012/C 326/02.

[36] Czechoslovakia, Supreme Court of Czechoslovakia, Tz II 1/77 [R 31/1978] (24 March 1977).

DOI: 10.46282/blr.2021.5.2.256

The forfeiture of the thing and the seizure of the item should not be used if the victim was entitled to compensation for the damage suffered, the satisfaction of which would be obstructed by the forfeiture or confiscation of the thing, or, if the value of the thing is obviously disproportionate, the court will refrain from punishing the perpetrator (Banerjee, n.d.).

The following institutes shall be used to seize property for the purpose of securing the execution of a sentence or protective measure:

- Related to real estate, business shares (not bonds!) and other property rights,
- Release of an item and withdrawal of an item:
    - shall be used in the case of cash, BNI, valuables, movable assets and paper securities
- Securing computer data
    - In the case of various forms of electronic money, credits, cryptocurrencies, etc.,
- Securing the money in bank account and booked bonds and securities
    - it is possible to use the tool if the money is in the bank account, if there is a reasonable suspicion that it is proceeds of crime, or that it was used to commit a crime or is intended for committing a crime.
    - The justification must be given by specific facts, both in relation to the accused, but also in the nature of the offense for which prosecution is being conducted in accordance with Section 95 par. 1 of the Code of Criminal Procedure
- Home search, personal search and search of other premises and land
- The obligation to deposit a sum of money or thing for safekeeping
- The prohibition to dispose of certain items or rights
    - The second measure is to restrict the handling of certain items or rights the nature of whose does not allow to seize such value from the accused. It is usually an intangible, property rights, receivables, IP rights (patents, licenses) other intangible assets that cannot be taken into custody.
- The obligation to do something, to refrain from something, or to endure something.
    - The nature of the measure is that a legal person is obliged to refrain from continuing criminal activity by restricting the possession of certain rights or things or values, which, however, cannot be effectively withdrawn from the possession of the accused´s legal person by virtue of point (a), for example, a ban on transfers of funds to other domestic or foreign accounts, or limiting transfers of funds to a certain amount.

5. CONCLUSION

Effective Anti-Money Laundering System requires the main authorities having good understanding of the ML and terrorist financing (TF) risks together with an outstanding cooperation and coordination. The country should have had developed the national AML strategy together with national risk assessment. The Financial Intelligence Unit should perform good quality financial intelligence that is used for the large and complex financial investigations and prosecutions. The national AML system represented by the law enforcing agencies should be able to confiscate larger amounts

of proceeds of crime including standalone ML cases based on foreign predicative cases and/or involving legal persons as well as to the length of the judicial process (The Financial Action Task Force, 2016b).

Financial intelligence unit should be proactive and produce larger number of in-depth analyses with added significant value based on properly filled and delivered suspicious transactions reports from reporting entities and notifications by the Border Guards and Customs on cash couriers and smugglers. The received prosecutions and delivered convictions should include all types of ML cases, including self-laundering, third party ML and stand-alone ML. The convictions with the confiscation of the identified proceeds of crime, through financial investigation should be compliant with the risk-profile of the country based on the national risk assessment outcomes. The parallel financial investigations should reflect and prioritize more complex cases, including potential misuse of the financial or non-financial sector (The Financial Action Task Force, 2016a).

The past and current involvement of banks, lawyers, accountants and "*gestorias*" in the formation of legal persons, and possibility that some professional trustees reside in Andorra are administering foreign legal arrangements have not been considered sufficiently. Measures to avoid the misuse of the banks, lawyers, accountants and other professional trustees should include the identification of the beneficiary owners through controls conducted over foreign investment and requirement for companies with foreign ownership to hold a bank account (The Financial Action Task Force, 2017).

BIBLIOGRAPHY:

Banerjee, R. (n.d.). Factors that facilitated and sponsored the explosion of money laundering. Retrieved from http://people.exeter.ac.uk/watupman/undergrad/ron/explosion%20of%20money%20laundering.htm (accesed on: 27.10.2021).

Borlini, L. S., and Montanaro, F. (2017). The Evolution of the EU Law Against Criminal Finance: The 'Hardening' of FATF Standards within the EU. *Georgetown Journal of International Law*, 48, pp. 1009–1062. DOI: https://doi.org/10.2139/ssrn.3010099

Čentéš, J., and Beleš, A. (2018). Regulation of agent as a tool for combating organized crime. *Journal of Security and Sustainability Issues*, 8(2), pp. 29–38. DOI: https://doi.org/10.9770/jssi.2018.8.2(3)

Dion, M. (2015). Is money laundering an ethical issue? *Journal of Money Laundering Control*, 18(4), pp. 425–437. DOI: https://doi.org/10.1108/JMLC-06-2014-0018

European Commission (2019). *Report from the Commission to the European Parliament and the Council on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities*. Retrieved from: https://ec.europa.eu/info/sites/default/files/supranational_risk_assessment_of_the_money_laundering_and_terrorist_financing_risks_affecting_the_union.pdf (accesed on: 27.10.2021).

Muller, W. H., Kälin, C. H., and Goldsworth, J. G. (2007). *Anti-Money Laundering: International Law and Practice*. (W.H. Muller, C.H. Kälin, and J.G. Goldsworth,Eds.). Chichester: John Wiley & Sons.

Reuter, P., and Truman, E. M. (2004). *Chasing dirty money: The fight against money laundering*. Washington D.C.: Peterson Institute.

Richards, J. R. (1999). *Transnational Criminal Organizations, Cyberrcrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors and Financial Investigators*. CRC Press.
Šimonová, J., Čentéš, J., and Beles̆, A. (2019). Financial analysis of innovative forms of money. *Entrepreneurship and Sustainability Issues*, 7(1), pp. 69–80. DOI: https://doi.org/10.9770/jesi.2019.7.1(6)
Stessens, G. (2000). *Money Laundering: A New International Law Enforcement Model*. Cambridge: Cambridge University Press.
The Financial Action Task Force (2013a). *FATF Guidance: National Money Laundering and Terrorist Financing Risk Assessment*. Retrieved from https://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf (accesed on: 27.10.2021).
The Financial Action Task Force (2013b). *Methodology for assessing technical compliance with the FATF recommendations and the effectiveness of AML/CFT systems*. Retrieved from http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF Methodology-March 2017-Final.pdf (accesed on: 27.10.2021).
The Financial Action Task Force (2016). *Recommendations of FATF*.
The Financial Action Task Force (2016a). *Anti-money laundering and counter-terrorist financing measures in Isle of Man*. Retrieved from https://rm.coe.int/anti-money-laundering-and-counter-terrorist-financing-measures-isle-of/168071610e (accesed on: 27.10.2021).
The Financial Action Task Force (2016b). *Anti-money laundering and counter-terrorist financing measures in Italy*. Retrieved from https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Italy-2016-Executive-Summary.pdf (accesed on: 27.10.2021).
The Financial Action Task Force (2017). *Anti-money laundering and counter-terrorist financing measures in Andorra*. Retrieved from https://rm.coe.int/andorra-fifth-round-mutual-evaluation-report/168076613e (accesed on: 27.10.2021).
The Wolfsberg Group (2020). *Developing an Effective AML/CTF Programme August 2020*. Retrieved from https://www.wolfsberg-principles.com/sites/default/files/wb/Wolfsberg Effective Financial Crimes Programme - August2020 %28FFP%29.pdf (accesed on: 27.10.2021).
Charter of Fundamental rights of the European Union 2012/C 326/0.
Charter of Fundamental rights of the European Union 2012/C 326/02.
Czechoslovakia, Supreme Court of Czechoslovakia, Tz II 1/77 [R 31/1978] (24 March 1977).
Directive 2018/1673/EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.
Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.
ECtHR, Zschüschen v. Belgium [dec.], app. no. 23572/07, 1 June 2017.
Germany, Federal Constitutional Court, M., 2 BvR 564/95 (14 January 2004).
Slovakia, Constitutional Court of the Slovak Republic, III. ÚS 117/06 (23 August 2006).
United Kingdom, Zamira Hajiyeva v. National Crime Agency [2020] EWCA Civ 108.

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

ROLE MODELS OF POLITICS DISGUISED IN TECHNIQUE: CASES C-78/18 ON ASSOCIATIVE TRANSPARENCY AND C-66/18 ON ACADEMIC FREEDOM IN HUNGARY / Irene Marchioro

Irene Marchioro, PhD.
Teaching Assistant
University of Padua, Department of Public, International and European Union Law
Via Anghinoni 3
35122 Padua, Italy
irene.marchioro@unipd.it
ORCID: 0000-0002-4837-8243

Abstract: *The article analyses two decisions of the European Court of Justice issued last year against Hungary, with the aim of outlining a new trend in the Court's caselaw, where threats to the rule of law are confronted without making express reference to it. The profiles of the two judgements that are investigated are three, and namely: the timing of the procedures, the role of discrimination in the assessment of violations of the TFEU rules on the freedom of movement of capital and services, the assessment of violations of the Charter of Fundamental Rights of the European Union alongside TFEU violations. The purpose of the article is to prove that the infringement procedure under Art. 258 TFEU can be successfully used to hinder antidemocratic drifts and illiberal trends even when a case is designed as purely technical and the rule of law is not called in, which may ultimately shield the Court itself from accusations of being too politically involved in Member States' affairs.*

Key words: *European Union law; rule of law; infringement proceedings; fundamental rights; transparency of associations; academic freedom; Hungary*

Suggested citation:
Marchioro, I. (2021). Role Models of Politics Disguised in Technique: Cases C-78/18 on Associative Transparency and C-66/18 on Academic Freedom in Hungary. *Bratislava Law Review*, 5(2), 23-42. https://doi.org/10.46282/blr.2021.5.2.261

Submitted: 15 September 2021
Accepted: 20 November 2021
Published: 30 December 2021

1. THE WIDER CONTEXT: CONSTITUTIONAL REGRESSION IN CENTRAL EUROPE AND THE ECJ TAKING THE CENTRE OF THE STAGE

Over the last decade, Hungary has witnessed an antidemocratic drift, which notably started in 2011, when a new, much criticised Constitution entered into force, and sparked a vague of "constitutional regression" and "rule of law backsliding" in other Central European States (Adamski, 2019; Besselink et al., 2019; Milani, 2019; Orlandi, 2019; Scheppele and Pech, 2018; Spadaro, 2021; Várnay and Varju, 2019). Ever since, the Hungarian legislature and government have adopted or proposed measures intended to weaken the legal position of subjects at risk of marginalization, such as LGBTs and migrants, while conducting a policy aimed at stifling any opposing voice both at the political and at the social level, and endangering the role of balancing powers, first and foremost the judiciary and the media (Benvenuti, 2020; Mori, 2020; Sena, 2020).

All these steps clearly indicate that Hungary is, together with Poland, one of the main protagonists of a constitutional regression that clearly endangers the very essence

of the EU. Yet the reaction of the European Union at the political level has been so far quite timid or otherwise ineffective. After the triggering of the procedure under Art. 7 of the Treaty on the European Union[1] against Hungary in September 2018,[2] indeed, the Council has failed in making effective use of it, as the European Parliament harshly stated in its resolution of January 2020.[3]

Consequently, the ECJ is increasingly taking on the role of guardian of the rule of law and other funding values enshrined in Art. 2 TEU. This latter role has so far materialised, it is true, in cases not directly involving Hungary, as it prompted the reinterpretation of Art. 19 TEU as a limit to the national competence concerning the organisation of the judiciary, in the Polish judges' saga,[4] as well as the proclamation of the 'non-regression' principle concerning those values, in a Maltese case.[5]

Still, as not just the Polish "spectre", but also the Hungarian one is haunting Europe, one is always waiting for the Court to enter the scene of a Hungarian case with rabbits "masterfully put out of the wizard's hat" (Kochenov and Dimitrovs, 2021).

Such theatrical developments, however, carry the risk of appearing too politically embroiled, and even to contradict the spirit of Art. 4(2) TEU, with its stress on the national identity of Member States. To avoid such criticism, be it justified or not, the ECJ should wisely resort to some form of "prudent self-restraint" (Spadaro, 2021, p. 201).

2. SETTING THE RESEARCH QUESTIONS AMONG THE VARIOUS LEGAL ISSUES RAISED BY THE COMMENTED CASES

It is precisely in this vein that the present essay will approach the judgements rendered last year by the ECJ on the Hungarian Transparency Law,[6] on one side, and on the limits imposed to academic freedom by the 2017 amendment of the Hungarian Act on National Higher Education (so called "Lex CEU"),[7] on the other side.

The attempt will be, indeed, to show that the ECJ rulings in these two Hungarian cases can be analysed as purely technical applications of EU internal market rules, complemented by a fundamental reference to the Charter of Fundamental Rights of the European Union. The idea is that both judgements are, in other words, expression of a prudent, though uncompromising, judicial self-restraint, that should be prioritized over any redundant assessment of the violation of the rule of law or other funding values of the European Union.

The intended approach explains why this paper will not, in particular, look into the GATS infringements that have been assessed by the Court in the case on academic freedom. While such infringements were indeed relevant in that case, and while the findings of the Court in that area are of extreme interest on their own (Nagy, 2021a, 2021b;

[1] Hereinafter referred to as "TEU".
[2] European Parliament, the resolution, 2017/2131(INL) (12 September 2018).
[3] European Parliament, the resolution, 2020/2513(RSP) (16 January 2020).
[4] Starting from notorious CJEU, the judgement of 27 February 2018, Associação Sindical dos Juízes Portuguese, C-64/16, ECLI:EU:C:2018:117, followed by multiple and well-known decisions on the independence of judges and the judiciary in Poland (see CJEU judgements of 24 June 2019, Commission v. Poland, C-619/18, ECLI:EU:C:2019:531; of 19 November 2019, A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy, in joint cases C-585/18, C-624/18, C-625/18, ECLI:EU:C:2019:982; of 2 March 2021, A.B, C.D., E.F, G.H, I.J. v. Krajowa Rada Sądownictwa, C-824/18, ECLI:EU:C:2021:153).
[5] See CJEU, the judgement of 20 April 2021, Repubblika, C-896/19, ECLI:EU:C:2021:311.
[6] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476.
[7] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792.

Vesperini, 2021; Vranes, 2021),[8] it remains that, on one side, such findings are not always decisive - as the assessment of the Treaty on the Functioning of the European Union[9] infringements would stand even without the GATS infringements; on the other side, that they constitute the judicial reflection of a very special Hungarian feature in that case, with no apparent risk of extension to other back-sliding States.

As it will emerge from the following paragraphs, the assessment of an infringement of the rules of the internal market that do eventually rebound on the rule of law can be used as a means to protect the rule of law itself. In this understanding, the assessment of the discriminatory character of a measure, even when it is not strictly necessary for the pronouncement of its illegitimacy as such, can be useful in order to enhance the blame for its adoption. Similarly, the assessment of a violation of the Charter of Fundamental Rights of the European Union, even when it results in a sort of duplication of the decision on the infringement of internal market rules, can be crucial to mark the difference between an 'ordinary' violation and a particularly odious one.

Lastly, the context in which a case arises is also to be taken into consideration. The factual context, indeed, may cast light and attention on politically relevant issues, prompting the appointed institutions to make their stand against acts and laws that appear to be in breach of fundamental rights and of the rule of law. That being the situation, even a judicial case designed by the Commission as technical – as are the two cases that will be analysed in the following paragraphs – can profit from the position statements of external bodies or other EU institutions, for example when it comes to justifying the special urgency of the triggering of an infringement procedure. These three features are all present in cases C-78/18 and C-66/18.

In view of the above, the following paragraphs will, in the first place, describe the content of the two Hungarian acts that have been brought to the attention of the Court. Then, the essay will focus on the timing of two prelitigation procedures and on the correct balancing between the need for the Commission to act fast, on one side, and the respect of Hungary's defence rights, on the other. Subsequently, attention will be given to the role and the emphasis of the discriminatory character of measures affecting the internal market. The last part of the essay will look into the reasons for a double assessment of the very same violation under TFEU rules and the Charter of fundamental rights of the European Union.

3. FEATURES AND CRITICALITIES OF THE TRANSPARENCY LAW AND OF THE ACT ON NATIONAL TERTIARY EDUCATION

Hungarian Law on the Transparency of Organisations which receive Support from Abroad (2017),[10] which is the object of one of the two judgements under comment, is clearly in line with the antidemocratic drift described so far. The law, which was issued in July 2017, declaredly relies upon the assumption that civil society organisations "contribute […] to democratic scrutiny of and public debate about political issues", thus

[8] The ECJ was in fact led to affirm there for the first time that GATS violations also represent EU law violations, since the EU, which detains exclusive competence in the field of commercial policy, could be held internationally liable for infractions of international obligations from its Member States.
[9] Hereinafter referred to as "TFEU".
[10] Hereinafter referred to as "Transparency Law".

DOI: 10.46282/blr.2021.5.2.261

performing "a decisive role in the formation of public opinion".[11] When they receive money from abroad, therefore, they might allegedly become the channel through which foreign public interest groups promote their own interests in the social and political life of Hungary, thus threatening national security (Bárd, 2020a).

For all these reasons, according to this law, the transparency of such organisations must be especially scrutinised. This purpose was reached through the creation of a complex and burdensome set of duties imposed on the organisations of the civil society that receive economic support from abroad, regardless of their legal qualification, with the sole exception of sports organisations, organisations that carry out a religious activity, and organisations that represent and protect the interests of a national minority.

In short, the Transparency Law obliged associations and foundations to declare to the competent court for the place of registration, within fifteen days of its promulgation, that they receive money from abroad, when this exceeds a certain fixed amount. Then, the competent ministry was supposed to make the information openly available to the public. When the economic support was to be considered particularly relevant, further detailed information about its source had to be given, including, for natural persons, the name and the country and city of residence, and, for legal persons, the business name, and the registered seat. If an organisation did not comply with all these duties, severe fines could be applied.

At the time of its promulgation, the law was strongly criticised both nationally and internationally, with Amnesty International defining it as a "vicious and calculated assault on civil society" (*Hungary: NGO Law a Vicious and Calculated Assault on Civil Society*, 2017) and the European Parliament calling for the withdrawal of the draft before it was even approved.[12] It was clear, indeed, that the law wanted to harm NGOs, that are among the few voices critical of the Hungarian government and the few subjects active in the promotion of the rule of law and of the rights of migrants, refugees and other marginalised groups. Furthermore, the law drew the attention of the European Commission for suspected infringements of both the free movement of capital and fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, originating the judgement of the Court in the case Commission v. Hungary.[13] As we will see, said infringements were eventually assessed by the Court; yet Hungary complied with the decision only after almost a year, and after the procedure under Art. 260 TFEU had been triggered (Mori, 2020).

In April of the same year, 2017, the Hungarian Parliament also passed, by means of an urgency procedure, an amendment to the Act on National Higher Education.[14] The amendment was supposedly meant to guarantee a higher quality level of non-Hungarian universities, at the same time preventing forms of unfair competition.

In order to do so, a burden of new stringent requirements was imposed on foreign-funded universities that intended to operate on Hungarian soil. Specifically, the new law prescribed that institutions having a seat outside the territory of the EU or the European Economic Area could function in Hungary only on condition that an intergovernmental agreement was concluded between Hungary and the other country where the university is located by 1 January 2018 (the deadline was later put off until January 2019). Plus, whenever the foreign country has its seat in a federal country, the

[11] English translation is drawn CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476.
[12] See European Parliament, the resolution, 2017/2656(RSP) (17 May 2017), § 6.
[13] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476.
[14] Hungarian Act on the Amendment of Act CCIV of 2011 on National Tertiary Education (2017).

international agreement with the foreign state had to be supported by a prior agreement signed by the federal government.

In the third place, the name of the foreign university was required to be clearly distinguishable from the name of any other Hungarian institution. This provision, as pointed out by the Venice Commission, "contribute[d] to the general impression that the recent amendments are aimed at one specific university",[15] insofar as the Central European University would be the only entity troubled by the provision. Lastly, foreign universities – situated both inside and outside the EU and the EEA – were required to prove that they genuinely offered educational activities in the country of origin, and visiting professors were no longer exempted from acquiring a work permit in order to engage in academic activities in Hungary (Bárd, 2020b; Benvenuti, 2020).

Commentators and critics immediately warned that these rules were "dependent on the political approval of those in power and appear[ed] to target one institution only, namely the Central European University" (Bárd, 2020b, p. 90; see also Hoxhaj, 2021, p. 3 and subsequent), founded by George Soros back in 1991; in fact, the law was renamed "Lex CEU". In its Resolution of May 2017 mentioned above,[16] the European Parliament regretted "that the developments in Hungary have led to a serious deterioration of the rule of law, democracy and fundamental rights over the past few years", and cited, *inter alia*, the undermining of academic freedom; scholars also pointed out the systematic character of the limitation of academic freedom in Hungary (Halmai, 2018; Ziegler, 2019). In April 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution lamenting the "alarming developments" in Hungary, which concentrated specifically on the "Lex NGO" and the "Lex CEU".[17] This law, just like the "Lex NGO", was eventually contested by the Commission, which started an infringement procedure a few weeks after its promulgation, namely on 27 April 2017.

4. THE TIMING OF THE PROCEDURES

As anticipated, the factual context did impact the timing of the procedures, which, on both occasions, were especially rapid. Therefore, before analysing the substance of the case, the ECJ was asked to focus on the pre-litigation procedure, and specifically on its timing, which Hungary considered too fast and thus detrimental to its rights.

As for the timing of the procedure against the Transparency Law, events unfolded as follows. The law was voted on 13 July 2017, and the following day the European Commission had already sent a letter of formal notice, accusing Hungary of several violations of the Treaties. In that first letter, the Commission only granted one month to submit observations, and a Hungarian request for an extension was rejected. Hungary eventually replied with two series of comments. Although the second series of comments was received after the deadline indicated by the Commission, it was nonetheless taken into consideration and evaluated.

Unsatisfied by the reply of Hungary, the European Commission issued a reasoned opinion on 5 October 2017, and, once again, it granted only one month for observations, refusing a renewed request for an extension from Hungary. The comments were eventually sent on 5 December 2017, one month too late, but the Commission again decided to take them into account anyway. Yet it was not convinced by the arguments of

[15] Venice Commission, the preliminary opinion, 891 / 2017 (11 August 2017), § 108.
[16] See European Parliament, the resolution, 2017/2656(RSP) (17 May 2017).
[17] See Parliamentary Assembly, the resolution, 2162 (2017) (27 April 2017).

DOI: 10.46282/blr.2021.5.2.261

the Hungarian government, and, therefore, an action was brought in front of the ECJ on 7 December 2017.

Hungary challenged the admissibility of the action claiming in the first place that the time limits granted for its reply comments were too short, so that the Commission would have allegedly breached the principle of loyal cooperation of Art. 4(3) TFEU, the right to good administration enshrined in Art. 41 of the Charter and the rights of defence.

It is common knowledge that the prelitigation stage has three main objectives: to define the subject-matter of the dispute; to allow the Member State to put an end to the infringement; to enable it to exercise its rights of defence (Prete, 2017). Now, this last objective was somehow neglected by the Commission, when it claimed in its reply to Hungary that "in this case, an extension of the time limit for responding to the reasoned opinion could have been granted only in order to enable the member state to adopt the measures necessary for it to comply with the reasoned opinion".[18] Fairly enough, then, Advocate General Campos Sánchez-Bordona contested, in his Opinion, that this argument of the Commission was "not compatible with the settled case-law of the Court",[19] nor did the ECJ recall this statement of the Commission in its decision.

Still, Advocate General and the ECJ agreed that the contentions of Hungary on the inadmissibility of the action were ill-founded on two other grounds. In the first place, it was noted that the Commission took into consideration all comments made by Hungary, including those received after the time limits set by the Commission,[20], so that Hungary had in fact made use of the extension it had asked for, even if it had been formally rejected. According to the settled case-law of the ECJ, indeed, the Commission cannot simply ignore belated observations, which shall be duly considered (Prete, 2017).

On top of that, both the ECJ and Advocate General reckoned that Hungary had failed to prove "the fact that the Commission's conduct rendered it more difficult for Hungary to refute the complaints raised by that institution and thereby infringed the rights of defence".[21] In its findings on this point, the Court recalled three of its precedents. Two of them, namely judgements in cases C-287/03 and C-546/07,[22] actually focused on a rather different topic, as they addressed the contention that the prelitigation stage had allegedly taken too long. With regard to the shortness of the time limit, indeed, the Court made reference to just one precedent, which is its judgement of 31 January 1984 in a Commission v Ireland case,[23] but merely in order to declare that the Court's case-law shows that "the pre-litigation subject to short time limits is not in itself capable of leading to the inadmissibility of the subsequent action".[24] In his Opinion, Advocate General mentioned two other previous judgements of the Court, which are cases C-490/04 and C-293/85.[25] The former, again, dealt with an allegedly too long prelitigation phase; the

[18] See CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 16.
[19] See Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:1, § 35.
[20] See Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:1, § 37 and CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 31.
[21] See CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 32.
[22] CJEU, the judgement of 12 May 2005, Commission v Belgium, C-287/03, ECLI:EU:C:2005:282, and of 21 January 2010, Commission v Germany, C-546/07, ECLI:EU:C:2010:25.
[23] CJEU, the judgement of 31 January 1984, Commission v Ireland, C-74/82, ECLI:EU:C:1984:34.
[24] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 30.
[25] Respectively, CJEU, the judgement of 18 July 2007, Commission v Germany, C-490/04, ECLI:EU:C:2007:430, and of 2 February 1988, Commission v Belgium, C-293/85, ECLI:EU:C:1988:40.

latter, which is more adherent to the case, was only marginally recalled in the Opinion's footnotes.[26]

In this context, it must be admitted that a closer look at the ECJ's case-law seems to be revealing a certain cherry-picking attitude by the Court. On many occasions, in fact, the Court has rejected applications of inadmissibility with the motivation that the applicant had not proven that an excessively long preliminary procedure had hindered its defence.[27] When it has come to deciding on time limits being too *short*, however, the Court has displayed a quite different set of reasonings, which, in this very occasion, was disregarded.

Starting from a judgement of 1988, indeed, the Court has repeatedly dismissed – or accepted – such challenges of inadmissibility claiming that "very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts".[28] Tight deadlines, in short, shall be justified only by reason of special urgency, or otherwise when the adverse position of the Commission had been long known to the Member State before the procedure was even started.

It seems, therefore, that ever since 1988 the case-law on the scheduling of the prelitigation stage has taken two different paths, one regarding such stage lasting too long, the other its excessive shortness. Nor is this differentiation surprising. Long terms, in fact, do not in themselves reduce the chances of a proper defence, but may rather trigger other kinds of obstacles. That may be the case, for example, when a persistent breach by the State is based on the reliance that the Commission has decided not to undertake judicial actions:[29] in such cases, it is surely up to the Member State to prove that their defence has been hindered by the Commission's conduct. On the contrary, short time limits can affect the substantial quality of the arguments reversed in the observations rendered by the Member State. It follows, in my understanding, that in this latter case the ECJ has lightened the burden of proof weighing on the State, in so far as it should be up to the Commission to argue that in a concrete case there were indeed reasons of urgency, or otherwise that its position had long been known to the Member State, even before the start of the proceeding.

It is curious, then, that in its judgement the Court mentioned the only precedent which founded the rejection of an inadmissibility application because of too short time limits on the failure to meet the burden of proof, resorting to outdated judgement

[26] See Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:1, footnotes No. 9 and 14.

[27] See for instance CJEU, the judgement of 16 May 1991, Commission v the Netherlands, C-96/89, ECLI:EU:C:1991:213; of 21 January 1999, Commission v Belgium, C-207/97, ECLI:EU:C:1999:17; of 12 May 2005, Commission v Belgium, C-287/03, ECLI:EU:C:2005:282; of 8 December 2005, Commission v Luxembourg, C-33/04, ECLI:EU:C:2005:750; of 18 July 2007, Commission v Germany, C-490/04, ECLI:EU:C:2007:430; of 24 April 2007, Commission v the Netherlands, C-523/04, ECLI:EU:C:2007:244; of 21 January 2010, Commission v Germany, C-546/07, ECLI:EU:C:2010:25.

[28] CJEU, the judgement of 2 February 1988, Commission v Belgium, C-293/85, ECLI:EU:C:1988:40, § 14. The same principle has been later reaffirmed (either expressly or implicitly) on multiple occasions, e. g. CJEU, the judgement of 28 October 1999, Commission v Austria, C-328/96, ECLI:EU:C:1999:526; of 13 December 2001, Commission v France, C-1/00, ECLI:EU:C:2001:687; of 15 November 2005, Commission v Austria, C-320/03, ECLI:EU:C:2005:684; of 30 November 2006, Commission v Italy, C-293/05, ECLI:EU:C:2006:750; of 2 April 2020, Commission v Poland, Hungary and the Czech Republic, joint cases C-715/17, C-718/17, C-719/17, ECLI:EU:C:2020:257.

[29] This argument was raised, for example, in the CJEU, the judgement of 12 May 2005, Commission v Belgium, C-287/03, ECLI:EU:C:2005:282.

DOI: 10.46282/blr.2021.5.2.261

Commission v Ireland of 31 January 1984, whereas no account has been given, in the judgement, to the subsequent case-law on this topic. It feels like the Court wanted to settle the issue as swiftly as possible, and it opted for the sharper and more definitive declaration that the burden of proof was not met.

In my view, rejection of the inadmissibility contention could have been more correctly explained and justified underlying that Hungary had been aware of the European institutions' position on the Transparency Law since its drafting, so much that the European Parliament had adopted a resolution calling for its withdrawal months before the approval of the law. The mere fact that the Commission notified the formal letter of notice on the very first day after its promulgation strongly suggests – although related documents are not available – that discussions were already under way between Hungary and the Commission *before* the adoption of the law. This being the case, Hungary had all tools, at the time of drafting, to foresee an upcoming letter of formal notice from the Commission and, therefore, to start working on its defence. It can thus be concluded that in the concrete case circumstances were such as to render the time limits granted by the Commission only apparently short, but in fact, adequate.

In short, it can generally be agreed that "it makes no sense to prolong the dialogue with a party that acts in bad faith abusing legal concepts and hiding its real objective to dismantle the rule of law" (Bárd, 2020a) and that, therefore, it was high time "to acknowledge that further dialogue will only result in granting sufficient time to complete the capture of state institutions and solidifying an authoritarian state structure" (Bárd, 2019). Still, it seems to me that this urge could (and should) have been justified by the Court with a reference to the fact that Hungary was aware of the Commission's objections of legitimacy of the law, and yet consciously persevered in its adoption. This motivation would have led to the rejection of the inadmissibility application and, at the same time, would have been more coherent with the Court's previous case-law. Furthermore, a solid-founded motivation on the reasons for the shortness of the time limits would have shielded the Court – and the Commission itself – more efficiently from any possible accusations of being politically prejudiced against Hungary.

Several months later, indeed, the ECJ faced an almost identical contention – and here we come to the "Lex CEU" – of inadmissibility for time limits in the prelitigation stage being too short. In that case, the infringement procedure was activated sixteen days after the law had been promulgated, and Hungary was granted only one month to reply to the letter of formal notice and to the reasoned opinion, respectively.

On that occasion, the Court justified the swiftness of the Commission's action making express reference to its case-law according to which "a short period may be justified in particular circumstances, especially where there is [urgency] or where the Member State concerned is fully aware of the Commission's views long before the procedure starts",[30] and thus founded the rejection of the inadmissibility contention on the need to settle the case quickly, before the new law on higher education, whose legitimacy was being examined, would cast its effects on the admission of new students into institutions that did not satisfy the conditions laid down by said law. Only subordinately did the ECJ recall that, "in any event", it is up to the contending Member State to give proof of the infringement of its rights of defence, due to time limits being too short.[31]

In similar cases, both designed as technical but implicitly affecting Hungary's democratic resilience, therefore, the very same timing of the prelitigation procedure was

[30] See CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 47.
[31] See CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, §52.

equally contested by Hungary, but differently justified by the ECJ. It seems, in my view that in its decision on academic freedom the Court has somehow adjusted its focus, dismissing Hungary's contentions and, at the same time, resorting to a coherent and flawless explanation of the reasons why the time limits granted to Hungary by the Commission must be considered adequate. It appears desirable that in future disputes the Commission (first) and the ECJ (then) will replicate this pattern, highlighting the criticism an act may have received even before its promulgation and emphasizing the threats it may cast over the rights of people that are affected by the measure, in order to justify the urgency of an infringement procedure.

5. ON THE ROLE OF DISCRIMINATION IN THE INVESTIGATION OF TFEU INFRINGEMENTS

5.1 Lex NGO: infringement of the movement of capital

Coming to the substance of the "Lex NGO" case, the Court investigated in the first place into the alleged infringement of the movement of capital. The reasoning of the Court is divided into two parts: first, the judges wondered if, in the given case, there actually was a restriction on the movement of capital; then, they looked for possible justifications thereof.

As for the first question, in Section VI, par. A(1) of the judgement[32] the Court analysed the constitutive elements of a restriction on the movement of capital. In the first place, the Court assessed that the Transparency Law does indeed concern the movement of capital, since it applies to "donation of money or other assets coming […] from abroad, regardless of the legal instrument", thus including, for example, donations, inheritances, loans, and credits, which fall in the definition of movement of capital according to the settled case-law of the Court itself.[33] Secondly, the Court confirmed the existence of a restriction of such movement, in so far as the Law creates a climate of distrust and sets of burdens that deter potential investors from financing organisations of the civil society. Thirdly, the Court found that the Transparency Law constitutes indirect discrimination on the basis of nationality since it creates a differentiation between Hungarian organisations receiving money from abroad and those receiving money from an internal source, but also treats "the persons who provide those [organisations] with financial support sent from another Member State or third countries differently from those who do so from a place of residence or registered office located in Hungary".[34]

Once the restriction on the movement of capital and, therefore, the triggering of Art. 63(1) TFEU, has been assessed, the Court turned its attention to possible justifications thereof. In this respect, the Court found that the objective of increasing

[32] See CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, §§ 40 – 65.

[33] The definition of 'capital' in the context of art. 63 TFEU relies on the nomenclature contained in Annex I of Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty (1988) (see CJEU, the judgement of 17 October 2013, Welte, C-181/12, ECLI:EU:C:2013:662); yet the list is not to be considered exhaustive, and also other kinds of transmissions of assets may be included in the notion of movement of capital (see e. g. CJEU, the judgement of 12 February 2009, Block, C-67/08, ECLI:EU:C:2009:92.)

[34] See CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 62. The Court only implied what Advocate General said openly about the discrimination having an indirect character, namely that "the foreign provenance requirement is much more likely to affect nationals of other Member States than Hungarian nationals, even though the latter may also reside outside Hungary and, accordingly, be affected by the measures at issue" (Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:1, § 111).

DOI: 10.46282/blr.2021.5.2.261

transparency may, indeed, represent an overriding reason in the public interest under Art. 65 TFEU. Yet, according to the Court, the measures introduced by the Transparency Law are not proportionate to this objective[35]. Above that, the justification of the law is denied in so much as it illegitimately relies on the presumption made on principle that any organisations of the civil society that receive money from abroad are potential threats to the political and economic interests of Hungary.[36] Lastly, the Court dismissed the argument of Hungary that the Transparency Law shall be justified by the ground of public policy or public security under Art. 65(1)(b) TFEU,[37] to eventually conclude that "the Transparency Law can be justified neither by an overriding reason in the public interest linked to increasing the transparency of the financing of associations nor by […] grounds of public policy and public security".[38]

Now, I do not intend to dwell upon the substance of the reasoning of the Court, which is supported by a settled and undisputed case-law. Yet the systematic of the reasoning appears to be quite curious. As said, indeed, the constitutive elements indicated by the Court to identify an illegitimate restriction on the movement of capital are apparently three: whether the subject matter of the measure is actually a movement of capital; whether such movement has been hindered or restricted; whether the restriction is discriminatory. The previous case-law of the Court, however, had clearly stated that a violation of the movement of capital, just like for all other freedoms of movement, is independent of the discriminatory character of the measure. Examples thereof are numerous,[39] and they all state that the prohibition of restrictions on the movement of capital "goes beyond the mere elimination of unequal treatment, on the grounds of nationality, as between operators on the financial markets",[40] like scholars have also highlighted (see Gobbato, 2004). Coherently, the case-law of the ECJ shows that the assessment of the discriminatory character of a measure is usually laid down in the section of the judgement dedicated to the justifications and not, instead, when talking about the existence of a restriction.[41]

In the given case, therefore, it appears that the Court has dwelled upon the discriminatory character of the measure with the aim of highlighting that the

[35] Although the Court does not expressly mention proportionality in its judgement (unlike Advocate General in its Opinion; Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:1, § 157 and subsequent), this principle clearly underpins the statement that "Hungary has not explained why the objective [shall be reached through] obligations applying indiscriminately to any financial support from any other Member State or any third country [and] to all organisations which fall within the scope of that law, instead of targeting those which […] are genuinely likely to have a significative influence on public life and public debate" (CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 82).

[36] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 86.

[37] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, §§ 88 and subsequent.

[38] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 96.

[39] See e. g., CJEU, the judgement of 4 June 2002, Commission v Portugal, C-367/98, ECLI:EU:C:2002:326; of 4 June 2002, Commission v France, C- 483/99, ECLI:EU:C:2002:327**;** of 13 May 2003, Commission v Spain, C-463/00, ECLI:EU:C:2003:272.

[40] CJEU, the judgement of 4 June 2002, Commission v France, C- 483/99, ECLI:EU:C:2002:327, § 40.

[41] See e. g. CJEU, the judgement of 21 May 2019, Commission v Hungary, C-235/17, ECLI:EU:C:2019:432 (especially § 107); of 4 May 2017, Commission v Greece, C-98/16, ECLI:EU:C:2017:346; of 20 September 2018, EV v Finanzamt Lippstadt, C-685/16, ECLI:EU:C:2018:743. The judgement of 16 March 2018, Segro, C-52/16 and C-113/16, ECLI:EU:C:2018:157 (which is notably a preliminary ruling) adopts a slightly different approach: the investigation on the discriminatory character of the measure at issue is indeed displayed in the section dedicated to the existence of a restriction on the movement of capital, and yet the question whether it must be regarded as discriminatory is only addressed after the assessment that such legislation constitutes a restriction on the fundamental freedom guaranteed in Art. 63 TFEU (see § 66 and § 67 of the judgement).

Transparency Law does not only constitute a restriction prohibited under EU law, but it is *also* discriminatory. Indeed, the judgement underlines that the concept of a restriction of movement includes "*in particular* […] State measures which are discriminatory in nature",[42] and subsequently investigates whether the measure at issue is actually discriminatory. In this sense, the assessment of the discriminatory character of the measure seems to be meant to emphasize its illegitimacy, thus fuelling to some extent the blame for its adoption.

5.2 Lex CEU: infringement of the freedom of establishment

As for the substance of the case on academic freedom, as anticipated above,[43] I shall not linger on the applicability of the GATS and on the assessment of the infringements thereof that have already been fully analysed by scholars. I would rather concentrate on the issues raised by Art. 76(1)(b) of the Hungarian Act on National Tertiary Education on the obligation to genuinely offer higher education in the country in which the institution has its seat, which, unlike the provision of Art. 76(1)(a), also applies to institutions that have their seat in a Member State of the EEA, and thus raises a possible infringement of the freedom of establishment guaranteed by Art. 49 TFEU. The goal is to make a comparison between the assessment of an infringement of the freedom of establishment under Art. 49(1) TFEU within this judgement and the assessment of the infringement of Art. 63 TFEU in the decision on the associative transparency, analysed above.

In this occasion, too, the Court followed the usual pattern. In the first place, indeed, it maintained that the conditions required under Art. 76(1)(b) of the Hungarian Act on National Tertiary Education, according to which foreign education institutions would be bound to supply services in the country of their seat, are in fact covered by Art. 49 TFEU, as far as those conditions also concern institutions that have their seat in a Member State other than Hungary and offer remunerated education services in Hungary.[44]

Secondly, the Court wondered whether there was a restriction of such freedom, and answered positively, stating that the requirement for foreign education institutions to genuinely operate in the State where they have their seat "is liable to render less attractive the exercise of the freedom of establishment in Hungary", and therefore such a requirement "constitutes a restriction of the freedom of establishment, within the meaning of Article 49 TFEU".[45]

Thirdly, the Court confirmed that no possible justification could be invoked by Hungary to legitimise its law under Art. 52 TFEU. Specifically, Hungary did not manage to prove that the activity of foreign institutions that do not provide for services in the country where they have their seat could be a genuine and sufficient threat to a fundamental interest of the society; nor did it prove that such a requirement could, in any way, help prevent deceptive practices or ensure a higher standard of education. For all these reasons, the ECJ concluded that the requirement imposed by Art. 76(1)(b) "cannot be justified by Hungary's arguments based on maintaining public order, nor on those based on overriding reasons in the public interest relating to the prevention of deceptive

[42] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 53.
[43]. Third paragraph of subchapter 2.
[44] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 163.
[45] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 169 and § 170.

DOI: 10.46282/blr.2021.5.2.261

practices and the need to ensure the good quality of higher education".[46] Hence, the infringement of Art. 49 TFEU was confirmed.

Discrimination, of course, underpins this judgement just like it had done in the judgement on associative transparency; yet in this case, the Court only mentioned discrimination when it talked about the infringement of the GATS, and not specifically when it handled the violations of the TFEU. That marks a difference with the decision on the "Lex NGO".

On the contrary, Advocate General Kokott, in her Opinion on the case,[47] had underlined the discriminatory character of Art. 76(1)(b) of the Hungarian Act on National Tertiary Education;[48] and that she had done precisely in the paragraph that analysed possible justifications to the infringement of Art. 49 TFEU. Indeed, Advocate General concisely dismissed the arguments of Hungary concerning the protection of public policy, the alleged necessity to prevent deceptive and fraudulent practices and the struggle to improve the quality of the education system, and eventually concluded that, in any case, "a justification for other overriding reasons in the public interest can be taken into consideration only in the case of restrictions of freedom of establishment which are applied without discrimination on grounds of nationality".[49]

All considered, the systematic order in which Advocate General Kokott handled the topic of discrimination when dealing with the possible infringement of Art. 49 TFEU seems to me the most convincing. In case C-78/18 on the Transparency Law, indeed, the ECJ had righteously emphasised the discriminatory character of the measure, and yet, as was made clear, it seemed to imply that the discrimination was a constitutive element of the notion of restriction to the freedom of movement of capital. In case C-66/18 on academic freedom, instead, the Court decided to overlook the discriminatory character of the measure when it dealt with the violation of Art. 49 TFEU. More convincingly, Advocate General did not fail to note the discrimination underlying the Act on Tertiary Education, and placed it systematically at the most appropriate spot, namely when considering possible justifications for the limitation.

6. ON THE INFRINGEMENT OF THE CHARTER OF FUNDAMENTAL RIGHTS

As mentioned above, the Commission also accused Hungary of infringement of several articles of the Charter of Fundamental Rights of the European Union. On this topic, the judgements at issue assessed, in the first place, that both the Transparency Law and the Act on National Tertiary Education do indeed implement European Union law according to Art. 51(1) of the Charter, and therefore they must comply with the rights enshrined therein.

The applicability of the Charter in the "Lex CEU" case, in particular, is drawn by the Court first from the fact that anytime "Member States are performing their obligations under [GATS], they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter"[50] (Nagy, 2021b, p. 701 and following; Vranes, 2021, p. 12 and subsequent). In that case, however, the applicability of the Charter is further

[46] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 189.
[47] Opinion of Advocate General Kokott of 5 March 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:172.
[48] I'm referring specifically to § 158 of the Opinion of Advocate General Kokott of 5 March 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:172, where Advocate General notes that "the discriminatory character of the rules resides precisely in the fact that the activities of foreign higher education institutions are subject to additional conditions because they have their seat in another Member State".
[49] Opinion of Advocate General Kokott of 5 March 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:172, § 162.
[50] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 213.

confirmed, as explained the Court, by the fact that a justification of the freedom of establishment is invoked by Hungary, based on "an overriding reason in the public interest recognised by EU law [so that] such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter",[51] as it had just been shown in the Transparency case.[52]

The case-law of the ECJ shows that judgements on the failure to fulfil an obligation under Art. 258 TFEU designed like these ones, namely judgements that declare the infringement of fundamental rights contained in the Charter from a Member State, are very rare. The latest precedent is the judgement on the rights of usufruct over agricultural land of 2019,[53] and on that occasion Advocate General Saugmandsgaard had highlighted, in his Opinion, that to his knowledge it was "the first time that the [Commission] has sought a declaration from the Court that a Member State has failed to comply with a provision of the Charter".[54] Until then, in fact, the Commission had shown some reticence (Mori, 2018), notwithstanding its own Communication of 2010 on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, where it had expressed its intention to "start infringement procedures against Member States for non-compliance with the Charter in implementing Union law" whenever necessary.[55] These last couple of years show, therefore, a change in the attitude of the Commission, which seems today to be more determined to demand that states respect the Charter. Similarly, the ECJ, even when the Commission did actually raise the issue of the possible violation of the Charter, often refrained from such a declaration.[56]

In any case, I will go through this section of the judgements very quickly. As for the case on the Transparency Law, the Court did indeed ascertain that the right to freedom of association enshrined in Art. 12(1) of the Charter had been violated due to the deterrent effect on the involvement of foreign donors in the financing of civil society organisations, which made it harder for them to achieve their purposes.[57] Furtherly, the Commission had also lamented the infringement of Art. 7 and 8 of the Charter on the right to respect for private and family life and on the right to protection of personal data, respectively. The Court assessed that the information concerned by the obligation of declaration and publication contained in the Transparency Law fell within the scope of the protection provided for in Art. 7,[58] nor could such protection be limited, since financial supporters of civil society organisations were not to be regarded as a public figure.[59] The Court, therefore, found that the right to respect for private and family life had indeed been violated, and so had Art. 8(2) of the Charter, in so much as the treatment of the data

[51] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 214.
[52] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 101.
[53] CJEU, the judgement of 21 May 2019, Commission v Hungary, C-235/17, ECLI:EU:C:2019:432.
[54] Opinion of Advocate General Saugmandsgaard Øe of 29 November 2018, Commission v Hungary, C-235/17, ECLI:EU:C:2018:971, § 64.
[55] Communication from the Commission, COM/2010/0573 final, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (19 October 2010).
[56] This happened most recently in CJEU, the judgement of 17 December 2020, Commission v. Hungary, C-808/18, ECLI:EU:C:2020:1029 (see Colombo, 2021), but also, to make another example, in the CJEU, the judgement of 6 November 2012, Commission v. Hungary, C-286/12, ECLI:EU:C:2012:687.
[57] Cf. CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, §§ 118 – 119.
[58] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 128.
[59] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 131.

DOI: 10.46282/blr.2021.5.2.261

prescribed by the Transparency Law did not meet the requirements of fair processing set out in the Charter.[60]

As for the Act on Tertiary Education, the Commission lamented the infringement of Art. 13 of the Charter on academic freedom and Art. 14(3) and 16 of the Charter on the freedom to found educational establishments and the freedom to conduct a business, respectively. All contentions were upheld by the Court, since, on the one hand, the measures at issue were held capable of "depriving the universities concerned of autonomous organisational structure that is necessary for conducting their academic research and for carrying out their educational activities"[61] and, on the other, they were considered "such as to render uncertain or to exclude the very possibility of founding a higher education institution, or of continuing to operate an existing higher education institution, in Hungary".[62]

The Court subsequently analysed the existence of possible justifications accorded by Art. 52(1) of the Charter for limitations that genuinely pursue objectives of general interest recognised by the Union. The reply of the Court on this point appears to be equally lapidary in both decisions: in fact, it recalled that it had already found, at § 96 of the judgement on the transparency of associations and at §§ 132, 138, 154, 155 and 189 of the judgement on academic freedom, that the provisions of the laws at issue "cannot be justified by any of the objectives of general interest recognised by the Union"[63] and implicitly affirmed that no more needed to be said on this topic.

It is interesting to note that, despite reaching the same results on the merits, the position of the Court and that of Advocate General Campos Sanchez-Bordona in the case of associative transparency (and, previously, of Advocate Saugmandsgaard in the judgement on "the rights of usufruct") on the topic of fundamental rights diverged profoundly. According to the latter, in fact, and in line with what Saugmandsgaard had previously expressed, the Court shall not "examine the possible infringement of the Charter 'independently of the question of the infringement of freedoms of movement'",[64] because "the rights laid down [in the Charter] must be treated as an integral part of the substance of those freedoms",[65] and, subsequently, the two complaints "should not be examined 'separately' but rather in an integrated way".[66] This systematic approach, claimed Advocate General, had allegedly already been adopted by the ECJ in joint cases *SEGRO* and *Horváth*.[67]

Accordingly, Advocate Campos Sanchez-Bordona proposed to adopt a new, two-folded parameter. Indeed, anytime a violation of Art. 63 TFEU presents itself as a mere and simple illegitimate restriction of the freedom of movement of capitals, the traditional control technique should be applied; on the contrary, when such a violation is actually

[60] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 132 and § 134.
[61] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 228.
[62] CJEU, the judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, § 233.
[63] CJEU, the judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476, § 140 and of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792, §240.
[64] Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C 78/18, ECLI:EU:C:2020:1, § 77 and Opinion of Advocate General Saugmandsgaard Øe of 29 November 2018, Commission v Hungary, C-235/17, ECLI:EU:C:2018:971, §76.
[65]Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C 78/18, ECLI:EU:C:2020:1, § 88.
[66] Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C 78/18, ECLI:EU:C:2020:1, § 49.
[67] CJEU, the judgement of 16 March 2018, Segro, C-52/16 and C-113/16, ECLI:EU:C:2018:157.

instrumental to the infringement of a fundamental right, more stringent review criteria should be used.[68]

Advocate General's concerns about the assessment of possible infringements of the Charter becoming a mere duplication of previous assessments of the violation of a freedom of movement are surely understandable. Yet, the features of these new alleged "more stringent criteria" and, in particular, their difference from the classical ones, seem to me to be quite evanescent and undefined. As for *SEGRO*, on that occasion the Court did not appear to resort to an integrated parameter but rather ascertained that a "legislation [..]which restricts the free movement of capital cannot be justified, in accordance with the principle of proportionality, either by overriding reasons in the public interest [..] or on the basis of Article 65 TFEU, so that it infringes Article 63 TFEU. Accordingly, it is not necessary to examine the aforesaid national legislation in the light of Articles 17 and 47 of the Charter in order to resolve the disputes in the main proceedings".[69]

More importantly, I do not consider the duplication of the assessment of a violation, examined both under the lens of the movement of capital and of fundamental rights, to be a sheer and useless exercise in style. Indeed, in the first place, this approach contributes to the development of a specific case-law of the ECJ on infringement proceedings for breach of the Charter, which, as it was said, is relatively new. Secondly, the assessment that given conduct from a State does not only configure a breach of movement but also entails the violation of fundamental rights somehow enhances the gravity of such conduct. In this sense, I fully share the view according to which "the alleged violation of the Charter may constitute an "aggravating factor", meaning that the seriousness of the infringement goes further than that stemming from the mere breach of the non-Charter provision(s)" (Prete and Smulders, 2021, p. 291).

To conclude, it is interesting to note that, in the case on academic freedom, the whole discussion about the role of the double assessment of violations (both under the lens of the TFEU and of the Charter of Fundamental Rights) remained fully under the radar: which may indicate that a process of normalisation of the assessment of violations of the Charter alongside the assessment of "simple" violations of technical rules of the Treaty is now under way, and may become a new trend in the ECJ case-law.

7. FINAL REMARKS

If one considers the relevance of the double assessment described so far, it does not appear surprising that the ECJ did not mention the values of Art. 2 TFEU in its judgements, like some had wished (Coli, 2020). It is true, of course, that the EU is facing a rule of law crisis which shall be fought tenaciously (Safjan, 2019), and it is also true that Art. 2 TFEU has proven to be very useful, especially when it came to protecting the independence of the judiciary (Rossi, 2020). At the same time, however, I reckon that such a tool should be preserved for situations where it is most necessary and should not be called upon whenever the legislative framework of the European Union is in itself sufficient to condemn and dismiss unlawful conducts. There are, indeed, single and specific complaints the Commission can lodge, and the ECJ can eventually uphold, in order to prevent the Member States from adopting laws and acts that do, at the end of the day, threaten the rule of law, without, though, calling in the rule of law itself. This

[68] Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C 78/18, ECLI:EU:C:2020:1, § 95.
[69] CJEU, judgement of 16 March 2018, Segro, C-52/16 and C-113/16, ECLI:EU:C:2018:157, §§ 127 – 128.

approach seems to have emerged clearly from the two cases described above, which could serve as role models for future assessments of further violations of the European treaties.

In fact, both cases analysed were set up as technical – not political – cases, and reference to the values of Art. 2 TFUE could have been redundant. Furthermore, as we saw, the implications of the Transparency Law and of the Act on Tertiary Education on fundamental rights have not been neglected by the Court, but rather enhanced, which conferred to the cases an adequate and balanced degree of political relevance. The extreme rapidity of the preliminary procedure and the relatively "easy-going" attitude of the Court in its justification are also symptoms of a strong will to act against Hungary. The emphasising of the discriminatory character of the measures may also be useful, as it serves as a way to underline that a given measure is not only invalid under EU law, it is *also* discriminatory. Lastly, of course, the double assessment of a violation of internal market rules *and* of the Charter underlines that fundamental rights are also involved in the illegitimate conduct of the State.

All considered, it seems to me that these judgements cleverly set a balance between two opposite needs, namely that of suppressing national rules and measures that grossly violate fundamental rights and threaten the rule of law, on the one hand, and of preserving a purely technical – and therefore apolitical – legal and judicial reasoning.

This technical approach to the fight against rule of law backsliding does not only allow for the Commission and the Court to act faster and more effectively but it may also shield its decisions from accusations of being *ultra vires*, confining, whenever possible, rule of law violations into the more "comfortable" field of internal market violations. Possibly, this could also help prevent derailing decisions of national Courts which aim at undermining the application, in their legal orders, of ECJ judgements, contesting that through those judgements European institutions are allegedly disregarding states' sovereignty – as Poland's Constitutional Court sadly teaches[70] (Biernat and Łętowska, 2021; Federico, 2021; Pace, 2021).

Lastly, it must be recalled that it cannot be (solely or mainly) up to the ECJ to react against violations of the rule of law (Casolari, 2020): the Member States shall remain, indeed, the privileged actors of the struggle to protect and restore the rule of law, which they can do not only through the procedure of Art. 7 TEU but also by means of their diplomatic bodies and contractual relations; the new Regulation on a general regime of conditionality for the protection of the Union budget[71] may, of course, constitute another useful tool, the effectiveness of which shall be assessed in the months to come.

BIBLIOGRAPHY:

Adamski, D. (2019). The social contract of democratic backsliding in the "new EU" countries. *Common Market Law Review*, *56*(3), 623–666.

Bárd, P. (2019). *The von der Leyen Commission and the Future of the Rule of Law*. VerfBlog. https://doi.org/10.17176/20191112-033639-0

Bárd, P. (2020a). *The Hungarian "Lex NGO" before the CJEU: Calling an Abuse of State Power by its Name*. VerfBlog. https://doi.org/10.17176/20200127-230141-0

Bárd, P. (2020b). The rule of law and academic freedom or the lack of it in Hungary. *European Political Science*, *19*(1), 87–96. https://doi.org/10.1057/s41304-018-0171-x

[70] Constitutional Court of Poland, K 3/21 (7 October 2021).

[71] Regulation on a general regime of conditionality for the protection of the Union budget (2020).

Benvenuti, S. (2020). *SIDIBlog*. Sulla Legge Organica Ungherese n. 12 Del 30 Marzo 2020 "Sulla Protezione Contro Il Coronavirus." http://www.sidiblog.org/2020/04/07/sulla-legge-organica-ungherese-n-12-del-30-marzo-2020-sulla-protezione-contro-il-coronavirus/

Besselink, L., Tuori, K., Halmai, G., and Pinelli, C. (2019). The rule of law crisis in Europe. *Diritto Pubblico*, *18*(1), 267–288. https://doi.org/10.1438/93726

Biernat, S., and Łętowska, E. (2021). *This Was Not Just Another Ultra Vires Judgment! Commentary to the statement of retired judges of the Constitutional Tribunal*. VerfBlog. https://doi.org/10.17176/20211027-182911-0

Casolari, F. (2020). *La protezione dello Stato di diritto nell'Unione Europea ai tempi del coronavirus: se non ora, quando?* SIDIBlog. http://www.sidiblog.org/2020/04/07/la-protezione-dello-stato-di-diritto-nellunione-europea-ai-tempi-del-coronavirus-se-non-ora-quando/

Coli, M. (2020). La legge ungherese sulla trasparenza associativa davanti alla Corte di giustizia: la tutela della rule of law che c'è ma non si vede? *Quaderni Di SIDIBlog*, *7*(1), 513–530. http://www.sidiblog.org/wp-content/uploads/2021/09/Quaderni-di-SIDIBlog-Volume-7-2020.pdf

Colombo, E. (2021). *La Corte di giustizia condanna (nuovamente) l'Ungheria per l'inadeguatezza della normativa sull'asilo*. Eurojus. http://rivista.eurojus.it/la-corte-di-giustizia-condanna-nuovamente-lungheria-per-linadeguatezza-della-normativa-sullasilo/

Federico, G. Di. (2021). *Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca): et nunc quo vadis?* BlogDUE. https://www.aisdue.eu/giacomo-di-federico-il-tribunale-costituzionale-polacco-si-pronuncia-sul-primato-della-costituzione-polacca-et-nunc-quo-vadis/

Gobbato, S. (2004). Golden share ed approccio uniforme in materia di capitali nella recente giurisprudenza comunitaria. *Il Diritto Dell'Unione Europea*, *2*, 427–443.

Halmai, G. (2018). *The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association*. VerfBlog. https://doi.org/10.17176/20180611-095505-0

Hoxhaj, A. (2021). The CJEU in Commission v Hungary Higher Education Defends Academic Freedom Through WTO Provisions. *The Modern Law Review*. https://doi.org/10.1111/1468-2230.12686

Hungary: NGO law a vicious and calculated assault on civil society. (2017). Amnesty International. https://www.amnesty.org/en/latest/news/2017/06/hungary-ngo-law-a-vicious-and-calculated-assault-on-civil-society/.

Kochenov, D. V., and Dimitrovs, A. (2021). *Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice*. VerfBlog. https://doi.org/10.17176/20210428-101313-0

Milani, G. (2019). Parlamento e parlamentarismo nella democrazia illiberale: l'esperienza ungherese. *DPCE Online*, *41*(4), 2917–2934. http://www.dpceonline.it/index.php/dpceonline/article/view/840/848

Mori, P. (2018). L'uso della procedura d'infrazione a fronte di violazioni dei diritti fondamentali. *Il Diritto Dell'Unione Europea*, *2*, 263–376.

Mori, P. (2020). La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi. *Federalismi.It*, *8*, 166–210.

Nagy, C. I. (2021a). Does WTO Law Protect Academic Freedom? It Depends on How You Use It. *ASIL Insights*, *25*(1), 1–6.

Nagy, C. I. (2021b). Case C-66/18. *American Journal of International Law*, *115*(4), 700–706. https://doi.org/10.1017/ajil.2021.45

Orlandi, M. A. (2019). La «democrazia illiberale». Ungheria e Polonia a confronto. *Diritto*

Pubblico Comparato Ed Europeo, *5*(1), 167–216. https://doi.org/10.17394/92979
Pace, L. F. (2021). *La sentenza della Corte costituzionale polacca del 7 ottobre 2021: tra natura giuridica dell'Unione, l'illegittimità del sindacato ultra vires e l'attesa della soluzione della "crisi" tra Bruxelles e Berlino*. BlogDUE. aisdue.eu/la-sentenza-della-corte-costituzionale-polacca-del-7-ottobre-2021-tra-natura-giuridica-dellunione-lillegittimita-del-sindacato-ultra-vires-e-lattesa-della-soluzione-della/
Prete, L. (2017). *Infringement proceedings in EU law*. Wolters Kluwer.
Prete, L., and Smulders, B. (2021). The Age Of Maturity Of Infringement Proceedings. *Common Market Law Review*, *58*(2), 285 – 332.
Rossi, L. S. (2020). Il valore giuridico dei valori. L'Articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali. *Federalismi.It*, *19*, iv–xxvi.
Safjan, M. (2019). The Rule of Law and the Future of Europe. *Il Diritto Dell'Unione Europea*, *3*, 425–439.
Scheppele, K. L., and Pech, L. (2018). *What is Rule of Law Backsliding?* VerfBlog. https://doi.org/10.17176/20180302-181145
Sena, P. De. (2020). COVID-19, stato di diritto e Convenzione europea dei diritti umani: il caso ungherese. *Quaderni Di SIDIBlog*, *7*(1), 191–202. http://www.sidiblog.org/wp-content/uploads/2021/09/Quaderni-di-SIDIBlog-Volume-7-2020.pdf
Spadaro, I. (2021). La crisi dello Stato di diritto in Ungheria, Polonia e Romania ed i possibili rimedi a livello europeo. *Federalismi.It*, *14*, 178–203. https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=45493&dpath=document&dfile=02062021111159.pdf&content=La%2Bcrisi%2Bdello%2BStato%2Bdi%2Bdiritto%2Bin%2BUngheria%2C%2BPolonia%2Be%2BRomania%2B-%2Bstato%2B-%2Bdottrina%2B-%2B
Várnay, E., and Varju, M. (2019). Whither Administrative Justice in Hungary? European Requirements and the Setting Up of a Separate Administrative Judiciary. *European Public Law*, *25*(3), 283 – 304.
Vesperini, G. (2021). L'applicazione dell'Accordo GATS nell'ordinamento europeo: il caso delle norme ungheresi sulla istruzione superiore. *Giornale Di Diritto Amministrativo*, *27*(1), 59–66.
Vranes, E. (2021). Enforcing WTO/GATS law and fundamental rights in EU infringement proceedings: An analysis of the ECJ's ruling in Case C-66/18 Central European University. *Maastricht Journal of European and Comparative Law*, *28*(5), 699–713. https://doi.org/10.1177/1023263X211024991
Ziegler, T. D. (2019). *It's Not Just About CEU: Understanding the Systemic Limitation of Academic Freedom in Hungary*. VerfBlog. https://doi.org/10.17176/20190517-144417-0
Charter of Fundamental Rights of the European Union (2012).
Treaty on the European Union (2012).
Treaty on the Functioning of the European Union (2012).
Regulation on a general regime of conditionality for the protection of the Union budget (2020).
Hungary, Act on the Amendment of Act CCIV of 2011 on National Tertiary Education (2017).
Hungary, Law on the Transparency of Organisations which receive Support from Abroad (2017).

Communication from the Commission, COM/2010/0573 final, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (19 October 2010).
Parliamentary Assembly, resolution, 2162 (2017) (27 April 2017).
European Parliament, resolution, 2017/2656(RSP) (17 May 2017).
European Parliament, resolution, 2017/2131(INL) (12 September 2018).
European Parliament, resolution, 2020/2513(RSP) (16 January 2020).
Venice Commission, preliminary opinion, 891 / 2017 (11 August 2017).
Opinion of Advocate General Saugmandsgaard Øe of 29 November 2018, Commission v Hungary, C-235/17, ECLI:EU:C:2018:971.
Opinion of Advocate General Campos Sánchez-Bordona of 14 January 2020, Commission v Hungary, C 78/18, ECLI:EU:C:2020:1.
Opinion of Advocate General Kokott of 5 March 2020, Commission v Hungary, C 66/18, ECLI:EU:C:2020:172.
CJEU, judgement of 31 January 1984, Commission v Ireland, C-74/82, ECLI:EU:C:1984:34.
CJEU, judgement of 2 February 1988, Commission v Belgium, C-293/85, ECLI:EU:C:1988:40.
CJEU, judgement of 16 May 1991, Commission v the Netherlands, C-96/89, ECLI:EU:C:1991:213.
CJEU, judgement of 21 January 1999, Commission v Belgium, C-207/97, ECLI:EU:C:1999:17.
CJEU, judgement of 28 October 1999, Commission v Austria, C-328/96, ECLI:EU:C:1999:526.
CJEU, judgement of 13 December 2001, Commission v France, C-1/00, ECLI:EU:C:2001:687.
CJEU, judgement of 4 June 2002, Commission v Portugal, C-367/98, ECLI:EU:C:2002:326.
CJEU, judgement of 4 June 2002, Commission v France, C- 483/99, ECLI:EU:C:2002:327.
CJEU, judgement of 13 May 2003, Commission v Spain, C-463/00, ECLI:EU:C:2003:272.
CJEU, judgement of 12 May 2005, Commission v Belgium, C-287/03, ECLI:EU:C:2005:282.
CJEU, judgement of 15 November 2005, Commission v Austria, C-320/03, ECLI:EU:C:2005:684.
CJEU, judgement of 8 December 2005, Commission v Luxembourg, C-33/04, ECLI:EU:C:2005:750.
CJEU, judgement of 30 November 2006, Commission v Italy, C-293/05, ECLI:EU:C:2006:750.
CJEU, judgement of 24 April 2007, Commission v the Netherlands, C-523/04, ECLI:EU:C:2007:244.
CJEU, judgement of 18 July 2007, Commission v Germany, C-490/04, ECLI:EU:C:2007:430.
CJEU, judgement of 12 February 2009, Block, C-67/08, ECLI:EU:C:2009:92.
CJEU, judgement of 21 January 2010, Commission v Germany, C-546/07, ECLI:EU:C:2010:25.
CJEU, judgement of 6 November 2012, Commission v. Hungary, C-286/12, ECLI:EU:C:2012:687.
CJEU, judgement of 17 October 2013, Welte, C-181/12, ECLI:EU:C:2013:662.
CJEU, judgement of 4 May 2017, Commission v Greece, C-98/16, ECLI:EU:C:2017:346.

DOI: 10.46282/blr.2021.5.2.261

CJEU, judgement of 27 February 2018, Associação Sindical dos Juízes Portuguese, C-64/16, ECLI:EU:C:2018:117.
CJEU, judgement of 16 March 2018, Segro, C-52/16 and C-113/16, ECLI:EU:C:2018:157.
CJEU, judgement of 20 September 2018, EV v Finanzamt Lippstadt, C-685/16, ECLI:EU:C:2018:743.
CJEU, judgement of 21 May 2019, Commission v Hungary, C-235/17, ECLI:EU:C:2019:432.
CJEU, judgement of 24 June 2019, Commission v. Poland, C-619/18, ECLI:EU:C:2019:531.
CJEU, judgement of 19 November 2019, A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy, joint cases C-585/18, C-624/18, C-625/18, ECLI:EU:C:2019:982.
CJEU, judgement of 2 April 2020, Commission v Poland, Hungary and the Czech Republic, joint cases C-715/17, C-718/17, C-719/17, ECLI:EU:C:2020:257.
CJEU, judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476.
CJEU, judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792.
CJEU, judgement of 17 December 2020, Commission v. Hungary, C-808/18, ECLI:EU:C:2020:1029.
CJEU, judgement of 2 March 2021, A.B, C.D., E.F, G.H, I.J. v. Krajowa Rada Sądownictwa, C-824/18, ECLI:EU:C:2021:153).
CJEU, judgement of 20 April 2021, Repubblika, C-896/19, ECLI:EU:C:2021:311.
Poland, Constitutional Court, K 3/21 (7 October 2021).

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

CONNECTING GENDER IDENTITY AND FREEDOM OF CONSCIENCE IN RECENT ROMANIAN CONSTITUTIONAL CASE-LAW / Mihail Stănescu-Sas

Mihail Stănescu-Sas
PhD Student
University of Bucharest
Faculty of Law
Kogălniceanu nr. 36-46
Bucureşti 050107, Romania;
as well as judge at Constanţa Court of Appeal,
Strada Traian nr. 35C
Constanţa 900743, Romania.
stanescu-sas.mihail@drept.unibuc.ro
ORCID: 0000-0003-0037-4750

This paper is the result of a research conducted during the author's doctoral programme within the University of Bucharest – Faculty of Law – Doctoral School of Law and has been presented on 22 April 2021 at the online international academic conference "Bratislava Legal Forum 2021", held under the auspices of the Alumni Club of Comenius University in Bratislava, Faculty of Law.

Abstract: *The Constitutional Court of Romania has recently ruled unconstitutional a new provision amending the Law regarding national education, meant to prohibit "any activity of disseminating the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from biologic sex and that the two are not always the same". This provision was found in breach of several constitutional principles, including freedom of conscience and freedom of expression. This decision makes for a brief ingression into the legal nature of gender identity and that of freedom of conscience, allowing for the former to serve as a means to clarifying the scope of application of the latter. Since gender identity recognition is not a "world view", but a reflection of diversity which is integral to a plural, democratic society, the only way the said provision breached freedom of conscience involved its interior dimension: the freedom of thought of pupils and students. But it did not even involve an interference with the right to manifest a "conviction", as far as pupils, students and also teachers are concerned. Nonetheless, it breached their freedom of expression.*

Key words: *freedom of conscience; gender identity; freedom of expression; equality before the law; Constitution of Romania, Romanian law*
Suggested citation:
Stănescu-Sas, M. (2021). Connecting Gender Identity and Freedom of Conscience in Recent Romanian Constitutional Case-Law. *Bratislava Law Review*, 5(2), 43-60. https://doi.org/10.46282/blr.2021.5.2.236

Submitted : 03 May 2021
Accepted : 09 June 2021
Published : 30 December 2021

1. INTRODUCTION

1.1 Factual Premise

A recent decision of the Constitutional Court of Romania recognized a significant connection between gender identity and freedom of conscience.[1] Seized by the President

[1] Romania, Constitutional Court of Romania, decision No. 907/16, December 2020, published in the Official Monitor of Romania, part I, No. 68/21, January 2021. Unless otherwise specified, further reference to Court's case-law reports to this particular decision.

of Romania to perform a constitutionality check before promulgation,[2] the Court, by a majority of 7 to 2, ruled unconstitutional a provision of a new law adopted by Parliament, which, within the institutions of education, as well as on their entire premises, including out-of-school educational facilities, would have prohibited *"any activity of disseminating the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from biologic sex and that the two are not always the same."*[3]

This provision, intended to be integrated into the Law No. 1/2011 regarding national education,[4] was found in breach of several constitutional principles: freedom of conscience (article 29); equality before the law (article 16 paragraph 1) in relation to access to education (article 32) and to child and youth protection (article 49); academic autonomy (article 32 paragraph 6); freedom of expression and the prohibition of censorship (article 30 paragraphs 1 and 2); the rule of law and the principle of abiding by the Constitution and laws (article 1 paragraphs 3 and 5) and the priority of international provisions regarding fundamental human rights (article 20 paragraph 2).

All these grounds of unconstitutionality, following either the reasoning of the Court or a different perspective I envisage hereby, converge to a certain connection between gender identity and freedom of conscience: is the dissemination the concept of gender identity a manifestation of freedom of conscience? Because, if it is, then opposing it and disseminating the counter-concept of gender identity non-existence might be equally protected. The stake of sliding such a matter under the ambit of freedom of conscience may be to obtain a certain public privilege of credibility; but it may as well be a way to discredit it: since it is a matter of conscience, nobody is bound by it. This strategy may deliver fine results when it is applied to antidemocratic religious and non-religious claims, but may backfire into the democratic values, when they are lowered to the level of their contrary.

This contribution is intended to prefigure an equation between freedom of conscience and democratic values, where the latter don't get mixed up with their opposite under the scope of freedom of conscience. This fundamental freedom is not the battlefield between democracy and non-democracy, between equal human rights and their destruction. Freedom of conscience provides for the protection of manifestations of conscience outside the field of the political and of its corollary law,[5] inside which only

[2] According to article 146 letter a) of the Constitution (republished in the Official Monitor of Romania, part I, No. 758/29, October 2003), the Constitutional Court may be seized to perform a constitutionality check of a law adopted by Parliament, before it is promulgated by the President of Romania (promulgation being necessary for its coming into force). The legal standing belongs to the President of Romania, to each of the Presidents of the two Chambers of Parliament, to the Government, to the High Court of Justice and Cassation, to the Ombudsperson and to a group of at least 50 deputies or 25 senators.

[3] Law regarding the amendment and addend of Law No. 1/2011 regarding national education – project No. L87/2020, adopted by the Senate, as decisional Chamber, https://www.senat.ro/legis/PDF/2020/20L087LP.PDF. Romanian parliamentary procedure provides for a bill to be submitted to one of the Chambers of Parliament: in principle, the first Chamber seized is the Senate, except for expressly provided matters, when the first Chamber seized is the Chamber of Deputies (article 75 paragraph 1 of the Constitution). In this case, the last solution applied, as the bill regarded the general organization of education [article 73 paragraph 3 letter n) of the Constitution]. After the bill is adopted or rejected by the first Chamber seized (in this case it was adopted), it is sent to the other Chamber (the Senate, in this case), which holds the attribute of being "decisional", meaning it will finally decide over the bill (article 75 paragraph 3 of the Constitution). The adopted law is sent to the President of Romania for promulgation. The President may demand the Parliament, only once, to re-examine the law. The President is obliged to promulgate the law adopted after re-examination (article 77 of the Constitution). The President may also seize the Constitutional Court, as described in the previous note.

[4] Published in the Official Monitor of Romania, part I, No. 18/10, January 2011.

[5] *„The premise and means by which the political power may put itself forward as a factor of social command are the creation and exercise of legal norms."* (Safta, 2020, p. 5).

the alternative protection of freedom of expression is to be sought. Freedom of conscience is way far from being a Trojan horse into democracy.

1.2 Freedom of Conscience

In Romanian constitutional law, freedom of conscience is an inclusive category. Provided by article 29 of the Constitution, it protects freedom of thought (formulated as "freedom of thought and opinion"), religious freedom (as "freedom of religious beliefs"), freedom of "convictions" (religious or non-religious), autonomy of religious organisations and the right of parents and tutors to perform, according to their own convictions, the education of minor children within their responsibility.

Thus, in my opinion, freedom of conscience incorporates the freedom of thought, that is the whole of the individual freedom over the *forum internum*, no matter the subject of thought,[6] and the freedom to manifest religious and non-religious "convictions", which is only a part of thought, while the manifestations of the other part are protected by freedom of expression. So, freedom of conscience and freedom of expression govern the same indivisible power the individual holds over the *forum internum*; meanwhile, the protection of *forum externum* is partially shared and partially split: it is generally protected by freedom of expression (article 30 paragraph 1 textually providing for the freedom to express "thoughts, opinions and beliefs", the latter evoking the "religious beliefs" in article 29 paragraph 1); but *forum externum* is also especially protected by freedom of conscience, when it consists of "religious beliefs" and other equivalent "convictions".

This complicated architecture has led the Constitutional Court to combine the two fundamental freedoms, stating that "*freedom of conscience implies, inevitably, the freedom of expression, which allows for the exteriorization, by any means, of thoughts, opinions, religious beliefs or spiritual creations of any kind*."[7] This statement is undoubtedly correct, but only when read from the proper angle. Freedom of conscience implies freedom of expression in two ways. First, they share the same freedom of thought/opinion, exercised in the *forum internum*. Second, all exterior manifestations of freedom of thought are protected by freedom of expression. But those exterior manifestations of "convictions" are also protected by freedom of conscience, whose level of protection may sometimes prove to be more effective, through either norms of accommodation, or conscientious objections.

In order to shape the scope of application of freedom of conscience, it is essential to define the "convictions", in the context of freedom of conscience. The European Court of Human Rights provides a classical definition, stating, with reference to article 2 of Protocol No. 1 to the Convention that "*the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 (art. 10) of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "convictions") appearing in Article 9 (art. 9) - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level*

[6] This view is not unanimous. It has been argued that freedom of thought protects only "*a form of thought about wide concern social phaenomena, having a direct connection to the exercise of state power, such as politics, religion, law, economy etc.*" (Ionescu, 2017, p. 391). However, I see thought as an indivisible matter, incompatible with any attempt of compartmentalisation, as the only way to value the absolute protection of *forum internum*. Fields of thought cannot be classified because nobody can properly understand the thought of another, not to say his or her own, as thought is only partially expressible. The only way to respect freedom of thought is to acknowledge its full integrity, as an indivisible purview where the individual is sovereign.

[7] Romania, Constitutional Court of Romania, decision No. 485/6, May 2008, published in the Official Monitor of Romania, part I, No. 431/9, June 2008.

DOI: 10.46282/blr.2021.5.2.236

of cogency, seriousness, cohesion and importance."[8] This definition is workable provided that it is interpreted in the light of the case-law excluding political manifestations, although religiously or philosophically motivated, from the scope of article 9 of the Convention.[9]

1.3 Gender Identity

As held by the provision found by the Court to be unconstitutional, gender identity doctrine states that "*gender is a concept different from biologic sex and that the two are not always the same*".

Philosophically speaking, gender identity houses a conflict between collective identity and individual identity, as sex is a collective identifier and gender is an individual one.

Collective identity resides upon an attribute or collection of attributes a community attaches to an individual member. Since basically all communities recognize the identifying value of biological sex, it is automatically attached to individuals. It is a determinism that communities use to identify their members and to assign them with precise roles corresponding to this biological feature.

Individual identity is, at least in part, the product of individual choice. Already subject to the determinism of biological sex, the individual may need an additional (though potentially challenging) concept in order to freely choose certain social roles and behaviour, no matter how traditionally assigned they are between the two biological sexes. Hence, the concept of gender is essentially challenging the absolute determinism of biological sex, as far as individual identity is concerned. In turn, those who deny the difference between the two concepts actually repudiate gender entirely; they argue that biological sex confers a collective identity that is unquestionable, immutable and non-derogative, so that, if "gender" exists, it is the same as biological sex.

Thus, the debate between the proponents of biological sex and those of gender is a fight between collectivism and individualism, over the territory of individual identity. The former embrace the prevalence of a collective identity (unilaterally and immutably recognized by the community), while the latter sustain, in relation to a certain part of the individual personality, the primacy of an individually chosen identity (based more or less on physical and/or psychological properties, but nevertheless freely assumed by the individual, in addition to biological sex).

In the contest between the two opposing doctrines, democratic values ensure the primacy of the individual identity over the collective, a solution in absence of which the concept of gender would be devoid of any significance. In this way, even though it is in the nature of any community to allocate collective identities, which actually build and maintain its identity as a group, these collective identities (attributes attached by the community to the individuals) are not unquestionable, immutable and non-derogative. The individual has a say in the matter of the social roles and behaviour he or she is choosing to undertake, which form the corollary of his or her identity. To this end, the individual uses an individual attribute – gender. Gender is an individual identity not because it is created in a unique fashion by the individual, as the concrete aspects of it may be shared with other people, but because it is freely and individually chosen, not collectively assigned.

[8] ECtHR, Campbell and Cosans v. United Kingdom, App. No. 7511/76 and 7743/76, 25 February 1982, § 36.
[9] ECtHR, Enver Aydemir v. Turkey, App. No. 26012/11, 07 June 2016, §§ 79 and 80; European Commission of Human Rights, Arrowsmith v. United Kingdom, App. No. 7050/75, report of 12 October 1978, § 75; European Commission of Human Rights, F.P. v. Germany, App. No. 19459/92, decision of 29 March 1993.

This paper is not dealing with any concrete aspects of gender identity, among which some might be controversial or at least require extensive examination. It is not an endorsement of any particular opinion or aspect aiming to fit under the scope of gender identity. All reference to this concept relates to its mere existence as a fact of life, different from biological sex. It is this mere existence of gender identity that the examined provision, adopted by the Parliament and struck by the Constitutional Court, tended to prohibit entirely from being disseminated within the educational system.

2. PUPILS' AND STUDENTS' FREEDOM OF CONSCIENCE

2.1 Constitutional Court's Assessment

The Court noted in § 79 of its decision that the educational system plays an essential role in the exercise of freedom of conscience, understood as "*the possibility of the person to have and to publicly express his or her world view*". In this regard, it quoted article 4 of Law No. 1/2011 regarding national education, according to which education aims to ensure "*personal fulfilment and development*", "*social integration and active citizen participation within society*", "*forming a conception of life, based upon humanist and scientific values, national and universal culture and stimulation of intercultural dialogue*", "*education in the spirit of dignity, tolerance and respect for fundamental human rights and freedoms*", "*cultivation of sensitivity to human matters, to moral and civic values*". The Court then stated that *"[t]hese principles, which can be subsumed to freedom of conscience, are incompatible with the imposition by law of a "truncated" knowledge of reality. A view about life cannot be "prescribed" or imposed by the state through establishing certain ideas as absolute truths and forbidding, de plano, any step to find out other opinions/theories on the same subject, all the more so as these opinions/theories are promoted/sustained scientifically and legally, marking evolutions of society at a certain time*."

It can be noticed that, even after having made an extensive presentation of the legal national and international context regarding gender identity (§§ 51-76) and concluding that the normative evolutions show that "*gender identity/gender equality represent more than biological sex/biological differences, thus refuting gender stereotypes attached to the traditional approach of men and women's roles in society*", the Court struggled to avoid stating its own substantial view related to gender identity, instead fitting it into the scope of freedom of conscience; the only vague approbation may be sustained by the expression "evolutions of society", which, semantically, suggests changes for the better.

Following this line of argument, in order to reach a conclusion of breach of freedom of thought, the Court stated that prohibiting any activity related to knowledge and debate within the educational system constrains pupils and students and also teachers to adopt and express, on educational premises, only the opinion recognized by the state, by law, that gender is identical with biological sex. This is contrary to freedom of conscience (§ 80), for the protection of which "*the educational system is supposed to be open to ideas, values, opinions and to encourage their free expression and criticism*." The state "*has to support the formation of a world view, but not to impose it*" (§ 81).

The Court also declared the analysed provision of the law to be in breach of article 1 paragraph 3 of the Constitution, according to which human dignity is a supreme value within the state, so that obstructing the knowledge and also the dissemination of "*opinions regarding gender identity contrary to that imposed by the state, which can come into conflict with opinions, convictions and maybe with the gender identity a person*

DOI: 10.46282/blr.2021.5.2.236

perceives, is contrary to human dignity." According to the Court, "*the wish of the state, through its authorities, to promote at a certain moment a conception about the notions of "sex" and "gender" must not transform into an act of imposition and punishment for the steps taken to know/make known the opinions about this theme*" (§ 83).

2.2 Indoctrination by Omission

The innovative value of this decision is that it recognizes and illustrates a case of indoctrination by omission, amounting to a breach of freedom of thought. This conclusion is not set aside by the fact that indoctrination is this time ideological, so it does not involve what in terms of freedom of conscience is called "convictions", but only a political approach, because indoctrination breaches freedom of thought no matter the subject of thought. Since, within society, there are two opposing opinions regarding gender identity, forbidding to learn and teach about one of them, within the educational system, implicitly favours the other. Pupils and students are presented a distorted reality, where only one absolute truth appears to exist, while the contrary opinion is strategically absconded. Thus, their mind may develop in a fake environment, making them more difficult to acknowledge gender identity, when they eventually find it out later in life. The purpose of the constraint is obviously not the protection of children and young people, as the prohibition was meant to be absolute, no matter the age of the pupils or the pedagogic methods applied, but concealing gender identity matter in order to increase the odds for them to reject the concept when they grow up, as they were not taught about it in school.

Nonetheless, indoctrination by omission is not universally applicable. In the absence of an explicit provision of the law, teachers' omission to mention gender identity in class may be completely contingent and non-intentional. As the law does not provide that it has to be taught, gender identity may be approached differently from teacher to teacher, from class to class, from year to year, according to mere disposition. Seeing this as indoctrination by omission would be an exaggeration. Teachers miss providing certain information all the time and this fact, taken alone, does not prove that it was done so as to indoctrinate. In order to respect the right to education, which is to be understood in view to the formation of members of a democratic society, the state is supposed to manifest a certain care for creating and maintaining a pedagogic framework allowing for proper civic education, including that of democratic values, such as equality under its different aspects, but should not be expected to pursue a teacher for failing to deliver one particular information. So, contingent omission does not amount to indoctrination.

But then, the purpose of constraining people to adopt the idea favoured by the state, which they are presented to be the absolute truth – although a competing idea challenges it, can be followed not just by adopting a law, but by a quasi-universal practice. That is, even if there is no legal constraint one way or another, teachers may still not bother to mention anything about gender identity, since there is no law compelling them to do so. Then, teachers may change their view and teach only about gender identity, concealing or actively criticising the now reputedly anachronistic view that sex and gender are the same.

If indoctrination is possible to be produced by an omission prescribed by the law, then it should also be seen as such when it is the result of a quasi-universal practice, even in the absence of a law, as the practice would be just as unconstitutional as the law.[10] This means that the state has a positive obligation to create and maintain a legal

[10] Indeed, repressing an unconstitutional practice, which is not related to constitutional procedures, exceeds the jurisdiction of the Constitutional Court, therefore it belongs to regular courts.

framework allowing people to act in order to stop or to change an unconstitutional practice, such as indoctrination by omission. Eventually, either directly by law or indirectly by court judgments, the state would have to prescribe the proper conduct in order to exclude indoctrination.

The guiding principle in this regard is pluralism, which, according to article 8 paragraph 1 of the Constitution, "*is a condition and a guarantee of constitutional democracy*". "*Pluralism manifests in all ambits of life: social, political, labour-union, organic or institutional. Pluralism means, then, spirit of tolerance, mutual respect and pacifism*" (Deaconu, 2017, p. 37). It is because of pluralism, meaning the social value that is attached to diversity, that the respect for freedom of conscience and for the other human rights is a reality or at least a reasonable expectation.

In this line of thought, the democratically prescribed conduct is one, which overtly favours diversity: there should be a proper way for teachers to inform pupils and students about the concept of gender identity, because, whether one accepts it or not, it is a conception certain people share without truly harming the others. Favouring diversity, the Court indirectly favours the gender identity upholders, as their adversaries deny pluralism by maintaining that gender and biological sex are the same.

However, the Court insists in keeping the position opposing gender identity within the frame of pluralism, even when it is directed against pluralism. This exercise of ostensible "neutrality" is confusing. After all, the debate about gender identity is just about another opinion or it is more than that? Is it concerning a non-religious conviction, maybe competing certain religious beliefs? Is it a matter of human rights, of equality, of respect for the private life?

These questions lead right back to the start. What are education and gender identity about?

2.3 Education is a Limitation of the Freedom of Thought

Leaving aside the "neutrality" exercise, meant to emphasize that education involves knowing and debating several opinions, accepting diversity and sometimes the conflict of ideas, the reasoning of the Court seems to miss the point that education is, in itself, a limitation of the freedom of thought. It is widely stated that freedom of thought is absolute (Sudre, 2019, p. 786), but education is nonetheless an exception.

Education, either performed by parents and tutors or by schools, is meant to shape and to influence thought. Any piece of knowledge does that: adding a fact to a previous reasoning, due to finding out relevant information, may lead to a different conclusion than before. As one might think that, in this way, he or she has gained something for his or her conscience, another may perceive it as a loss. Learning one thing may discredit what was learned before. Not learning it prevents from knowing the truth. It so happens that, as the discussed case proves, education influences thought either by action or by omission. And so, it is in itself a limitation of the freedom of thought.

Performed institutionally, education changes people and is doing it by systematically following the aims the Court referred to in § 79 of its decision, as provided by article 4 of the Law regarding national education; among them, "*education in the spirit of dignity, tolerance and respect for fundamental human rights and freedoms.*"

Freedom of thought allows people to conceive life and the world in complete contradiction with the spirit of universal human dignity, tolerance and human rights. Everybody is entitled to disregard certain people or groups of people, no matter who constructed the stereotypes this attitude feeds upon. Nevertheless, pluralism does not spread that far as to provide for its own destruction, that is for an "impartial" education

DOI: 10.46282/blr.2021.5.2.236

about the values of tolerance and those of persecution, about human rights and the disregard of them, about equality before the law, aside with collective privileges and absolute collective identities.

As a common way of reproducing its values, any state uses the education system to shape the thought of its citizens. A democratic state does that by teaching them democratic values, including tolerance, human rights, human dignity, equality before the law. It does that in spite of certain citizens not acquiescing to these values. As the Court notes in the same § 79, the state aims to empower citizens to enjoy their rights and freedoms, beginning with their freedom of thought. This, by definition, requires rejecting the challenging doctrines of individual disempowerment, as it happens to be that which denies the mere existence of gender identity.

Therefore, the principle that "*the protection of freedom of thought implies the prohibition of any kind of indoctrination, of imposing an ideology*" (Selejan-Guţan, 2020, p. 256) must not be taken to the extreme. Democratic values, as ideological in nature as they are, since they do not derive from revelation nor from science, are to be taught in schools. Pluralism excludes its own denial. Tolerance excludes intolerance.[11] Equal respect for human rights excludes preventing people to learn that explicit provisions of the law guarantee it.

As education is by itself a limitation of freedom of thought, but not to the extent of indoctrination, a line has to be drawn between the two notions. If a certain fact is unsure, controversial or subject to religious or philosophical belief, the school is to be neutral. This is the case of scientific uncertainty, of religious revelation and dogma or of opinions related to the political game. But if a fact is reasonably certain, there is no justification to hide behind neutrality, which simply does not apply to such cases. There is no point in telling children things that are utterly untrue or to cast doubt over things which are certain. Neutrality is not there to equalize truth and untruth. Neutrality is not a means to prevent the reproduction of a culture based upon the state guaranteed exercise of equal human rights. Neutrality is a means to realize all that. Hence, state neutrality does not preclude, but instead requires, that young people are educated not to discriminate against others, including on grounds of gender identity. In this way, they will be able to fully enjoy their rights and freedoms while respecting those of others. Neutrality and non-discrimination are inter-related, as discrimination exhibits prejudice, and state indifference to discrimination, due to the refusal to recognize an identity factor such as gender, would prove all but neutrality. So, neutrality can never serve as an argument for indifference to discrimination.

2.4 "A World View"

In Romanian constitutional law, freedom of conscience is regularly defined as the right to adopt, to have, to change, to manifest or to abandon "a world view".[12] The term conspicuously reflects the concern to encapsulate religion and non-confessional doctrines, as well as the lack of any of them. Whereas the expression holds the merit of being integrative, it is not to be taken literally.

[11] It was shown that „*tolerance should not be tolerated unless the intolerant response to intolerance will reduce significantly the total level of tolerance in society as a whole or will cause undesirable harm to desirable values or interests*." (Nehushtan, 2018, p. 38). These exceptions exceed the matter here discussed, as the analysed provision of the law did not respond to such objectives and gender identity teaching is not reasonably expected to produce or increase intolerance within society, nor any breach to democratic values.

[12] See Muraru (2019, p. 250). The notion evokes the German concept "Weltanschauung", meaning "a general world view" (Blackburn, 2016, p. 504).

The notion appears to be extremely wide, although, in my opinion, it excludes two important domains that have a lot to do with "a world view": science and ideology. Science involves many times a diversity of opinions, but in some matters it is certain. In common algebra, 1+1=2. Manifesting a different belief does not express "a world view", but a generally recognized scientifical failure. Then, scientifical controversies are to be carried on scientifical grounds. A scientifical truth or possibility may be accepted or not in terms of either conscience or ideology, but this kind of acceptance or denial is external to science itself. Ideology, understood as any doctrine regarding the organization and functioning of society and public power, encompasses certain values and technical means necessary to this end. Law reflects both democratic values and many bits of different comprehensive ideologies selected through the democratic process. Law, and human rights in particular, image themselves "a world view". And yet, being ideological in its core, law, as well as the ideologies it puts in place, is not a manifestation of freedom of conscience. One does not have to obey the law only when subscribing to its deeply perceived moral meaning. Also, one does not have the right to obtain a change within the law only to put it in line with a "world view". Abiding by the law, breaking the law, criticising the law, militating for amending the law, even when they originate from the principles and norms of a religious or an equivalent non-confessional doctrine, or make up no more than a political ideology, are not manifestations of freedom of conscience.[13] They are the manifestations of an ideology, be it attached or not to a religious or to a non-religious doctrine.

Not seeing this difference between religious and non-religious doctrines on the one hand and science and ideology on the other may lead, as it so happened, to the error of taking gender identity for a matter of freedom of conscience.

In fact, gender identity is partly scientifical and partly ideological. It is scientifical to the extent it involves the cognition of the objective fact that there are people who sincerely think that their or other people's gender is different than their biological sex. This is a matter central to the individual identity of those who state it with regard to their own persons, their sense of themselves, which significantly influences their lives. It is ideological insofar as it is socially valued as an expression of diversity and a fulfilment of pluralism, a way of recognizing equal human dignity and equal human rights. Gender identity recognition falls within the principles of democracy, understood as a social system designed for the protection of human rights. From democratic ideology, gender identity passed into law, benefiting from a non-negligible legal recognition. Essentially, gender identity recognition expresses principles of equality, justice and human dignity. On the other part, it does not show any democratic downfall; it does not harm or threaten other people's rights and freedoms, it challenges only intolerance, which anyway falls outside the law (article 29 paragraph 2 of the Constitution).

To conclude, endorsing gender identity recognition is not, in my opinion, a manifestation of freedom of conscience, since it only involves a partly scientific and partly ideological opinion; therefore, it is protected under the common regime of freedom of expression. Endorsing a contrary opinion follows the same path. However, the two

[13] As I have argued elsewhere, the conscientious objection is a typical manifestation of freedom of conscience. Even if the law does not expressly provide for it (meaning there is no norm of accommodation), so that, to the unaccustomed eye, it may appear as a breach of law, the conscientious objection actually lies within the law (Stănescu-Sas, 2020, p. 48). Whether the objection is admissible or not depends on the proportionality of the legally prescribed obligation, considered as a limitation of the freedom of conscience, with the legitimate aim pursued, in as far as this limitation is necessary in a democratic society. For more see ECtHR, Bayatyan v. Armenia [GC], App. No. 23459/03, 7 July 2011, § 112.

DOI: 10.46282/blr.2021.5.2.236

opinions are not equal, since one is tolerant, therefore democratic, and the other is not. Teaching that gender exists as a concept different from that of sex (a fact which is expressly provided by national law)[14] is no more than civic education, to which the young citizens of a democratic state are entitled to, under their right to education. In the end, parents' and tutors' convictions may not deny them the realization of this human right.

3. TEACHERS' FREEDOM OF CONSCIENCE

3.1 A Breach of Freedom of Expression

I remind that the Court found the analysed provision in violation of freedom of conscience, as far as both freedom of thought and freedom to express an opinion endorsing gender identity are concerned. I supported only the first conclusion, in the part that regards pupils' and students' freedom of thought, as the new provision prescribed an indoctrination by omission. However, in my opinion, it did not interfere with their freedom to manifest their convictions, as well as their parents' convictions, since gender identity recognition is a matter of basic civic education, in line with the values of a plural, democratic society.

The Court also found a breach of teachers' freedom of conscience, the criticised provision forcing them to adopt and to express only the opinion recognized and promoted by the state, which, in the field of education, rejects gender identity recognition (although it promotes it, by law, anywhere else). I don't see how the teachers' freedom of thought is touched by this provision, but this issue is marginal. More important is whether their freedom of conscience is involved.

In this point, the legal reasoning meets the ambit of freedom of expression. The Court stated that "*prohibiting access to the knowledge of an opinion and to its expression only because it doesn't concord with that of the state over an issue – hereby gender identity – appears from this perspective as a manifest violation of freedom of conscience in a democratic society, impossible to subsume to the limits provided*" exhaustively by article 30 paragraphs 6 and 7 of the Constitution[15] (§ 94). According to these provisions, "*[f]reedom of expression may not affect dignity, honour, person's private life and the right to one's own image*" and the following actions are prohibited by law: "*defamation of country and nation, incitement to war of aggression, to national, racial, class or religious hatred, to discrimination, to territorial separationism or to public violence, as well as obscene manifestations, contrary to morals.*" Additionally, the Court found the criticised provision to be in contradiction with the principle of academic freedom, as provided by article 123 of Law No. 1/2011 regarding national education, and also in violation of the constitutional principle of academic autonomy, provided by article 32 paragraph 6 of the Constitution (§§ 95 and 90). The Court concluded that "*the prohibition of the free expression of the theory of gender obviously brings about the prohibition of any research initiative in this field, the criticised provision imposing, independent of any free debate or research, a dogmatic, truncated education, restraining for the free expression of teachers and the beneficiaries of the act of education, ignoring their right to opinion*" (§ 90).

[14] *Infra*, note 17. Also, article 2 paragraph 5 of Government Ordinance No. 137/2000 regarding the prevention and punishment of all forms of discrimination, republished in the Official Monitor of Romania, part I, No. 166/7, March 2014, defines harassment making explicit reference to gender. Article 4 paragraph 2 letter l) of Government Ordinance No. 43/2003 regarding the achievement and administrative change of name by individuals, published in the Official Monitor of Romania, part I, No. 68/2, February 2003, provides for the right to change one's first name following a sex change operation.

[15] Romania, Constitutional Court of Romania, decision No. 650/25, October 2018, published in the Official Monitor of Romania, part I, No. 97/7, February 2019, § 584.

It is unquestionable that the analysed provision breaches the freedom of expression of pupils and students as well as that of teachers. It is an interference with this fundamental freedom that is not justified by any legitimate aim, provided by article 30 paragraphs 6 and 7 of the Constitution or by article 10 paragraph 2 of the European Convention of Human Rights.

Still, the interpretation of the criticised provision in the sense that gender identity recognition does not concord with "the opinion" of the state is not to be taken lightly. The same goes for the Court's notice in § 83 that the said provision expresses "*the wish of the state, through its authorities, to promote at a certain moment a conception about the notions of "sex" and "gender*"." What is retainable here is that the Court qualified the examined provision as the expression of an opinion of the state or of the wish of the state; as if two contrary opinions capered through society and the state adopted one of them; it cannot force people to adopt it, but can nonetheless hold it. In my view, this equation does not hold.

If there were actually two contrary opinions, and they had political meaning, the solution that is adopted by law necessarily reflects the "opinion" of the state. Nobody would reasonably question the prerogative of the state to enforce its "opinion" upon society and apply the said legal solution. During this time, political debate whether the other solution is better or worse remains open and protected by freedom of expression. But the "opinion" of the state is always that which stems from its current legislation. There cannot be an "opinion" of the state outside its legislation, because, under the rule of law, the state cannot express "opinions" but by its law.

In the case hereby, the only expression of the "opinion" allegedly directed against the concept of gender identity came from a provision found to be unconstitutional, which therefore never entered into force; so, there is not and there cannot actually be any state "opinion" denying the said concept, as it is not even possible to express it within a valid, constitutional legislation.

3.2 Gender Identity and Equality before the Law

Keeping equality before the law in the field of the right to education, the Court secured the former solely on the grounds that the criticised provision discriminated against those who preferred to study the gender identity theory (§ 85), but failed to state on the issue which is the most striking: prohibiting, by law, the dissemination of the simple existence of the concept of gender identity is in itself a breach of the principles of equality before the law and of non-discrimination. Here, the matter is not whether God created man or the latter just evolved from monkey, which are two conflicting theories that equally reject each other. This is about the social recognition of individual identity, faced with denial. On the one hand, somebody states his or her own identity; on the other hand, somebody denies somebody else's identity, while keeping his or her own safe. Gender identity recognition is a facet of equality, so that everybody can have a say about his or her own identity, while bluntly denying somebody else's identity is no more than a facet of discrimination. This ideological conflict is not to be dealt with the serenity which otherwise attends opposing opinions which do not involve denying the contenders' conception of themselves.

Therefore, if the criticised provision were phrased the other way round – that gender identity is to be mentioned during some class in schools, I believe it would have been constitutional, as it responded the already quoted aim of education provided by article 4 of the Law No. 1/2011, to be "*in the spirit of dignity, tolerance and respect for fundamental human rights and freedoms*", the latter being a supreme value of the state

DOI: 10.46282/blr.2021.5.2.236

(article 1 paragraph 3 of the Constitution). Teaching about gender equality may require a little more skill than teaching against racism, antisemitism or homophobia, may need a certain pedagogic contribution as to which is the proper age for introducing it to young people and which are the proper educational means to do that, but it is not any different in essence; it is still about teaching tolerance, equal respect and non-discrimination.

The Court did not follow this line of thinking. It found the criticised provision to be "almost anachronistic", because it bluntly restricted access to education concerning "*a notion which, by the multitude of legal, sociologic, psychologic meanings, may entail a variety of study and research areas"* and which is *"long time present within the social and legal landscape*" (§ 86). Here, the Court recalled that the authors of the bill intended to forbid only "*proselytism, meaning the acts of convincing young people to embrace an idea/theory*". In that case, "*maybe there could have been made considerations in terms of the conditions to restrain rights and freedoms*". But "*[h]iding/denying/repressing an opinion does not prompt its disappearance and neither can "protect" the individual from the allegedly detrimental effects the state would wish to prevent, as far as children and youth education is concerned*" (§ 87).

To put it simply, the Court recognizes the right of pupils and students to be educated in relation to gender identity, since this is a serious concept, which deserves to be studied. The Court fails to point out that gender equality, all the more so reflected in legislation, is an aspect of equality before the law which itself is a principle to be taught as such. The evocation of the initial bill is, in this context, troubling. The initiators intended to prohibit "proselytism on grounds of gender",[16] as defined by article 4 letter d[3]) of Law No. 202/2002 regarding the equality of chances and treatment between women and men[17] - version initially adopted by the Chamber first seized.[18] So, actually, teachers were meant to be prevented from endorsing, in the exercise of their job, an explicit provision of the law, which defines a facet of the constitutional principle of equality. And still, the Constitutional Court found that, if this version had been adopted, maybe it would have performed a check upon the legitimacy to limit the exercise of rights and freedoms – meaning that a certain limitation of the right to education might be taken into consideration, as some pupils and students would sustain a limitation into their alleged right to avoid education in the letter and spirit of equality before the law. Nevertheless, envisaging such a right is rather dubitable, since it falls outside the scope of education in a democratic society, which involves the recognition and valorisation of equality and of diversity in all its forms.

In the end of the decision, the Court stated that "*Romanian legislation prohibits discrimination on grounds of sexual orientation, provides legislative solutions for situations*

[16] This is an interesting case of reverse legal rhetoric. Instead of prohibiting discrimination on grounds of gender, as the law already provides, the initiators intended to prohibit „proselytism *on grounds* of gender", using the same language, but reversing the sense. The term "proselytism" was obviously out of place, since the debate was not about adopting a doctrine, which is totally optional, but about the shape and size of equality before the law. The words "on grounds of gender" [*"pe baza criteriului de gen"* – in original], attached to "proselytism", instead of "discrimination", induce the idea that the prohibition of discrimination was only the manifestation of a creed, that is not to be exercised by dissenters, but only by "proselytes". An independent analyst might however notice that the blunter wording of the prohibition eventually adopted by the Senate, replacing the insidious wording of the initial version, was more likely to fail in front of the Constitutional Court, as the reasoning of the its decision illustrates.

[17] Republished in the Official Monitor of Romania, part I, No. 326/5, June 2013. According to article 4 letter d[3]), gender is "*the entirety of roles, behaviours, features and activities that society sees fit for women and, respectively, for men*."

[18] Law regarding the amendment and addend of Law No. 1/2011 regarding national education – project No. PLX617/2019, adopted by the Chamber of Deputies, as Chamber first seized, available at: https://www.senat.ro/legis/PDF/2020/20L087FC.PDF (accessed on 15.11.2021).

of sex change, the distinction between "sex" and "gender" [being] connected, by article 20 of the Constitution, to the international legal framework." In this context, the criticised provision "*equates with the passing of legal solutions that mutually exclude, making a confuse and contradictory normative framework*" (§ 99). This "*conceptual contradiction of the legislator […] cannot be accepted because it generates a lack of coherence, clarity and predictability of the legal norm, putting the subjects of the law in the position of not being able to adapt their conduct*." In this sense, the Court found a breach with the rule of law and the principle of abiding by the Constitution and laws (article 1 paragraphs 3 and 5 of the Constitution), as well as with the primacy of international provisions regarding fundamental human rights (article 20 paragraph 2 of the Constitution) (§ 100).

Beyond this, it should not be absconded that the conspicuous contradiction between the criticised provision – literally a denial of education related to the concept of "gender equality" – and the principle of equality, sustained by the whole legal framework providing for non-discrimination on grounds of gender, which the Court carefully reviewed in §§ 51-76 of its decision, is due to the breach of the principle of equality itself. The Court acknowledges that gender identity is provided by the national law and by international instruments regarding human rights, which hold primacy over national legal provisions, according to article 20 paragraph 2 of the Constitution, but allows for the interpretation that, in the same time, gender identity is established anywhere else but in the Constitution of Romania. Were the national and international legislation recognizing gender identity ever to be repealed, so that the contradiction just faded away, then it would seem unclear whether the Constitution opposed.

The principle of equality before the law, provided by article 16 paragraph 1 of the Constitution of Romania, in the context of the principle of pluralism, provided by article 8 paragraph 1, is nevertheless not hollow. It encompasses, beyond its wording, a whole democratic culture of human rights, in the shadow of the supreme values provided by article 1 paragraph 3, among which are human dignity, citizens' rights and freedoms, free development of human personality and justice. Whether recognizing and teaching gender identity is meant to realize or, on the contrary, to violate any of these supreme values is not actually a genuine legal quarrel.

3.3 Manifestations of Conscience in a Democratic Society

In order to conclude, one more clarification is needed. It may appear that, since gender identity is already recognized by national and international legislation, the prohibition of its dissemination would run against the conscience of typical members of a democratic society. That is, since gender identity recognition reflects democratic values, namely those of pluralism and equal respect for individual human rights, its exterior manifestation might be taken for an act of conscience. I believe it is not. It is still a manifestation of an ideology and therefore it has nothing to do with freedom of conscience.

Calling democratic values ideologic is not to be taken by democratic consciences as offending, nor by the antidemocratic as encouraging. Both perceptions would be utterly wrong. As already stated, democratic values are ideologic since they are neither products of revelation, nor of science. The fact that they are incorporated into law and law forms a science, does not take away their ideologic nature, as the roots of law are always ideologic. Law is about enforcing a conception of justice that nature fails to produce itself. It is not the law that made up social values, but the other way round. There was a social need for law and a respected legal order, based upon already existing values, even before the law existed. Equality before the law stands within the law only because

DOI: 10.46282/blr.2021.5.2.236

members of democratic societies value it in the form they do. Human rights, justice and human dignity spring from religious and philosophical doctrines whose proponents have passed the frontiers of their closed circles and engaged into a free political society. Values which are religious or philosophical in their origin join other values and so become political; or, to say the word again, ideological.

In order to turn into law, a religious or philosophical principle enters the political market, where it assumes an ideologic nature, as only is this form it may be negotiated to become a part of the social contract and thus be adopted by the whole society. The whole society, at least when it is democratic, never professes a certain religion or equivalent philosophic doctrine; people profess many of those. Although it rejects the sectarian value of a principle that has been presented, it may still adopt it in the light of its ideologic form. An entire society, as well as the state it is organized in, does not profess a religion or an equivalent philosophical doctrine. It only professes a contractual ideology; the fact that the latter may be a synthesis of religious and non-religious doctrines is irrelevant as far as its nature is concerned.

It is not the social value of an idea (whether it is democratically "good" or "bad") that makes it an act of conscience. It is rather its nature. No matter if it springs from a religious or an equivalent philosophical doctrine, when the idea turns political, its nature is no more than ideologic. For instance, the commandment to help the needy may be religious or philosophical, but when it turns into principles of a state operated social security system, it becomes ideologic. Passed into law, the obligation to contribute to a public budget that serves also to this end is no longer a matter of free choice; people have to pay whether they believe in its purpose or not. When religious or equivalent philosophical commandments pass onto the political stage to attempt being translated into laws, they are no more than other political claims. They are protected by freedom of expression, but they are not manifestations of freedom of conscience.

I do not expect opposition to the idea that teachers are prohibited from expressing, within the exercise of their profession, ideas which are of an undisputed antidemocratic nature, like supporting the activity of suicide bombers who make political claims in order to establish a religious state, of those who commit violent attacks against crowds or individuals as a response to religious frustration or of those who work to establish a dictatorship. People's conscience can produce all that. It is their freedom of thought. It is the way they may "view the world". But nevertheless, in order to protect both public order and the rights and freedoms of other people, teachers are prevented to manifest such thoughts in class, even if they sincerely and intensively hold them. There is no conscientious objection admissible is this regard because all these are only political (therefore ideological) claims, situated outside the scope of freedom of conscience. It is only the exercise of freedom of expression that is limited here.

As the apology of antidemocratic ideas exceeds the ambit of freedom of conscience, so does the apology of democratic values, such as gender equality. There is no reason to force the scope of application of freedom of conscience, stuffing the endorsement of democratic values inside it. These are well protected under the freedom of expression and the other rights and freedoms related to political action, such as the right to association and the freedom of assembly. But, most of all, their nature is ideologic and has nothing to do with the manifestations of conscience. To state otherwise is to jam both democratic and antidemocratic manifestations into the scope of freedom of conscience and finally to erase any difference between that and freedom of expression, so that freedom of conscience is devoid of its substance.

4. CONCLUSION

I have argued that prohibiting the dissemination of an idea within education institutions is a case of breach of pupils' and students' freedom of thought, since the *forum internum* is indivisible, in the sense of article 29 paragraph 1 of the Constitution. At the interior level, there is no distinction between thoughts, according to their nature, so they (or, more exactly, the thought itself) are evenly protected.

However, at the exterior level, that of manifestations, a clear distinction must be drawn between religious or philosophical acts of conscience on the one hand and ideological manifestations on the other hand. While both are protected by freedom of expression, only the former are protected by freedom of conscience. Holding democratic values, as well as antidemocratic views, is protected by freedom of thought (which is a part of freedom of conscience), but their exterior manifestation exceeds the scope of this fundamental freedom. This is due to their ideologic nature, as they underlie or at least aim to shape the way society and public power are organized and function.

In the exercise of an ideology, since freedom of conscience is not applicable, there is no conscientious objection. This is true either if the stance taken is the expression of democratic values or it is the expression of contrary views.

The concept of gender identity serves well as a means to explain this distinction. It is connected to freedom of conscience as far as its interior dimension (freedom of thought) is concerned, as prohibiting the dissemination of this concept within the educational system amounts to indoctrination by omission. But this is only because thought is indivisible. This prohibition has however nothing to do with any manifestation of freedom of conscience. Instead, it breaches the freedom of expression, the right to education, academic autonomy, human dignity, as well as equality before the law.

A democratic state cannot be "neutral" as far as both democratic values and their contrary are concerned. It openly supports democratic values[19] and is expected to refute views, which are contrary. It promotes and enforces equal individual rights and freedoms and, to this purpose, it sanctions discrimination. This does not mean that the state is to recognize any alleged individual or collective identity. But gender identity recognition and its corollary, gender equality, are already recognized and protected by the law. As the Court stated in § 57, "*the Constitution contains no distinction as to identify the belonging to the feminine (or masculine) sex turning to biological or some other kind of criteria. Article 16 correlated with article 4 of the fundamental Law enshrines formal equality, regardless of sex*." This is a way of saying that the constitutional concept of "sex" might actually be read also as "gender". Even if the Court's reasoning did not eventually follow this reading of the Constitution when it found violations of several of its articles, as previously shown, but instead accepted to integrate both gender identity recognition and its denial in the sphere of a pluralism of opinions, I believe that gender equality can be found within the Constitution, either if "sex" is read as "gender", as the Court seems to imply, or if the general wording of the principle of equality before the law in article 16 paragraph 1 of the Constitution incorporates gender as any of the relevant facts of life that shall not be a ground for discrimination.

[19] In this regard, it was shown that „*the terms "Constitution" and "constitutionalism" refer to the enforcement of certain conducts, according to a certain selection of values intrinsic to a human community*" (Deaconu, 2020, p. 111).

DOI: 10.46282/blr.2021.5.2.236

BIBLIOGRAPHY:

Blackburn S. (2016). *The Oxford Dictionary of Philosophy*. Third edition. Oxford: Oxford University Press. 531 pages. ISBN 978-0-19-873530-4.
Deaconu Ş. (2020). *Drept constituţional*. Fourth edition. Bucharest: C.H. Beck. 266 pages. ISBN 978-606-18-1016-1.
Deaconu Ş. (2017). *Instituţii politice.* Third edition. Bucharest: C.H. Beck. 315 pages. ISBN 978-606-18-0720-8.
Ionescu C. (2017). Commentary of Article 29. In: Ionescu, C. and C. A. Dumitrescu (eds.), *Constituţia României. Comentarii şi explicaţii*. Bucharest: C.H. Beck, pp. 383-401. ISBN 978-606-18-0681-2.
Muraru I. (2019). Commentary of Article 29. In: Muraru I. and E.-S. Tănăsescu (eds.), *Constituţia României. Comentariu pe articole*. Second edition. Bucharest: C.H. Beck, pp. 249-256. ISBN 978-606-18-0847-2.
Nehushtan Y. (2018). *Intolerant Religion in a Tolerant-Liberal Democracy*. Oxford and Portland, Oregon: Hart Publishing. 203 pages. ISBN 978-1-50992-008-2 and 978-1-84946-605-9.
Safta M. (2020). *Drept constituţional şi instituţii politice. Vol. II. Instituţii politice*. Third edition. Bucharest: Hamangiu. 384 pages. ISBN 978-606-27-0675-3.
Selejan-Guţan B. (2020). *Drept constituţional şi instituţii politice. Volume 1*. Fourth edition. Bucharest: Hamangiu. 306 pages. ISBN 978-606-27-1643-1.
Stănescu-Sas M. (2020). Impactul măsurilor de prevenţie sanitară dispune în context pandemic asupra manifestării libertăţii conştiinţei. In: Dimitriu O. (ed.), *Probleme şi soluţii legale privind criza COVID-19*. Bucharest: C.H. Beck, pp. 43-67. ISBN 978-606-18-1000-0.
Sudre F. et al. (2019). *Droit européen et international des droits de l'Homme*. 14th edition. Paris: Presses Universitaires de France. 946 pages. ISBN 978-2-13-080791-9.
Constitution of Romania, republished in the Official Monitor of Romania, part I, No. 758/29, October 2003.
ECtHR, Bayatyan v. Armenia [GC], App. No. 23459/03, 7 July 2011
ECtHR, Campbell and Cosans v. United Kingdom, App. No. 7511/76 and 7743/76, 25 February 1982
ECtHR, Enver Aydemir v. Turkey, App. No. 26012/11, 07 June 2016
European Commission of Human Rights, Arrowsmith v. United Kingdom, App. No. 7050/75, report of 12 October 1978
European Commission of Human Rights, F.P. v. Germany, App. No. 19459/92, decision of 29 March 1993
Government Ordinance No. 43/2003 regarding the achievement and administrative name change by individuals, published in the Official Monitor of Romania, part I, No. 68/2, February 2003.
Government Ordinance No. 137/2000 regarding the prevention and punishment of all forms of discrimination, republished in the Official Monitor of Romania, part I, No. 166/7, March 2014.
Law No. 1/2011 regarding national education, published in the Official Monitor of Romania, part I, No. 18/10, January 2011.
Law No. 202/2002 regarding the equality of chances and treatment between women and men, republished in the Official Monitor of Romania, part I, No. 326/5, June 2013.
Law regarding the amendment and addend of Law No. 1/2011 regarding national education – project No. PLX617/2019, adopted by the Chamber of Deputies, as Chamber first seized, available at

https://www.senat.ro/legis/PDF/2020/20L087FC.PDF (accessed on 15.11.2021).
Law regarding the amendment and addend of Law No. 1/2011 regarding national education – project No. L87/2020, adopted by the Senate, as decisional Chamber, available at: https://www.senat.ro/legis/PDF/2020/20L087LP.PDF (accessed on 15.11.2021).
Romania, Constitutional Court of Romania, decision No. 907/16, December 2020, published in the Official Monitor of Romania, part I, No. 68/21, January 2021.
Romania, Constitutional Court of Romania, decision No. 650/25, October 2018, published in the Official Monitor of Romania, part I, No. 97/7, February 2019.
Romania, Constitutional Court of Romania, decision No. 485/6, May 2008, published in the Official Monitor of Romania, part I, No. 431/9, June 2008.

DOI: 10.46282/blr.2021.5.2.236

DISCUSSION PAPERS AND COMMENTARIES

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

TOOLBOX OF THE PUBLIC ADMINISTRATION ENTITY. INTERSECTION OF THE PRINCIPLE OF LEGALITY AND ADMINISTRATIVE DISCRETION IN EXERCISING THE REVOCATION OF AN ADMINISTRATIVE DECISION: THE CASE OF LITHUANIA / Simona Bareikytė

Simona Bareikytė
PhD. Student
Vilnius University, Faculty of Law
Saulėtekio al. 9 - I rūmai
10222 Vilnius
Lithuania
simona.bareikyte@tf.vu.lt
ORCID: 0000-0002-4502-8619

Abstract: *For some, revocation of an administrative decision arises doubts, for others, it is a legal measure ensuring that public administration entities are able to respond to changing circumstances and adopt not only legitimate, but also fair decisions by striking a balance between private and public interests. This paper aims to analyse the choice of Lithuania with respect to the implementation and application of the public administration entities right to revoke its previously adopted administrative decision. In order to achieve this goal, the results of analysis of the role of the principle of legality and administrative discretion in the decision-making process, legal regulation of public administration and case-law are revealed. The analysis will show that there is room for the possible systematisation of the administrative procedures, aiming to ensure that public administration entities are able to respond to the ongoing changes in order to fulfil the objectivities based on which the particular public administration entities were established.*

Key words: *administrative procedure; revocation; legality; administrative discretion; Lithuanian law.*

Suggested citation:
Bareikytė S. (2021). Toolbox of the Public Administration Entity. Intersection of the Principle of Legality and Administrative Discretion in Exercising the Revocation of an Administrative Decision: The Case of Lithuania. *Bratislava Law Review*, 5(2),63-74. https://doi.org/10.46282/blr.2021.5.2.255

Submitted: 09 July 2021
Accepted: 07 October 2021
Published: 30 December 2021

1. INTRODUCTION

Public administration entities have the power, in accordance with the requirements of legal acts, to adopt administrative decisions, which have direct legal effects[1] with respect to those for whom they have been adopted or indirect legal effects on other interested parties. In legal rules-based societies, natural people and legal entities coordinate their actions and activities in accordance with administrative decisions.

[1] For instance, to grant a request or benefits, to impose sanctions (disciplinary or service penalties, economic sanctions, fines, or enforcement obligations), to issue permits, licences or certificates which are entitling a natural person or legal entity to engage in certain activities, etc.

Therefore, it is not surprising why people expect from public administration entities not to "*change their minds*" after adopting administrative decisions. But it is also not surprising why this "expectation" has been denied by accepting the fact that in a dynamic field of public administration, administrative decisions taken by public administration entities could be revoked by the same public administration entities (so-called Revocation of administrative decision[2]).[3]

The establishment of the Revocation of administrative decision in a number of legal acts regulating administrative procedures is usually based on the aim to ensure that public administration is flexible enough to be sufficient to respond to changes and that public administration entities are provided with sufficient legal means to adopt not only lawful but also fair administrative decisions having in mind the possibility of errors, changes in circumstances, etc. Given that the Revocation of administrative decision provides an exclusive right to public administration entities to intervene in a legal relationship established where an arbitrariness could be occur, usually the number of safeguards are developed to ensure that the Revocation of administrative decision would be applied only on a legal basis indicated in legal acts, in accordance with a clear and public procedure and after the assessment how it would affect people to whom the revoked administrative decision had been issued, what benefits it brings to the common good.

In Lithuania, unlike in other European countries,[4] administrative procedures are not codified. Instead, there is variety of special laws, regulating different regulatory fields. No significant changes have been taken in place in legal regulation of public administration since the declaration of Lithuania's independence. But from 2020 November 1 the new version of the Law on Public Administration has been entered into force. From that day, public administration entities in addition to have the power to adopt administrative decisions as well have the power to revoke them by declaring that lawful or unlawful administrative decisions are no longer into force (in Lithuanian: *neteko galios*). Taking it into account, the one question arises as to whether the aforementioned legal development is the start of the possible essential changes in the administrative decision-making process.

This and the significance of the meaning of the Revocation of administrative decision for the relationship among public administration entities and natural and legal people reveals the goal of this article – to analyse the "legal road" of Lithuania with respect to the Revocation of administrative decision. In order to fully achieve the set goal, the following tasks have been set: first, to determine the intersection of the principle of

[2] The definition "Revocation of administrative decision" is understood as an act in which the public administration entity revokes its own administrative decision. Taking into account the legal situation in Lithuania and assessing the limited scope of this article, this definition covers cases when unlawful or lawful administrative decisions are revoked, and when the legal effects of revoked administrative decisions are considered to have disappeared *ex tunc* or *ex nunc.* A more detailed analysis of these cases is needed in the future.

[3] This is approved by legal scholars (Schønberg, 2003), Council of Europe (see Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration, S 21 (2007)) and the legislators of the different States (see the Polish Code of Administrative Procedure, Chapter 13 (1960), the Italian Administrative Procedure Act, Chapter IV-bis (1990), the German Administrative Procedure Act, S 48 and 49 (1976), the Spanish Law on Administrative Procedure of the Public Administrations, S 109 (2015), the Austrian General Administrative Procedure Act, S 68 (1991), the Slovenian General Administrative Procedure Act, S 278 (1999), the Croatian General Administrative Procedure Act, S 129 – 131 (2009), etc.) and European Union (Research Network on EU Administrative Law, S III-35 and III-36 (2017). Proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration, S 23 and 24 (2016)).

[4] See ref. 3.

legality and administrative discretion. This is necessary to uncover the general idea of the public administration entities powers and their limitations in Lithuania; second, to analyse the legal context and *status quo* of the legal regulation regarding the public administration entities power to revoke administrative decisions, in order to determine whether a clear procedure of Revocation of administrative decision is in place; third, to analyse the case-law regarding the interpretation of presented legal regulation. This is important to understand whether near the legislative rules, there are rules created by case law regarding the right to revoke administrative decisions. The results of these tasks will help without repeating to formulate final conclusions that focus on future prospects.

In order to achieve the goal of this article, mainly historical, descriptive, method of analysis and induction methods were used.

In addition, some clarification should be noted. In order to reveal the meaning of the Revocation of administrative decision (also – concept of administrative discretion), the legal regulations of other countries were used, but it is not the subject of this analysis. Also, the scope of this research is limited to the adoption of the administrative decisions during the provision of administrative services, supervision and implementation of legal acts and administrative decisions, and administration of the provision of public services.[5] Therefore, the scope of this study does not include the adoption of the normative (regulatory) administrative decisions. This study is also limited to purely internal situations, which means that the analysis of the content of the principle of legality, administrative discretion, and power to revoke the administrative decision is not assessed regarding the implementation of the European Union primary or secondary law.

2. PRINCIPLE OF LEGALITY AND ADMINISTRATIVE DISCRETION IN DESICION-MAKING PROCESS

The most important activity of public administration entities is the adoption of administrative decisions that have negative or positive consequences for natural or legal people. It, therefore, becomes extremely important in analysing what standards (principles) are set for the decision-making process in public administration.

Despite the very wide scope of the public administration, the basic principles that all public administration entities must follow when making administrative decisions are recognized and called "*general principles"* (Dambrauskienė, 2004, p. 145). One of them is the principle of legality, according to which all activities of public administration entities are based, and which is understood as a necessary condition for the consistency of the entire public administration system (Bakaveckas, 2012, pp. 74, 76). This principle is distinct from other legal principles governing public administration, as it contains other principles relevant to the decision-making process and creates a general requirement to adopt administrative decisions in accordance with the requirements indicated in the laws (Bakaveckas, 2012, pp. 74–75). Also, the uniqueness of this principle is reflected in the fact that it directly implements the general principle of public administration that "*only what is provided by the law is allowed"*, which is understood to mean that in the absence of a sufficiently clear legal rules, the public administration entity has no discretion to act in any way.

Having this in mind it is not surprising that the legal doctrine upholds a strict position that public administration entities cannot take any other action without a legal basis, that all actions of the public administration entities must be regulated by laws. It is

[5] In respect of the areas of the public administration indicated in the Lithuanian Law on Public Administration, S 6 (1999).

DOI: 10.46282/blr.2021.5.2.255

worth mentioning that this doctrinal position is supported by the meaning of other general principles of the public administration "*rule of law*", which basically means that the activities of public administration entities must be established in accordance with and comply with the legal bases set out in the laws.[6] This is approved by court.[7] Also it is in comply with the principle of non-abuse of power, which basically means that public administration entities are prohibited from performing the functions of public administration without the powers of public administration granted in accordance with the procedure established by the law or from making administrative decisions for purposes other than those established by the law.[8]

However, it is not possible to regulate all situations. Keeping this in mind, scholars began to think more about the importance of administrative discretion in administrative decision-making process. Unfortunately, there are not many studies analysing which concept of administrative discretion in public administration prevails (Andruškevičius and Paškevičiene, 2011, p. 227). It is limited to declarative reflections that, for instance, administrative discretion is a tool for dealing with situations that are not fully resolved, or that the public administration entities should be left with as little administrative discretion as possible, thus avoiding arbitrariness and (or) abuse. However, neither the doctrine, nor the case-law, nor the legislator has denied the using the administrative discretion in administrative decision-making process.

As the definition of administrative discretion is not provided by the law, its concept is revealed in the case law. According to the case law, administrative discretion is understood as the power which gives the administrative entity a degree of discretion in enabling it to choose the most appropriate action from among the various options available.[9] This position is essentially in line with the French and German concepts of administrative discretion (Seerden, 2018, pp. 27, 90), which is understood as a choice between several legally established alternatives in the administrative decision-making process and assessment of law and facts.

To sum up, in Lithuania, the decision-making process is based on the principle of legality, which ensures the application of the basic principle of all public administration system – "*only what is provided by the law is allowed*". Administrative discretion does not provide a legal basis for adopting administrative decision, which is not provided by the law. Administrative discretion which confers a degree of freedom in the administrative decision-making process is limited to availability to choose one of the legal possible ways indicated in law and to assess both facts and law. It means that any shortcomings in the legal regulation of administrative procedures essentially eliminate the adoption of any possible or needed administrative decision *ad hoc*. The fact that the choice of issuing administrative decision is exclusively limited by the legal regulation established by law in legal doctrine is considered to be one of the mainly shortcomings of the quality of public administration (Andruškevičius, 2008, p. 309).

Taking into consideration, it is therefore necessary to determine whether this doctrinal position will be confirmed by the existing legal regulation of the public administration.

[6] Lithuanian Law on Public Administration, S 3, part 4 (1999).
[7] The Republic of Lithuania, the Supreme Administrative Court of Lithuania, A^{261}-706/2014 (14 May 2014).
[8] Lithuanian Law on Public Administration, S 3, part 8 (1999).
[9] The Republic of Lithuania, the Supreme Administrative Court of Lithuania, A^{415}-2203/2006 (18 December 2006), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A-2995-492/2018 (13 November 2018).

3. LEGAL "CONTEX" AND THE *STATUS QUO*

In Lithuania, public administration is regulated by: (i) the Constitution of the Republic of Lithuania; (ii) the primary and secondary European Union legislation[10]; (iii) Part 4 of Article 72 of the Law on the Constitutional Court of the Republic of Lithuania (regarding the enforcement of administrative decisions taken during the implementation of anti-constitutional legislation (provisions); (iv) the Law on Public Administration (hereinafter referred to as the "LPA"), which establishes the principles of public administration, areas of public administration, systems of public administration entities, administrative procedures, main provisions for the supervision of the activities of economic entities, and guarantees the right of individuals to appeal against acts, omissions or administrative decisions, as well as the right to the examination of requests and complaints of individuals, and establishes other rights and obligations of people and entities in the field of public administration; (v) special laws that govern specific regulatory areas[11] and (vi) the secondary legislation (in Lithuanian: *poįstatyminiai teisės aktai*) that details the legal regulation established in the LPA and special laws.[12]

Even though administrative procedures are not codified, the prevailing position is that public administration is regulated on the basis of the legal regulatory model of *lex generalis* (LPA) and *lex specialis* (special laws), with the view that the public administration first shall be carried out using the LPA. However, in legal reality, legal regulation indicated in special laws is preferred, in compliance with the principle of *lex specialis derogat legi generali*. Even though this problematic regulatory situation is not the subject of this article, the analysis of the Revocation of administrative decision in public administration is performed, considering presented prevailing distinction.

3.1. Lex Generalis

On 1 January 2007, the *Error Correction Procedure* was established in Article 35 of the LPA. In general – the *Error Correction Procedure* did not allow the public administration entity to revoke its administrative decision, because by using this procedure public administration entities were enabled to correct only typographical or technical errors. Mainly the most important aspect of the *Error Correction Procedure* is that it was applied only in the case of "administrative procedure", which in Lithuania is understood as an administrative appeal against an act (omission) of a public administration entity.[13] It means that this procedure was not applied to the administrative decision-making process. This is the reason why until 1 November 2020 there were no general legal provisions indicated in the LPA governing the procedure and grounds on which the public administration entity may lawfully revoke its administrative decision.

Following the abovementioned date, together with Article 15 under which the *Error Correction Procedure* is regulated, Article 16 of the LPA came into force. Currently, the public administration entity may declare invalid (the result is the same as to revoke

[10] Lithuanian Constitutional Act concerning the Membership of the Republic of Lithuania in the European Union, S 2 (2004).

[11] For instance, the Law on the Legal Status of Aliens (2004), Law on Tax Administration (2004), Law on Competition (1999), Law on Competition (2012), Law on the Legal Protection of Personal Data (1996), Law on the Legal Protection of Personal Data (2000), Law on the Legal Protection of Personal Data (2003), Law on the Legal Protection of Personal Data (2008).

[12] For instance, Rules for the Examination of Applications and Complaints and the Servicing of Persons in Public Administrative Entities (2007).

[13] The concept of the administrative procedure is not the object of this article, but the conception which is stated in the LPA is criticised by legal scholars.

DOI: 10.46282/blr.2021.5.2.255

administrative decision) previously adopted illegal or lawful (only if this is permitted under other law) administrative decision, or lawful conditional administrative decision, meaning when the person did not fulfil established conditions within the established period of time. In compliance with Article 17, the public administration entity has the power to declare invalid all administrative decisions which have been made as a result of an illegal influence or fraud. Mainly the most important change regarding the abovementioned legal changes is that legislator started to regulate the administrative decision-making process.

It is needed to note that Article 16 of the LAP is of a declarative nature and it does not contain any indication of *how* the right to declare invalid issued administrative decision should be exercised. There is no time limit, no indicators regarding to which decisions (in a substantive matter) this right could be applied and to which could not, no procedural provisions or indicators about the procedure during which the administrative decision under Article 16 of the LAP (in some cases in conjunction with Article 17 of the LAP) has to be taken. It is not clear how the right to revoke administrative decision has to be exercised (whether for each administrative decision or not, mandatory or optional part of the procedure). Also, considering the legal regulation of other States, it is not clear if the act "to declare invalid" must always end up with the revocation of the previously adopted administrative decision alone, or it may end up with the revocation of the previously adopted administrative decision and the adoption of a new one.

To sum up, Article 16 of the LAP (in some cases in conjunction with Article 17 of the LAP) raises doubts about what is the value ground of the legislator, who decided to adopt such legal regulation, whether the objectives which were sought to be achieved could be actually achieved having in mind the uncovered shortcomings in legal regulation.

3.2. Lex Specialis

First of all, it should be noted that in the special laws, unlike the LPA, the right to revoke a previously adopted administrative decision was legitimised long before.[14]

But the analysis of the special laws reveals that the legal regulation is selective: there are regulatory areas in which the Revocation of administrative decision is established, and there are regulatory areas in which the Revocation of administrative decision is not established. Legal norms indicated in special laws give a wide degree of administrative discretion to the public administration entities to assess facts in respect of special legal regulation of specific regulatory field.

In cases where the right to revoke a previously adopted administrative decision is regulated for the final administrative decisions[15] (Schønberg, 2003), there are no provisions regarding the time limit and provisions of what procedure should be used in order to use this power. Also, there is a lack of procedural provisions, which would be helpful in revealing what steps the public administration entity should make in order to revoke previously adopted administrative decision. In addition, not all grounds (for instance, legal error, factual error, misconduct of the party, etc.) are established as well.

[14] For instance, the Law on Construction (1996), Law on Construction (2001), Law on Local Self-Government of the Republic of Lithuania (1994), Law on Land Reform (1991), Law on State Supervision of Territorial Planning and Construction (2013), Law on the Bank of Lithuania (1994), Law on Banks (2004), Law on Central Credit Unions (2000), Law on Credit Unions (1995), Financial Instruments Law on Markets (2007), Law on Collective Investment Undertakings for Informed Investors (2013), Statute of the Internal Service (2003), Law on the Protection of Persons and Property (2004), Law on the Control of Weapons and Ammunition (2002), Law on Animal Breeding (1994), Law on the Legal Status of Aliens (2004), Law on Competition (1999), Law on the Control of the Circulation of Civil Pyrotechnic Articles (2002).

[15] So called *temporary completed decisions*.

In other cases where the right to revoke a previously adopted administrative decision is regulated for the administrative decisions which have continuous temporal dimension (Schønberg, 2003), the law sets out specific and clear grounds for the use of analysed right, but there is a lack of the provisions of the time limit which is important in ensuring legal certainty.

After evaluating the preliminary conclusions of Part 3.1 and evaluating the results of the analysis presented in this Part, it can be stated that the LPA and special laws itself do not constitute a harmonized legal regulation regarding the Revocation of administrative decisions.

It is worth considering that the courts have the possibility, to a certain extent, to fill in legal gaps, left by the legislators, *ad hoc* by applying the law.[16] The judicial *ad hoc* elimination of legal gaps presupposes the formation of a uniform case law in resolving a certain category of cases. The court precedents can be later substantially amended or otherwise adjusted by the legislator (or another competent legislative entity), regulating certain public relations by law (or another legal act) and thus eliminating the respective legal gap not already by *ad hoc* means, but with a future-oriented legal regulation of a general nature.[17]

Because the procedures are the heart of any activity carried out by public administration entities, firstly it should be pointed that it is obvious that rules based on case law cannot replace or change rules indicated in the legal act. But at the same time courts' precedents are not only inspirations for the changes in legal regulation, but also are mandatory for the public administration entities in similar or analogous situations. Having this in mind it becomes important to see if the courts' precedents regarding the Revocation of administrative decision procedure have been created.

4. CASE LAW: STILL IN A "LEGAL IMPASSE"?

For the beginning it is worth stressing out that the Supreme Administrative Court of Lithuania has gradually relaxed the interpretation of the law with regard to the Revocation of administrative decision. Initially, the position was that the public administration entity itself could not revoke its administrative decision, which has legal consequences for the persons concerned, but was adopted in violation of the applicable legal norms.[18] It was later acknowledged that there was no direct prohibition on the public administration entity itself to revoke an administrative decision.[19] Until finally, the Supreme Administrative Court of Lithuania clarified that the principle of legality of decisions taken by public administration entities in the field of public administration means that a public administration entity may not revoke its decisions unless such possibility is provided by special laws applicable to its regulatory area.[20]

However, this mitigating position was limited to that that courts has been following the legal precedent on the basis of which, the public administration entity cannot revoke its own administrative decision, if there is no legal norm indicated that.[21]

[16] The Republic of Lithuania, the Constitutional Court of the Republic of Lithuania, 09/2008 (29 November 2010).
[17] The Republic of Lithuania, the Constitutional Court of the Republic of Lithuania, 34/03 (8 August 2006).
[18] The Republic of Lithuania, the Supreme Administrative Court of Lithuania, A2-161/2005 (4 February 2005).
[19] The Republic of Lithuania, the Supreme Administrative Court of Lithuania, A756-35/2010 (1 February 2010).
[20] The Republic of Lithuania, the Supreme Administrative Court of Lithuania, A602-227/2012 (12 March 2012).
[21] For instance, the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A602-1356/2012 (3 May 2012), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A143-79/2013 (29

DOI: 10.46282/blr.2021.5.2.255

But such adjudicating actually does not lead anywhere[22], if the legal regulation is not changed. The fact that this is acknowledged by the court is proved by certain indications in case law revealing the advantages of the Revocation of the administrative decisions and, in certain cases, the necessity for it. Firstly, when courts found that the factual situation has changed since the administrative decision was taken, it indicates to the parties that it is the ground for the public administration entity to revoke an administrative decision and adopt a new one. This explanation is not based on a specific legal provision,[23] but only on court's interpretation about what actions public administration entity should take.

Secondly, there are cases when even with the conclusion that the public administration entity had no the power to revoke a previously adopted administrative decision, at the same time court expressed an opinion outside this conclusion (*orbiter dictum*). In these types of cases, the Supreme Administrative Court of Lithuania formulated the future test which defines what public administration entity should assess in order to revoke a previously adopted administrative decision: public administration entity should assess the situation in the context of the principle of legal certainty, to determine that the legitimate expectations will not be violated, and in the case of a violation of the legitimate expectations, to assess whether the revocation of the administrative decision will not unreasonably negate one of the competing interests – private or public.

Turning to the procedures, it is worth noting that the court takes a strict view that the Revocation of administrative decisions must be carried out in accordance with all the essential administrative decision-making procedures laid down in special laws.[24] In legal doctrine this is called the *principle of parallelism of the procedure* (Cliza, M. C). Having this in mind, the principal stages of this type of procedure can be identified (*see Table 1*).

In respect to the preliminary conclusions regarding the selective legal regulation regarding the procedure of the revocation of administrative decisions, this could be the inspiration for the legislator to systematize legal regulation regarding Revocation of administrative decisions.

January 2013), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A3277-525/2018 (7 February 2018), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, eA-934-492/2019 (2 October 2019), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, eA-935-492/2019 (29 October 2019).

[22] One of the cases highlighted the legal limitations of administrative procedures: the Central Electoral Commission, in accordance with the 2016 December 4 ruling of the Supreme Court of Lithuania, which found that the political leader of the party and the responsible persons had carried out fraudulent bookkeeping, reassessed these new facts and revoked previous administrative decisions, which was issued 2005-2007 and by which the political party was awarded state budget grants. Court resolved the dispute in a formal way, formally stating that the public administration entity had acted *ultra vires* by revoking its own administrative decisions, because there was not any legal basis for it. Court did not assess the public administration's arguments on the need to revoke its own administrative decisions (the Republic of Lithuania, the Supreme Administrative Court of Lithuania, eR-2-442/2019 (17 April 2019)).

[23] For instance, the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A^{602}-1865/2013 (2 December 2013), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, eA-1055-602/2018 (14 November 2018), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, eA-687-602/2019 (13 November 2019).

[24] The Republic of Lithuania, the Supreme Administrative Court of Lithuania, A525-2380/2011 (27 June 2011), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A602-151/2012 (8 November 2012), the Republic of Lithuania, the Supreme Administrative Court of Lithuania, A525-560/2014 (19 February 2014).

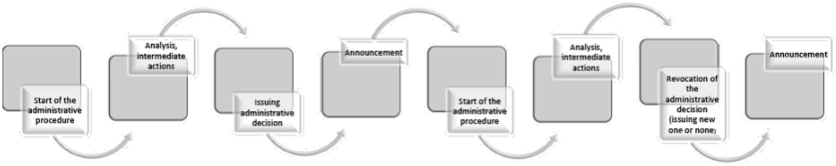

Table 1

Taking this into consideration and the fact that there is no case-law regarding Article 16 and 17 of the LAP so far, instead of the preliminary conclusions there are some remarks regarding the future developments. Adoption of Article 16 of the LAP has the potential to influence the Supreme Administrative Court of Lithuania to modify its case-law so that, despite only the general provision of Article 16 of the LAP, which does not take precedence over norms established by special laws, the public administration entities would be able to revoke administrative decisions. But, if the predominance of principle of legality and formal adjudicating continue, the legal impasse regarding the revocation of administrative decisions will continue.

5. CONCLUSIONS

Lithuanian legal regulation regulating the right to revoke a previously adopted administrative decision is still selective and fragmented, legal rules do not interact with each other, so there is the absent of the consistent revoked administrative decision-making procedure. Dominance of the principle of legality in public administration precludes administrative courts from legitimizing administrative decisions which are made in respond to the changes and the unregulated legal situations. Because the Lithuanian administrative decision-making process is subject to a strict adherence to the principle of legality, this eliminates any possibility of adopting an administrative decision only on the basis of administrative discretion. In order to ensure such strict standard, comprehensive and detailed legal regulation, with a clear and public procedure, is necessary. Otherwise, only the formal requirement to follow the legal regulation has the possibility to hinder the resolution of problems arising in the public administration and the adoption of fair administrative decisions, which also undermines trust in the public administration.

BIBLIOGRAPHY:

Andruškevičius, A. (2008). *Administracinė teisė: bendrieji teorijos klausimai, valdymo aktų institutas, ginčo santykių jurisprudenciniai aspektai*. Registrų centras.

Andruškevičius, A. and Paškevičiene, L. (2011). *Viešojo administravimo teisiniai pagrindai: mokomoji knyga*. Registrų centras.

Bakaveckas, A. (2012). *Administracinė teisė: teorija ir praktika. I dalis*. Leidykla "Mes."

Dambrauskienė, G. (2004). *Lietuvos teisės pagrindai*. Justitia.

Schønberg, S. J. (2003). *Legitimate expectations in administrative law*. Oxford University Press.

Seerden, R. J. G. H. (Ed.). (2018). *Comparative Administrative Law. Administrative Law of the European Union, Its Member States and United States.* (4th ed.). Intersentia.

Cliza, M. C. Revocation of administrative act.

DOI: 10.46282/blr.2021.5.2.255

Austria, General Administrative Procedure Act (1991).
Croatia, General Administrative Procedure Act (2009).
Germany, Administrative Procedure Act (1976).
Italy, Administrative Procedure Act (1990).
Lithuania, Law on Land Reform (1991).
Lithuania, Constitution of the Republic of Lithuania (1992).
Lithuania, Law on the Constitutional Court of the Republic of Lithuania (1993).
Lithuania, Law on Animal Breeding (1994).
Lithuania, Law on the Bank of Lithuania (1994).
Lithuania, Law on Local Self-Government of the Republic of Lithuania (1994).
Lithuania, Law on Credit Unions (1995).
Lithuania, Law on Construction (1996).
Lithuania, Law on the Legal Protection of Personal Data (1996).
Lithuania, Law on Competition (1999).
Lithuania, Law on Public Administration (1999).
Lithuania, Law on Central Credit Unions (2000).
Lithuania, Law on the Legal Protection of Personal Data (2000).
Lithuania, Law on Construction (2001).
Lithuania, Law on the Control of Weapons and Ammunition (2002).
Lithuania, Law on the Control of the Circulation of Civil Pyrotechnic Articles (2002).
Lithuania, Law on the Legal Protection of Personal Data (2003).
Lithuania, Statute of the Internal Service (2003).
Lithuania, Constitutional Act concerning the Membership of the Republic of Lithuania in the European Union, (2004).
Lithuania, Law on Banks (2004).
Lithuania, Law on the Legal Status of Aliens (2004).
Lithuania, Law on the Protection of Persons and Property (2004).
Lithuania, Law on Tax Administration (2004).
Lithuania, Financial Instruments Law on Markets (2007).
Lithuania, Rules for the Examination of Applications and Complaints and the Servicing of Persons in Public Administrative Entities (2007).
Lithuania, Law on the Legal Protection of Personal Data (2008).
Lithuania, Law on Competition (2012).
Lithuania, Law on Collective Investment Undertakings for Informed Investors (2013).
Lithuania, Law on State Supervision of Territorial Planning and Construction (2013).
Poland, Code of Administrative Procedure (1960).
Spain, Law on Administrative Procedure of the Public Administrations (2015).
Slovenia, General Administrative Procedure Act (1999).
Republic of Lithuania, Constitutional Court of the Republic of Lithuania, 34/03 (8 August 2006).
Lithuania, Constitutional Court of the Republic of Lithuania, 09/2008 (29 November 2010).
Lithuania, Supreme Administrative Court of Lithuania, A415-2203/2006 (18 December 2006).
Lithuania, the Supreme Administrative Court of Lithuania, A2-161/2005 (4 February 2005).
Lithuania, the Supreme Administrative Court of Lithuania, A756-35/2010 (1 February 2010).
Lithuania, the Supreme Administrative Court of Lithuania, A525-2380/2011 (27 June 2011).

Lithuania, the Supreme Administrative Court of Lithuania, A602-1356/2012 (3 May 2012).
Lithuania, the Supreme Administrative Court of Lithuania, A602-227/2012 (12 March 2012).
Lithuania, the Supreme Administrative Court of Lithuania, A602-151/2012 (8 November 2012).
Lithuania, the Supreme Administrative Court of Lithuania, A143-79/2013 (29 January 2013).
Lithuania, Supreme Administrative Court of Lithuania, A602-1865/2013 (2 December 2013).
Lithuania, the Supreme Administrative Court of Lithuania, A525-560/2014 (19 February 2014).
Lithuania, Supreme Administrative Court of Lithuania, A261-706/2014 (14 May 2014).
Lithuania, the Supreme Administrative Court of Lithuania, A3277-525/2018 (7 February 2018).
Lithuania, Supreme Administrative Court of Lithuania, A-2995-492/2018 (13 November 2018).
Lithuania, Supreme Administrative Court of Lithuania, eA-1055-602/2018 (14 November 2018).
Lithuania, Supreme Administrative Court of Lithuania, eR-2-442/2019 (17 April 2019).
Lithuania, Supreme Administrative Court of Lithuania, eA-934-492/2019 (2 October 2019).
Lithuania, Supreme Administrative Court of Lithuania, eA-935-492/2019 (29 October 2019).
Lithuania, Supreme Administrative Court of Lithuania, eA-687-602/2019 (13 November 2019).
Research Network on EU Administrative Law. (2017). *ReNEUAL Model Rules on EU Administrative Procedure* (H. C. H. Hofmann, J.-P. Schneider, J. Ziller, J.-B. Auby, P. Craig, D. Curtin, G. della Cananea, D.-U. Galetta, J. Mendes, O. Mir, U. Stelkens, and M. Wierzbowsk (Eds.)). Oxford University Press. http://www.reneual.eu/images/Home/ReNEUAL--Model-Rules-update-2015_rules-only-2017.PDF
Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration (2007).
Proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration (2016).

DOI: 10.46282/blr.2021.5.2.255

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

IMPLEMENTATION OF THE EPPO REGULATION FROM THE SLOVAK PERSPECTIVE / Dominika Becková, Katarína Koromházová

JUDr. Bc. Dominika Becková, PhD.
Assistant Professor
University of Pavol Jozef Šafárik in Košice, Faculty of Law
Kováčska 26, 040 75 Košice,
Slovakia
dominika.beckova@upjs.sk
ORCID: 0000-0001-6489-1701

Mgr. Katarína Koromházová
PhD. student
University of Pavol Jozef Šafárik in Košice, Faculty of Law
Kováčska 26, 040 75 Košice,
Slovakia
katarina.koromhazova@student.upjs.sk
ORCID: 0000-0002-7776-897X

The article presents an output of the research project APVV-18-0421 „*The European Public Prosecutor´s Office in Connections of the Constitutional Order of the Slovak Republic as Strengthening of the European Integration through Law*".

Abstract: ***Nowadays, 22 Member States are participating in enhanced cooperation for establishment of the European Public Prosecutor's Office. Due to the fact that the establishment and exercise of powers of the European Public Prosecutor's Office significantly changes the current concept of EU criminal law, it was necessary for the participating Member States to adapt to this change. To ensure effective application of the Regulation in practice, the Member States had to adopt different implementing measures. As in other Member States, also the national authorities of the Slovak Republic needed to consider necessary legislative measures ensuring effective application of the EPPO Regulation for the purpose of investigating and prosecuting criminal offences affecting financial interests of the EU.***

Key words: ***EPPO; European Delegated Prosecutors; Code of Criminal Procedure of the Slovak Republic; competence; investigation, EU criminal law***

Suggested citation:
Becková, D., Koromházová, K. (2021). Implementation of the EPPO Regulation from the Slovak Perspective. *Bratislava Law Review*, 5(2), 75-86. https://doi.org/10.46282/blr.2021.5.2.262

Submitted : 20 September 2021
Accepted : 09 November 2021
Published : 30 December 2021

1. INTRODUCTION

The European Public Prosecutor's Office, as a new body of the European Union, was established by Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation for the establishment of the European Public Prosecutor's Office (hereinafter as "*the EPPO Regulation*"). The adoption of the EPPO Regulation is the result of a mutual political agreement between the states in a group of the Member States, which have expressed an interest in setting up a separate Union body responsible for combating crimes affecting financial interests of the Union. On 3 April 2017, these

Member States,[1] including the Slovak Republic, notified the European Parliament, the Council and the Commission of their wish to establish enhanced cooperation on the basis of a proposal for a Regulation establishing a European Public Prosecutor's Office, thus making use of the procedure set out in Art. 86(1) TFEU.[2] The EPPO Regulation entered into force on 20 November 2017 with Art. 120 of the EPPO Regulation setting out a minimum period of three years during which the European Public Prosecutor's Office was to prepare for its tasks.[3] That three-year period was intended to provide sufficient space not only for the European Public Prosecutor's Office and the European Union to ensure all necessary matters relating to the establishment of a new European Union body, but also for the Member States, which also had to prepare for the activities of the supranational prosecutor's office. Although there was a strong expectation that the European Public Prosecutor's Office would take over the tasks entrusted to it as soon as the "preparatory" three-year period had expired, this was not the case. The date on which the European Public Prosecutor's Office took over the tasks of investigation and prosecution entrusted to it by the EPPO Regulation was set by Commission Decision[4] on 1 June 2021.

Today, 22 EU Member States[5] are participating in enhanced cooperation for the establishment of the European Public Prosecutor's Office. These 22 Member States have become parts of a very ambitious EU project, which, if successful, will bring great benefits to the Union itself but also to its Member States. The European Public Prosecutor's Office, which has become a part of the EU's institutional system, is the only EU body with the power to investigate and prosecute perpetrators and accomplices of crimes affecting the Union's financial interests, as well as to bring them to court.[6] The European Public Prosecutor's Office is an indivisible body of the Union, acting as a single authority with a decentralized structure (Article 8(1) of the EPPO Regulation), which has its own legal personality (Article 3 of the EPPO Regulation) and which is independent in carrying out its tasks (Article 6 EPPO Regulation). Investigations and prosecutions on behalf of the European Public Prosecutor's Office are governed by the EPPO Regulation, but in cases

[1] These Member States were Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain. Subsequently, four other Member States decided to join the enhanced cooperation, namely Latvia on 19 April 2017, Estonia on 1 June 2017, Austria on 9 June 2017 and Italy on 22 June 2017.

[2] The EPPO Regulation regulates three different, consecutive procedures for the creation of a European Public Prosecutor's Office. The first subparagraph of Art. 86(1) TFEU provides for the possibility of setting up a European Public Prosecutor's Office from Eurojust, which requires unanimity in the Council and obtaining consent of the European Parliament. In the absence of unanimity in the Council, the second subparagraph of Art. 86(1) TFEU provides for the possibility of submitting a proposal for a Regulation establishing a European Public Prosecutor's Office to the European Council, which, if consensus is reached, shall refer the proposal back to the Council for adoption. However, when setting up the European Public Prosecutor's Office, only the procedure provided for in the third subparagraph of Art. 86 (1) TFEU was applied, according to which: "*If no consensus is reached in the European Council and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly within the same time limit. In such a case, the authorization to carry out enhanced cooperation shall be granted pursuant to Article 20* (2) *of the Treaty on European Union and Article 329 (1) of this Treaty and the provisions on enhanced cooperation shall apply*."

[3] According to Art. 120 (2) subparagraphs 2 and 3, the specific date on which the European Public Prosecutor's Office takes over its tasks under the EPPO Regulation is to be determined by a Commission decision based upon a proposal from the Chief European Prosecutor, which may not be earlier than three years from the date of entry into force of the EPPO Regulation.

[4] Commission Implementing Decision (EU) 2021/856 of 25 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks.

[5] Following the entry into force of the Regulation, the Netherlands joined the enhanced cooperation on 1 August 2018 and Malta on 7 August 2018.

[6] Article 4 of the EPPO Regulation.

where the EPPO Regulation does not regulate a specific matter, the relevant national law will apply (Article 5(3) of the EPPO Regulation). Due to the fact that the EPPO Regulation regulates many issues of the functioning and operation of the European Public Prosecutor's Office only in a framework, the European Public Prosecutor's Office will often rely on the provisions of an applicable national law of one of the 22 participating Member States whose substantive and procedural criminal law regulations are significantly different.

Given that establishment and exercise of the powers of the European Public Prosecutor's Office significantly changes the current concept of the EU criminal law, it was necessary for the Member States to decide on participation in enhanced cooperation to adapt to this change. The European Public Prosecutor's Office was established by a regulation binding in its entirety and directly applicable in all participating Member States,[7] which means that its application in the Member States is automatic without the need for further implementing measures by the Member State. However, in order to ensure effective application of the Regulation in practice, in particular in the conduct of investigations and prosecutions conducted by the European Public Prosecutor's Office in each participating Member State, it was necessary to adopt different legislative measures in those Member States (Kert, 2020). The measures taken were intended to prepare the Member States and their national authorities for the operation of the European Public Prosecutor's Office, in particular to regulate the status and remit of the European Public Prosecutors and European Delegated Prosecutors and to determine the national law to be applied in the Member States to investigations and prosecutions conducted by the European Public Prosecutor's Office (Herrnfeld, 2020). There is a three-year "preparatory" period set out in Art. 120(2) of the EPPO Regulation that should give the participating Member States sufficient time to take necessary implementing measures.

The Slovak Republic is one of the Member States participating in this enhanced cooperation, and it was therefore necessary for the legislators to adapt the standards of Slovak criminal law so that the Slovak Republic was prepared for the functioning of the European Public Prosecutor's Office. Legislative measures adopted in the territory of the Slovak Republic were reflected in the amendment of the provisions of several laws, in particular Act no. 301/2005 Coll. Code of Criminal Procedure, Act no. 153/2001 on the Prosecutor's Office and Act no. 154/2001 Coll. on prosecutors and prosecutor trainees. The first part of this article deals with the issue of the position of the European Public Prosecutor's Office in the conditions of the Slovak Republic, the authors dealing in more detail with the position of the European prosecutors and European delegated prosecutors in the Slovak legal system. In the second part of the presented article, the authors focused their attention on the provisions of the national law, which are crucial for the activities of the European Public Prosecutor's Office, focusing primarily on procedural issues related to the competence of and its exercise by the European Public Prosecutor's Office in Slovakia.

2. EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN THE SLOVAK CRIMINAL JUSTICE SYSTEM

The European Public Prosecutor's Office was established by the EPPO Regulation as an indivisible body of the Union, acting as a single authority with a decentralized structure (Article 8(1) of the EPPO Regulation). The internal organizational

[7] Article 288 TFEU.

structure of the European Public Prosecutor's Office is regulated by Art. 8 of the EPPO Regulation, which sets out the basic organizational principles and actors, and which, together with the related articles of the third chapter entitled "The position, structure and organization of the European Public Prosecutor's Office", can be described as the European Public Prosecutor's Office's organizational system, which is integrated, comprehensive and multi-level (Burchard, 2021). The central level of the European Public Prosecutor's Office is made up of a headquarters consisting of the Chief European Prosecutor who heads the European Public Prosecutor's Office and his two deputies (Article 10 of the EPPO Regulation), one European Public Prosecutor for each participating Member State (Article 12 of the EPPO Regulation), a college consisting of the Chief European Prosecutor and Delegated Prosecutors (Article 9 of the EPPO Regulation), the Permanent Chambers, each with three members (Article 10 of the EPPO Regulation), and the Administrative Director (Article 18 of the EPPO Regulation). The second, decentralized level of the European Public Prosecutor's Office consists of European Delegated Prosecutors who are located in the participating Member States and act on behalf of the European Public Prosecutor's Office in their Member States (Article 13 of the EPPO Regulation). The link between the decentralized level and headquarters is ensured by close cooperation between the European Delegated Prosecutors responsible for the investigation and prosecution of criminal offences affecting the financial interests of the Union in their Member States and the European Public Prosecutors supervising such investigation and prosecution (Article 12(1) of the EPPO Regulation). At the same time, European Public Prosecutors are a "link" between the European Delegated Prosecutors and the Permanent Chambers, which monitor and direct investigations and prosecutions conducted in the Member States by the European Delegated Prosecutors (Article 10(2) of the EPPO Regulation).

The structure of the European Public Prosecutor's Office determined by the EPPO Regulation has also been reflected in several regulations of the Slovak criminal law regulating the issue of the position and competence of the European Prosecutor's Office as a whole, but also issues of the status and competence of the Chief European Prosecutor, the European Prosecutor and the European Delegated Prosecutor. The basic regulation of the criminal procedural law in the conditions of the Slovak Republic is represented by Act no. 301/2005 Coll. Code of Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure" or the "CCP"), which stipulates, for the purposes of exercising the powers of the European Public Prosecutor's Office in the Slovak Republic, that: "*a prosecutor shall also mean the Chief European Prosecutor, a Delegated Prosecutor, and a Permanent Chamber*" (Section 10 CCP). This change in the Criminal Procedure Code was made by Act no. 312/2020 Coll.[8] of 21 October 2020 and represents one of the implementing measures for proper implementation of the EPPO Regulation. The aim of the implementing measure was to ensure that, wherever the rules of criminal law deal with the prosecutor, they are automatically understood to also mean the Chief European Prosecutor, the European Prosecutor, the European Delegated Prosecutor and the Permanent Chamber for criminal matters falling within the remit of the European Public Prosecutor's Office.[9]

Undoubtedly, one of the most important issues related to effective and coherent functioning of the European Public Prosecutor's Office is the position and competence of European Prosecutors and European Delegated Prosecutors, which are regulated in the

[8] Act no. 312/2020 Coll. of 21 October 2020 on the enforcement of the decision on seizure of property and administration of seized property and on the amendment of certain acts.
[9] Explanatory report to Act no. 312/2020 Coll.

Slovak legal system by Act no. 153/2001 Coll. on the Prosecutor's Office (hereinafter referred to as the "Prosecutor's Office Act"), as well as Act no. 154/2001 Coll. on Prosecutors and Trainee Prosecutors (hereinafter referred to as the "Act on Prosecutors"). For the purposes of the regulation, Act no. 242/2019 Coll.[10], Amending the Prosecutor's Office Act and the Act on Prosecutors was adopted, the primary objective of which was to create legislative preconditions for proper functioning of the European Prosecutor's Office and effective exercise of its powers in the Slovak Republic, as well as legislative preconditions for quality representation of the Slovak Republic in the European Public Prosecutor's Office by prosecutors temporarily assigned to the function of the European Prosecutor, European Delegated Prosecutors and, where applicable, the Chief European Prosecutor.[11] A separate act[12] also introduced legislation concerning selection of candidates for the position of the European Prosecutor and the European Delegated Prosecutor of the European Public Prosecutor's Office.

2.1 Position of the European Public Prosecutor

There is one European Public Prosecutor in the European Public Prosecutor's Office for each Member State, whose main task is to supervise prosecutions and investigations for which the European Delegated Prosecutor acting in the case of their Member State of origin is responsible (Article 12 of the EPPO Regulation). At the same time, the European Public Prosecutors act as a liaison point and information channel between the Permanent Chambers and the European Delegated Prosecutors in their Member States of origin, precisely because they are sufficiently familiar with the national legislation in question (Article 12(5) of the EPPO Regulation).

The European Public Prosecutors who are parts of the central level of the European Public Prosecutor's Office shall be employed as temporary staff of the European Public Prosecutor's Office in accordance with Article 2(a) Conditions of Employment (Article 96(1) of the EPPO Regulation). Thus, after their appointment, the European Public Prosecutors do not remain active members of their national prosecutor's offices, but become employees of the European Public Prosecutor's Office. As the European Public Prosecutors are employees of the European Public Prosecutor's Office who will perform their tasks at the European Union level and whose tasks are very clearly set out in the EPPO Regulation, they will be guided based on the provisions of the Union law (Švedas and Markevičiute, 2020).

Although the European prosecutors are not active in the national prosecutor's offices and in most cases they "only" supervise investigation and prosecution of the European Delegated Prosecutor, the EPPO Regulation does not preclude the European Public Prosecutors from personally investigating or prosecuting criminals, thus falling within the remit of the European Public Prosecutor's Office (Article 28(4) of the EPPO Regulation). As the European Public Prosecutor is not a member of the national prosecutor's office, the Member States have also had to deal with this situation and legislate for it. In the case of the Slovak Republic, neither the Prosecutor's Office Act nor the Act on Prosecutors explicitly respond to this situation. According to Section 10 of the CCP, in the Slovak legal system, the European Prosecutor is considered to be a prosecutor whose position and competences are regulated by the Prosecutor's Office Act

[10] Act no. 242/2019 Coll. Of 27 June 2019.
[11] Explanatory report to Act no. 242/2019 Coll.
[12] Act no. 286/2018 Coll. of 12 September 2018 on the selection of candidates for the position of European Prosecutor and European Delegated Prosecutor in the European Public Prosecutor's Office.

DOI: 10.46282/blr.2021.5.2.262

and the Act on Prosecutors in the parts in which he is not subject to a special regulation. The Slovak legislator understood the position of the European Public Prosecutor quite broadly and granted him the same status as the European Delegated Prosecutor, i. e. the position of a public prosecutor under the Slovak law. As the European Public Prosecutor is understood in the Slovak legal sense as a prosecutor, the legislation allows him to conduct investigations, exercise investigative and other powers or order them.

2.2 Position of the European Delegated Prosecutor

The European Delegated Prosecutors have a key role to play in performance of the tasks of the European Public Prosecutor's Office, as they are representatives who act on behalf of the European Public Prosecutor's Office in their Member States and are responsible for investigations, prosecutions and indictments. In order to carry out the tasks entrusted to them effectively, the EPPO Regulation stipulates that the European Delegated Prosecutors should have the same powers as national prosecutors with regard to investigations, prosecutions and indictments, in addition to the specific powers and positions conferred on them by the EPPO Regulation (Article 13(1) of the EPPO Regulation). Implementation of this provision of the EPPO Regulation can already be found in the above-mentioned Section 10 CCP, with the position and competence of the European Delegated Prosecutor also being covered by the Act on Prosecutors (Section 1(3) of the Act on Prosecutors).

Unlike the European Public Prosecutors, the European Delegated Prosecutors are not temporary staff of the European Public Prosecutor's Office, but are employed as special advisers in accordance with the Conditions of Employment (Article 96(6) of the EPPO Regulation). The European Delegated Prosecutors shall be considered as active members of the public prosecutor's offices or judiciaries of the Member States, which have nominated them for this post. Within the Prosecutor's Office of the Slovak Republic, the European Delegated Prosecutor, during the term of office, is considered to be the Prosecutor of the Office of the Special Prosecutor.[13]

In addition to the tasks of the European Public Prosecutor's Office, the European Delegated Prosecutors may also perform tasks of national prosecutors to such extent that they do not prevent them from fulfilling their duties as the European Delegated Prosecutor (Article 13(3) of the EPPO Regulation). Although the European Delegated Prosecutors continue to be active members of national prosecutors' offices, they must be independent and impartial in carrying out the tasks of the European Public Prosecutor's Office, meaning that they act in the interests of the Union as a whole and must not seek or take instructions from any person other than European Public Prosecutor's Office or from an EU Member State (Article 6(1) of the EPPO Regulation). This "dual" position of the European Delegated Prosecutors also had to be regulated in the national law. Act no. 242/2019 Coll. amended Section 6 of the Prosecutor's Office Act, which regulates the issue of issuing an instruction to a subordinate prosecutor so that Section 6 was amended with a new paragraph 11, according to which an instruction to the European Delegated Prosecutor while carrying out tasks of the European Public Prosecutor's Office may be imposed only in accordance with the EPPO Regulation, however, in matters in which the European Delegated Prosecutor performs the tasks of a Prosecutor of the Office of the Special Prosecutor, the process in accordance with the Prosecutor's Office Act shall apply when issuing an instruction.[14] Furthermore, Section

[13] Section 9(3) of the Prosecutor's Office Act.
[14] Section 6(11) of the Prosecutor's Office Act.

12a of the Prosecutor's Office Act explicitly states that the management and control powers of the Prosecutor General[15] do not apply to matters falling within the competence of the European Public Prosecutor's Office.

3. PROCEDURAL POWERS: RELEVANT NATIONAL LEGAL FRAMEWORK

3.1 Powers of the European Public Prosecutor's Office

The EPPO Regulation brings a fundamental change into the Slovak law with regard to functioning of the Prosecutor's Office of the Slovak Republic. The change stems from the fact that the Slovak Republic and its prosecutor's offices, on the basis of the EPPO Regulation, lose their competence to investigate, prosecute and file charges in criminal matters which fall within the exclusive competence of the European Public Prosecutor's Office and which would otherwise fall within the competence of the Slovak Prosecutor's Office. According to Article 149 of the Constitution of the Slovak Republic, "*the Prosecutor's Office of the Slovak Republic protects the rights and legally protected interests of natural and legal persons and the state*." As a result of the adoption of the EPPO Regulation, the current competence of the Prosecutor's Office of the Slovak Republic in the criminal agenda has been changed by removing criminal matters in which the European Public Prosecutor's Office will have exclusive or selective powers to investigate, prosecute and indict.[16]

Under Articles 22 and 23 of the EPPO Regulation, the competences of European Public Prosecutor's Office shall include criminal offences affecting the financial interests of the Union as laid down in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud affecting the Union's financial interests (hereinafter referred to as the "Directive"). The Directive does not regulate the wording of the individual elements of criminal offences, which should fall within the remit of the European Public Prosecutor's Office, but lays down minimum rules concerning the definition of criminal offences as regards the fight against fraud and any other illegal activities detrimental to the EU's financial interests. With regard to the above, it was necessary for the Slovak Republic to adopt a law at the national level that would meet the requirements set out in the Directive. This happened under Act no. 214/2019 Coll., amending and supplementing Act no. 300/2005 Coll. Criminal Code as amended and amending certain laws.

This Act fully transposed the Directive into the legal order of the Slovak Republic. *This Directive replaces the EU Convention of 26 July 1995 on the protection of the European Communities' financial interests (*OJ EC C 316, 27.11.1995) and its Protocols, to which the Slovak Republic acceded in 2004 and the content of which was reflected in the Slovak law. Therefore, most of the requirements of the Directive are already met. However, compared to the Convention, the Directive strengthens protection of the European Union's financial interests and lays down minimum rules concerning the definition of criminal offences and sanctions in connection with the fight against fraud and any other illegal activities affecting the European Union's financial interests. Given the relationship of the Directive with the EPPO Regulation, the provisions of the Directive are crucial for proper functioning of the European Public Prosecutor, which refers to the directive defining its jurisdiction.[17]

[15] Sections 10 to 12 of the Prosecutor's Office Act.
[16] See Chapter IV of the EPPO Regulation for more details.
[17] Explanatory report to the bill no. 214/2019 Coll.

DOI: 10.46282/blr.2021.5.2.262

Article 22 of the EPPO Regulation also regulates the competence of the European Public Prosecutor's Office, according to which "*the competence of the European Public Prosecutor's Office shall include criminal offences against the financial interests of the Union provided for in Directive (EU) 2017/1371, as implemented under national law, without regard to whether the same criminal offence could be classified as a different type of criminal offence under national law.*" The EPPO Regulation also explicitly defines the cases in which the European Public Prosecutor's Office will not be responsible for acting, in particular for criminal offences involving national direct taxes.[18] Investigations and prosecutions on behalf of the European Public Prosecutor's Office are governed by the EPPO Regulation and therefore the national law applies only if the matter is not regulated by it.[19]

Since 01 January 2021, the Act no. 312/2020 Coll. on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain laws has been in force. *The bill continues to implement Council Regulation (EU) 2017/1939 of 12 October 2017 which implements enhanced cooperation for the establishment of the European Public Prosecutor's Office, as well as ensuring the implementation of Regulation (EU) 2018/1805 of the European Parliament and of the Council on mutual recognition of seizure orders and confiscation orders. Both regulations are key tools in the fight against crime affecting the financial interests of the European Union, in particular with regard to the confiscation of the proceeds of such crime. In order for the Slovak Republic to be able to effectively apply the Regulation on Mutual Recognition of Seizure and Confiscation Orders, it must have an effective national system for tracing and subsequent confiscation of assets, including the management of seized and confiscated property.*[20]

Act no. 312/2020 Coll. caused a change in the provisions of Act no. 301/2005 Coll. Code of Criminal Procedure.[21] *As part of the amendment to the Code of Criminal Procedure, the bill focuses primarily on the expansion of institutes used to seize property intended for criminal offences or which is the proceeds of crime (securing real estate, securing ownership interest in a legal entity, securing other property value, securing replacement value, securing movable property) and the fourth section of the first part of the fourth chapter of the Code of Criminal Procedure is re-amended. At the same time, for the purposes of criminal proceedings, a matter important for criminal proceedings is defined and the purposes of seizing are distinguished. The other points of the amendment are mostly related to the transposition of directives and the implementation of Council Regulation (EU) 2017/1939, which implements enhanced cooperation for the establishment of the European Public Prosecutor's Office.*[22]

Article 4 of the EPPO Regulation sets out the primary role of the European Public Prosecutor's Office, according to which "*the European Public Prosecutor's Office is responsible for investigating, prosecuting perpetrators and accomplices of crimes affecting the financial interests of the Union as set out in Directive* (EU) 2017/1371 and regulations, and for indicting them. *In this context, the European Public Prosecutor's Office shall conduct investigations, prosecute and act as prosecutors in the competent courts of the Member States pending a final decision on the case.*" The European Delegated Prosecutor will therefore initiate an investigation within their own Member State if a criminal offence falling within the competence of the European Public Prosecutor's Office

[18] For details, see Article 22(4) of the EPPO Regulation.
[19] For details, see Article 5(3) of the EPPO Regulation.
[20] Explanatory report to the bill no. 312/2020 Coll.
[21] See Article III of Act no. 312/2020 Coll. for more details.
[22] Explanatory report to the bill no. 312/2020 Coll.

has been or is being committed. These will most often be offences committed on the territory of several States, so the EPPO Regulation stipulates that "*proceedings will be brought and dealt with, as a rule, by a European Delegated Prosecutor from the Member State where the crime was concentrated or, if several related criminal offences were committed that fall within the remit of the European Public Prosecutor's Office, the European Delegated Prosecutor from the Member State where the majority of the offences were committed*."[23]

Article 28(1) of the EPPO Regulation allows the European Delegated Prosecutor, in accordance with the EPPO Regulation and national law, to carry out investigative and other measures by themselves or to order them to be carried out by the competent authorities in their Member State. In view of the above, the question arises as to the extent to which European Delegated Prosecutors will conduct investigations themselves and in which cases they will use the opportunity to order them to the competent national authorities. Dr. Ondrejová states that the European Delegated Prosecutor cannot entrust the investigation as a whole to national authorities, but must participate in it on an ongoing basis (Ondrejová, 2018). Responsibility for the activities of national authorities will be exercised through the supervision of the Delegated European Public Prosecutor. If, in the course of an inquiry, the European Delegated Prosecutor finds that the act under investigation does not constitute a criminal offence falling within the EPPO's remit, the question whether to transfer the matter to the competent national authorities will not be decided by the European Public Prosecutor, but by a Permanent Chamber, who will do so without undue delay.[24]

3.2 Investigation and Criminal Prosecution in the Conditions of the Slovak Republic

Within our legal system, the prosecutor, as a body active in criminal proceedings in the pre-trial part of the proceedings, has the status of a so-called master of litigation. Its role consists in particular in supervising observance of the rule of law in the procedure before commencement of criminal proceedings and in preparatory proceedings,[25] as well as in performance of procedural acts, in particular in issuing decisions in accordance with the provisions of Section 231 of the Code of Criminal Procedure. The prosecutor is entitled to carry out the entire investigation themselves,[26] but in practice prosecutors use this right only in rare cases. Investigations and prosecutions provided for in the EPPO Regulation are, in substance, in line with our national legislation. However, Dr. Ondrejová draws attention to the fact that the European Delegated Prosecutor will have to be involved much more during investigations conducted in matters within the competence of the European Public Prosecutor's Office than prosecutors do in the so-called ongoing supervision of investigations conducted in national criminal proceedings. Otherwise, they would not be able to fulfil obligations imposed on them by, for example, Article 28(1) of the EPPO Regulation, according to which the acting European Delegated Prosecutor shall notify the relevant European Public Prosecutor and the Permanent Chamber through the case management system of any significant developments in accordance with the rules laid down in the internal rules of procedure of the European Public Prosecutor's Office. According to point 35 of the preamble, it should thus announce, for example,

[23] Article 26(4) of the EPPO Regulation.
[24] For details, see Article 34 of the EPPO Regulation.
[25] For more details, see Section 230 of the Code of Criminal Procedure.
[26] For more details, see Section 230(2c) of the Code of Criminal Procedure.

DOI: 10.46282/blr.2021.5.2.262

implementation of investigative measures or changes in the list of suspects (Ondrejová, 2017).

Another difference can be found in the prosecutor's authorization at the post-investigation stage. As part of our national legislation, after investigation or abbreviated investigation, a police officer shall submit the file to the prosecutor with a motion to indict or otherwise decide.[27] In the conditions of the Slovak Republic, therefore, only the prosecutor has the right to indict the accused in accordance with the provisions of Section 231 of the Code of Criminal Procedure. A different post-investigation procedure takes place under the EPPO Regulation, which in Article 35(1) provides that "*if the acting European Delegated Prosecutor considers the investigation closed, he/she shall submit to the supervising European Prosecutor a report summarizing the case and a draft decision on whether to bring an action before a national court or consider referring or dismissing the case or a simplified prosecution procedure under Article 34; 39 or 40 of the Regulation. The supervising European Public Prosecutor shall forward these documents to the relevant Permanent Chamber and, if he/she deems it necessary, will attach his/her own opinion. If a Permanent Chamber pursuant to Article 10(3) adopts a decision proposed by the European Delegated Prosecutor, the European Delegated Prosecutor shall proceed accordingly*." Thus, unlike our national legislation, the European Delegated Prosecutor is not entitled to bring an action immediately after the end of the investigation, but must submit a draft opinion to the supervising European Prosecutor, who will then forward the documents to the Permanent Chamber. If, in the draft decision, the European Delegated Prosecutor proposes to bring an action, the Permanent Chamber may not reject the case.[28] At the national level, therefore, the prosecutor supervises compliance with the basic principles of the criminal procedure, as well as the provisions of the Code of Criminal Procedure with regard to the procedure and decision-making of the police officer (Ivor et al, 2021). However, under the EPPO Regulation, supervision of a prosecutor in criminal proceedings in the European Public Prosecutor's Office will be even more significant, as the investigation will be overseen by the European Delegated Prosecutor, who will in turn be overseen by the European Public Prosecutor of the given country.

4. CONCLUSION

The European Public Prosecutor's Office began its activities on 01 June 2021, which means that only the current application practice will show the most fundamental problems of its functioning. In particular, it will be important to assess the impact of the European Public Prosecutor's Office on judicial cooperation and the fight against crime affecting financial interests in the initial phase of its operation. In the article, we pointed out particular changes in our national legislation that have occurred in connection with the adopted EPPO regulation, as well as possible problems that may hinder effective performance of the activities of the European Public Prosecutor's Office. We agree with the opinion of Dr. Tóthová that exercise of the powers of the European Public Prosecutor's Office within non-participating states and especially third countries can be deemed the most problematic (Tóthová, 2021). It should be in the interest of the European Union that measures are taken to enable the European Public Prosecutor's Office to also exercise its powers effectively vis-à-vis third countries. It will also be important to follow the decisions of the College concerning determination of a uniform procedure for the European Public Prosecutor's Office in the field of investigation and

[27] For more details, see Section 209 of the Code of Criminal Procedure.
[28] For details, see Article 36(1) of the EPPO Regulation.

prosecution in accordance with the application of Article 26(5) of the EPPO Regulation, according to which the Permanent Chamber may decide to change the allocation of a case pending the indictment. The Permanent Chamber may therefore change the Member State in which the indictment is to be brought and thus the criminal law, which raises questions as to whether such action will be in accordance with the accused's right to a fair trial and in which cases the Permanent Chamber will exercise this right. It should also be borne in mind that national legislation on criminal law varies considerably from one Member State to another. For example, our legal system includes the provision of Section 363 of the Code of Criminal Procedure, according to which "*the Prosecutor General shall annul a valid decision of the Prosecutor or a police officer if such a decision or the proceedings preceding it constituted violation of the law*." This provision is not included in the legal systems of most Member States and it will thus be important to observe how the European Public Prosecutor's Office will deal with the differences of individual criminal codes. In addition, the work of the European Public Prosecutor's Office may be greatly affected by the current situation with the COVID-19 pandemics. Given the negative economic consequences of this pandemics, the amount of EU resources available to the Member States will increase, as will the flexibility in their use, which may lead to increase in crime rates harming the EU's financial interests. Laura Kövesi, the European Prosecutor General herself, said in an interview that "*more funds and more freedom to use European funds unfortunately also mean more opportunities for fraud and corruption*." (Geist and Gabrižová, 2020).

BIBLIOGRAPHY:

Burchard, Ch. (2021). Article 8: Structure of the EPPO. In: Herrnfeld, H., Brodowski, D., Burchard, Ch. (eds.): *European Public Prosecutor´s Office: Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor´s Office (´EPPO´): Article-by-Article Commentary*. Baden-Baden: Nomos Verlagsgesselschaft mbH & Co. KG, pp. 41 - 64. DOI: 10.5771/9783845290768-1

Geist, R. and Gabrižová, Z. (2020). Šéfka európskej prokuratúry: Z politických tlakov nie som nervózna, zvládam ich veľmi dobre [online]. *Euractiv.sk*, available at: https://euractiv.sk/section/spolocnost/interview/sefka-europskej-prokuratury-z-politickych-tlakov-nie-som-nervozna-zvladam-ich-velmi-dobre/ (accessed on 20.09.2021).

Herrnfeld, H-H. (2020). Implementation of the EPPO Regulation: A Perspective from Germany. In: Ligeti, K., Antunes, M. J., Giuffrida, F. (eds.): *The European Public Prosecutor´s Office at Launch: Adapting National Systems, Transforming EU Criminal Law*. Milano: Wolters Kluwer Italia, pp. 149 - 162. ISBN 978-88-13-37468-6.

Ivor, I., Polák, P. and Záhora J. (2021). *Trestné právo procesné II. Priebeh trestného konania*. 2. vydanie. Bratislava: Wolters Kluwer SR. ISBN: 978-80-571-0334-9.

Kert, R. (2020). Specific Aspects of the Implemantation of the EPPO Regulation in Austria. In: Ligeti, K., Antunes, M. J., Giuffrida, F. (eds.): *The European Public Prosecutor´s Office at Launch: Adapting National Systems, Transforming EU Criminal Law*. Milano: Wolters Kluwer Italia, pp. 137 - 148. ISBN 978-88-13-37468-6.

Ondrejová, A. (2017). *Európsky prokurátor, Komentár k nariadeniu Rady Európskej únie*. Bratislava: Wolters Kluwer. ISBN: 978-80-8168-749-5.

Ondrejová, A. (2018). Európska prokuratúra – nový subjekt, nové otázniky, 1. časť: Rozsah prokurátorského dozoru – oprávnenie vykonávať vyšetrovanie a iné opatrenia. *Bulletin slovenskej advokácie,* XXIV (4), pp. 6-9.

Švedas, G. and Markevičiute, U. (2020). The EPPO Implementation: A Perspective form the Republic of Lithuania. In: Ligeti, K., Antunes, M. J., Giuffrida, F. (eds.): *The European Public Prosecutor´s Office at Launch: Adapting National Systems, Transforming EU Criminal Law*. Milano: Wolters Kluwer Italia, pp. 137 - 148. ISBN 978-88-13-37468-6.

Tóthová, V. (2021). *Potreba zmeny právnej úpravy po zavedení inštitútu európskeho prokurátora do praxe*. Recenzovaný zborník príspevkov interdisciplinárnej vedeckej konferencie doktorandov a vedeckých pracovníkov, QUAERE, ročník XI. pp.902. ISBN 978-80-87952-34-4.

Commission Implementing Decision (EU) 2021/856 of 25 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks.

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. OJ L 283, 31.10.2017. pp. 1-71.

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law. OJ L 198, 28.7.2017, pp. 29-41.

Slovakia, Act no. 153/2001 Coll. on the Prosecutor's Office

Slovakia, Act no. 154/2001 Coll. on prosecutors and prosecutor trainees

Slovakia, Act no. 301/2005 Coll. Code of Criminal Procedure

Slovakia, Act no. 286/2018 Coll. of 12 September 2018 on the selection of candidates for the position of European Prosecutor and European Delegated Prosecutor in the European Public Prosecutor's Office

Slovakia, Act no. 214/2019 Coll., Amending and supplementing Act no. 300/2005 Coll. Criminal Code as amended and amending certain laws.

Slovakia, Act no. 242/2019 Coll., Amending and supplementing Act no. 153/2001 Coll. On the Prosecutor´s Office and Act no. 154/2001 Coll. on prosecutors and prosecutor trainees

Slovakia, Act no. 312/2020 Coll. of 21 October 2020 on the enforcement of the decision on seizure of property and administration of seized property and on the amendment of certain acts

Slovakia, Explanatory report to the bill no. 214/2019 Coll.

Slovakia, Explanatory report to the bill no. 312/2020 Coll.

Treaty on the Functioning of the European Union (consolidates version 2016). OJ C 202, 7.6.2016, pp. 47-390.

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

THE UNIFICATION OF THE CASE-LAW WITHIN THE CIVIL PROCEDURE SYSTEM OF ROMANIA / Laura Cristina Carcia

Laura Cristina Carcia
PhD student
Faculty of Law
University of Bucharest
Bulevardul Mihail Kogălniceanu 36-46,
București 050107, Romania;
as well as judge at Tribunalul Ilfov
Strada Știrbei Vodă 24,
Buftea 070000, Romania
laura.carcia@gmail.com
ORCID: 0000-0003-3205-8621

Abstract: *The present article contains the main legal practice unification mechanisms, as regulated by the Romanian legislator in accordance with the current Civil Procedure Code, as well as those partaking to the Supreme Court jurisprudence in conjuncture with the lower courts by granting a uniform settlement on the legal issues comprised by the litigations referred to. The presentation starts off with the referral in the interest of the law, a traditional instrument within the national civil procedure legal sphere of activity, it continues with the notification of the Supreme Court for settling certain legal matters, a novelty at national level and of whose practical utility has already been recognised, and it ends by making reference to the second appeal, as an extraordinary means of challenge, with a relatively reduced efficiency, at present, in settling the different interpretations of the legal norms.*

Key words: *Divergent jurisprudence; referral in the interest of the law; notification of the High Court of Cassation and Justice in order to render a preliminary decision for the settlement of legal matters; second appeal, Civil law, Romanian law*

Submitted : 15 March 2021
Accepted : 07 October 2021
Published : 30 December 2021

Suggested citation:
Carcia, L. C. (2021). The Unification of the Case-law within the Civil Procedure System of Romania. *Bratislava Law Review*, 5(2), 87-100. https://doi.org/10.46282/blr.2021.5.2.227.

1. GENERAL NOTIONS

The unity of the jurisprudence has come to represent the objective of any legal system, including that practiced in Romania. Considerable efforts have been made by the national legislator and its practitioners to reach clarity and foreseeable character in implementing the law. A foreseeable act of justice confers to the legislator the trust needed in the legal system, the certainty that his/her endeavours have been analysed on an unbiased basis and in accordance with the adherent legal norms, as well as that of the final rulings of the notified matters brought before the court by the citizen, without the possibility of ever being appealed.

The coming into force of the new Civil Procedure Code[1] has led to the implementation of three main methods for the achievement of the jurisprudence unity,

[1] The Civil Procedure Code was adopted as the Act No. 134/2010, published in the Official Gazette No. 485, dated July 15th 2010, and reprinted in the Official Gazette No. 247, dated April 10th 2015, with the amendments brought forth via the Government Emergency Ordinance No. 1/2016, printed in the Official Gazette No. 85, dated February 4th 2016, via the Government Emergency Ordinance No. 95/ 2016, printed in the Official

more exactly, the second appeal, the referral in the interest of the law, and the notification of the High Court of Cassation and Justice to render a preliminary decision for the settlement of certain legal matters.

Two of these mechanisms are included under a specific title specially designed for the legal provisions needed to assure uniform legal practices (Title III from the IInd Book), respectively, the referral in the interest of the law and the notification of the High Court of Cassation and Justice for rendering a preliminary decision, and the third mechanism, the second appeal, being regulated under extraordinary means of challenge (Section 1, Chapter III, Title II, IInd Book).

As a result of the intervening amendments, if it was previously appreciated that the decisions ruled under a referral in the interest of the law came to represent "the main method by means of which the Supreme Court fulfils its constitutional attributes of assuring the uniform interpretation and application of the law" (Andreescu, 2009). Currently, based on the new civil procedure concept, this fulfilment of such an attribute is divided between the second appeal, the referral in the interest of the law and the notification of the High Court of Cassation and Justice in order to render a preliminary decision for the settlement of certain legal matters.

The novelty element of the new civil procedure regulation is represented by the legal commitment to notify the High Court of Cassation and Justice for rendering a preliminary decision for the settlement of certain legal matters, a mechanism which intervenes at an incipient stage of the emergence of the non-uniform legal practices, as compared to the referral in the interest of the law, which is applicable in case of the existence of a "consolidated" non-uniform practice.

2. THE REFERRAL IN THE INTEREST OF LAW

The referral in the interest of the law, regulated by the provisions of Art. 514 – 518, is recognised by the legislator as representing a specific mechanism needed to ensure the unity in interpretation and law applicability by all courts, should different settlements be granted for the same legal matter. The declared purpose of such a procedural instrument is to channel a correct method of interpreting a legal text that is susceptible to multiple interpretations.

This mechanism has a long history within the Romanian civil procedure system, being regulated for the first time by the Law regarding the High Court of Cassation and Justice of 1861 (Ciobanu, 1997, pp. 457–458). During its lengthy applicability, this regulation faced numerous amendments, at present being clearly limited by the legislator, with the competent court having to settle the ruling on the request in the interest of the law, the subjects of the right to notice, the admissibility conditions of this procedural mechanism, the actual trial, but also the settlement method for the notice.

Regarding the competent court settling the notice of referral in the interest of the law, this will be represented by the Supreme Court, more exactly, the High Court of Cassation and Justice, by a panel comprising, in accordance with Art. 516 Line (1) of the Code, the President, or should he/she be absent, one of the Vice-Presidents of the court, the division presidents, as well as 20 judges, of which 14 judges partaking to the

Gazette No. 1009, dated December 15th 2016, Law No. 17/ 2017, reprinted in the Official Gazette No. 196, dated March 21st 2017, and via Law No. 310/ 2018, published in the Official Gazette No. 1074, dated December 18th 2018.

division(s) within which the legal matter comes under jurisdiction and that was ruled differently by the court houses, and other 2 judges adherent to the other divisions.[2]

Therefore, within all cases, the panel is comprised of 25 judges, presided over by the President of the High Court of Cassation and Justice, and should the latter be absent, by one of the Vice-Presidents of the court.

The Subjects of the right to notice the Supreme Court are found within the legal provisions of Art. 514 of the Code, being represented by the prosecutor general partaking to the Public Prosecutor's Office, attached to the High Court of Cassation and Justice, either *ex officio* or at the request of the Justice Minister, the Ruling Council of the High Court of Cassation and Justice, the ruling councils of other circuit courts of appeal, as well as the Ombudsman.

The recital of the people authorised as subjects of the right to notice is limited, and not exemplary, and as such, other persons or entities do not have the possibility to petition the Supreme Court for the uniform putting into practice and interpretation of the law via this procedural mechanism. On the other hand, other persons or entities can inform the authorities listed by the legislator regarding the existence of certain legal matters settled differently by the courts via final judgments, with the subjects of the notice for the referral in the interest of the law having the possibility of analysing whether the notification of the Supreme Court be imposed or not (see Carcia, 2020, p. 303).

The notification of the Supreme Court is done by the subjects via a written request, having as object the ruling by the High Court of an adjudication, compulsory in its character, for the legal matter brought before the court, aspect which was at the receiving end of different interpretations by the Romanian court houses, interpretations resulted from final court decisions.

Such a notice can be formulated at any time, without a time constraint (see Ciobanu, 2018, p. 524; Pop and Grosu, 2011), by any of the indicated subjects, if the admissibility conditions are fulfilled, as subject to the preliminary analyses by the Supreme Court.

From the content of Art. 515 of the Code, the admissibility conditions for a referral in the interest of the law can be implied, more exactly: it should make reference to a legal matter, that respective legal matter must have been settled differently by the courts of law via final rulings, and those court rulings must be attached to the request.[3] To be mentioned that these conditions are cumulative, being necessary that all such be fulfilled in order for the Supreme Court's notification to be admissible for the settlement in the interest of the law.

The syntagma "legal matter" has never been defined by the legislator, and as such the task of explaining its' meaning has befallen with the legal practice and doctrine. Generally, it was appreciated that a legal matter must be real, authentic and must target a legal norm which is unclear, imprecise, doubtful, susceptible to multiple interpretations or not correlated with other legal provisions.[4] The same approach was adopted by the

[2] According to the law, and metaphorically speaking, this panel was named „Micul Plen" (The Low Court) (M. Nicolae, 2014).

[3] The same requirements are also stipulated by the Supreme Court, the competent panel must hear the referral in the interest of the law, by making reference to the content of the ruled decisions. For example: Decree No. 19, dated October 5th 2015, published in the Official Gazette No. 11, dated January 7th 2016; Decree No. 21, dated June 24th 2019, published in the Official Gazette. No. 872, dated October 29th 2019; Decree No. 22, dated June 24th 2019, published in the Official Gazette No. 853, dated October 22nd 2019.

[4] The authors show how the referral in the interest of the law has a limited domain "more exactly, only in cases in which the unclear, confusing (doubtful), incomplete (with omissions) or contradictory legal provisions receive a different interpretation from the court houses" (see Ciobanu, Boroi, and Nicolae, 2001, p. 21).

DOI: 10.46282/blr.2021.5.2.227

Supreme Court, which, during the analysis of the admissibility conditions adherent to the referral in the interest of the law, verifies if the legal texts subject to interpretation, have a clear and unequivocal character, if the aspect confronts itself with a regulatory ambiguity in order to consider whether the legal matter subject to examination is susceptible of being settled differently by the courts.[5]

Furthermore, the legal matter must be genuine[6] and current, a feature that is lost in case the divergence had been settled by intervention on the part of the legislator[7] or when the Supreme Court itself has given adjudication over that respective legal matter, via a prior decision ruled also during the proceedings of a referral in the interest of the law.

The legal matter must form the object of the litigations for which the final court decisions were ruled, regardless of whether that respective problem is of material, substantive or procedural law (Les, 2011).

As it is normally the case, within the referral in the interest of the law procedure, the legislator opted to subject for analysis before the Supreme Court only those court rulings that are final, due to the fact that only in such cases can it be observed whether or not the legal matter was given a different judging. To the extent to which the decision is not final, the interested party has the possibility of making use of the appeal or second appeal as means of challenge, for the legal matter to be resolved by the judicial review court, case in which, in accordance with the solution ruled, it might not lead to the non-uniform practice (Tăbârcă, 2011, pp. 135–136).

Equally, the procedural method of referral in the interest of the law cannot be used when the diversity of adopted solutions within a certain domain is not determined by the occurrence of certain distinctive points of view, here meaning by means of the attached court rulings, for the putting into practice of the law texts that govern that respective field, but by the assessment of the courts of law deduced from the entire legal provisions, by reporting it to the circumstances of each case.[8]

The norms referencing the proceedings are stipulated by Art. 516 Line (5)-(1) of the Code and they have their sights set on the preliminary drafting of a report by three judge members of the panel, as nominated by its President. The report must comprise different settlements granted for the legal matter and the arguments on which these are based on, the relevant jurisprudence of the Constitutional Court, the European Court of Human Rights, or the Court of Justice of the European Union, if the case, the relevant doctrine, as well as the opinion of the consulted specialists. Once the report has been completed, the nominated judges will draft and motivate the settlement project proposed to be granted for the referral in the interest of the law.

The request is settled by the Supreme Court within a term of at most three months from the notice date, without summoning the parties. Regarding the referral in the interest of the law, the competent panel will rule on the decision, which will be published in the Official Gazette of Romania, Part I.

[5] For example, Decree No. 30 dated November 16th 2009, ruled by the High Court of Cassation and Justice, United Divisions, available on www.scj.ro.

[6] Via Decision No. 10 dated May 25th 2015, published in the Official Gazette No. 595, dated August 6th 2015, the Supreme Court argued that "only those imprecise, imperfect and omissions rendered types of legal texts, in other words, those texts that can be interpreted, can constitute the object of a referral in the interest of the law initiated under the purpose of ruling a principle settlement for a controversial legal matter".

[7] See Decree No. 12, dated March 16th 2009, issued by the High Court of Cassation and Justice, United Divisions, available on www.scj.ro.

[8] As such, see Decree No. IV, dated January 15th, 2007, issued by the High Court of Cassation and Justice, United Divisions, on www.scj.ro.

By means of decision, the High Court admits the request for the referral in the interest of the law, or rejects it as being inadmissible. Should the request be admitted, the Supreme Court will grant an adjudication for that respective notified legal matter, indicating its correct interpretation in accordance with the law.

The decision to admit the request will be ruled only in the interest of the law and will not impact the examined court settlements and or those situations regarding the parties as components to those rulings [Art. 517 Line (2) of the Code]. This presupposes that the analysed court decisions cannot be reformulated during the appeal or second appeal, taking into consideration that these are final in their nature (Tăbârcă, 2019, p. 92). Therefore, these will maintain the authority of res judicata and their enforceability (Les, 2011).

The adjudication granted for the legal matters is compulsory for all courts starting with the publication date of the decision in the interest of the law within the Official Gazette of Romania, Part I. This settlement will also be applied for ongoing litigations and not just those which were presented before the courts after the publication of the decision in the Official Gazette, with the interpretation given by the courts to the legal texts not being contrary to those ruled by the Supreme Court (Carcia, 2020; Drăguşin, 2015; Tăbârcă, 2011).

3. THE NOTIFICATION OF THE HIGH COURT OF CASSATION AND JUSTICE IN ORDER TO RENDER A PRELIMINARY DECISION FOR THE SETTLEMENT OF CERTAIN LEGAL MATTERS

Via this new procedural unification mechanism of the divergent judicial practices, as regulated by the legal provisions of Art. 519 – 521 of the Code, a panel nominated with settling the matter following a careful examination, solicits, under the situations and conditions foreseen by the legislator, the assistance of the Supreme Court for the settlement under a compulsory character of a notified legal matter, adjudication that is necessary for the settlement of the merits for that particular case.

Based on the provisions of Art. 519 Civil Procedure Code, referencing the object of the notice, the admissibility conditions of the notification procedure of the High Court of Cassation and Justice can be highlighted in order for a preliminary decision to be rendered for the settlement of certain legal matters, conditions which are different from those applicable for the referral in the interest of the law, to be more exact: the existence of a legal matter, the interpretation of the legal matter which is to influence the settlement of merits of the case, the legal matter must be new, the High Court did not previously rule a settlement in connection to this legal matter, the matter does not form the object of a referral in the interest of the law and, finally, the panel which formulates the notice must rule as a result of final examination.[9]

As a requirement of making reference to the existence of a legal matter, as foreseen by the legislator for the admissibility of the referral in the interest of the law, the legal matter is connected to a legal norm interpretation problem, a norm susceptible to various interpretations. Moreover, the legal matter must be difficult, genuine, real, must be connected to the litigation brought before the court for ruling and must not be hypothetical (see M. Nicolae, 2014, pp. 59–60). To the extent to which the legal matter does not create the premises or did not generate different and contradictory

[9] These conditions have also been recognized according to the law by the doctrine (M. Nicolae, 2014), but also by the Supreme Court via Decree No. 1, dated November 18th 2013, published in the Official Gazette No. 43, dated January 20th 2014.

DOI: 10.46282/blr.2021.5.2.227

interpretations during the court practices nor a divergent jurisprudence, then, it cannot be considered a real and difficult legal problem.[10]

Not every legal aspect that occurs during the proceedings of the cause can lead to the notification of the High Court of Cassation and Justice by means of a prior inquiry, but only those aspects that directly influence the settlement of the merits.

Furthermore, the legal aspect subject to settlement must be new, presenting a novelty feature that can result either from the existence of a normative deed recently effective, or from the occurrence of certain litigations based on a previous normative deed, but which was not brought forth before the courts for judgment.[11]

In order to address a prior inquiry to the attention of the Supreme Court, it is necessary that, beforehand, the High Court did not rule over the litigated legal matter via another preliminary judgment or decision in the interest of the law or a consequent case decision, and moreover, that respective legal matter must not form the object of a referral in the interest of the law found on the dockets for settlement.[12]

The condition that the subjects of the right to notice must submit for judging as a result of final examination, implicitly comprises the courts that withhold the procedural legitimacy in triggering the notification mechanism for the High Court of Cassation and Justice in order to rule a prior decision for the settlement of certain legal matters. As such, the subjects of the right to notice can be represented by tribunals, the court of appeals, and the High Court of Cassation and Justice, under the condition that the litigation referring to the legal matter under trial to not be in its last procedural stage. This mechanism is not made available to the parties of the pending litigation, who do not have the possibility of notifying the High Court of Cassation and Justice via a prior inquiry, but these can request the panel that was nominated with settling the legal matter to notify the Supreme Court in order to rule a preliminary decision.

The notification of the Supreme Court is done by means of a procedural deed, court decision, which must contain the reasons that help support the admissibility of the notice, as well as the point of view of the panel in charge of ruling over the parties. The notification deed is not subject to any means of challenge and the litigated proceeding which generated the notification of the Supreme Court is thereby suspended.

The High Court of Cassation and Justice's Object of the Notification is represented by the legal matter of whose settlement is requested via this procedural mechanism, an aspect which has a determining character for the settlement of the merits.

The High Court of Cassation and Justice has the competency to settle the notice in order to rule a preliminary decision for the settlement of certain legal matters, via the formulation of the Court as stipulated according to the legal provisions of Art. 520 Line (6) and (8) from the Code, respectively the notification will be ruled over by a panel comprising the president of that adherent High Court of Cassation and Justice division, the legal division under jurisdiction to solve the requested legal matter or by a judge nominated by such and 12 judges partaking to that respective court division.

[10] The High Court of Cassation and Justice, The Panel for settling certain legal matters, Decree No. 35, dated June 4th, 2018, published in the Official Gazette No. 810, dated September 21st 2018.

[11] Regarding the analysis of this novelty requirement, see, The High Court of Cassation and Justice, The Panel for settling certain legal matters, Decree No. 1, dated February 17th, 2014, published in the Official Gazette No. 260, dated April 9th 2014; Decree No. 4, dated January 14th 2019, published in the Official Gazette No. 132, dated February 19th 2019; Decree No. 46, dated October 14th 2019, published in the Official Gazette No. 900, dated November 7th 2019 etc.

[12] To verify the existence of a request - referral in the interest of the law that is on the dockets regarding the same legal matter, the panel can consult the Internet page of the High Court www.scj.ro.

As with the High Court of Cassation and Justice notification mechanism for the ruling of a preliminary decision for the settlement of certain legal matters, the trial proceeding guidelines are partially similar to those bestowed on to the legislator for the referral in the interest of the law, consisting of the prior drafting of a report with the same content as with the other analysed procedural mechanism, the trial being conducted without the summoning of the parties, within 3 months from the referral date, via an admission or rejection decision issued for the notice. In comparison to the trial of the referral in the interest of the law, the difference is given by the necessity to communicate the report to the attention of the parties, in their quality as components to the litigation for which the notice was formulated, parties who have the possibility of expressing their point of view in writing regarding the content of the report.

The decision to admit the notice will comprise the settlement ruled for that litigated legal matter, a ruling which is compulsory for the court that requested its settlement starting with its sentencing, and for other courts, authorities, legislators etc. It will be compulsory starting with the publication date of that preliminary decision within the Official Gazette of Romania, Part I.[13]

The ruling granted by the Supreme Court will also apply to those litigations on the dockets and not just to those submitted before courts after the publication of the decision within the Official Gazette, with the interpretation given by the courts to the legal texts non-contradicting those ruled by the Supreme Court.

4. A BRIEF SUMMARY OVER THE SECOND APPEAL AS A MEANS OF UNIFYING THE LEGAL PRACTICES

The second appeal is an extraordinary means of challenge, regulated by the legal provisions of Arts. 483-502 of the Code, which sees to subject before the competent courts, in accordance with the law, the conformity analysis of the challenged decision with the applicable judicial rules [Art. 483 Line (3) Civil Procedure Code].

This present means of challenge does not fall under the exclusive competency of the Supreme Court, but also of those tribunals and courts of appeal that can use them against certain court decisions partaking to cases strictly determined by the legislator. From the perspective of the multitude of national courts that can settle this extraordinary means of challenge, the capability of the second appeal of contributing to the unification of the judicial practices is limited.

However, the uniform jurisprudence approach method by means of the second appeal is done through its compulsory nature partaking to the legal matters settled by the second appeal court.

Furthermore, in accordance with the legal provisions of Art. 501 Line (10) of the Code, in case the second appeal is admitted, and the challenged decision is cassated quashed, annulled, with the consequence of forwarding the request for a retrial, the decisions of the second appellate court over the settled legal matters are compulsory for the court that decides on the merits.

The legal norm obliges the retrial court to apply that method of settlement corresponding to the legal matters as given by the second appeal court; the non-

[13] In law, it has been shown that establishing different times is justified by the fact that the court of reference already knows the invoked arguments in assisting or fighting back the legal matter ruled by the Supreme Court, while the other courts must take into consideration the settlement only from the date of learning of the facts of the preliminary decision (Tăbârcă, 2019).

DOI: 10.46282/blr.2021.5.2.227

compliance with those ruled during the procedure of the second appeal can lead to a breach of the *res judicata* authority partaking to the cassation decision (A. Nicolae, 2010).

5. ELEMENTS OF COMPARATIVE LAW

The main source of inspiration for the Romanian legislator for the new civil procedure regulation on the case-law unification mechanisms at national level was represented by the French law, and what follows will come to represent a comparative analysis between the two legal frameworks.

As such, within the legal provisions of the French Law, it is stipulated that the referral in the interests of the law, as regulated by Art. 17 Law No. 67523, dated July 3rd 1967, adherent to the Court of Cassation,[14] and exercised by the general prosecutor attached to the High Court of Cassation and Justice, as having knowledge of a civil section decision as being contrary to the law, regulations or procedural forms, a decision which was not challenged by the parties as according to the legal timeframe or which was executed. The request for the referral in the interests of the law will be formulated by the general prosecutor following the appeal expiry term allotted to the parties or after the execution of that decision.

Such procedural norms referring to the referral in the interests of the law are stipulated by Art. 6391 of the French Civil Procedure Code. Therefore, and for starters, the lawmaker notes that the referral in the interests of the law will be exercised against a decision which gained the *res judicata* authority. In what follows, the disposition given by Law dated 1967 is resumed, referring to the moment in which such a means can be exercised, under the remark that the term cannot surpass five years from the decision ruling date. Regarding the enunciation of such a referral, the parties are notified via the Public Ministry attached to the court that settled the challenged decision and by the registry partaking to that respective court which settled the decision, via registered mail with acknowledgement of receipt.

The request for the referral in the interests of the law must be motivated and directed against the considerations or the settlement part of the challenged judgement, document which will be attached if solicited. The request for the referral in the interests of the law will be submitted with the registry of the Court of Cassation, will be communicated to the attention of the parties, which have the possibility of formulating written observations within two months from the communication date.

The judgement under procedure according to the referral in the interests of the law will continue to produce effects for and between the parties, even if, via the decision in the interest of the law ruled by the Court of Cassation, that respective judgement is either totally or partially quashed (Art. 639-2 of the Code).

That being said, even if, in case of a cassation procedure, the parties cannot make use of the decision in the interests of the law to elude the dispositions of the quashed judgement [Art. 17 Line (2) of the Law dated 1967], a situation similar to that acknowledged on a Romanian level for the effects of the decision in the interest of the law. However, as different from the French legal framework, where the Court of Cassation can rule on a cassation settlement of the decision that makes up the object of the notice in the interests of the law, the High Court of Romania cannot overrule the final decisions that generated the non-unform practices and which were attached to the notice, but settles the way the legal issue is interpreted within the meaning of those

[14] Version consolidated on April 25th, 2021, and available on www.legifrance.gouv.fr.

respective decisions, matter that was at the receiving end of different settlements within the practice of the courts of law.

Furthermore, the other Romanian procedural means of unifying the legal practices can be found within the French legislation, called "the referral for the opinion of the Court of Cassation" (*la saisine pour avis de la Cour de Cassation*) and regulated by Art. 1031110317 of the French Civil Procedure Code and by Art. L. 44114414 and Art. R. 4411 of the Judiciary Organisation Code.

The objective of requesting the opinion of the Court is to allow the Court of Cassation to make a speedy decision, before all the requirements for notifying it according to its jurisdictional role are to be fulfilled with regards to a delicate and new legal matter, which could generate different interpretations for the courts of first instance (Bachellier, Buk Lament, and Jobard-Bachellier, 2018, p. 31).

The procedure of requesting such an opinion within the French legal framework was considered by the doctrine, appealing and useful in giving quick solutions to certain legal technicality problems, susceptible of generating unnecessary mistakes by the first instance courts, however, drawing attention that this procedure should be used only to differentiate real legal matters (Bachellier et al., 2018).

In essence, the French regulation allows the judge to request the opinion of the Court of Cassation, via a decision which is not susceptible to appeal, only when it needs to decide on a new legal matter, which represents a serious difficulty, and which can be found within a significant number of litigations (Art. L 4411 of the Judiciary Organisation Code). The novelty of the legal issue is analysed from a double perspective, more exactly, the existence of a new legal norm and that the legal matter not have been previously settled by the Court of Cassation.[15]

Before the request being communicated to the attention of the Court of Cassation, under the sanction of inadmissibility, the judge must notify the parties and the Public Ministry, allotting a certain timeframe for any written observations to be submitted in connection to the request and the legal issue that forms the object of the opinion.[16] After those respective observations have been submitted or after the term set by the judge in this meaning has expired, the latter can address a request for opinion to the Court of Cassation, suspending the litigation on the dockets for settlement (Art. 10311of the French Civil Procedure Code). As such, the procedure becomes facultative and not compulsory, and the holder of the notice, in the lack of an express conditioning of the lawmaker, can be represented, here inclusively, by the judge of the first instance courts, who awards decisions that can be challenged via the means stipulated by the French law (Canivet, 2003, p. 156).

The request will be settled by a competent chamber, part of the Court of Cassation. In case the legal issue comes within the competency umbrella of several legal divisions, the panel will be a mixed one, and in case the matter makes reference to a principle legal issue, the settlement will be done by the plenary panel adherent to the same Court, with the panel being presided over by the President of the Court of Cassation or,

[15] See J. Buffet, overview dated March 29th, 2000, found on www.courdecassation.fr.

[16] Literature deals also with the legal practice of making reference to the rejection of the request as being inadmissible, as a follow up of the non-fulfilment of the notification obligation of the parties and of the Public Ministry, with a consequence of non-complying with the contradictoriality principle (Callé and Dargent, 2018, p. 927), and the meaning of regulating such a sanction and within the Romanian law, for the non-compliance of the referencing court with the obligation to have the parties contradictorily discuss the notice submission (see Varga, 2020).

DOI: 10.46282/blr.2021.5.2.227

should the former be missing, by the dean of the Presidents of the Chambers (Art. L. 4412 of the Judiciary Organisation Code).[17]

The Court of Cassation will rule within a three months' term, starting with the request and file reception date (Art. 10313 of the Civil Procedure Code),[18] via an opinion that is not mandatory for the court that formulated the notice (Art. L 4413 of the Judiciary Organisation Code). Within the content of the opinion, the remark can be inserted, referencing the necessity to publish such within the Official Journal of the French Republic,[19] but within all cases, such opinion is to be communicated to the referring court, to the parties, the Public Ministry, the president of the court of appeals and to the general prosecutor (Art. 10316, 10317 of the Civil Procedure Code).

For the case-law partaking to the Court of Cassation, the request to award an opinion is to be rejected when the legal issue targeted the interpretation of a European Union law, or whether to establish the compatibility between a national disposition and the legal provisions of the European Convention on Human Rights or when targeting a legal issue already settled by the Court of Cassation[20] or within the legal practice.[21] In the latter cases, the novelty requirement of the legal issue has not been fulfilled. Furthermore, should the noticed legal issue be found in other litigations that are under the second appeal procedure before the Court of Cassation, then, the release of an opinion will not be imposed.[22] The same rejection of the notice was also given when the legal issue did not represent a serious difficulty.[23]

From the previous exposure of the French procedure, the existence of certain similarities with the Romanian procedure regarding the notification of the High Court for rendering a preliminary decision must be noted.

First of all, for both legislative frameworks, the procedure is facultative and not mandatory, and the competency to settle the notice falls with the Supreme Court.

Within the meaning of both regulations, the compliance with the adversarial principle represents a necessity, by bringing to the attention of the parties of the possible notification of the Supreme Court for settling a legal matter, and without the opinions of the parties hindering the judge from continuing with the procedure. To the extent to which the notification of the Supreme Court is decided upon, the ruling of the litigation is suspended within both legislative frameworks, not subjecting the notice document to any means of challenge.

The Supreme Court rules over the request/notification by a panel specifically established by the lawmaker, within three months from the notice date, via a decision/opinion through which the notice can be admitted or rejected on the grounds of being inadmissible, or to appreciate that an opinion for that respective matter is not necessary.

[17] The method of establishing such judging panels for the aforementioned cases is set in Art. R. 4411 of the Judiciary Organization Code.

[18] The period of time needed to issue an opinion was considered a major advantage for diminishing the appeals with which the Court of Cassation is being notified (Canivet, 2003).

[19] Until 2020, a single opinion was published in the Official Journal, with the Court of Cassation thus avoiding such a measure, so as not to reinforce a compulsory character of the opinion, see J. Buffet, exposure dated March 29th, 2020, found on www.courdecassation.fr.

[20] See: Cass., avis, 9 October 1992, D. 1993. Somn. 188, obs. Julien; Cass. Avis, 16 December 2002, no. 00-20.008 P (Callé and Dargent, 2018).

[21] Cass., avis, 24 January 1994, no 09-30.019 P (Callé and Dargent, 2018).

[22] Cass., avis, 22 October 2012, no 12-00.012 P: R. 2012. 392 and 463 (Callé and Dargent, 2018).

[23] Cass., avis, 24 January 1994, no 09-30.018 P (Callé and Dargent, 2018).

The notice for the opinion and the preliminary decision exclusively make reference to a legal issue which is new, precise, difficult and determined. Even if the difficulty of the legal matter was not expressly stipulated by the Romanian legislator, as compared to the French one, it was retained within the jurisprudence of the Supreme Court.[24]

The opinion and the preliminary decision indicate the interpretation method partaking to a legal norm, when within its broad meaning, is susceptible to distinct interpretations, without the possibility of the notified court to give indications to the referral court on the settlement of that respective litigation.

On the other hand, the distinctions between the two procedures are visible and make reference to the holder of the notice, which at Romanian level represents a judging panel of the court, court of appeal or the High Court that settles the proceedings after careful examination, while within the French legislation, the judge of the first instance court, meaning the judge that renders decisions susceptible to ordinary means of challenge, is allowed to exercise the rights and ability to notify the Court of Cassation; for the admissibility conditions, the French lawmaker expressly stipulates the degree of difficulty of the legal issue and the necessity that the respective legal matter is to give rise to numerous litigations; the possibility of publishing the opinion with the Official Journal, as compared to the existence of the obligation to publish the preliminary decision within the Official Gazette of Romania.

The essential difference between the French regulation and the Romanian one is represented by the lack of the mandatory feature of the opinion issued by the Court of Cassation regarding the settlement method of the legal matter that formed the object of the notice for the referral court and consequently, for the other national courts as well. However, even when such a compulsory feature is lacking therein, within the French doctrine it has been shown, on the one hand, that it is difficult to imagine how a judge, who has requested the help of the Court of Cassation, and who has thus admitted the inability to resolve the legal matter, not to comply with the communicated opinion, as a result of his own notice; and also, for the other national courts it was appreciated that it is far more easier to follow the recommendation of the Court of Cassation, thus eliminating the incidental shortcomings generated by the similar litigations brought before the courts for settlement (Bachellier et al., 2018).

The lack of the compulsory feature of the opinion also denotes the non-existence of a considerable number of notices sent by the courts of first instance (in the year 2019, 15 opinions have been ruled; in 2018, 12 opinions),[25] as comparable to the existing situation in Romania, where, reported to the compulsory feature of the settlement by the High Court and of the fact that the referral court awards a decision not subject to challenge, the number of preliminary referrals is much higher (Bachellier et al., 2018).

6. CONCLUSION

The mechanisms for the analysed judicial practices represent useful instruments, found at the disposal of the courts to ensure a consistent interpretation and applicability of the legal norms. With their help, the legal provisions become clear and predictable not only for the law courts, but for the legislators as well.

[24] The High Court of Cassation and Justice, The Panel for settling certain legal matters, Decree No. 35, dated June 4th, 2018, published in the Official Gazette No. 810, dated September 21st 2018..
[25] Data available on www.courdecassation.fr.

DOI: 10.46282/blr.2021.5.2.227

The unification of the case-law in Romania has registered a surprising dynamic, the role previously recognised, in this regard, especially to the referral in the interest of the law has been consolidated by the new Supreme Court notification mechanism in order to rule on a preliminary decision for the settlement of certain legal matters. This new procedural instrument has the objective of preventing the occurrence of a divergent judicial practice, granting the Supreme Court the possibility of directing the law courts in connection to the interpretation of the legal norms.

Although questionably used at the beginning both, by the courts as well as by the Supreme Court,[26] later on, this mechanism has proven its usefulness, seeing that in time, the courts have started to use it more often, and with its help, the Supreme Court can give the necessary instructions for the uniform settlement of legal matters that are susceptible to multiple meanings.[27]

Only to the extent, to which the non-uniform jurisprudence is determined to be consolidated, the intervention on part of the High Court is done via the referral in the interest of the law and has a purpose to terminate the persistent divergence connected to the notified legal matters.

However, the regulation of such mechanisms can be perfected, imposing the lawmaker to analyse the possibility of indicating a procedural instrument via which the panel, part of the Supreme Court, in charge of settling certain legal matters, by means of assessing that the notice is not admissible due to the fact that it imposes the referral in the interests of the law, can notify, directly, the competent panel (see Anghel, 2015), or at least to fulfil the obligation of notifying the Supreme Court Ruling Council on the need to exercise a referral in the interests of the law (Carcia, 2020).

Furthermore, imposed is the legal and explicit commitment of applying the preliminary decision and of the decision in the interests of the law also for those litigations on the dockets when such mandatory decisions are ruled, by also taking into consideration the divergent opinions expressed both within the doctrine and within the legal practice (M. Nicolae, 2014).

Regarding the second appeal, the desire to unify the legal practices at national level cannot be achieved by having a multitude of law courts settling this type of procedure as a means of challenge but by concentrating majority of such procedures under the jurisdiction of the Supreme Court, which amongst other aspects has a constitutional role in watching over the uniform implementation and interpretation of the law by all such courts.

BIBLIOGRAPHY:

Andreescu, M. (2009). Aspecte privind constitutionalitatea recursului in interesul legii si a deciziilor pronuntate in aceasta procedura (Aspects regarding the constitutional character of the referral in the interest of the law and of the decisions ruled according to this proc. Retrieved from https://www.juridice.ro/90021/aspecte-privind-constitutionalitatea-recursului-in-interesul-legii-si-a-deciziilor-pronuntate-in-aceasta-procedura.html.

Anghel, R. (2015). Unificarea Practicii Judiciare - Deziderate, Mecanisme, Perspective. *Curierul Judiciar*, (1).

[26] In 2013, for civil matters, only one notice was formulated, in 2014 – 13 notices, in 2015 – 27 notices, data available on www.scj.ro.

[27] In 2019, for civil matters, 52 preliminary decisions have been issued; in 2018 – 72 preliminary decisions have been issued; in 2017 – 71 preliminary decisions have been issued – data available on www.scj.ro.

Bachellier, X., Buk Lament, J., and Jobard-Bachellier, M.-N. (2018). *La technique de cassation Pourvois et arrêts en matière civile*. Paris: Dalloz.
Callé, P., and Dargent, L. (2018). *Code de procédure civile annoté (édition 2019)*. Paris: Dalloz.
Canivet, G. (2003). La Cour de cassation et les divergences de jurisprudence. In P. Ancel and M.-C. Rivier (Eds.), *Les divergences de jurisprudence*. Saint Étienne: Publications de l'Université de Saint Étienne.
Carcia, L. C. (2020). Privire comparativă între recursul în interesul legii şi sesizarea Înaltei Curţi de Casaţie şi Justiţie în vederea pronunţării unei hotărâri prealabile pentru dezlegarea unor chestiuni de drept. In *European Judicial Studies and Research, the International Conference of Bachelors of Laws, 12th Edition*. Timisoara: Faculty of Law, West University of Timişoara, European Center for Legal Studies and Research.
Ciobanu, V. M. (1997). *Theoretical and practical Treaty of Civil Procedure, vol. II.* Bucharest: National Publishing House.
Ciobanu, V. M. (2018). *Drept procesual civil - Editia a II-a revazuta si adaugita de Tr. C. Briciu si C. C. Dinu*. Bucharest: National Publishing House.
Ciobanu, V. M., Boroi, G., and Nicolae, M. (2001). Amendments brought forth to the Civil Procedure Code via de Government Emergency Ordinance No. 138/2000 (II). *Carte de Lege*, (2).
Drăguşin, C. (2015). The court decision ruled by invoking a decision settled within the referral in the interest of the law before the publishing of its motivation. *Revista Română Scrisul de Execuţie*, (3).
Les, I. (2011). The referral in the interest of the law in regulating the new Civil Procedure Code. *Pandectele Române*, (8).
Nicolae, A. (2010). The power of the res judicata during the same trial. *Romanian Private Law Magazine*, (3).
Nicolae, M. (2014). The referral in the interest of the law and the preliminary settlement of a new legal matter by the High Court of Cassation and Justice in compliance with the new Civil Procedure Code. *Law Book*, (2).
Pop, P., and Grosu, D. (2011). Mijloace procedurale prevazute pentru unificarea practicii instantelor judecatoresti in lumina prevederilor Noului Cod de procedura civila. *Romanian Private Law Magazine*, (3).
Tăbârcă, M. (2011). *Law No. 202/2010 regarding certain measures to accelerate trial settlements*. Bucharest: Universul Juridic Publishing House.
Tăbârcă, M. (2019). *Civil Procedural Law, 2nd Edition, vol. I, II, III, supplement containing remarks on Law no. 310/2018*. Bucharest: Editura Solomon.
Varga, I. V. (2020). Etapele procedurii întrebării preliminare adresate Înaltei Curţi de Casaţie şi Justiţie. *Universul Juridic*.

DOI: 10.46282/blr.2021.5.2.227

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

FINAL THESES OF STUDENTS OF FACULTY OF LAW IN LITHUANIA: 1925-1939 / Ieva Deviatnikovaité

Prof. Dr. Ieva Deviatnikovaité
Mykolas Romeris University,
Faculty of Law, Institute of Public Law
Ateities str. 20, LT-08303 Vilnius,
Lithuania
ieva@mruni.eu
ORCID: 0000-0003-0982-878X

Abstract: *The study examines the final students' theses of the Faculty of Law of the University of Lithuania (later – Vytautas Magnus University), which was the only one university during the interwar period in Lithuania. Thus, it was the only place where lawyers were prepared. The research is based on the different branches of law, considering structure, literature, legal acts, jurisprudence students used in their theses, and the Lithuanian legal language of that time. The most valuable and interesting quotes of students are presented, the teachers who assessed their works are named, and the fates of the students and teachers are revealed. The research covers over five hundred students' final theses written between 1925 and 1939. Namely such a number of final theses are held in the Department of Manuscripts of Vilnius University Library. Noteworthy that around one thousand students graduated in law during the interwar period in Lithuania. Each of this thesis was reviewed in the series of four articles published in Lithuanian language. This article summarizes all four articles and presents final conclusions. The theses reveal not only how the Faculty of Law educated lawyers, but also the legal topicalities of Lithuania at that time. Students wrote about various issues of civil, criminal, administrative, constitutional, labour, and international law. Historical, comparative, and analytical methods were used in the research.*

Key words: *Faculty of Law; Legal History; Legal Literature*

Submitted : 08 March 2021
Accepted : 21 July 2021
Published : 30 December 2021

Suggested citation:
Deviatnikovaité, I. (2021). Final Theses of Students of Faculty of Law in Lithuania: 1925-1939. *Bratislava Law Review*, 5(2), 101-108. https://doi.org/10.46282/blr.2021.5.2.222.

1. INTRODUCTION

There were only forty persons with legal education in Lithuania after the declaration of independence in 1918. Half of them did not speak or write Lithuanian. Then it is not surprising that in 1922 a modest staff of the Faculty of Law worked at the University of Lithuania. In the period from 1922 to 1932, approximately 20 to 30 positions were occupied. Meanwhile, the number of students at the Faculty was higher – in 1922 there were 244 students, and in 1932 there were 1609 students. Thus, the classes were also led by guest lecturers, and some subjects were taught not in Lithuanian, but in the German or Russian languages.

This paper represents a research in the legal history of Lithuania. The research covers over five hundred students' final theses. The object of the research is the final theses of the students of the Faculty of Law written from 1925 to 1932. The aim of the research by evaluating the content of diploma theses is to identify legal issues in the

interwar Lithuania and law studies. Due to the set goal, the content of the final theses, literature, legal acts, relevant case-law, legal language of students are analysed, the most valuable work citations are presented, lecturers' and students' destinies are revealed.

The article is mainly based on the documents found in the Department of Manuscripts of Vilnius University Library, the Rare Books and Manuscripts Section of the Martynas Mažvydas National Library of Lithuania, and the Central State Archives of Lithuania.

2. UNIVERSITY OF LITHUANIA AND ITS FACULTY OF LAW

From 1795 until 1918 one part of Lithuania was a part of the Russian empire and the other part belonged to Germany. Thus, the newly established state after the First World War had to educate new lawyers. There were serious reasons for that. In 1918 there were around forty people with legal education in Lithuania. Half of them did not write or read in the Lithuanian language. Most of them graduated from the universities of Russia. The Faculty of Law was established in 1922 in Kaunas in the University of Lithuania. The University was granted the name of Vytautas Magnus in 1930. A small number of teachers worked at the Faculty of Law. For instance, in the period of 1922–1932 around 20–30 people worked there. However, the number of students was growing: in 1922 there were 244 students, in 1932 there were 1609 students (Maksimaitis, 2002, p. 339). That is why some professors came to teach at the Faculty from other universities and classes were taught not only in Lithuanian, but also in the Russian and German languages (see Maksimaitis, 2002, pp. 330–335).

Final theses were assessed by a small number of teachers – legal philosopher and the Dean of Faculty professor P. Leonas, legal history professor A. Janulaitis, professor of constitutional law and the President of the University M. Romeris, administrative law professor V. Biržiška, professor of international law A. Jaščenka, professors of civil law V. Mačys, S. Bieliackinas, K. Šalkauskis, professors of criminal law A. Kriščiukaitis, V. Stankevičius, teacher of financial law M. Pokrovskis, associated professors A. Tamošaitis, A. Tumėnas, T. Petkevičius, K. Žalkauskas, assistant A.Veryha-Darevskis and others.

3. REQUIREMENTS FOR THE FINAL THESES

The basic requirements for the Faculty of Law diploma were specified in the Regulation of the School of Law in 1923 (*Lietuvos universiteto Teisių fakulteto regulaminas ir mokslo planas*, 1923). Under paragraph 33 of this regulation students had to pass all exams, make all tasks during the seminars, and write final theses from the fields of law or economics to get the diploma.

There were also requirements for the final theses: students should choose the topic together with the professor, the topic should be clearly formulated and related to the economical or legal life of Lithuania. Students should prove their ability to use scientific literature, methods, also ability to spread the topic properly. Technical requirements were also specified – the final thesis should be at least of twenty pages and had to be typed.

According to paragraph 54, the final theses were assessed in three ways - „very good", „good" and „satisfactory". The final thesis was assessed by two teachers, the one who helped the student with the formulation of the topic, and the other who was appointed by the dean of the Faculty. If the opinion of two teachers differed, the Dean

appointed the third teacher. It seems that there was no defence of the final theses, but only their evaluation.

Not only the regulation was issued, which established more technical guidelines for the final theses, but also the methodological instructions were written by S. Šalkauskis, a scientist at the Faculty of Theology and Philosophy (Šalkauskis, 1926; 1933). This work described the role of a student, his duties in the research, the maturity of a researcher, the sources, the means, the types of scientific works and the process of writing a scientific work. It is difficult to say whether students used these instructions in writing their theses – among the sources mentioned in their final theses, only one student indicated methodological instructions of S. Šalkauskis.

4. TOPICS OF THE FINAL THESES

Students analysed classical issues of criminal and civil law, including family law, divorce, adoption of children, inheritance law, property law, contract law, definitions of crime, offense, felony, extradition, participation of third parties in judicial proceedings, system of punishments, status of a witness, evidence, juvenile crimes, the process of cassation, civil action in criminal proceedings. They also tried to assess some current issues of that time: the principle of publicity in criminal procedure, euthanasia, criminal liability of civil servants, responsibility for the termination of pregnancy, etc.

Theses on criminal and civil law were the most popular. Over one hundred and fifty works concerning civil law were written. A lot of attention was dedicated to criminal proceedings, law enforcement, and penitentiary law – about ninety theses.

Administrative (over fifty works) and constitutional (thirty-five works) issues were also discussed in the final theses. It was popular to write about the responsibility of the Railway Board of the Republic of Lithuania, local self-government, land reform, and police. In the topics of constitutional law students compared the provisions of the constitutions of the State of Lithuania and analysed the structure, the status of legislative bodies of other states (for example, Germany, the United States, Austria, Czechoslovakia, etc.), institutes of referendum, plebiscite, status of the head of the state, etc.

Less attention was paid to the philosophy of law and legal history – over thirty works in which the ideas of capitalism and socialism were discussed.

The civil process was also not popular among students since over ten works were written on this subject. Eleven works were written on labour law and twenty on international law, including such topics as international recognition of the state, international air law, state role in international law, the League of Nations, the Permanent Court of International Justice, etc.

Moreover, students wrote about the legal aspects of the establishment of the state of Lithuania, human rights, training of future judges, the possibility of election of judges, their social guarantees, copyright, powers of notary, fingerprint identification, court of jurors, etc. Also, they assessed such questions as the organization of the bar, the monopoly of tobacco, trademarks, fair competition, legal status of foreigners, state credit, copyright, representation in the court, constitutional control of laws, railway liability, waterway administration, movies demonstration supervision, state control, business law, administrative court, press censorship, state liability.

5. LEGAL REGULATION IN LITHUANIA IN THE INTERWAR PERIOD

As it was noted above, one part of Lithuania was a part of the Russian Empire and another part belonged to Germany. Understandably, it was not possible to draft legal

DOI: 10.46282/blr.2021.5.2.222

acts such as civil or criminal code in few months. Thus, unsurprisingly, para. 24 of the Provisional Constitution of the Lithuanian State adopted by the Council of State in 1918 established that „in areas in which the Council of State has not adopted new laws, the laws which were adopted before the war remain in force, if it does not contradict with the basic principle of the Provisional Constitution of the Lithuanian State" (Lietuvos valstybės laikinosios Konstitucijos pamatiniai dėsniai, 1918). In 1919 the Council of State also adopted the law on Criminal Code in which it established that the Criminal Code of Russia of 1903 remains in force in Lithuania if it does not contradict with the Provisional Constitution of Lithuania (Baudžiamasis kodeksas, 1919). Of course, during the independence period, provisions of these civil and criminal law were amended.

However, it should be noted that during the interwar period in Lithuania not only the law adopted in the Tsar Russia was in force. The laws of the German Empire and some amendments made by the Parliament of the Memel Territory and the Directory were in force in the Memel Territory. The French Civil Code (the Code of Napoleon) remained in force in Suvalkija region, which was later named as the Polish Civil Statute. In the Province of Kuršas (lt. Kuršo gubernija) the code of laws of the province was in force.

Thus, during the interwar period in Lithuania four civil law systems were in force (civil laws of the Russian and German Empires, Suvalkija region and the Province of Kuršas) and two criminal law systems (of Russian and German Empires).

Noteworthy, the codes of civil, civil proceedings, criminal and criminal proceedings were not adopted during the interwar period. The students frequently mentioned this aspect in their theses and suggested to draft the new laws.

Therefore, the students had to analyse several systems of legal regulation. They analysed the jurisprudence of the Chief Tribunal of the Republic of Lithuania, the Senate of the Tsar Russian, case law of the German courts, textbooks written in the Russian and German languages and assessed the ideas of scholars from Russia and Germany.

6. LITERATURE USED IN THE FINAL THESES

According to the peculiarities of the legal regulation in Lithuania during the interwar period, it is not a surprise that students analysed law textbooks written mostly in the German and Russian languages.

Around 1935 the number of sources written in the Lithuanian language that students used in their works increased. While investigating criminal and civil law institutes, the Russian and German scientific literature was the most widely used.

This is also explained by the fact that once the University of Lithuania was established, all the teachers who taught there were graduates of universities in Russia. Thus, they knew the Russian language. However, the new generation of teachers, who graduated from Vytautas Magnus University, had the opportunity to study at other Western European universities. Perhaps this also explains the increase in the amount of literature used in 1935 in the English and French languages.

Noteworthy „Law" and „Lawyer" journals published shortened versions of some (apparently the most successful) graduate theses, and some of the studies were published in the separate publications of Vytautas Magnus University. This indicates that there was a lack of legal literature in the Lithuanian language and the decisions were made to publicize students' works.

7. THE LEGAL LANGUAGE IN THE INTERWAR LITHUANIA

The variety of legal regulation, as well as the fact that there were no official translations of the Civil Code, the Criminal Code and procedural laws led to the problem of legal terminology. Some terms were incorrectly translated from German and Russian. Different phenomena could have been identified in the same terms.

8. THE MOST INTERESTING QUOTES OF STUDENTS

Students' final theses were full of thoughts that could not be found in the daily newspapers of that time, especially about the prevailing authoritarian regime in Lithuania, censorship of the press, the role of the League of Nations. This shows that the University teachers openly talked with students, discussed not only legal but also political issues.

The author of the article presumes that the authority of the President of the University Mykolas Romeris was a very important factor to maintain the spirit of freedom at the Faculty of Law. The author of the article makes this conclusion from the comments left by M. Romeris on diploma papers, some of his thoughts expressed during the classes, and quoted by the students in their final theses. Some of the quotes are presented in this paper:

"<...> we can undoubtedly say that our laws, which were created under completely different circumstances, are generally behind the laws of the civilized countries: casualty, contradictory, without any system, without exact terminology, without common concepts and legal principles" (Krasauskas, 1932, p. 38);

The League of Nations "did not deal with the political issues in Lithuania with impartiality. It made mistakes and majority of them were to the detriment of Lithuania" (Meškauskas, 1932, p. 15);

"1928 in the constitution, democracy is fable. This weakening of democracy is not so much the fact that the President of the Republic is above the Seimas, because they are both elected by the nation, but because the relationship between the President of the Republic and the nation is disadvantageous for the nation and it is a fact that cannot be considered democratic" (Volfas, 1939, p. 41);

"In 1928, the dictatorship of the coup, named after the President of the Republic, established the new formal constitutional premise. However, the politically decorative function of this act was clear" (Jaugelis, 1939, pp. 64–65);

"So our press censorship policy went in the direction of the abolition of press freedom" (Zaleskis, 1937, p. 21).

9. FATES OF STUDENTS AND TEACHERS

According to the data found in the Central State Archives of Lithuania about thirty graduates worked as judges, eleven as notaries, thirteen as lawyers, ten graduates became law professors. Some of them continued this activity after the Soviet occupation.

However, some fates of students reveal not only the situation in Lithuania but also in Europe: about fifty graduates of the Faculty of Law emigrated, twenty were taken to the ghettos, at least ten were evacuated, and several were imprisoned.

And it is just preliminary data because there are no data left for many graduates.

The fate of teachers is also ambiguous. However, first, it is noteworthy that the teachers had interesting biographies. Among them there were high governmental officials – member of Constituent Assembly Antanas Tamošaitis, the first chair of the board of the Bank of Lithuania Vladas Jurgutis, ad hoc judge of the Permanent Court of

DOI: 10.46282/blr.2021.5.2.222

International Justice Mykolas Romeris, chair of the regional court of Kaunas Vladas Mačys, governor of the Memel Territory Karolis Žalkauskas, member of the State Council Domas Krivickas, minister of justice Petras Leonas, minister of finance, member of the Lithuanian Academy of Sciences Albinas Rimka, Prime Minister Antanas Tumėnas, the chair of the Ministerial Legal Advisors Commission Antanas Ignas Veryha Darevskis, member of the Chamber of Commerce, Industry and Crafts Petras Šalčius. Some teachers were famous not only in law, but also in artistic work – Simonas Bieliackinas, who, incidentally, taught both civil and criminal law. Some of the teachers' legal works were known not only in Lithuania, but also in Russia, from which they had emigrated to Lithuania, e.g. Alexander Yashchenko, also already mentioned Simonas Bieliackinas.

However, the fates of the teachers were complicated and tragic. Some of them emigrated (Stasys Žakevičius, Vaclovas Biržiška, Vladimiras Stankevičius, Konstantinas Račkauskas, Domas Krivickas, Karolis Žalkauskas, Kazys Oželis, Feliksas Mackus, Mečislovas Mackevičius), others were deported, imprisoned (Tadas Petkevičius, Antanas Tumėnas, Vladas Jurgutis). Simanas Bieliackinas was killed in Auschwitz concentration camp in 1944. Antanas Tamošaitis was arrested by the NKVD and died in prison in 1940.

10. CONCLUSIONS

1. The research revealed how the Faculty of Law prepared future lawyers, and the topicalities of Lithuania in the interwar period. Students wrote about various issues of civil, criminal, administrative, constitutional, labour, business, and international law. Students also assessed some current issues of that time: the principle of publicity in the criminal procedure, euthanasia, criminal liability of civil servants, responsibility for the termination of pregnancy, legal backgrounds of competition law, etc.

2. During the interwar period in Lithuania four civil law systems (civil laws of the Russian and German Empires, Suvalkija region and the Province of Kuršas) and two criminal law systems (laws of the Russian and German Empires) were in force. Therefore, students had to analyse several systems of legal regulation, including the case-law of the Chief Tribunal of the Republic of Lithuania, the Senate of the Tsar Russian, case law of the German courts.

3. Students' final theses were full of thoughts that could not be read in the daily newspapers of that time, especially about the prevailing authoritarian regime in Lithuania. It shows that the spirit of freedom at the Faculty of Law was maintained by the president of Vytautas Magnus University Mykolas Romeris.

4. Fates of students and teachers reveal not only the situation in Lithuania but also in Europe: some of them were evacuated, taken to ghettos, imprisoned, some emigrated, and some continued their activity in the occupied Lithuania.

BIBLIOGRAPHY:

Baudžiamasis kodeksas (1919). Lithuania: Laikinosios vyriausybės žinios.

Deviatnikovaitė, I. (2020a). Teisių fakulteto studentų darbai 1925–1939. I dalis (1925–1932). *Law Review*, 21(1), pp. 21–60. DOI: https://doi.org/10.7220/2029-4239.21.2

Deviatnikovaitė, I. (2020b). Teisių fakulteto studentų darbai 1925–1939. II dalis (1933–1934). *Law Review*, 21(1), pp. 61–105. DOI: https://doi.org/10.7220/2029-4239.21.3

Deviatnikovaitė, I. (2020c). Teisių fakulteto studentų darbai 1925–1939. III dalis (1935–1937). *Law Review*, 21(1), pp. 106–153. DOI: https://doi.org/10.7220/2029-4239.21.4
Deviatnikovaitė, I. (2020d). Teisių fakulteto studentų darbai 1925–1939. IV dalis (1937–1939). *Law Review*, 21(1), pp. 154–195. DOI: https://doi.org/10.7220/2029-4239.21.5
Jaugelis, J. (1939). *Normatyvinė valdymo organų galia Lietuvos konstitucinėje teisėje*. Vytauto Didžiojo Universitetas.
Krasauskas, L. (1932). *Atstovavimas įgaliojimui*. Vytauto Didžiojo Universitetas.
Lietuvos universiteto Teisių fakulteto regulaminas ir mokslo planas. (1923). Teisių fakulteto leidinys.
Lietuvos valstybės laikinosios Konstitucijos pamatiniai dėsniai (1918). Lithuania: Laikinosios vyriausybės žinių papildymas.
Maksimaitis, M. (2002). Teisių mokslai. In: E. Aleksandravičius (Ed.), *Mokslas ir visuomenė 1922-2002* (pp. 325–344). Kaunas: Vytauto Didžiojo universitetas.
Meškauskas, J. (1932). *Teisinė reikšmė Tautų Sąjungos Lietuvai*. Vytauto Didžiojo Universitetas.
Šalkauskis, S. (1926). *Bendrosios mokslinio darbo metodikos pradai*. Kaunas.
Šalkauskis, S. (1933). *Bendrosios mokslinio darbo metodikos pradai*. Sakalo b-vė.
Volfas, J. (1939). *Tiesioginis ir reprezentacinis valdymas*. Vytauto Didžiojo Universitetas.
Zaleskis, L. (1937). *Spaudos cenzūra nepriklausomoje Lietuvoje*. Vytauto Didžiojo Universitetas.

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

PROBLEMATIC ASPECTS OF JUDICIAL PROTECTION AGAINST THE INACTION OF ADMINISTRATIVE AUTHORITIES IN THE CZECH REPUBLIC / Kateřina Frumarová

doc. JUDr. Kateřina Frumarová, Ph.D.
Associate Professor
Faculty of Law of Palacky University in Olomouc
Tř. 17. listopadu 8
771 11 Olomouc
Czech Republic
katerina.frumarova@upol.cz
ORCID: 0000-0001-5886-1645

Abstract: *One of the three most important types of actions in the Czech administrative judiciary is the action for protection against the inaction of an administrative body. Judicial protection follows on from the protection within the administrative proceedings (according to the Administrative Procedure Code).[1] Its entrenchment in the Czech law in 2002 was a huge positive. Nevertheless, in practice there are some controversial issues or issues for discussion which relate to this action. The article analyses the essence of this action, its conditions and hearing in court. However, the main attention is paid to the problematic aspects of the action, both those regarding its legislation and those arising from the practice and case law relating to protection against administrative inaction.*

Key words: *Administrative authority; inaction; judicial protection; administrative judiciary; action for protection against inaction of administrative authority, Czech law*

Suggested citation:
Frumarová, K. (2021). Problematic Aspects of Judicial Protection against the Inaction of Administrative Authorities in the Czech Republic. *Bratislava Law Review*, 5(2), 109-120. https://doi.org/10.46282/blr.2021.5.2.252

Submitted : 09 July 2021
Accepted : 27 October 2021
Published : 30 December 2021

1. INTRODUCTION

The Code of Administrative Justice[2] has brought to the Czech administrative judiciary a new means of protection against the inactivity of the Czech public administration. For the first time in the history of the Czech Republic, there is an action for protection against the inactivity of an administrative body. Until 31 December 2002, such a type of action was significantly absent in the Czech legal system, as was pointed out by the case law of the courts, including the Constitutional Court. The Constitutional Court has long replaced this role (of the administrative justice) and pointed this shortcoming out.[3] „*The regulation of the administrative judiciary shows very serious constitutional deficits, where, above all, some activities of the public administration, as well as its possible inactivity, are not under the control of the judiciary.*"[4] Until 1 January 2003,

[1] Act No. 500/2004 Coll, Administrative Procedure Code.
[2] Act No. 150/2002 Coll., Code of Administrative Justice.
[3] Constitutional Court of the Czech Republic, No. IV. ÚS 114/96 (25 September 1997), or the Constitutional Court of the Czech Republic, No. II. ÚS 507/05 (4 January 2006), etc.
[4] Constitutional Court of the Czech Republic, No. Pl. ÚS 16/99 (27 June 2001). See also Varvařovský and Holeček (2001, pp. 9–10).

the courts did not have the competence to provide protection against the inactivity of the public administration, although this is one of their traditional roles in a democratic state governed by the principle of the rule of law (Frumarová, 2012, p. 111).

The aim of this action is to ensure the protection of the public subjective rights of individuals and legal entities against the inactivity of the administrative authorities. The subject matter of the protection are specifically the subjective public rights deriving from Article 38 (2) and Article 36 (1) of the Charter of Fundamental Rights and Freedoms.[5] It is a right to a hearing without undue delay (both in court proceedings and in administrative proceedings). When administrative authorities decide on matters falling under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, their decision-making activity must also respect the requirement to decide the case "within a reasonable time" (i.e. one of the attributes of the right to a fair trial).[6] For the needs and conditions of public administration, the principle of speed is explicitly enshrined and concretized in the Administrative Procedure Code (§ 6) as one of the so-called basic principles of the activity of administrative bodies (see Frumarová, 2003, pp. 1–13; Frumarová, Grygar, Pouperová, and Škurek, 2021, p. 20 et seq.; Skulová et al., 2020, p. 51 et seq.). The inactivity of an administrative body can therefore be generally defined as "*an unlawful act of administrative bodies consisting of a breach of the statutory obligation to act, in particular to make a decision or take another act, in the statutory or reasonable time.*" (Srebalová, 2008, pp. 9–11; Frumarová, 2012, p. 36 et seq.). Similarly, the case law defines the inactivity as an objectively existing situation in which the relevant procedural acts were not performed within the time limits stipulated by law.[7]

Although the introduction of the complaint for failure to act was undoubtedly a welcome step and significantly improved the possibilities of the addressees of public administration to defend themselves against the inaction of administrative authorities, it should also be pointed out that the legal regulation of this complaint and its application in practice entail certain controversial or problematic aspects. Therefore, the main aim of this article is to identify the shortcomings of the legal regulation of the inaction complaint and to propose possible *de lege ferenda* solutions in the context of the analysis of this complaint. The first sub-area of the research will address the question of whether the dual concept of a judicial protection against the inaction, which is currently present in the Czech Republic, is appropriate and effective. Next, the article will address the question of whether the protection can be sought through this complaint even in the case of the inaction consisting of the failure to initiate administrative proceedings *ex officio*. This issue points to the fact that the possibility of judicial protection against inaction appears to be narrower than in the case of protection under the Administrative Procedure Code. In addition, other sub-issues will be analysed, such as the protection in the case of inaction by ministries and other central administrative authorities or the enforceability of court decisions concerning protection against inaction in practice.

In addressing the above-mentioned problems and issues, the author will rely primarily on the analysis of the existing legislation as well as the relevant case law of the courts. In particular, the decisions of the Constitutional Court and the Supreme

[5] Constitutional Court of the Czech Republic, No. III. ÚS 218/97 (4 December 1997), Constitutional Court of the Czech Republic, No. IV. ÚS 114/96 (25 September 1997), Constitutional Court of the Czech Republic, No. II. ÚS 366/96 (1 October 1997), or Constitutional Court of the Czech Republic, No. IV. ÚS 690/01 (27 March 2003). For more details see also Potěšil, Šimíček, et. al. (2014, p. 749 et seq.).

[6] Constitutional Court of the Czech Republic, No. I. ÚS 5/96 (5 November 1996), Constitutional Court of the Czech Republic, No. IV. ÚS 559/2000 (9 November 2000), or Constitutional Court of the Czech Republic, No. III. ÚS 687/04 (5 October 2005).

[7] Supreme Administrative Court of the Czech Republic, No. 2 Ans 14/2012 (10 December 2012).

Administrative Court significantly complete the standard of a legal protection against public administration inaction in practice. Of course, the opinions and conclusions of legal doctrine will also be reflected. The article should introduce the Czech legal regulation of a judicial protection against inaction to the foreign expert community and, above all, provoke expert discussion on the optimal form of a legal regulation of this complaint. The principle of the speed of administrative proceedings as well as the effective judicial protection of the addressees of the public administration are among the basic standards of all European democratic states.

2. THE ESSENCE AND GENERAL CHARACTERISTICS OF THE ACTION FOR PROTECTION AGAINST THE INACTION OF AN ADMINISTRATIVE AUTHORITY

The purpose and function of the judicial protection against the unlawful acts of the public administration is to provide an effective means of defence at all times, regardless of the form in which the public administrative authority acts.[8] This also applies to the substantive scope of three basic types of actions: actions against administrative decisions, actions for protection against the inaction of administrative authorities and actions against an unlawful interference of the administrative authorities. It is important that *„any act of public administration directed against an individual and interfering with his or her rights or obligations is subject to the effective judicial review."*[9] We can say that the primary role in the system of these three actions is played by the action against the decision of the administrative body. The action for failure to act is a preparatory and auxiliary means in relation to the action against a decision. Its purpose is to force the administrative body to make a decision. As regards the relationship between the action for failure to act and the action against an interference, the action against an interference is subsidiary to the action for failure to act.

The legal regulation of this action can be found in § 79 et seq. of the Code of Administrative Justice. This action may require the court to oblige the administrative authority to issue either a decision on the merits or a certificate. It clearly follows that this inaction action does not cover all possible forms of an administrative inaction. The legislator chose only two, which are, in their opinion, probably the most serious forms of inaction - namely failure to issue a decision on the merits and failure to issue a certificate.

Thus, the first problematic aspect is that in cases of other forms of public administration inaction, an inaction action cannot be brought. Initially, therefore, problems arose in practice as to how to proceed when the inaction of an administrative authority consists of something other than the failure to issue a decision or a certificate. The question was whether judicial protection should also be granted in such a situation and, if so, under which action. Ultimately, the situation had to be resolved by the courts themselves, in particular by the Supreme Administrative Court. It concluded that if the administrative authority's failure to act takes a form other than a failure to issue a decision on the matter or to issue a certificate, it must be regarded as unlawful interference and defended against by an action for interference. The Supreme Administrative Court has stated that *"an action for interference protects against any other*

[8] An action for protection against the inaction of an administrative authority is one of the modalities of the so-called general administrative action. Although it is not explicitly defined in the Czech legal order, a general administrative action can be defined as a legal instrument that opens the way to court for persons who are affected or threatened by the potentially tortious (unlawful) conduct of public administration officials (Pomahač, 2002, p. 100 et seq.).

[9] Supreme Administrative Court of the Czech Republic, No. 7 Aps 3/2008-98 (16 November 2010).

DOI: 10.46282/blr.2021.5.2.252

acts of the public administration directed against an individual which are capable of affecting the sphere of his rights and obligations. (...) An interference may therefore also be an unlawful failure to act."[10] Therefore, the Czech Republic currently has dual judicial protection against public administration inaction. Depending on the type of inaction, it is necessary to defend against it with an action for inaction or an action for interference. However, the question is whether it is appropriate to have two institutes (actions) for protection against the inaction and whether it is not more appropriate to simplify the system in this respect. From the point of view of both the addressees of public administration and the courts themselves, I consider it preferable to unify it.

The action for failure to act may only seek a decision in the matter or a certificate. It is therefore not possible to request merely in general terms that the administrative authority "should continue the proceedings".[11] Nor is the court empowered to review decisions already taken in those proceedings.[12] However, there are also situations in which the administrative authority is inactive even though it has taken a decision on the matter (Kühn, Kocourek, et al., 2019, p. 661). First, this may be the case where the administrative authority decides only part of the subject-matter of the proceedings. In such a situation, there is 'partial' inaction.[13] And secondly, it may be a situation where the act by which the administrative authority has 'decided' is a null and void administrative act.[14] Such an act is not a decision and is regarded as if it had not been issued (it has no legal effect).[15]

Another very problematic aspect of this action is whether it is possible to seek to initiate administrative proceedings *ex officio*. If in an administrative procedure initiated at the request of a party the administrative authority is inactive and considers that no procedure has been initiated, there is no doubt about the applicability of the action for inaction. If the administrative court finds that the party has duly initiated the administrative proceedings by its request, it shall, in its judgment, impose an obligation on the administrative authority to issue a decision on the matter (within a specified period of time). However, the situation is different for administrative proceedings initiated *ex officio*. These proceedings are always initiated by the administrative authority; the party to the proceedings or any other person may only give a motion. However, this activity does not initiate the proceedings (as opposed to a request), but merely alerts the competent administrative authority that there may be prerequisites for initiating proceedings. It is then up to the administrative authority to evaluate the information obtained by the party or some third person, and to initiate proceedings *ex officio* (for more details, see Večeřová, 2021, p. 28 et seq.). The problem arises, however, in a situation where the administrative authority assesses that there are no conditions or grounds for initiating *ex officio* proceedings and therefore does not initiate proceedings, but the person (party) does not agree with this and considers that the administrative authority is illegally inactive.

In such a situation, protection may be sought under § 80 of the Administrative Procedure Code (Večeřová, 2020, p. 137 et seq.). However, if this procedure does not lead to a remedy, the question arises whether the action for protection against inaction can subsequently be brought. The case law in this respect takes a broadly uniform (negative) view, according to which the inaction action cannot be brought to require the

[10] Supreme Administrative Court of the Czech Republic, No. 7 Aps 3/2008-98 (16 November 2010).
[11] Supreme Administrative Court of the Czech Republic, No. Ans 4/2004-116 (15 December 2004).
[12] Here it is necessary to proceed in accordance with § 65 et seq. of the Code of Administrative Justice.
[13] Supreme Administrative Court of the Czech Republic, No. 4 Ans 8/2009-71 (29 October 2009).
[14] Supreme Administrative Court of the Czech Republic, No. 2 Azs 193/2017-37 (3 August 2017).
[15] For more detail about a null decision, see Frumarová (2014, p. 496).

administrative authority to initiate proceedings but only to issue a decision on its merits or a certificate in proceedings already initiated'.[16] Thus, such an action cannot be brought successfully where the legislation does not require the administrative authority to issue a decision on the matter (or a certificate), particularly where the submission is merely a motion and not a request.[17]

Despite the above conclusion, however, the Supreme Administrative Court has stated on several occasions in the past that there are some exceptional cases in which the action against inaction can be successfully brought. This is because if a person initiates an *ex officio* proceedings, and he or she has a public subjective right enshrined in the Charter of fundamental rights and freedoms or in the international human rights treaties that is to be litigated (condition 1), and at the same time the person cannot pursue his or her claim or the protection of his or her claim by other legal means, (condition 2), then an action can be brought.[18]

However, in its relatively recent decision the Extended Chamber of the Supreme Administrative Court again confirmed by majority an opinion that it is not possible to seek to initiate administrative proceedings *ex officio* by means of the action for inaction. In essence, it merely briefly stated that the motion cannot in itself initiate any administrative proceedings.[19]

In agreement with the extended Chamber, I consider that the current wording of the Code of Administrative Justice (§ 79) does not really allow a party to seek this type of protection through this kind of action, i.e. to impose an obligation on the administrative authority to initiate proceedings *ex officio*. Its possible use in the exceptional cases mentioned above is also very questionable. The point is that the Code of Administrative Justice provides for its application only in cases where administrative proceedings have already been initiated (whether at the request or *ex officio*). However, the proceedings have not been initiated by a motion, so one of the basic conditions for such an action is not fulfilled. At the same time, it is questionable what the court's ruling, if any, would be if we were to allow the possibility of bringing an action for failure to act. The Code of Administrative Justice provides that the court shall order the administrative authority to issue a decision and shall set a reasonable time limit for doing so. It does not speak of the imposition of an obligation to initiate proceedings.

It should be added that relatively recently a rather "revolutionary" decision was issued by the Supreme Administrative Court which allowed the use of an interference action for such situations, however under certain strict conditions.[20] A person who has initiated the proceedings may bring an action for intervention and request the initiation of *ex officio* proceedings under the following conditions: the unlawful state which the proceedings are intended to remedy directly affects the substantive rights of the claimant and, at the same time, the claimant must have no other remedy available to them within the public administration or administrative justice system or must have unsuccessfully exhausted it (Frumarová, 2021, pp. 430–435).

[16] Supreme Administrative Court of the Czech Republic, No. 4 Ans 10/2006-59 (26 June 2007), Supreme Administrative Court of the Czech Republic, No. 8 Ans 1/2008-170 (31 March 2009), Supreme Administrative Court of the Czech Republic, No. 4 Ans 6/2006-162 (30 August 2007), or Supreme Administrative Court of the Czech Republic, No. 3 Ans 2/2007-64 (13 December 2007).
[17] Supreme Administrative Court of the Czech Republic, No. 8 Ans 1/2008-170 (31 March 2009).
[18] Supreme Administrative Court of the Czech Republic, No. 5 As 39/2008-46 (29 August 2008), similarly Supreme Administrative Court of the Czech Republic, No. 8 As 19/2008-50 (12 May 2009).
[19] Supreme Administrative Court of the Czech Republic, No. 6 As 108/2019-39 (26 March 2021).
[20] Ibidem.

DOI: 10.46282/blr.2021.5.2.252

I believe that the distinction between administrative proceedings in terms of how they are initiated (on request versus *ex officio*) has its tradition, but above all, it has its essence and purpose. The opinion of the Supreme Administrative Court carries the danger of relativising this dichotomy and opens up room for reflection as to whether *ex officio* proceedings do not in fact become claim proceedings. Moreover, by doing so, the judicial power interferes quite significantly with the competence of the administrative authorities, since it is the administrative authorities, not the courts, which are entrusted with the special laws related to the determination of whether or not to initiate administrative proceedings. On the other hand, even in proceedings initiated *ex officio*, it is often not only objective law that is the subject of protection but also the subjective rights of a particular person. It is therefore understandable that the administrative courts seek to provide protection for those persons. This need is not only pointed out in practice, but also by doctrine, e.g. D. Codl in his article also supports the "open access to judicial protection" (2021, p. 64).

3. STANDING AND TIME LIMIT FOR BRINGING AN ACTION

The person who claims that the failure to act interferes with his or her legal sphere is the one who has an active standing to bring an action for failure to act.[21] However, whether the administrative authority was in fact inactive is examined by the court only during the proceedings. Accordingly, a finding that an administrative authority has failed to act presents grounds for dismissing the action (a decision on its merits), not for rejecting it (a procedural decision).[22]

As regards the passive standing, the law (Code of Administrative Justice) provides that the defendant is the administrative authority which, according to the claim, is obliged to issue the decision or a certificate. Passive standing is therefore determined by the applicant's allegations in the application. However, the existence of an obligation on the part of the defendant to issue a decision or a certificate is dealt with by the administrative court only when it considers the substance of the application and not when it decides on procedural issues. The incorrect designation of the defendant therefore leads to the dismissal of the action, not to its rejection. The applicant's position is more complicated here than in proceedings against a decision, which are differently structured in that respect. In proceedings for failure to act, the responsibility for correctly identifying the defendant rests with the applicant. However, the courts have sought to 'mitigate' this potentially problematic aspect in practice. This is because the courts rely on the so-called 'procedural paternalism'.[23] The court notifies the plaintiff that they have misidentified the defendant and only after the plaintiff fails to respond to this notification are there negative procedural consequences (dismissal of the action).[24] In my view, the case law in question is clearly positive since it contributes to the fulfilment of the right to judicial protection against unlawful conduct or, in this case, unlawful inaction by the public authorities.

The time limit for bringing an action is one year. If a time limit is set for the decision of the administrative authority, there are no problems in determining the start of the time limit for bringing an action. However, if the law does not provide for a specific time limit for the decision, the action may be brought within one year from the date on

[21] Supreme Administrative Court of the Czech Republic, No. 1 Ans 5/2008–104 (2 July 2008).
[22] Supreme Administrative Court of the Czech Republic, No. 5 As 86/2015-42 (26 July 2016).
[23] Supreme Administrative Court of the Czech Republic, No. Nad 224/2014–53 (9 December 2014). See also Kühn, Kocourek, et al. (2019, pp. 672–673).
[24] Supreme Administrative Court of the Czech Republic, No. 1 Ans 5/2007-195 (14 November 2007).

which the last act was done by the applicant against the administrative authority or by the administrative authority against the applicant. The problem is that the Code of Administrative Justice does not specify which acts are considered relevant in this respect. However, it is possible to draw on case law which considers them to be the so-called procedural acts, either of the parties to the proceedings or of the administrative authority.[25] Such a procedural act is, for example, an application to initiate proceedings, an appeal against a decision, summoning a party, serving a decision, and so on. On the other hand, the urgency of a case cannot be considered as such a procedural act.[26] That view can be accepted since otherwise a new time limit for bringing an action would begin to run with each urgent application which would in effect negate the purpose of the time limit for bringing an action.

4. CONDITIONS FOR BRINGING THE INACTION ACTION BEFORE COURT

In addition to the general conditions of the proceedings, the specific conditions related exclusively to the action for failure to act must be satisfied. The complainant must:

1) claim the inaction of the administrative body and at the same time

2) exhaust the means of protection against this inaction, which must be a) generally stipulated by law and at the same time b) exhausted to no avail.

The judicial protection is built on the principle of subsidiarity. This means that the control of public administration activities should always be primarily provided by the public administration itself. If such a procedure is unsuccessful, the judicial protection should be implemented. The complainant is therefore obliged to exhaust the means provided by the procedural regulation valid for proceedings before an administrative body to protect him/her against the inaction of the administrative body. This condition must be met by the date on which the action is brought before the court. If this condition is not met when the action is brought, the action is inadmissible and the court will dismiss it as such. This means is a request for the application of measures against an inactivity pursuant to § 80 of the Administrative Procedure Code.[27] This provision allows a superior administrative authority to take remedial action in the situation of inaction by a subordinate administrative authority. The superior authority may issue a remedial order, make an attraction or delegation or extend the time limit for issuing a decision.

The issue of the need to apply § 80 of the Code of Administrative Procedure in relation to the inactive ministries and other central administrative authorities was a bit problematic. The courts have not required this condition to be met for a long time as these administrative bodies do not have a superior body. And the government of the Czech Republic cannot be considered such a body. Nevertheless, after several years of this practice, the Supreme Administrative Court took the opposite view and now the party to the proceedings is obliged to exhaust the application pursuant to § 80 of the Administrative Procedure Code even in situations when the complainant seeks protection against the inaction of the central administrative authority.[28] It is a question for discussion whether this was a step in the right direction. In the case of inaction by the ministry, the minister himself, as the head of that body, should take action against inaction. However, it must be asked to what extent this person is separate from the

[25] Supreme Administrative Court of the Czech Republic, No. 8 Ans 3/2005-107 (12 June 2006).
[26] Ibidem.
[27] Supreme Administrative Court of the Czech Republic, No. 7 Ans 1/2007-100 (18 October 2007).
[28] Supreme Administrative Court of the Czech Republic, No. 8 Ans 2/2012–278 (20 May 2014).

DOI: 10.46282/blr.2021.5.2.252

ministry, i.e. to what extent the person being inspected and the person inspecting are different. It may be questioned whether such a procedure makes sense and whether it would not be more appropriate to apply directly to the courts.

The above-mentioned means must be used to no avail. In practice, this can present several situations. On the one hand, the superior administrative body to which the party to the proceedings turned with their application for protection against the inactivity may also remain inactive. The question is at what point this body becomes inactive. The law does not explicitly state anything about this. The case law concludes that this is a period of 30 days, which is set as the basic time limit for issuing a decision under the Code of Administrative Procedure (§ 71).[29] The ineffectiveness can also lie in a situation where the superior administrative body takes measures against inactivity but the subordinate administrative body still remains inactive. Finally, this can include a situation in which the superior administrative body does not comply with the request.

Another condition of proceedings on this action is the fact that a special law does not connect the inaction of an administrative authority with the legal fiction that a decision with certain contents has been issued or with another legal consequence. According to the legislator, the fiction of a decision, whether positive or negative, is a sufficient means of legal protection against inaction. If a party is dissatisfied with such a fictitious decision (which will certainly be in the case of a fictitious negative decision), he or she can, of course, seek judicial protection, however not by bringing an action for failure to act but by bringing an action against the administrative decision.

5. COURT DECISION ON THE COMPLAINT

The regional courts are materially competent to decide on the inaction actions. The decision is made by a senate (not by a single judge), regardless of what is involved in the proceedings in which the administrative body failed to act. The inactive complaints are among the cases that are discussed and decided as a matter of priority (§ 56 of the Code of Administrative Justice).

The court decides according to the facts established on the date of its decision. This means that the administrative authority's inaction must still persist at this time. Even if the court finds the inaction, it must further examine whether it is attributable to the administrative body (the so-called material corrective). It is very important because the party to the proceedings may also be liable for inaction.[30]

If the court concludes that the action is well founded, it will impose an obligation on the administrative authority to issue a decision or a certificate. It should be emphasized that the court cannot determine the content of the decision in its decision as this would violate the principle of the separation of powers (Article 2 of the Czech Constitution).[31] Such a rule applies without any problem to inaction in deciding a case but in the case of inaction concerning non-certification, the situation is somewhat different as the court will have to break the boundary and impose an obligation on the administrative authority issuing a certificate of certain content.[32]

An obligatory part of the judgment is also the setting of time limit for issuing a decision (or a certificate). This time limit should be reasonable, so it must be based in particular on the complexity of the case and other circumstances of the case that have

[29] Supreme Administrative Court of the Czech Republic, No. 2 Ans 14/2012-41 (10 December 2012).
[30] Ibidem.
[31] Supreme Administrative Court of the Czech Republic, No. 7 Afs 33/2003-80 (30 September 2004).
[32] For more details see Jemelka et al. (2013, p. 690 et seq.).

been identified. This time limit may not be longer than the limit stipulated by a special law. If the court concludes that the action is unfounded, it will dismiss it.

A cassation complaint (§ 102 et seq. of the Code of Administrative Justice) may be filed against a final judgment of a regional court. The cassation complaint is decided by the Supreme Administrative Court. The subject of ambiguity and various interpretations[33] was the question of whether the administrative body will issue a decision as imposed by a final judgment of the regional court, will not make the cassation complaint filed by it groundless (because the administrative body is no longer inactive). The Enlarged Chamber of the Supreme Administrative Court stated in its resolution that „*the subject of the cassation complaint procedure is the decision of the regional court, not the inaction of the administrative body (which was the subject of the proceedings before the regional court).*"[34] Thus, even if the administrative body issues a decision in the meantime, this is not an obstacle to the hearing of the cassation complaint.

The last problematic aspect that I would like to mention is the fact that the Code of Administrative Justice does not give the power to the courts to subsequently monitor compliance with the obligations imposed. The courts cannot therefore check whether the administrative authorities have actually issued the decision or a certificate. The courts also do not have the possibility to impose a sanction, for example in the form of fines. However, the complainant has the opportunity to apply for the enforcement of the decision by a court or a bailiff. He can also seek damages or a non-pecuniary damage for maladministration.[35]

6. CONCLUSION

In summary, the legal regulation of the action for protection against inaction is undoubtedly one of the benefits of the current administrative justice system. I believe that protection against the inaction by administrative authorities should constitute one of the competences of the administrative judiciary in any democratic state governed by the principle of the rule of law. Nevertheless, there are certain problems, or at least questions for reflection, associated with the legal regulation of inaction actions and their application in practice.

First, there is a need to discuss whether the current "dual" concept of judicial protection against the inaction is appropriate. The fact is that if an administrative authority is inactive, an action for inaction should be brought in some cases and an action for protection against unlawful interference in other cases. In my view, consideration should be given to simplifying this system of judicial protection. A solution could be to formulate the regulation of inaction actions more broadly in the Code of Administrative Justice. At present, the failure to act must consist of a failure to issue a decision on the merits or a failure to issue a certificate. *De lege ferenda*, the regulation could be worded in such a way that the plaintiff could seek protection in the case of failure to issue a decision or to carry out another act provided for by the law.

Another issue for discussion concerns the fact that there is a very limited possibility of seeking the initiation of administrative proceedings *ex officio* in the administrative justice system. An inaction action cannot be used at all in such cases.

[33] Supreme Administrative Court of the Czech Republic, No. 5 Ans 1/2005-54 (August 2005), or Supreme Administrative Court of the Czech Republic, No. 8 Ans 1/2006-135 (15 August 2006).
[34] Supreme Administrative Court of the Czech Republic, No. 8 Ans 1/2006-135 (15 August 2006).
[35] Act No. 82/1998 Coll., on Liability for Damage Caused in the Exercise of Public Authority by Decision or Improper Official Procedure.

DOI: 10.46282/blr.2021.5.2.252

More recently, however, the Supreme Administrative Court has admitted the possibility of using an action for intervention in such a case, provided that several strict conditions are met. In my view, this is a very contentious issue. As a result of the conclusions of the Supreme Administrative Court, the meaning of the distinction between administrative proceedings initiated on request and *ex officio* may be negated. On the other hand, the efforts to extend judicial protection in favour of individuals should be supported. I think that the Slovak legislation may present suitable inspiration for the Czech legislation *de lege ferenda*. The Slovak Code of Administrative Justice allows the public prosecutor to bring an action for inactivity to initiate administrative proceedings *ex officio* (§ 242). I consider the prosecutor's standing to sue to be a more appropriate solution than conferring such standing on all natural and legal persons. They are people with specialist knowledge and limiting standing to the public prosecutor alone does not negate the essence of the *ex officio* administrative procedure to such an extent.

A certain problem of the Czech legislation is also the question of the enforceability of court decisions. It is that Czech administrative courts do not have the power to control the execution of their judgments, nor do they have sanctioning powers in this respect. I believe that this weakens the protective function of the administrative judiciary. *De lege ferenda*, it would be advisable to consider taking inspiration from the Slovak legislation again. The Slovak Code of Administrative Justice allows the administrative court to impose a fine on an administrative authority in the situation when the administrative authority fails to remedy the failure within the time limit set by the court (§ 251). I believe that introducing similar competences of administrative courts into the Czech legislation would strengthen the effectiveness of judicial protection against the inaction of the public administration.

In spite of the above-mentioned shortcomings, the legal regulation of inactivity actions can be assessed positively. This institution has significantly contributed to the protection of public subjective rights of the addressees of public administration. *De lege ferenda*, however, it would be advisable to consider making some changes which would strengthen the effectiveness and functions of this judicial protection.

BIBLIOGRAPHY:

Codl, D. (2021). Zamyšlení nad stávajícím pojetím veřejných subjektivních práv jakožto základu aktivní žalobní legitimace v soudním řízení správním. *Právnik*, CLX(1), 51–64.

Frumarová, K. (2003). Nezákonná nečinnost ve veřejné správě a význam institutu „přiměřené lhůty" ve vztahu k nezákonné nečinnosti veřejné správy. *Správní Právo*, 36(1), 1–13.

Frumarová, K. (2012). *Ochrana před nečinností veřejné správy*. Praha: Leges.

Frumarová, K. (2014). *Nicotnost správního rozhodnutí*. Praha: Leges.

Frumarová, K. (2021). Správněsoudní ochrana v případě nezahájení správního řízení ex offo. *Právní Rozhledy*, 29(13–14), 430–435.

Frumarová, K., Grygar, T., Pouperová, O., and Škurek, M. (2021). *Správní právo procesní*. Praha: C. H. Beck.

Jemelka, L., Podhrázký, M., Vetešník, P., Zavřelová, J., Bohadlo, D., and Šuránek, P. (2013). *Soudní řád správní*. Praha: C. H. Beck.

Kühn, Z., Kocourek, T., et al. (2019). *Soudní řád správní. Komentář.* Praha: Wolters Kluwer.

Pomahač, R. (2002). Modality obecné správní žaloby. *Justiční Praxe*, (3), 100 et seq.

Potěšil, L., Šimíček, V. et al. (2014). *Soudní řád správní. Komentář.* Praha: Leges.
Skulová, S. et al. (2020). *Správní právo procesní* (4th edition). Plzeň: Aleš Čeněk s.r.o.
Srebalová, M. (2008). *Rýchlosť správneho konania a nečinnosť správneho orgánu*. Bratislava: Právnická fakulta UK.
Varvařovský, P., and Holeček, M. (2001). K vydání nálezu ÚS, kterým se zrušuje část pátá „Správní soudnictví" OSŘ. *Právní Zpravodaj*, (5), 9–10.
Večeřová, S. (2020). Opatření proti nečinnosti v případě nezahájení správního řízení z moci úřední. *Správní Právo*, (3), 137–148.
Večeřová, S. (2021). Vyřizování podnětu k zahájení správního řízení z moci úřední. *Jurisprudence*, (2), 28–36.
Act No. 82/1998 Coll., on Liability for Damage Caused in the Exercise of Public Authority by Decision or Improper Official Procedure.
Act No. 500/2004 Coll., Administrative Procedure Code.
Act No. 150/2002 Coll., Code of Administrative Justice.
Charter of Fundamental Rights and Freedoms.
Constitution of the Czech Republic (Act No. 1/1993 Coll.).
Convention for the Protection of Human Rights and Fundamental Freedoms.
Czechia, Constitutional Court of the Czech Republic, No. I. ÚS 5/96 (5 November 1996).
Czechia, Constitutional Court of the Czech Republic, No. IV. ÚS 114/96 (25 September 1997).
Czechia, Constitutional Court of the Czech Republic, No. II. ÚS 366/96 (1 October 1997).
Czechia, Constitutional Court of the Czech Republic, No. III. ÚS 218/97 (4 December 1997).
Czechia, Constitutional Court of the Czech Republic, No. IV. ÚS 559/2000 (9 November 2000).
Czechia, Constitutional Court of the Czech Republic, No. Pl. ÚS 16/99 (27 June 2001).
Czechia, Constitutional Court of the Czech Republic, No. IV. ÚS 690/01 (27 March 2003).
Czechia, Constitutional Court of the Czech Republic, No. III. ÚS 687/04 (5 October 2005).
Czechia, Constitutional Court of the Czech Republic, No. II. ÚS 507/05 (4 January 2006).
Czechia, Supreme Administrative Court of the Czech Republic, No. 7 Afs 33/2003-80 (30 September 2004).
Czechia, Supreme Administrative Court of the Czech Republic, No. Ans 4/2004-116 (15 December 2004).
Czechia, Supreme Administrative Court of the Czech Republic, No. 5 Ans 1/2005-54 (August 2005).
Czechia, Supreme Administrative Court of the Czech Republic, No. 8 Ans 3/2005-107 (12 June 2006).
Czechia, Supreme Administrative Court of the Czech Republic, No. 8 Ans 1/2006-135 (15 August 2006).
Czechia, Supreme Administrative Court of the Czech Republic, No. 4 Ans 10/2006-59 (26 June 2007).
Czechia, Supreme Administrative Court of the Czech Republic, No. 4 Ans 6/2006-162 (30 August 2007).
Czechia, Supreme Administrative Court of the Czech Republic, No. 7 Ans 1/2007-100 (18 October 2007).
Czechia, Supreme Administrative Court of the Czech Republic, No. 1 Ans 5/2007-195 (14 November 2007).
Czechia, Supreme Administrative Court of the Czech Republic, No. 3 Ans 2/2007-64 (13

December 2007).
Czechia, Supreme Administrative Court of the Czech Republic, No. 1 Ans 5/2008–104 (2 July 2008).
Czechia, Supreme Administrative Court of the Czech Republic, No. 5 As 39/2008-46 (29 August 2008).
Czechia, Supreme Administrative Court of the Czech Republic, No. 8 Ans 1/2008-170 (31 March 2009).
Czechia, Supreme Administrative Court of the Czech Republic, No. 8 As 19/2008-50 (12 May 2009).
Czechia, Supreme Administrative Court of the Czech Republic, No. 4 Ans 8/2009-71 (29 October 2009).
Czechia, Supreme Administrative Court of the Czech Republic, No. 7 Aps 3/2008-98 (16 November 2010).
Czechia, Supreme Administrative Court of the Czech Republic, No. 2 Ans 14/2012 (10 December 2012).
Czechia, Supreme Administrative Court of the Czech Republic, No. 2 Ans 14/2012-41 (10 December 2012).
Czechia, Supreme Administrative Court of the Czech Republic, No. 8 Ans 2/2012–278 (20 May 2014).
Czechia, Supreme Administrative Court of the Czech Republic, No. Nad 224/2014–53 (9 December 2014).
Czechia, Supreme Administrative Court of the Czech Republic, No. 5 As 86/2015-42 (26 July 2016).
Czechia, Supreme Administrative Court of the Czech Republic, No. 2 Azs 193/2017-37 (3 August 2017).
Czechia, Supreme Administrative Court of the Czech Republic, No. 6 As 108/2019-39 (26 March 2021).

REVIEWS

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

WHYTE, DAVID: ECOCIDE. KILL THE CORPORATION BEFORE IT KILLS US. MANCHESTER UNIVERSITY PRESS, 2020 / Nikolas Sabján

Mgr. Nikolas Sabján, PhD., LL.M
Assistant Professor
Comenius University in Bratislava
Faculty of Law
Department of Theory of Law
and Philosophy of Law
Šafárikovo námestie č. 6
810 00 Bratislava, Slovakia
nikolas.sabjan@uniba.sk
ORCID: 0000-0001-7017-0468

Submitted : 06 December 2021
Published : 30 December 2021

Suggested citation:
Sabján, N. (2021). Whyte, David: Ecocide. Kill The Corporation Before It Kills Us. Manchester University Press, 2020. *Bratislava Law Review*, 5(2), 123-128. https://doi.org/10.46282/blr.2021.5.2.271

Today's predicament is characterized by the "corporatisation" of every aspect of life: health, education, work, goods and services, in some states even incarceration (particularly in the US) and furthermore, even our private, most intimate relations are mediated by corporations (think about social media or dating apps). In other words, we are witnessing the privatisation of many aspects of our lives with which we have become heavily dependent upon corporations. By the same token, the power and influence of corporations have grown exponentially.

However, this "material force" of the corporate sphere is also complemented by stories, or rather, ideologies which serve to legitimise the corporation and its position in society. Of course, this is not a new phenomenon. At least in the context of the US, the entire PR industry emerged in the beginning of the 20th Century as a tool, among other things, to shed a positive light upon corporations and their activities as their power grew and its legitimacy was being questioned. Today, the ideological justification of corporate activity and power appears in many different forms: stories about its importance for trade and development, its "responsible" conduct (supposedly guaranteed by *soft law* instruments such as the UN Guiding Principles on Business and Human Rights), its "sustainable" character (whatever that means) and there is, moreover, an effort from corporations to present themselves with a "human face" by supporting different social justice causes (so-called "woke corporate capitalism").

Now, as Michel Foucault would have put it, "*where there is power, there is resistance*" (Foucault, 1990) and the corporate sphere is no exception in this regard. Social movements, activist-lawyers or trade unions are stepping up against the

environmentally and socially destructive character of these institutions. In addition, there are new initiatives emerging which demand the adoption of a binding international treaty to end the impunity of corporate actors though these initiatives have their own limitation (Baars, 2019). Be that as it may, the ideological hegemony of corporations is nevertheless being challenged.

In the academic field, it seems to be the case that new, critical approaches are being produced. Their aim is to critically assess the operation, functions and power of corporation and address the relation between capitalism, law and corporation (Baars and Spicer, 2017).

Professor David Whyte's new book, *Ecocide: Kill the Corporation before It Kills Us,* undoubtedly falls into this category. It provides a succinct and readable piece of critical analysis (those who are familiar with critical legal scholarship will certainly appreciate this) of the destructive nature of today's corporate capitalism by focusing upon one of its specific subjects – the Corporation. Essentially, to simplify it to the utmost, Whyte aims to show the nexus between capitalism, corporation and ecocide. The argument could be summarised as follows: "*the entity of the corporation has been specifically designed and adopted to ensure the fast and uninhibited reproduction of profit, with little regard for the environment and social costs.*" (Whyte, 2020, p. 21). Thus, the corporation is "*an invention that has accelerated the capacity for the destruction of the planet*." (Whyte, 2020, p. 3).

The important point, however, is that this destructive and abusive nature of corporations should not be interpreted as an exception from the norm (a few "bad apples") but rather, as a structural feature of the corporation and capitalist socio-economic system more generally. This stems from what he calls the "structure of irresponsibility" – i.e. there are structural reasons and incentives for the corporation to act in an environmentally and socially destructive manner (more to that later).

The introductory chapter is a summary of "super-scary and staggering figures" to get the attention of the reader right from the beginning. It shows how corporation knowingly denied different forms of environmental degradation – for instance, firms had known for long time about the harms of tobacco or asbestos and moreover, oil companies were well aware, at least from the 1970s, about the way carbon dioxide affects the climate (this research was done by their own scientists). Yet the fossil industry did not shy away from fuelling climate denialism and scepticism and spent huge amounts of money on lobbying against necessary legislative changes in this sphere. The list goes on: Whyte lists a number of chemicals or materials (such as leaded petrol, Polychlorinated biphenyl, Bisphenol A, Polyvinyl chloride, Organophosphates or Glyphosate) produced by corporations with the knowledge about their harmful and even deadly effects. As to the amount of greenhouse gases emitted – Whyte refers to uncompromising numbers already known to those working in the field of ecology: since 1988, 100 corporations have collectively produced 71 % of all fossil fuel emissions; around 60 % of Coca-Cola's packaging is estimated to be singe use plastic; corporations are in mostly responsible for the deadly chemicals in our water and air (such as pesticides and dioxins), etc etc. On the other hand, the influence of corporations is enormous: according to the Swiss Federal Institute of Technology in Zurich, 737 corporations control approximately 80 % of global wealth.

Subsequently, the first chapter starts with a brief discussion on the nature of corporation and the different theories about corporate personality (e.g. fictional/artificial entity or contractural/aggregate theory). A short discussion is devoted to the judicial practice of domestic (Supreme Court of US) and supranational courts (European Court of Human Rights) regarding the rights granted to corporate entities. Additionally, corporation gained favourable position within the architecture of international investment

law, giving them the possibility to sue governments within the ISDS system. States were brought to international arbitration for trying to adopt regulatory measures which, apparently, violated the "rights" of corporations. A relatively large part of this chapter is devoted to two aspects of the corporation – its longevity (even immortality), the separation of ownership and control within corporations and the issue of shareholder v. director primacy. Even if corporations committed crimes or contributed to environmental destruction in the past (and continued to do so), corporations tended to survive (often without assuming any responsibility). The clearest example is IG Farben or Volkswagen. Each of them employed during WWII hundreds of thousands of slave labourers, many of them from Auschwitz (IG Farben also knowingly manufactured Zyklon B which was used in the concentration camps for mass killings). Both corporations of course survived and are operating today (IG Farben was split into six corporations, including Bayer or Sanofi). Another example which is central in Whyte's book is Stora Kopparberg, the world's first known corporation founded in 1288. Today, it is known as Stora Enso, the second largest paper producer in the world (implicated in environmental destruction in Brazil and Uruguay).

Whyte also shows, following Zygmunt Bauman, how the separation of corporation as a legal entity from its shareholders and executives (together with limited liability, corporate veil, shareholder primacy and the profit motive) is the primary cause of the "structure of irresponsibility": "*Just like Zygmunt Bauman's description of the profoundly dehumanising character of the bureaucratic structures, the corporation allows its human constituents to remain indifferent to the social and human impact of the production processes and investment strategies*." (Whyte, 2020, p. 58). Simply put, the shareholder's interests are put above the interests of others and they can look away from the consequences of the corporation's actions and focus on profit. This is not a coincidence. As Whyte writes: "*The corporation developed in this way, not merely as a matter of historical coincidence, or a twist of faith. The corporation is structured in this way precisely to enable a system of investment that is dehumanised. It evolved as a mechanism that would allow investors to pursue their 'economic standpoint' above any other standpoint*." (Whyte, 2020, p. 59).

In the second chapter, Whyte describes the insatiable need of capital to expand and destroy and situates the corporation as the central actor in this process. He claims that the "*corporation was formative in the development of a colonial capitalism that was always ecocidal.*" (Whyte, 2020, p. 69). Here we see a fourth aspect connected to the triad capitalism-corporation-ecocide: colonialism. First, the underlying principle is the priority of economic productiveness over other sustainable ways of organizing societies. Whyte relies on Karl Marx's explanation about the endless process of expansion of capital into new places and markets to extract natural resources and produce. This results in the shrinking of time and space as the main precondition for the reproduction of capital. The natural world, identically to time and space, is merely a limit to be overcome. As he succinctly puts it, capital "*cannot stand still*". (Whyte, 2020, p. 76). The annihilation of space and time was, as Whyte states, one of the most important aspects of European colonialism. In this process, corporations played the essential role as an institution which ensures the mobility of capital. Corporations were, furthermore, a means to overcome natural barriers. Accordingly, corporations were used by colonial powers in this manner, and this led to the "*annihilation of nature and the annihilation of people on an unprecedented scale*" (Whyte, 2020, p. 76).

To support this, Whyte provides many examples from the late 1500s onwards (for instance, the activity of well-known East India Company, Royal African Company, Virginia Company, etc.). Whyte also provides examples from the 20th century – e.g. how

DOI: 10.46282/blr.2021.5.2.271

ChevronTexaco was implicated in the cultural genocide of Amazon tribes, the Tetetes and the Sansahuari. Similarly, he discusses how both Mussolini and Hitler were upheld by international capital (banks such as Barclays, Chase, Credit Suisse were implicated in the theft of Jewish property and General Motors, Standard Oil of New Jersey or IBM provided fuel, weapons, vehicles, etc. to the Nazi regime). In the second half of the 20th century, the racist regimes of South Africa and Rhodesia were maintained also by Western capital and there are well-documented cases of corporations being implicated in "disappearances" and assassinations in Latin America in this period.

Whyte offers some thoughts in the third chapter on the issue of regulation of corporate behaviour and its effectivity. Essentially, he argues that regulation not only controls but also enables environmentally destructive behaviour. The debate is an old one in Marxian legal circles and in a more general way, it concerns the question of reform *versus* revolution. The orthodox wing of Marxist legal theory tended to make the claim that the concessions provided to labour and the consensus between labour and capital after the WWII helped to legitimized the capitalist order and de-radicalised labour. The "reformist" strand deemed this development as genuinely progressive. For Whyte, this is a false dichotomy. He correctly asserts that regulations "license" corporations to kill within the limits set by the state. The problem is that this limit is not set in order to protect the planet but are determined according to economic efficiency. Whyte puts forward the standard Weberian argument – the aim of regulation in capitalist societies is to secure its growth and stability, i.e. to ensure the system of production, distribution, consumption, etc. Now, Whyte makes several arguments why regulation is insufficient to alter the ecocidial nature of corporations – reduction of funding for environmental agencies which have to deal with complex cases, lack of enforcement on national and international level for political or economic reasons, or the inadequacy of fines (if imposed) since these constitute only a fracture of their assets and so on. However, he is not dismissing regulations as a sort of "false consciousness". He takes issue with a specific type of regulation prevalent today, the so-called "*end-point regulation*". So, for example, the industrial processes are usually regulated at the end phase, controlling greenhouse gasses, waste or poisonous substances but not immediately at the start-point "*against investors, and therefore corporations.* Start-point regulation would mean "*intervening to control the extraction of raw materials, intervening in chemical and other industrial manufacturing processes. And it* [would] *also mean intervening to control financing of corporate activities.*" (Whyte, 2020, p. 142). Consequently, Whyte is not against regulation *per se*, his argument is about the limited effectivity of the current type of regulatory processes.

Finally, in the fourth chapter, Whyte offers solutions to ensure the accountability of corporations and prevent further environmental destruction. As he correctly points out, what we are witnessing today is "green market fetishism" which wants to turn the current ecological crisis into another "business opportunity" and creates new possibilities for profits. This "green market" is full of greenwashing and false pledges from the fossil industry. Moreover, he criticizes the possibility to resolve, or at least mitigate the ecological crisis that we are facing today by individual, consumer solutions – a sort of "enlightened consumerism" that will apparently help to resolve climate change and other ecological problems. Whyte correctly argues that this is merely "*tinkering at the margins of an overheating world.*" (Whyte, 2020, p. 151). Even though changes in individual behaviour are also necessary, we need to undertake much more radical, systematic changes to avert the ecological crisis that we are facing. That's what Whyte advocates for.

Namely, Whyte supports the idea of public control of assets of biggest carbon emitters. He further proposes a carbon tax and a tax on financial transactions on a global scale. Whyte is also sympathetic to the solutions proposed by "Green New Deal" programme (e.g. reconstruction of the financial system, nationalising the transport companies, creating new forms of recycle cooperatives and new modes of "slow" and local food productions, etc.).

With regard to the corporation, Whyte argues for the following measures: first, the corporate structure must be broken (meaning that we need to restrict the global scope of corporations by breaking the complex ownership structures and chains of subsidiaries); second, that impunity for investors and shareholders must end (meaning that the limited liability principle is unsustainable and that all actors with any type of ownership should be held liable for the harms caused by the activity of corporations); and finally, it is required to end the impunity of corporate executives (executives must be simply liable for criminal activities ensuring that the assets gained from environmentally destructive actions could be reclaimed).

Clearly, all this requires massive interventions by the state and also pressure from "below", i.e. action from popular movements. Now, the solutions proposed by Whyte might be sympathetic to some, but the last chapter is too vague and there is no further discussion on how to achieve these aims. Any discussion about how such changes would look like is also absent. This is partly understandable considering the length and objective of the book but nevertheless, a more in-depth discussion regarding these complex and relatively radical changes would certainly add to their persuasiveness. Even more critically, some of the suggestions are not particularly novel at least in some political and legal circles. Thus, in the end, these might be considered as mere platitudes. In any case, the book provides a good basis for anyone who's interested in more critical accounts about the functioning and power of corporations today.

BIBLIOGRAPHY:

Baars, G. (2019). *The Corporation, Law and Capitalism. A Radical Perspective on the Role of Law in the Global Political Economy*. Leiden: Brill.

Baars, G. and Spicer, A. (2017). *The Corporation. A Critical, Multidisciplinary Handbook*. Cambridge: Cambridge University Press.

Foucault, M. (2020). *The History of Sexuality, Volume 1: The Will to Knowledge*. London: Penguin.

Whyte, D. (2020). *Ecocide. Kill the Corporation Before It Kills Us.* Manchester: Manchester University Press.

DOI: 10.46282/blr.2021.5.2.271

REPORTS

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

MEASURES AGAINST AVOIDANCE AND ABUSE OF PUBLIC PROCUREMENT REGULATION & PRIVATE LAW ASPECTS OF PUBLIC PROCUREMENT (BRATISLAVA, 25 NOVEMBER AND 9 DECEMBER 2021) / Adam Máčaj, Daniel Zigo

Mgr. Adam Máčaj
Comenius University in Bratislava, Faculty of Law, Institute of European Law
Šafárikovo nám. 6; 818 00 Bratislava, Slovakia.
adam.macaj@flaw.uniba.sk
ORCID: 0000-0002-3086-8025

Mgr. Daniel Zigo, PhD., LL.M.
Comenius University in Bratislava, Faculty of Law, Institute of Clinical Legal Education
Šafárikovo nám. 6; 818 00 Bratislava, Slovakia.
daniel.zigo@flaw.uniba.sk
ORCID: 0000-0003-2414-3471

This report was prepared as part of the research project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

Suggested citation:
Máčaj, A., Zigo, D. (2021). Measures against Avoidance and Abuse of Public Procurement Regulation & Private Law Aspects of Public Procurement (Bratislava, 25 November and 9 December 2021). *Bratislava Law Review*, 5(2), 131-136. https://doi.org/10.46282/blr.2021.5.2.273

Submitted : 16 December 2021
Published : 30 December 2021

Once again, Comenius University in Bratislava, Faculty of Law held two conferences related to contemporary issues in public procurement and its regulation by the European Union and national law. Both conferences were held as a part of the research project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context" and focused on various interdisciplinary issues of public procurement in current law and policy. Due to the pandemic restrictions connected to the COVID-19, the conference was held in online format, allowing professionals from all over the country to participate.

The first conference „Measures against Avoidance and Abuse of Public Procurement Regulation" took place on 25 November 2021. The conference was opened

by JUDr. Miroslav Hlivák, PhD., LLM, president of the Office for Public Procurement of Slovakia, and Assoc. Prof. JUDr. Ing. Ondrej Blažo, PhD., director of the Institute of European Law at Faculty of Law of the Comenius University in Bratislava.

JUDr. Miroslav Hlivák, PhD., LLM followed up with a keynote speech aimed at providing outline of legislative initiatives dealing with public procurement. He outlined several areas of interest for various stakeholders involved and introduced various initiatives that already resulted into changes in legislation, but also visions and prospects for future of public procurement law and policy. Specifically, legislative changes introduced pertained to independence of the Office for Public Procurement, accelerating the public procurement procedures, in particular easing the procedure in case of contracts with low value, or changes aiming to streamline the complaint mechanisms. At the same time, initiatives for legislative amendments enshrined providing for a more effective implementation of liability for abuses and avoidance of public procurement legislation, which included the amendments to criminal law, unadopted as of yet.

JUDr. Miroslav Cák focused on the issue of public procurement in cases of construction and development, specifically in connection to cases of constructing affordable rental housing projects. The presentation outlined how multiple cities and municipalities, since 2018, in dozens of public procurement procedures, sought to avoid public procurement regulation in these projects in order to be able to award the contract to specific company they preferred. Once these authorities secured funding from state fund, they were bound by public procurement legislation, however the municipalities subsequently requested the procurement participants to have ownership or lease of a plot of land having specifications that were especially hard to fulfil, and often the contracting authorities themselves held title to such lands, which they then granted to the preferred company, creating a covertly discriminatory scheme. In other cases, the contracting authorities abused an exception that declared acquisition of existing real estate to fall outside the applicable regulation.

JUDr. Ing. Maroš Katkovčin, PhD. focused on the role of interim measures in public procurement oversight of the contracting authorities. Interim measure is regarded an exceptionally powerful tool of the Office of the Public Procurement, especially in ongoing procurements, as it allows total suspension of ongoing procurements. On the other hand, while this measure allows for control of manifestly excessive abuse of applicable regulation, the measure at the same time comes at a cost of promptness of the proceedings, which in itself may lead to rendering the objectives of the procurements pointless due to passage of time. The trouble may then be exacerbated due to the current legislation, which e. g. allows the interim measure to be issued without possibility of the contracting authority to challenge it, allows the statutory time-limits to elapse even while the procedure is suspended, and the interim measures are often granted at the very outset of the oversight Office for Public Procurement exercises. The discussion should therefore question whether these issues should be addressed by legislative amendments, or changes in practice of the Office for Public Procurement as the oversight authority and reasoning of its interim measures.

JUDr. Andrej Beleš, PhD. dealt with current issues of machinations in public procurement, from the viewpoint of criminal law. In Slovakia, the amount of persons prosecuted under the provisions dealing with machinations in public procurement varies depending on the specific crime committed, however, Slovakia prosecutes up to ten times fewer suspects in comparison to Czechia in certain types of offences. In order to streamline the effective implementation of criminal law, the legislation should more clearly and unambiguously delimit which violations of public procurement law are relevant from the viewpoint of criminal law, and which are to be dealt with under the public

procurement procedures and oversight, or under administrative law penalties. Further issues requiring consideration under criminal law through the lens of public procurement include matter of evidence, calculation of harm caused, and the severity of applicable penalties. Nevertheless, apart from legislative changes, question necessarily is whether the prosecuting authorities themselves are sufficiently capable in the specifics of public procurement to efficiently investigate and prosecute the offenders.

PhDr. Matúš Džuppa, LL.M. dealt with the usage of Big Data in the fight against abuses and avoidance of public procurement legislation. The available data related to e. g. finances of companies, personnel etc. were gathered into several huge databases that allow automatization of certain activities related to public procurement, allowing more transparent procurement, and using the database as a measure of prevention from abuses, or conflicts of interest. The database available allows for quantitative comparison of practices not only on part of contracting authorities, but also suppliers, and their disaggregation on the basis of various criteria. Pooling of data allows consideration of various factors, such as how many public procurements a contracting authority initiates, how many participants are in each procurement, what were the prior relations between them, and how the specific procurements were eventually concluded. At the same time, behavioural patterns of contracting authorities can be ascertained through the usage of Big Data e. g. when some companies won 100 % of the contracts, they applied for with one specific contracting authority.

Mgr. Daniel Zigo, PhD., LL.M. presented the research carried out within the research project APVV-17-0641, which focused on one of the relatively new measures of transparency in public procurement in the Slovak Republic – the register of public sector partners (RPSP). In the first place, it differentiated between the principle of transparency in public procurement and the transparency that the RPSP was supposed to bring to the public procurement procedures, as it is aimed at openness on the part of private sector entities, through the obligation to disclose their beneficial owners. Within the objective, the research then focused on several specific areas of functioning of the register. Efficiency indicators have been defined as two basic indicators, which assess whether the register can achieve its goal, and propriety indicators, which in turn assess whether this goal is being achieved in a reasonable way. In the author's opinion, the main indicator of the effectiveness of RPSP is a significant impact on revealing the real ownership structures of companies. The propriety indicators are then, in particular, the adequacy of the costs associated with the RPSP for the company, and the adequacy of the obligations that the law imposes on concerned stakeholders in relation to the results of the register. The adequacy and effectiveness of the RPSP could also be scrutinized by analysing alternative ways of achieving a defined goal. In evaluating the empirical data, the presented research concluded that RPSP is a relatively effective tool in determining the real ownership structures, and the obligations imposed on private sector entities, although extensive, are offset by a prospective procurement contract. As part of the study of possible alternative models of functioning of the register, the research then presented several proposals *de lege ferenda*, aiming to improve the efficiency in practice.

Prof. JUDr. Katarína Kalesná, CSc. and JUDr. Mária Patakyová, PhD. focused on interplay of public procurement and state aid in their presentations. The general presumption of public procurement is that compliance with the regulation excludes the possibility to find the awarded contract to constitute state aid is currently being challenged. The interaction between competition law and public procurement is considerable especially in case of public undertakings and services of general economic interest, as such undertakings are often not bound by the regulation, having exceptional status in areas such as research & development. Some of such undertakings are even

DOI: 10.46282/blr.2021.5.2.273

not selected by public procurement at all, which raises its own set of issues and questions, such as the amount of compensation these undertaking may receive in comparison to undertaking that in fact are awarded the contract through the public procurement. Some Member States in the EU regard services of general economic interest exceptionally broadly, where even public procurement itself may be considered such a service, e. g. services of electronic public procurement. The question posed then is whether this entire sphere will eventually be exempted from the provisions of competition law as well.

At the same time, provision of state aid through public procurement is often a reality as well, as public procurement generally satisfies most of the elements of state aid under Article 107 of the Treaty on the Functioning of the European Union. The issue at hand is whether the consideration for performance of a contract constitutes aid *per se*, as the contracts generally are presumed to be performed under market conditions, and therefore suppliers do not receive any aid or benefit outside the market conditions. The outlined problems may arise e. g. when regulations are breached when awarding the contract, or when a single participant is awarded the contract without any competitor. The manifest cases of aid are present especially when contracts are overpriced, the amount of goods provided is excessive, or goods and services which are not necessary are contracted anyways. In such cases, the contracting authorities are at particular risks of flouting the state aid rules, in particular when such contracts constituting state aid are not notified to the European Commission.

The second conference „Private Law Aspects of Public Procurement" took place on 9 December 2021 and focused on the issues which formed counterpart to the first conference, predominantly related to private law and its interaction with public procurement regulation. The conference was opened by Assoc. Prof. JUDr. Ing. Ondrej Blažo, PhD., director of the Institute of European Law at Faculty of Law of the Comenius University in Bratislava.

Assoc. Prof. JUDr. Hana Kováčiková, PhD. focused in the first presentation on compensation for damages caused by the state authorities in public procurement procedures. The general law on state compensation of damages in administrative proceedings is inapplicable to public procurement procedures, and therefore other legal regimes of liability have to be considered. However, as no contract is concluded before public procurement awards the contract, potential contractual liability of contracting authorities for violations of public procurement regulation under commercial law and the Commercial code is also excluded in Slovakia. The only applicable regime is therefore the general liability regime stipulated in the Civil Code. Unfortunately, while the courts recognized possibility of using such regime, very little jurisprudence deals with the specifics of applying the said regime on liability for damages caused throughout the public procurement procedure, and therefore the practice of such regime is little explored thus far. Specific issues then arise e. g. the question whether the claimants have to prove intent of the contracting authority to cause harm in order to seek damages via judicial proceedings, or whether existence of harm can be proven in conduct before contract is awarded, and what types of compensation may be sought, or whether legislative amendments are required to further clarify the liability regime.

Assoc. Prof. JUDr. Jana Duračinská, PhD. presented essential views on contractual terms in public procurement. Contracts are specific in public procurement, both from the viewpoint of contracting authority and the suppliers. Contractual freedom is limited in the interests of transparency and financial efficiency, and the suppliers have only limited ability to interfere with the terms and conditions of the contracts they compete for, even if those contracts would violate mandatory provisions of national law.

Instead, other regimes are enshrined in the legislation to ensure legality, such as possibility to ask the contracting authority for clarifications before contracts are concluded, or before offers are made. Similarly, changes to contracts after conclusion or submission of offers has to regulated appropriately and differently from law of contracts governing private parties, having regard to the specifics of public procurement contracting. Changes in contracts that are unlawful are also sanctioned with specific procedures allowing to claim the contracts void, such as procedures before Office for Public Procurement, not the judiciary. Certain abuses of contractual terms may even lead to exclusion of undesired competition by the contracting authorities, e. g. through disproportionate contractual damages. To remedy the issues, proposals and existing standardized contractual terms and conditions may be considered, with the prospect of their implementation into Slovak law and practice.

Assoc. Prof. JUDr. Peter Lukáčka, PhD. and JUDr. Peter Kubolek examined relations between commercial law and public procurement regulation, including the historical development of public procurement, as well as contractual terms, dating back to Roman law. The interaction relates especially to the extent of oversight that should be exercised over contracting authorities, where two principal opinions are present. First argues that Office for Public Procurement should refrain to assessment of procedures and principles of public procurement, while opposing opinion argues for more extensive oversight, including fairness and efficiency of the contracts concluded. More extensive interplay is nowadays present even in areas of green public procurement and corporate social responsibility, as well as public procurement and fight against the COVID-19 pandemic, which both pose new questions for the public procurement law, policy and practice. Secondary goals in public procurement generally are being increasingly important, and the emerging practice has shown that the goals such as social public procurement may be achieved even when not requested by the contracting authorities beforehand through pubic procurement, but through mutual agreement of the successful contractor and the authority when concluding the contract itself.

Finally, JUDr. Juraj Tkáč, PhD. dealt with the relationship between procuring authorities and consultants. While the issue itself is not addressed in the EU law, OECD incentivizes states to professionalize the public procurement globally. With that in mind, Slovakia adopted amendments to the Law on Public Procurement that will enter into force in 2022. The law reflects the need for professionalization by recognizing the position of professional supervisor, person that may perform various tasks associated with public procurement, as well as exercise oversight. Concerning consultants and professionals in public procurement, the essential issue is whether contracting authorities are allowed to seek compensation from the consultants for harm caused in the course of their work in public procurement. The question then is whether in case of finding of violations of applicable regulation, the liability between the contracting authority and the professional supervisor should be liable jointly, or exclusively, and to what extent and under what conditions may professional supervisors be held liable.

Both conferences drew widespread attention from academia, professionals, and state bodies daily involved in public procurement. The outlined issues posed vital questions not only as regards the current state of play, but also problems and obstacles in application of current public procurement law, as well as future prospects of development in securing transparent, efficient, and timely performance of public procurement. Although the grant scheme forming the backbone of the provided research slowly draws to a close, the discussed issues shall have a long-term influence on public procurement in Slovakia, and the researched topics have a significant prospect for further development of scientific and legal knowledge in the future.

DOI: 10.46282/blr.2021.5.2.273

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

HOW TO MAKE THE DIRECT CITIZEN PARTICIPATION IN LOCAL SELF-GOVERNMENT MORE EFFICIENT IN THE CONDITIONS OF SMART CITIES AND MUNICIPALITIES (BRATISLAVA, 19 NOVEMBER 2021) / Ľudovít Máčaj

Mgr. Ľudovít Máčaj, PhD.
Assistant Professor
Comenius University in Bratislava
Faculty of Law
Department of Administrative
and Environmental Law
Šafárikovo nám. 6
818 00 Bratislava, Slovakia
ludovit.macaj@uniba.sk
ORCID: 0000-0001-7869-950X

This report is written as an outcome of the project VEGA No. 1/0757/20 titled "Means of direct democracy in the conditions of smart cities and municipalities".

Submitted : 07 December 2021
Published : 30 December 2021

Suggested citation:
Máčaj, Ľ. (2021). How to Make the Direct Citizen Participation in Local Self-Government More Efficient in the Conditions of Smart Cities and Municipalities (Bratislava, 19 November 2021). *Bratislava Law Review*, 5(2), 137-140. https://doi.org/10.46282/blr.2021.5.2.272

On 19 November 2021, Comenius University in Bratislava, Faculty of Law organized an international scientific conference entitled "How to make the direct citizen participation in local self-government more efficient in the conditions of smart cities and municipalities". It was organized online via the MS Teams application. The conference represented the outcome of the research team concerning the project VEGA No. 1/0757/20 titled "*Means of direct democracy in the conditions of smart cities and municipalities*", awarded by the Scientific Grant Agency of the Ministry of Education, Science, Research and Sport of the Slovak Republic and the Slovak Academy of Sciences.

This conference was one of the scientific outputs of the above-mentioned grant and it was a direct follow-up to the conference called "*International and national legal aspects of direct citizen participation in local self-government*", which was organized last year.

The aim of the conference was to identify the most significant shortcomings of the existing legal regulation of the means of direct democracy at the level of municipal self-government. The ambition was to offer proposals for improving the legislation,

especially in terms of the possibility of electronic implementation of the local referendum in the Slovak Republic. The conference presented solutions that will enable a broader digitization of public administration with a special focus on the implementation of direct forms of local democracy in the Slovak Republic.

A total of 26 participants registered for the conference, while 14 separate scientific submissions were presented during the meeting. The conference was attended by representatives of the academic community from Comenius University in Bratislava, Faculty of Law, members of academic community from Slovakia as well as the Czech Republic, but also representatives of legal practice and the third sector.

The conference was held under the auspices of doc. JUDr. Lívia Trellová, PhD. from Comenius University in Bratislava, Faculty of Law. She opened the conference with a speech and also welcomed all guests. In her scientific submission, she also approached the issues of the local referendum and its legislative potential in the conditions of smart cities and municipalities, thus pointing to the central subject of research in the above-mentioned scientific project. At the same time, she presented the practical research carried out and its results concerning the practice of using the means of direct democracy at the level of local self-government.

The scientific part of the conference was divided into three separate sessions, at the end of each, there was a valuable discussion, also with other participants, not only presenters.

During the first session, our guests from the Czech Republic, as well as other important experts proved the universality of the issue of local direct democracy. In the first lecture, JUDr. Ing. Josef Staša, CSc. from Charles University in Prague, Faculty of Law, Czech Republic pointed out the complexity of the concept of the public in relation to local self-government, as well as the definition of its rights. Subsequently, doc. JUDr. Pavel Mates, CSc. presented a paper that he prepared together with his colleague JUDr. Petr Čechák, Ph.D. from University of Finance and Administration, Prague, Czech Republic. He presented to the conference participants the issues of digital services and electronic communication with municipal authorities and practical problems with their implementation. Subsequently, doc. JUDr. Michal Maslen, PhD. presented lecture that he prepared together with his colleague JUDr. Ľubica Masárová, PhD. from Trnava University in Trnava, on the issues of local direct democracy in relation to environmental protection, specifically participatory environmental rights of the public and their implementation in the conditions of local self-government. Next lecture was given by doc. JUDr. Marek Domin, PhD. from Comenius University in Bratislava, Faculty of Law, who outlined the campaign regulation issues as one option of the streamlining of direct democracy at the municipal level. In the last presentation during the first session, JUDr. Matúš Radosa, presented a paper prepared together with prof. JUDr. Marián Vrabko, CSc. from Comenius University in Bratislava, Faculty of Law. They pointed to a number of considerations for simplifying access to electronic communications in the area of local self-government.

The second session of the conference was opened by doc. PhDr. Daniel Klimovský, PhD. from Comenius University, Faculty of Arts, explaining issues of participatory budgeting, its legislative definition, theoretical aspects and application in practice. Mgr. PhDr. Rastislav Král, PhD. from Pavol Jozef Šafárik University in Košice, Faculty of Public Administration, focused on the "participation clause" as a legislative vision in support of direct participation of the population in the performance of municipal self-government. In the following lecture, Mgr. Ing. Kristína Jančovičová Bognárová, PhD.; doc. Ing. Erika Neubauerová, PhD. and doc. Ing. Alena Zubaľová, PhD. from University of Economics in Bratislava analysed selected forms of civic participation also in connection

with local self-government. Representatives of the third sector attracted the participants of the conference with an interesting practical lecture, namely Ing. Paul Pirovits and Ing. Vladimír Ješko from the civic association Priama demokracia (Direct democracy). They pointed to local referendums in Slovakia from 1993 to 2020 in terms of their number, result and other aspects. The session ended with the submission of Mgr. Roman Bisták from Comenius University in Bratislava, Faculty of Law. In a very interesting and current lecture, he approached the use of the institute of a referendum in the dismissal of the mayor of the municipality.

The final session was opened by Mgr. Kristína Slámková from Comenius University in Bratislava, Faculty of Law. In her remarkable contribution, she presented several considerations focused on the cyber security issue in smart cities. Subsequently, Mgr. Ján Ivančík from Comenius University in Bratislava, Faculty of Law presented very actual issues of distant municipal council meetings, public access to information and related current challenges, which are becoming increasingly important in the current situation. In the last lecture, JUDr. Lukáš Tomaš from Pavol Jozef Šafárik University in Košice, Faculty of Law, presented reflections on the wording of Section 15 of the Act on Self-Governing Regions (or what can be improved in the legal regulation of a regional referendum). Finally, doc. JUDr. Lívia Trellová, PhD. concluded the conference and informed the conference participants with other tasks within the project research and thanked them for participating in the conference.

The conference provided a presentation of several interesting views on the implementation of direct democracy institutes at the local government level. Several papers pointed to the theoretical aspects of this issue, as well as their practical use. The conference represents a valuable result of research within the mentioned project and it is the basis for further research and the contribution of the proposals to the application practice.

DOI: 10.46282/blr.2021.5.2.272

BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY IN BRATISLAVA
FACULTY OF LAW

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

THE EFFICIENCY OF PRE-TRIAL PROCEEDINGS – RESEARCH, EVALUATION, CRITERIA AND INFLUENCE OF LEGISLATIVE CHANGES (BRATISLAVA, 4 AND 5 NOVEMBER 2021) / Patrícia Krásná, Stanislav Mihálik, Veronika Marková

npor. JUDr. Patrícia Krásná, PhD., LL.M.
Academy of the Police Force
in Bratislava
Criminology Department
Sklabinská 1
835 17 Bratislava 35, Slovakia
patricia.krasna@minv.sk

JUDr. Stanislav Mihálik, PhD.
Comenius University in Bratislava, Faculty of Law
Department of Criminal Law, Criminology and Criminalistics
Šafárikovo nám. 6
818 00 Bratislava, Slovakia
stanislav.mihalik@flaw.uniba.sk
ORCID: 0000-0002-7576-4000

pplk. JUDr. Veronika Marková, PhD.
Academy of the Police Force
in Bratislava
Criminal Law Department
Sklabinská 1
835 17 Bratislava 35, Slovakia
veronika.markova@minv.sk

This report was prepared as part of the research project APVV No. 19-0102 titled "The efficiency of pre-trial proceedings – research, evaluation, criteria and influence of legislative changes".

Suggested citation:
Krásná, P., Mihálik, S., Marková, V. (2021). The Efficiency of Pre-Trial Proceedings – Research, Evaluation, Criteria and Influence of Legislative Changes (Bratislava, 4 and 5 November 2021). *Bratislava Law Review*, 5(2), 141-142. https://doi.org/10.46282/blr.2021.5.2.270

Submitted : 29 November 2021
Published : 30 December 2021

An international scientific conference organized by the Academy of the Police Force in Bratislava entitled: "The Efficiency of Pre-Trial Proceedings – Research, Evaluation, Criteria and Influence of Legislative Changes" was held on 4th and 5th

November 2021 at the Academy of the Police Force in Bratislava, within the project APVV-19-0102 "The Efficiency of Pre-trial Proceedings – Research, Evaluation, Criteria and Influence of Legislative Changes" under the auspices of Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD., Rector of the Academy of the Police Force in Bratislava and prof. JUDr. Jozef Čentéš, PhD., Head of the Department of Criminal Law, Criminology and Criminalistics, Comenius University in Bratislava, Faculty of Law.

The subject of the international scientific conference was the exchange of knowledge in the field of pre-trial proceedings as well as related areas of criminal law, while the meeting was divided according to the program into two negotiating days.

The first day of the international scientific conference began with a speech by Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD., Rector of the Academy of the Police Force in Bratislava. This fact added value to the international scientific conference and convinced the conference participants of the need to address the issue of "the efficiency of the pre-trial proceedings, its research, evaluation, criteria and the influence of legislative changes". In professional as well as academic circles, the question of the efficiency of the pre-trial proceedings is very current and requires a direct correlation between the discussion within the academic community and application practice. The members of the research team within the project APVV-19-0102, whose principal investigator is prof. JUDr. Jozef Čentéš, PhD., took part in the professional discussion in particular. The ideas and outputs of participants will undoubtedly contribute to the dialogue on the efficiency of the pre-trial proceedings but also to the efficiency of the criminal proceedings and criminal law.

During the second day of the meeting, the participants of the conference were also able to get acquainted with some specialized workplaces of the Academy of the Police Force in Bratislava, which are to assist in the development of several activities in the field of pre-trial proceedings, such as, e.g., a special interrogation room which, by its nature, is aimed at interrogating particularly vulnerable victims, or a specialized workplace of the Criminalistics and Forensic Science Department with a focus on teaching crime scene inspections. The second day of the meeting was also devoted to a panel discussion on selected application problems of criminal proceedings associated with the efficiency of the pre-trial proceedings, while the subject of the panel discussion was the presentation of activities in science and research, as well as other current issues related to the research area. Members of individual law faculties or other institutions who accepted the invitation to the conference took part in the discussion, and these were representatives not only from the Slovak Republic but also from the Czech Republic.

The importance and justification of this international scientific conference lay in the effort of experts, through such important events, to encourage the society to think about the realisation of pre-trial proceedings, but also criminal proceedings in the conditions of the Slovak Republic. Nevertheless, despite the efforts of many experts, it is clear that the efficiency of pre-trial proceedings has its shortcomings, and in view of the above, it is therefore extremely important to gradually build general public awareness of this issue.

Peer-reviewed proceedings will be published from the conference, through which it will be possible to disseminate the ideas expressed during the conference to the professional as well as the general public.