Recent Challenges of Public Administration 2
Papers Presented at the Conference of
‘2nd Contemporary Issues of Public Administration’
on 20th September 2017

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Sádt Nóra, Siket Judit, Maria Karcz-Kaczmarek,
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Conference_2.indd 2 2018. 01. 29. 14:56:33

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Editor:
Erzsébet Csatlós

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Conference_2.indd 3 2018. 01. 29. 14:56:33

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Balogh Elemér
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TABLE OF CONTENTS

Conference_2.indd 5 2018. 01. 29. 14:56:33

Conference_2.indd 6 2018. 01. 29. 14:56:33

PREFACE

Public administration is bureaucracy in the positive sense of the idea. Max Weber defined bureaucracy in his typology of powers as the most effective organizational form. His critics aimed to demonstrate that bureaucracy could never be effective, because it is unfit for correcting itself compared with committed defects. 'Modern' public administration is a concept of qualities and values that contain the capacity of self-correction. 'Modern' public administration reflects more than a 'contemporary' or an 'actual' sense; it is also able to take into adaptations and innovations. 'Modern' public administration implements the sine qua non elements of the ideal type of bureaucracy, but in addition to this, it uses the new forms of public cooperation and communication at the same time, and creates limited scope for changes and flexibility.

The needs of innovation and adaptation in public administration have many sources. First, the metamorphosis of the infrastructural and technical conditions of the administration is worth mentioning. To use a medical analogy: the 'diagnostical' potential of the public administration increased on a huge scale. It must be evident that the potential power and organization of the public administration should be in harmony with growing possibilities. The quality of the public administration of a rule-of-law-state still depends on the relation between possibility, capacity, and effectivity.

The motive for change and adaptation is in transformation along with the territorial dimension of the public administration. Public administration still belongs to the nation state but in a different manner as it used to be. The phenomenon of globalization could be followed by the public administration, if it spills over the limits of the national State. The regionalization and self-governments make a new constitutional situation, from which the nation state seems as a confederation of several administrative bodies. The basic question is therefore if this kind of fragmentation correspond to the basic function of public administration.

For public communities, which are sometimes identical with the national state, sometimes wider or less than the state, is an earnest of success that the public administration would be equal to the requirements of changing conditions. The recognition of the needs and conditions, and the searching for methods of adjustment to them is not futurology, but is a special field of scientific thought. Every initiative which makes this aspects for the matter in dispute is welcome.

Conference_2.indd 7 2018. 01. 29. 14:56:33

The Department of Public Administrative Law of the Faculty of Law and Political Sciences in Szeged is devoted to a comprehensive approach of facts and development of public administration. The manifestation of the mission of our department was a round-table conference organized recently by any enthusiastic colleges. Now, we can talk about such event as a custom to welcome our scholars and to share our recent scientific results with our environment. The edited version of the presentations is here accessible for the gentle readers. It is to be hoped that the below published studies contribute to the better understanding of 'modern' public administration.

Benevolo lectori salutem!

Szeged, 20th December 2017

Dr. habil. Albert Takács, *CSc.*
Head of Department of Public Administrative Law

Conference_2.indd 8 2018. 01. 29. 14:56:33

EDITOR'S NOTE

The idea of having collegial gatherings to share some thoughts related to public administration has long been desired. Research work should not be *l'art pour l'art*; it is important to get to know each other's results, to explore the matching points, to introduce the new waves to the scientific profile of the Department. Last but not least, it is also our mission to give students the possibility to set the frames for expanding their knowledge beyond the obligatory teaching and show some actual challenges of public administration and recent developments in legal literature.

This volume is a manifestation of such event which was organised to welcome our Polish Erasmus partner, *Dr. Maria Karcz-Kacmarek* from the University of Łódz where the biggest Polish legal faculty trains and educates future lawyers. Her visit gave the opportunity to come together and discuss some actual challenges of public administration. On 20th September 2017, lecturers and PhD students presented interesting topics on financial, domestic, and international aspects of public administration. It is a pleasure to declare that we could announce this event as a habit as we are devoted to being involved in many more workshops and conferences in the future and set a forum for a less formal but rather fruitful gathering with academic persons and hard-working students who wishes to expand their knowledge and taste the academic life.

As organiser, I would like to express my gratitude to the participants for their valuable contributions, and our Dean, *Prof. Dr. Elemér Balogh*, former Head of Department, who has always supported our aims and made the publication of the volume possible.

Szeged, 20th December 2017

Dr. Erzsébet Csatlós, PhD
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Conference_2.indd 9 2018. 01. 29. 14:56:33

PANEL I – RECENT CHALLENGES OF ADMINISTRATIVE STRUCTURE IN EUROPE

Conference_2.indd 10 2018. 01. 29. 14:56:33

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SELF-GOVERNMENT OF LEGAL ADVISERS AS A FORM OF DECENTRALIZATION OF PUBLIC AUTHORITY IN POLAND

I. The legal concept and types of self-governments

Issues concerning the concept, legal nature, and place of self-government in the system of public law in the Polish doctrine of administrative law were taken already since the interwar period. The doctrine, however, focuses on the essence and systemic role of local government. Much less attention has been paid in the subject of special kind of self-governments, including the professional self-government, whose significance in the current legal system increases. Self-government is not a homogeneous phenomenon, in the literature self-government institutions are divided into local (general) and special (non-territorial) self-government. The concept of "special self-government" was introduced at Polish administrative law by *Kazimierz Władysław Kumaniecki* in the interwar period. According to this author, the term "special government" points to the fundamental difference between territorial and non-territorial self-government, whereby a special government refers only to a certain category of cases or persons, and therefore is not a universal activity in contrast to local government[1]. Special self-government distinguishes from the local government the way of acquiring membership. To the territorial unit's persons belong by virtue of the law, while membership in the special self-government is associated with performing a particular profession or carrying out a specific activity. Another difference is the extent of public affairs provided by the state to local governments. Territorial units are responsible for various manifestations of human life, and special self-governments perform only tasks in the field of occupational (professional) matter or economic activity.

In the contemporary doctrine of administrative law[2] the following types of special self-government are distinguished into: professional, that links people in the same profession, economic self-government linking business people with common interests, religious self-government that links people of the same religious faith, national self-government linking national minorities. The distinction between religious and national self-government is not difficult. Complications arise, however, when we try to distinguish professional self-

[1] Kumaniecki, Kazimierz Władysław: *Administracja społeczna* In: Kumaniecki, Kazimierz Władysław – Wasiutyński, Bolesław – Panejko, Jerzy: Polskie prawo administracyjne w zarysie. Księgarnia Powszechna, Kraków, 1929. 428-430.

[2] Zimmermann, Jan: *Prawo administracyjne*, Wolters Kluwer, Warszawa, 2008. 110–111.; Filipek, Józef: *Prawo administracyjne. Instytucje ogólne*, Zakamycze, Kraków, 2003. 237.; Granat, Mirosław: *Zasada decentralizacji władzy publicznej i samorządu terytorialnego*. In: Skrzydło, Wiesław (ed): Polskie prawo konstytucyjne. Oficyna Wydawnicza Verba, Lublin, 2004. 146.

Conference_2.indd 11 2018. 01. 29. 14:56:33

government from economic self-government.[3] At present the most exemplary difficulty in uniquely classifying an organization to a specific type of self-government is the agricultural self-government. In the doctrine of administrative law, it essentially falls to the economic[4] self-government, but according to *Jan Zimmermann*, the chambers of agricultural self-government combine the features of economic and professional self-government.[5] Interestingly, the literature also raised doubts about the affiliation of pharmacist's self-government to the professional self-government[6]. The reason for the difficulty of assigning a particular activity to the category of professional or economic activity is that "o*ccupational interests often coincide with or fall within economic interests*"[7]. The criterion which distinguishes the different types of self-governments shall be "t*he activity that underlies the existence of a given self-government organization*"[8].

II. The concept of free profession and profession of public trust

II.1. The concept of free professions (freelancers)

Separation of professional self-governments from other special self-governments requires the presentation of the concept of *free professions*. Professional autonomies perform a significant part of the statutory tasks assigned to them in the field of public administration and therefore they are considered as public entities. In Polish law the term *freelance* does not have a statutory definition or a uniform meaning. There is also no single legal regulation of the competition. In the present legal situation, it is difficult to determine whether a given occupation is or not a free occupation (e.g. artist, craftsman) by material criteria. Therefore, the formal criterion whether the regulations distinguish occupations as a free profession is the most helpful. The list of free professions is variable and depends on the legal traditions of the state, the strength, and requirements of the professional group and on the needs of society.[9] Laws that use the term *freelance* most often refer what kind of professions, within the meaning of this legal act, are understood as free occupations or legal acts leave the meaning of concept of *freelance* to determine by doctrine of law. With this

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[3] Leoński, Zbigniew: *Problematyka samorządu gospodarczego i zawodowego w nowych regulacjach prawnych*. Administracja, 1990/7. 34 – 35.

[4] Banasiński, Cezary: *Samorząd gospodarczy i samorząd zawodowy*. In: Wierzbowski, Marek – Wyrzykowski, Mirosław (eds): Prawo gospodarcze. Zagadnienia administracyjnoprawne. LexisNexis, Warszawa, 2003. 184.; Grzelak, Mirosław – Kmieciak, Robert: *Ustrój i zadania samorządu gospodarczego*. In: Wykrętowicz, Stanisław (ed): Samorząd w Polsce, Istota, formy, zadania. Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, Poznań, 2008. 302.

[5] Zimmermann 2008, 111.

[6] Wojtczak, Krystyna: *Pojęcie wolnego zawodu w świetle prawa*. Studia Prawnicze, 1997/3-4, 138.; Wojtczak, Krystyna: *Zawód i jego prawna reglamentacja. Studium z zakresu materialnego prawa administracyjnego*. Ars Boni et Aequi, Poznań, 1999. 106.; Jacyszyn, Jerzy: *Wykonywanie wolnych zawodów w Polsce*. LexisNexis, Warszawa, 2004. 289.

[7] Starościak, Józef: *Samorząd adwokatury*, Wrocław-Wilno, 1939. 19.

[8] Starościak 1939, 19–20.

[9] Leoński, Zbigniew: *Wolne zawody*. In: Smoktunowicz, Eugeniusz (ed): Wielka Encyklopedia Prawa. Wydaw. Prawo i Praktyka Gospodarcza, Białystok-Warszawa 2000. 1157.

Conference_2.indd 12 2018. 01. 29. 14:56:33

kind of situation, one must deal on Law on craftsmanship[10], which stated that the services provided by the free professions are not included in the craftsmanship. Unfortunately, this law does not specify which professions are free and because of it their performance is not a part of craftsmanship. In turn, the *Code of Commercial Companies*[11] provides for a special type of partnership, established only for jointly pursuing a freelance profession, the so-called partner company. According to Article 87 of this Code, partners in such a company may only be natural persons, entitled to perform free professions, which are listed in the Code or in a separate act. The following categories of professions, according to Code, are considered freelance: attorney, apothecary, architect, construction engineer, chartered accountant, insurance broker, tax adviser, securities broker, investment advisor, accountant, doctor, dentist, veterinary surgeon, notary, nurse, midwife, legal adviser, patent attorney, property valuer and sworn translator. This list is extensive and includes professions that are not traditionally considered as a free in the legal doctrine, e.g. insurance broker, accountant, property valuer or sworn translator.

II.2. The concept of profession of public trust. Constitutional base of professional self-governments.

It is extremely important to determine which profession can be determine as a *free* or as a *profession of public trust*, because according to the Constitution of the Republic of Poland[12] professional self-government is an organization of profession of public trust. A normative definition contained in Article 17 (1) of by means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for protecting, the public interest. Unfortunately, the term *profession of public trust* is not defined in the Constitution nor in the ordinary law. During the constitutional debate, it was explained that this term refers to traditionally understood legal and medical professions. During the work on the Constitution, however, none criteria were created to distinguish the different types of professions. Interestingly, on the grounds of ordinary law some professions were explicitly referred as "profession of public trust" such as: notary or patent attorney. In the doctrine of administrative law some views denied the need to define the concept of the profession of public trust. Professor *Michał Kulesza* believed that "*attempts to build a substantive definition of the profession of public trust lead nowhere*"[13]. This author did not refer to the category of public trust in the profession itself and its characteristics, but to the state or degree of organization of the profession. This category should point to the deontological level presented by this environment and to the fact that the group is

[10] Act of 15th of September 2000 on craftsmanship, Unified text Journal of Laws of 2016, item no 1285.

[11] Act of 15th of September 2002 the Code of Commercial Companies, Unified text Journal of Laws of 2017, item no 1577.

[12] Act of 2nd of April 1997 the Constitution of the Republic of Poland, Journal of Laws of 1997/78, item no 483.

[13] Kulesza, Michał: *Pojęcie zawodu zaufania publicznego*. In: Legat, Sławomir – Lipińska, Małgorzata (ed.): Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka. Senat RP. Warszawa, 2002. 25.

Conference_2.indd 13 2018. 01. 29. 14:56:33

coherent, organized in a social and traditional sense. Only such organizations are able to, in accordance with Article 17 (1) of the Constitution, on its own behalf, perform part of the function of public authority *within the limits of the public interest and its protection*. Referring to the constitutional conception of the profession of public trust, *Kulesza* argued that these are freelance professions (but not all) traditionally performed on an economic basis (or at least in the past it was true), and their deontological character is exceptional.[14]

It is worth noting that an attempt to define the notion of the profession of public trust was included in the draft of Act on the professional self-governments' custody over the exercising of profession of public trust and on the supervision of the activities of professional self-governments and on the amendment of certain acts. In this draft law it was stated that the profession of public trust is a profession performed by persons entrusted with tasks of a special character from the public tasks point of view, the concern for the realization of the public interest or the guarantee of human's freedoms and rights.[15] The professions of public trust are not only those professions in respect of which the statute provides so. Adoption of such a view would reduce the normative content of the Constitution to the level of the act and would also deprive constitutional norms of binding force, addressed first to the legislator.[16] Statutory provisions do not have to use *expressis verbis* the term *profession of public trust*, but they must contain features relevant to these professions, as in the case of advocates, undoubtedly included in the category of public trust in Poland, as in other countries, e.g. US law, which emphasize the public character of the profession of advocate in ensuring public access to justice and legal assistance. Therefore, one should agree with the view that the inclusion in the indicated category is determined by the fact of confirmation in the act of the general characteristics attributed to the professions of public trust in the doctrine[17].

In practice, the definition of clear criteria for granting a particular profession the status of a public trust profession presents many difficulties. Some professions, e.g. basic legal professions – advocate, legal adviser, notary public, have gained the status of public trust professions during their long-term pragmatics and traditionally they are treated as public jobs, but in the case of other professions, these attributes are just shaping and perpetuating. The lack of a normative definition of the concept of the profession of public trust relates to the necessity to consider the attributes of the discussed professions. According to views of doctrine of law, the features of the public trust professions shall include:

- entrusting representatives of this profession with information on the private life of people using their services,
- recognition of these information as a professional secret (resulting in the obligation to protect it),
- the inclusion of persons performing the profession of public trust by immunity from criminal liability for failing to disclose information,

[14] Kulesza 2002, 26.

[15] Project no IV, dated on 1st of March 2003, Article 2, Radca Prawny (Legal Adviser) 2003/3. 7.

[16] Karcz-Kaczmarek, Maria: *Wykonywanie funkcji administracji publicznej przez samorząd radców prawnych*. Fundacja Radców Prawnych Okręgowej Izby Radców Prawnych w Warszawie, Warszawa, 2017. 18.

[17] Sarnecki, Paweł: *Glosa do wyroku Sądu Najwyższego z dnia 29 maja 2001*. Palestra, 2002/5-6. 185–188.

Conference_2.indd 14 2018. 01. 29. 14:56:33

- the use of the services of these professions is most often associated with the occurrence of a real or even potential danger for goods of special importance for the individual (eg. life, health, freedom, dignity, good name),
- failure to comply with the rules of the clerical hierarchy,
- occurrence of formalized professional deontology[18].

According to *Paweł Sarnecki*, the *profession of public trust* is a profession consisting in servicing personal human needs, and its performance involves obtaining information regarding personal, confidential matters. This element objectivizes and distinguishes these professions from the professions of social trust, i.e. pilots, drivers, engineers, whom we entrust to our health and even life, but we do not entrust personal matters. Confidence, which is a special relationship that distinguishes this kind of competition, can be described as *official trust* since the people performing this profession perform specific public tasks entrusted to them by the state. The state and citizens are interested in who carries out this profession. This interest is manifested, among others, in the statutory specification of requirements for candidates for these professions. The society is also expected to meet the requirement of "*having very high professional skills, usually graduating from higher studies and conducting further training (application, specialization*)"[19]. Therefore, people performing public trust professions become entities that connect civil society with the state.

The profession of public trust is a special category of regulated profession. The concept of a regulated profession has been recirculated from EU law to Polish law. The Act of 22nd of December 2015 on the rules for the recognition of professional qualifications acquired in the Member States of the European Union[20] defines in the provision of Article 5 point 4 indicated concept as a set of professional activities, the performance of which depends on having defined in the regulatory provisions formal qualifications necessary to perform these professional activities and, if required, to meet other conditions specified in these regulations. A regulated profession is, therefore, a profession which is or remains to be performed in the host country, based on laws, regulations, or administrative provisions, dependent on direct or indirect certification of a particular education or training. All EU countries can independently determine the list of professions belonging to regulated professions. Most often these are professions in which their improper or incorrect performance may pose a threat to the life and health of others or may result in material or moral damage. As each Member State itself determines which professions are regulated, the same profession may be a regulated profession in one Member State, while in other Member States it will not be in that category. Most countries in the EU consider regulated professions related to medicine, pharmacy, construction, law, transport, education, and finance. "Performing a regulated profession" may take place on its own account, under a contract of employment or in another form permitted by law. Therefore, the possibilities to pursue a regulated profession have been broadly defined, allowing in principle every legal basis for taking up

[18] Karcz-Kaczmarek 2017, 18 – 20. See also the literature given there.

[19] Sarnecki, Paweł: *Pojęcie zawodu zaufania publicznego* (*art. 17 ust. 1 Konstytucji*) *na przykładzie adwokatury*. In: Garlicki, Leszek (ed.): Konstytucja, wybory, parlament. Liber, Warszawa, 2000. 154 – 157.

[20] Act of 22nd of December 2015 on the rules for the recognition of professional qualifications acquired in the Member States of the European Union, Unified text Journal of Laws of 2016, item no. 65.

Conference_2.indd 15 2018. 01. 29. 14:56:33

a regulated profession.[21] Thus, the professions for which the appropriate self-government is created may have complex legal character. First, these professions belong to regulated professions because their taking up and performance depends on the fulfilment of appropriate qualification requirements and conditions specified in legal regulations. Secondly, they can be legally recognized as a profession of public trust, as is the case for the notary profession. The legislator, however, does not have complete freedom in considering the professions concerned as a profession of public trust. The restriction of this freedom is the content of a constitutional norm indicating the functions that local self-governments of public trust professions should fulfil: representation of the profession and the care of proper performance of the profession, within the limits of public interest and for its protection. Separate functions characteristic for trade unions, such as the protection of social interests of the group, should be separated from public functions performed by professional self-governments. Unfortunately, some self-governments are more like quasi-trade unions than professional self-governments.

Due to the above, only some professions can be included in the category of public trust professions due to regulatory tasks entrusted by the state to the professional self-government. The purpose of professional self-governments professions of public trust is, in accordance with the Constitution of the Republic of Poland, protection of the public interest. The consequence of this statement is the recognition of the tasks of these self-governments, or at least some of them, as a category of public tasks, and not a category of independent powers and recognition of these self-governments. It should be remembered that the associations of public trust professions carry out the public tasks entrusted to them on their own behalf and on their own responsibility, which is why it is necessary to equip individual professions with the utmost responsibility and the quality of public trust. The professional self-governments operate independently only in the field of matters belonging to the so-called organizational governance domain, but it should be noted that the so-called domain of organizational power, is not completely beyond the reach of state regulation. Public authorities are entering this area by introducing, among others, compulsory payment of membership fees and their administrative execution. The statutory framework also shapes the organizational structure of such governments. As it was indicated earlier, the rank of professional self-governments is underlined in the Constitution of the Republic of Poland, according to which these associations exercise custody over the proper performance of public trust professions within the limits of the public interest and for its protection. The provisions of the Constitution regarding the possibility of creating professional self-governments in professions of public trust [Article 17 (1)] and the decentralization of public authorities [Article 15 (1)] create a kind of whole range of legal regulations. In this way, that the existence and transfer of tasks of public administration to professional communities should not be understood solely as a manifestation of the will of the legislator, but as a constitutional order regarding the formation of the political system of the Republic. Decentralization of public administration should be understood as the statutory transfer of public-law liability for the implementation of specific public tasks to independent entities, authorities or administrative institutions that do not belong to the centralized government administration[22]. Therefore, it is crucial

[21] Karcz-Kaczmarek 2017, 19 – 20.

[22] Izdebski, Hubert – Kulesza, Michał: *Administracja publiczna. Zagadnienia ogólne*, Liber, Warszawa 1998, 123.

Conference_2.indd 16 2018. 01. 29. 14:56:33

to determine whether the given association performs the tasks of public administration independently – on its own behalf and under its own responsibility – in forms appropriate for public administration, acting on the basis of the law, while remaining under the supervision of the state. Professional self-governments – constituting a form of decentralization of public authority – perform public tasks entrusted to them by law with the use of imperious forms of action. Due to this, the legal and systemic role of this type of associations cannot be bypassed or marginalized in a democratic state ruled by law. The transfer of functions and tasks of public administration to professional self-governments justify not only systemic considerations, but also praxeological considerations. Professional self-governments, as professional and specialized entities are naturally predestined to perform public tasks related to a given profession. It seems that this circumstance should contribute to increasing – with the simultaneous existence of an effective system of state control and supervision – the participation of professional self-governments in performing public administration tasks. The democratic system naturally refers to corporatism as an element necessary to build a civil society. Both the territorial and the special self-government is inherently connected with civil society and is an expression of social participation. The ability to self-organize citizens shows the strength of the whole society, and this in turn is important for the state, because "*the state cannot be strong by the very power of officials; the state can only be strong by the strength of society*"[23]. Regarding this, certain types of professions undertake activities aimed at organizing themselves on the basis of self-government, which proves the attractiveness of the idea of professional corporatism. An example is functioning since the 31st of May, 2016[24] Physiotherapist's self-government. This corporation associates together people, who perform an independent medical profession of physiotherapists. The creation of new professional self-governments should be deeply preceded by a thorough assessment of the need for its existence. The indicated activities can not only be result from the bottom-up efforts of specific professional environments. Self-government associations should be created "*when the performance of a given profession*:

- *firstly, has significant public importance*;
- *secondly, when the whole society is involved in the proper exercise of this profession*;
- *thirdly, when exercising a particular profession requires the cultivation of certain ethical and professional traits*,
- *fourthly, when, for the stabilization of a given profession, it is advisable to provide people with this profession performing certain independence*"[25].

Transferring public administration tasks to professional self-governments shall concern professions with a well-established history, tradition, and stable internal organization. When transferring public tasks, it is important to engage the community in various forms of public life beforehand, as it allows to prepare for the subsequent performance, on the principle of decentralization of power, of public administration tasks. An example of premature decentralization of public tasks for the newly established self-government was the functioning of the brokers' self-government created by the provisions of the Act of 22nd

[23] Osiatyński, Wiesław: *Rzeczpospolita obywateli*, Rosner & Wspólnicy, Warszawa, 2004. 97.

[24] Act of 25th of September 2015 on Physiotherapist's Profession, Journal of Law of 2015, item no. 1994.

[25] Sarnecki, Paweł: *Opinia o projekcie ustawy „Prawo o adwokaturze*". Palestra, 1991/1–2. 51.

Conference_2.indd 17 2018. 01. 29. 14:56:33

of March, 1991 Act on public trading in securities and trust funds[26], and abolished in 1997 by new Law on Public Trading in Securities[27]. The Autonomies of Securities Brokers and Advisors in the Public Trading of Securities was then transformed into an association with privet-law nature. In this light, the aspirations of certain professions to organize them on the basis of professional self-government and admission to perform public administration functions should be assessed as premature. From the point of view of protecting public interests, the decentralization of power should not be too hasty and should not be the result of only strong pressure from specific professional environments.

In summary, the professional self-government of public trust professions can be considered as subcategory of self-government in the legal sense, closely related to the concept and formation of the profession. The members of these professional self-governments are people performing the same occupation and people preparing to perform it (apprentices). Such a solution from the practical point of view is beneficial for these people, because during the application they deepen their theoretical and practical knowledge about the profession, but also learn about the self-government structures and the rights and obligations of self-government members. The literature[28] indicates that the professional self-government is a compulsory organizational form of association of citizens based on a professional community, created to represent the interests of people performing professions requiring special social trust towards state institutions, conducting professional development and social protection of their members. The professional self-government is an organizationally separated community with the features of self-government in the legal sense, membership in which it is associated with the performance of a specific, common profession. It seems that these observations concern professional self-governments from paragraph 1 Article 17 of the Constitution of the Republic of Poland. Self-governments of public trust professions should – unlike other types of self-governments and civil law associations – be guided not only and not primarily by the interests of the affiliates themselves, but above all aim to protect the public interest. Used in the provision of Article 17 (1) of the Polish Constitution, reimbursement of the profession of public trust, refers to the criteria of high qualifications and skills of representatives of individual professions of public trust, shaped by the tradition of principles of performing a given profession, including ethical principles and the ability to properly perform public tasks entrusted to the profession.

III. The history of professional self-government chambers in Poland

During interwar period in Poland there were five self-governments of freelancers. These were the following chambers: advocate's, notary's, medical, dentist's and pharmacy's. Considering the significant development of special governments in the Second Polish Republic, it can be stated that administrative system was characterized on the one hand by an outstanding development of professional self-government organizations shaped in such a way as to safeguard the influence of central authorities on their activities. On the other hand,

[26] Act of 22nd of March 1991 on public trading in securities and trust funds, Journal of Laws of 1991, No 35, item no 155.

[27] Journal of Laws of 1997, No 118, item no 754.

[28] Zimmermann 2008, 110.

Conference_2.indd 18 2018. 01. 29. 14:56:33

by the process of successive limiting the position of local self-government, in particular during the so-called Colonel's rule (1929 – 1935). Prominent representatives of inter-war science pointed out that the special (economic and professional) self-government could be an antidote to the deepening political and economic crisis of the state[29]. Polish concepts of economic self-government were to a large extent a reference to legal solutions functioning at that time in other European countries, primarily in Portugal and Italy. Unfortunately, hopes in this type of legal institutions have not come true. It was caused on the one hand by the aspirations of the public authorities to centralize the state, and on the other hand by the weakness of the professional organizations. This is clearly confirmed by the words that "*acceptance into the system of political state life of a corporate idea, where it is only a tool in the hands of the administration, not a new approach to man with the demand for cooperation for a general good on other principles than before, maybe a corporate idea, the idea of social rebuilding on different principles only harm. Let us hope that our authoritative factors from this false path will step down*"[30]. Liquidated in connection with the outbreak of World War II, professional self-government organizations reactivated their activities after the end of the war, basing, as a rule, on inter-war legislation. In the new system conditions, the existing shape of self-government in the legal sense has changed significantly. Since the local government was a form of decentralization of public authority, there was no place for it in Poland and other countries of Central and Eastern Europe. *Stanisław Kaźmierczyk* said, that after 1945 in socialist state there was no appropriate formulas for the self-government. In socialist countries the self-government deliberations were not popular, because there was no climate for such scientific researches. The political situation of Poland, which did not encourage the development of self-government, caused that the functioning professional self-governments were liquidated until the beginning of the 1950s. The only exception was the advocate association which formally existed as a self-government, but in practice it was strongly subordinated to the state authorities and did not fulfil its tasks independently.

Trends aimed at the decentralization of the state intensified in the early 1980s. Their result was the restoration of the self-governmental shape of advocacy structures and the creation by the Act of 6 July, 1982[31] the professional self-government of legal advisers (solicitors). In Poland the idea of professional self-government of legal advisers was strong and overcame the bureaucracy of that time. From the point of view of the political status of legal advisers, a statutory statement that a legal adviser was not bound by an order regarding the content of a legal opinion. In the opinion of the professional environment, "*just getting your own independent social organization nationwide was an incredible achievement, a value in itself*"[32]. Set up at this time professional council of legal advisers was originally equipped with very modest public competences. First, it did not perform the function of admission to practice as a legal adviser. Despite the existence of self-government, this

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[29] Kumaniecki, Kazimierz Władysław: *Na drodze ku stanowości*, Czasopismo Prawnicze i Ekonomiczne 1920; Jaworski, Władysław Leopold: *Projekt Konstytucji*, Wydawca: Frommer, Leon, Kraków. 1928. 76 – 77.

[30] Kałwa Piotr: *Korporacjonizm i formy polityczne*. Konstytucja polska. In: Stopniak, Piotr et. al. (eds.): Korporacjonizm. Towarzystwo Wiedzy Chrześcijańskiej, Lublin, 1939. 298.

[31] The original text Journal of Laws of 1982/19, item no. 145.

[32] Bereza, Arkadiusz, (ed): *Zawód radcy prawnego. Historia zawodu i zasad jego wykonywania*. Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych, Warszawa, 2010. 37.

Conference_2.indd 19 2018. 01. 29. 14:56:33

function was still carried out by the state administration. The decision to refuse to enter the list of legal advisers or the decision to strike off the list was subject to appeal to the Chairman of the State Commercial Arbitration. Self-government bodies were also not competent in the cases of legal adviser application. According to the original wording of the provision of Article 38 (1) of Act on Legal Advisers, legal application was organized and conducted by district arbitration commissions, which were a state bodies. The Act on Legal Advisers provided only the obligation to cooperate with the organs of the State Commercial Arbitration with the bodies of the self-government of legal advisers in matters related to the organization and running of the legal adviser application. Competences in the field of granting the right to practice, organize and conduct legal adviser training and conducting legal adviser exams were obtained by the councillor's legal advisory in 1989 pursuant to the provisions of the Act of 24th of May, 1989 on the recognition of business cases by courts. Obtaining these rights, had from processional chamber point of view, a fundamental meaning and made from discussed self-government a corporation with full self-government authority. Legal solutions introduced by the May 1989 Act had a significant importance not only to the professional community concerned, but also to the entire society. The political and social transformation initiated in Poland in 1989 has had a major impact on the activation of professional environment. An expression of this movement was the amended wording of Article 5 of the Constitution of the Polish People's Republic from 1952. Amendment from 1989[33] provides that the Republic of Poland guarantees the participation of local self-government in the exercise of public power and the freedom of other forms of self-government. The principle of decentralization of public administration has become a systemic principle, according to which the management of public affairs was to take place with a significant participation of territorial self-government and obligatory associations of citizens performing a specific profession (self-government) or operating in a specific branch of the national economy (economic self-government). The functioning of self-government communities in all forms was considered to be an improvement of administration. Because of so-called The Little Constitution[34] of 1992 maintained in force the 1989 amended provision of Article 5 of the previous Constitution of the Polish People's Republic.

IV. Public tasks performed by self-government of legal advisers

IV.1. General information about the scope of tasks

The analysis of legal regulations concerning the functioning of professional self-governments in Poland indicates that the public-law competences of professional associations are significantly different. In opinion of *Jan Boć* the state decides to create or modify the current regulation of professional self-government, decides to relinquish to the communities a specific part of their regulatory function, which these entities perform as part of the state's

[33] Act of 29th December 1989 on amendment to the Constitution of the Polish People's Republic, Journal of Laws of 1989/75, item no. 444.

[34] Act of 17th October 1992 on mutual relations between the legislative and executive power of the Republic of Poland and on local self-government, Journal of Laws of 1992/84, item no. 426.

Conference_2.indd 20 2018. 01. 29. 14:56:33

public power[35]. The scope of public administration functions performed by individual professional government is variable over time. The functioning and the political position of self-governments is closely related to the political and legal system of the state, as well as the actual position of a given profession in the state. The performance of various functions of public administration by professional autonomies does not absolve the state from responsibility for the correctness and effectiveness of taking up these functions. Certain tasks are undertaken, in a way, "in place of the state", which does not change their public character. This statement emphasizes the important role of state supervision over professional self-governments. At the same time, due to the requirements of a democratic state ruled by law and the need to protect the independence of these self-governments, the legislator should clearly define the imperious powers of professional bodies and the powers of government administration bodies exercising supervision over these self-governments. The doctrine[36] of administrative law includes to the functions (tasks) of public administration carried out by professional autonomies, functions such as: regulating access to the profession, exercising supervision over the profession and exercising disciplinary judiciary. The tasks of public administration carried out by professional self-government include also: representing the interests of the professions concerned with state authorities, shaping the rules of professional ethics and deontology, as well as professional development and the definition of education programs in each profession.

There is no doubt that self-government of legal advisers certainly meets the contemporary constitutional requirements set for professional self-governments of public trust professions. This self-government associates representatives one of the most recognizable professions of public trust. In accordance with the provisions of Article 4 on the Act on Legal Advisers[37], *exercising the profession of a legal adviser consists in providing legal assistance*. The provision of "*legal assistance*" should be treated broadly, it is not only to provide advice, *sensu stricto*, but to perform on behalf of the commissioner one all legal acts occurring in the legal turnover. In accordance with Article 41 of Act on Legal Advisers the catalogue of tasks of the legal adviser self-government is opened and contains only a sample tasks. This catalogue includes in particular: 1) participation in providing conditions to perform statutory tasks of legal advisers; 2) representing legal advisers and apprentices and protecting their professional interests; 3) cooperation in shaping and applying the law; 4) preparation of apprentices for the proper performance of the profession of legal adviser and professional development of legal advisers; 5) supervision over the proper performance of the profession by legal advisers and apprentices; 6) conducting research in the scope of functioning of legal assistance; 7) cooperation with local government units in ensuring the provision of free legal assistance referred to Act of 5th August 2015 on free legal aid and legal education.[38] Taking into account the statutory provisions and the doctrine, the functions of public administration conducted by the legal adviser self-government can be distinguished

[35] Boć, Jan: *Administracja publiczna*, Kolonia Limited, Wrocławm, 2003. 64.

[36] Kmieciak, Robert: *Asymetria w rozwoju samorządu zawodowego i gospodarczego w Polsce*. In: Wykrętowicz, Stanisław (ed): Spór o samorząd gospodarczy w Polsce, Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, Poznań, 2005.; Izdebski, Hubert: *Sprawowanie pieczy nad należytym wykonywaniem zawodu przez samorządy zawodowe*. In: Legat, Sławomir – Lipińska, Małgorzata (eds): Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Senat RP, Warszawa, 2002.

[37] Act of 6th July 1982 on Legal Advisers; Unified text Journal of Laws of 2017, item no. 1870.

[38] Journal of Laws of 2015, item no. 1255.

Conference_2.indd 21 2018. 01. 29. 14:56:33

into: 1) regulating access to the profession, including conducting apprentices application; 2) supervising the proper exercise of the profession; 3) exercising disciplinary sanctions; 4) shaping rules of professional ethics. The whole public-law functions and tasks carried out by the self-government of legal advisers are referred in this study as a custody over the proper performance of a given profession. The analysis of the functioning of the self-government of legal advisers is justified by numerous statutory changes concerning internal organization and functioning of these self- government, as well as amendments regarding the rules of exercising corporation's disciplinary jurisdiction. It is important to stress that self-government of legal advisers trying to satisfy the needs and expectations of its owns members, also strives to meet high social expectations towards this professional group. This professional autonomy in its activities considers the changing social conditions and legal conditions.

IV.2. Adopting of professional ethical codes

The result of this kind of activities is, among others, adoption of the new *Code of Ethics of Legal Advisers* on 22nd of November, 2014. Referring to professional ethics codes, it should be noted, that the legislator has delegated the competence to determine the rules of professional ethics and deontology for national organizational units of individual professional self-governments. The competence of these authorities is justified by the fact that these rules apply to all members of a given community (professional chamber) to the same extent. As a rule, ethical codes are passed by the National Conventions, thanks to which the largest number of delegates, who express the will of other members of the professional community, can participate in the work on their adoption. It should be clearly emphasized that professional self-governments are the most appropriate, and indeed predestined entities to determine the principles of professional ethics and deontology. The experience, practice, and professionalism of this type of organizations is a guarantee that the codes passed by them will respond to the real doubts and ethical needs of a given professional group. Such an effect cannot be achieved by the norms imposed by state authorities from above. On the contrary, any external interference can be met with rejection and reluctance to submit to its requirements. Some interpretative doubts may arise due to the heterogeneous formulations used in the authorization to set standards of professional ethics. The indicated *Code of Ethics of Legal Advisers* came into force on 1st of July, 2015. The existing regulations apply to events taking place before the effective date of this resolution. The indicated legal act begins with the preamble exposing the systemic meaning of the profession of legal adviser. According to the introduction: *a legal adviser performing independently and freely the independent profession serves the interests of the judiciary as well as those, whose rights and freedoms have been entrusted to him for protection*. The profession of legal adviser is an important element of the system of guarantees and respect for law in Poland. It is a profession of public trust that respects ethical ideals and responsibilities shaped during its performance. Defining the rules of conduct in professional and self-governmental life contributes to the dignified and honest practice of the profession of legal adviser. The *Code of Ethics of Legal Advisers* from 2014 consists of 66 Articles divided into seven sections: Section I General provisions; Section II Basic principles of practicing the profession and ethical values and duties of the legal adviser; Section III Practice; Section IV Customer

Conference_2.indd 22 2018. 01. 29. 14:56:33

relations; Section V Relationship to courts and offices; Section VI Relations between legal advisers; and Section VII Relations of legal adviser with self-government. The *Code of Ethics of Legal Advisers* exposes the fundamental principles of practicing the profession of legal adviser, including independence and the rank of professional secrecy. It prohibits paid brokering. According to Article 34 (1), a legal adviser (solicitor) cannot accept remuneration or other benefit for referring a client to another entity providing legal assistance or services connected with it. Newness is that Article 36 (3) of the *Code of Ethics of Legal Advisers* establishes a prohibition on determining remuneration dependent solely on the success (so-called *success fee*). These self-government provision says that legal adviser may not conclude an agreement with the client, under which the client undertakes to pay a fee for running the case only if successful results are obtained, unless otherwise provided by law. However, an agreement is acceptable, which provides for an additional fee for the successful outcome of the case, concluded before the final settlement of the case. To sum up this part, it is worth to notice that adopted by the National Congress, the *Code of Ethics of Legal Advisers* refers not only to traditional, basic issues related to the profession, but also to new phenomena appearing in legal transactions. Thanks to this, the *Code of Ethics of Legal Advisers* from 2014 can be a real and important self-government's tool for lawyers.

Due to the need for unification of modern Europe and the growing importance of cross-border activities, issues of professional ethics ceased to be not only national. The professional status of legal advisers in the European Union, as a rule, is identified with the status of the advocate profession, therefore there are no separate regulations relating exclusively to the ethics of legal advisers. As a substitute for the European legal code of deontology, it should be recognized already in 1977 *Perugia Declaration*. Work on these Declarations was initiated by the *Consultative Committee of Bars and Law Societies of the European Community* (CCBE). This act contained general norms concerning professional ethics, professional secrecy, respecting the principles of foreign bars and law societies, but it did not constitute a complete set of rules that could regulate cross-border practices. The next step on the road to creating a European Code of Ethics for Lawyers was the adoption by the CCBE on October 28th, 1998 in Strasbourg *Common Code of Conduct for Lawyers in the European Community*. The updated version of *the Code* was subsequently adopted at the CCBE plenary session in Lyon on November 28th of the same year. Subsequent changes were introduced at the Dublin session on December 6th, 2002 and in Brussels on November 24th, 2006. The provisions of the Code apply, in principle, to all lawyers within the meaning of Directive 77/249/EEC[39] and Directive 98/5/EC,[40] and lawyers from organizations that are members of CCBE observers in the case of undertaking cross-border activities within the European Union and the European Economic Area. The relevant national authorities of the relevant professional self-government may only sanction possible violations of the Code. The mentioned Code was adopted for use by Polish legal advisers during their

[39] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977. 17–18.

[40] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. OJ L 77, 14.3.1998. 36–43.

Conference_2.indd 23 2018. 01. 29. 14:56:33

cross-border activities pursuant to Resolution No. 8/2010 of the 9th National Congress of Legal Advisors of November 6th, 2010.[41]

V. Supervision over the self-government of legal advisers

In contrast to legal acts regulating legal existence and functioning of local self-government, laws regarding professional self-governments do not generally contain separate chapters on the supervision over these associations. The exceptions are regulations contained in the *Act on notary law* of 1991[42] and in the *Act on court bailiffs and executions* of 1997.[43] The legislator included in these mentioned above acts separate provisions on supervision due to the specific role played by notaries as a person of public trust and bailiffs who are in fact public officials. The specific legal status of representatives of the indicated professions forces them to be subject of more intense state supervision and control than representatives of other professions.

Pursuant to the provisions of Article 5 (3) of *Act on Legal Advisers* and Article 3 (2) of Law on the Bar (advocate) supervision over the activity of the legal adviser self-government and barrister is performed by the Minister of Justice in the scope and forms specified by law. This wording underlines the legal nature of the supervisory authority and the fundamental consequence that supervisory measures can only be applied when the legislator provides for it and in the forms, it makes specification. It is worth noting that the current shape of the paragraph 3 Article 5 of Act on Legal Advisers underlining the formal guarantees of self-government independence, was introduced by the Act of May 22nd, 1997, which amended the provision. The earlier provision provided only that the superior supervision over the chamber of legal advisers is exercised by the Minister of Justice. The currently applicable laconic regulation of the issue of supervision over the legal adviser's self-government (*the Minister of Justice supervises the activity of self-government in the scope and forms defined by law*), allows to refer to doctrinal arrangements in the subject of supervision. In addition, in the provision of Article 5 (3) of *Act on Legal Advisers* the concepts of supervision were used in a clear and precise way, referring them to relations of a systemic character. Such a statutory formulation allows to distinguish the supervision exercised over the whole self-government (the supervision with systemic nature) from the supervision over the individual performance of the profession of a legal adviser, which have material-legal character.

In conclusion, it should be stated that formally supervised entities, the passive side of supervision, are professional self-governments, including the self-government of legal advisers, as decentralized entities of public authority. From a practical point of view, the collegial resolution bodies of all organizational levels of self-governments are primarily subject to state supervision. Such a solution guarantees supervision over the activities of bodies that make decisions in the most important matters for a given professional association. In addition, subjecting the activity of these authorities to state supervision is justified by the fact that some of the self-government decisions are not only intra-corporate in nature, but

[41] Unified text of the Code of Ethics of Legal Advisers. http://bibliotekakirp.pl/items/show/545 (05.12.2017.)

[42] Unified text Journal of Laws of 2016, item no. 1796.

[43] Unified text Journal of Laws of 2017, item no. 1277.

Conference_2.indd 24 2018. 01. 29. 14:56:33

are the implementation of public administration tasks. The self-government implements several tasks commissioned by the state e.g. settlement in the subject of the right to pursue a profession, setting ethical standards or setting disciplinary rules.

VI. Statutory changes and proposition of new legal regulations

It should be stressed that one of the important public tasks of professional self-governments is to provide disciplinary jurisdiction. As part of the supervision over the proper performance of the profession, the self-government courts can decide about suspension, limitation and even about the deprivation of the right to practice of given profession. From 2014 the penalty of depriving the right to practice the legal adviser is no longer of a long-term nature. Nowadays the penalty of depriving the right to practice entails deleting from the list of legal advisors without the right to apply for re-enrolment in the list of legal advisers for a period of 10 years from the day the termination of the right to practice as a legal advisor becomes final.

At present, in the Polish Parliament, the debate on the reform of the judiciary is being held. The proposed changes, in a certain extent, will also apply to the functioning of professional self-governments. This applies, among others, appointment in the Supreme Court a separate *Disciplinary Chamber*. The Disciplinary Chamber should consist of two departments. The first Department should include, in particular, the affairs of the judges of the Supreme Court and the cases of judges and prosecutors regarding disciplinary offenses extending the features of deliberate offenses prosecuted by public prosecution. Whereas the Second Department should consider disciplinary judgments considered by the Supreme Court in connection with disciplinary proceedings conducted on the basis of the *Act on the Bar*, the *Act on Legal Advisors and the Law on Notary*. One of the basic difference between the current and the proposed legal status would consist in directing cassation from corporate disciplinary decisions directly to a specially designated disciplinary chamber. Currently, cassation against disciplinary decisions are considered by the Supreme Court based on the general provisions of the *Code of Criminal Procedure* in the *Criminal Chamber of Supreme Court*. The *National Council of Legal Advisers* has submitted a negative attitude towards the proposed statutory changes[44]. The Act of 20th July, 2017 on the Supreme Court[45], after consideration by the Parliament, was directed to the President, who used his veto right and asked for its re-examination. Finally, after a deliberation in the Sejm's committee of Justice and Human Rights 8th December, 2017 Sejm adopted new version of Law on Supreme Court. The above-mentioned Act was referred to the Senate, i.e. the

[44] Stanowisko Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych dotyczące poselskiego projektu ustawy o Sądzie Najwyższym (Position of Center Research Studies and Legislation the National Legal Advisers Counselors about parliamentary draft of Law on Supreme Court Print No.1727). http://orka.sejm.gov.pl/Druki8ka.nsf/0/03824EE6F88C03C0C12581620035DA76/%24File/1727-004.pdf (05.12.2017.)

[45] The Act of 20th July 2017 on the Supreme Court. http://orka.sejm.gov.pl/opinie8.nsf/nazwa/1727_u/$file/1727_u.pdf (10.10.2017)

Conference_2.indd 25 2018. 01. 29. 14:56:33

upper house of Polish Parliament and 11th of December, 2017 these Law was handed over to the President for signature.[46]

Finally, on December 20, 2017 President of Poland signed the indicated legal act and new Law on Supreme Court was announced in the Official Journal of Laws.[47]

VII. General conclusion

Considering the Polish constitutional statements contained in Article 17, it can be concluded that the concept of professional self-government is inextricably linked to the organization of public trust professions. The provision clearly states that, by way of law, professional self-governments can be formed, representing persons performing public trust professions. The term contained in Article 17 (1) the Constitution of Poland seems to be a normative definition of professional self-government. According to this provision, there are two clear premises for recognizing a given professional organization as a self-governing community. The first premise is the purpose of the functioning of the self-government, that is keeping custody over the proper performance of professions within the public interest and for its protection. The second premise is that the implementation of this objective concerns only the professions of public trust. Both objectives that are to be implemented by professional autonomies (self-governments) are complementary to each other and justify the transfer of part of important public authority and tasks to professional self-governments.

Analyzing the role of the self-government of legal advisers in performing the functions and tasks of public administration, one can cite *Kazimierz Władysław Kumaniecki*, who said

> *" (...) one should remember the Toqueville's words that without the self-government institutions the nation can give the government a liberty, but it cannot have the spirit of freedom. The point is, however, that the local government should be duly developed and built on the one hand, and on the other hand should not be considered a factor that should be raised against government bodies, because in a state of a nation, its own, based on democratic principles, the local government should, in a certain sense in the very organization of state authority, become one of its essential elements, a balancing, binding, ruling authority with those governed in the name of preservation and development of a state organization as a social organization with general, universal and compulsory objectives."*[48]

This opinion seems to be fully current, although it was expressed almost a hundred years ago.[49]

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[46] Sejm przyjął ustawy o SN i KRS. https://wiadomosci.wp.pl/sejm-przyjal-ustawy-o-sn-i-krs-6196158218745985a (12.12.2017.) Text of Law of 8th of December 2017 on Supreme Court. http://orka.sejm.gov.pl/opinie8.nsf/nazwa/2003_u/$file/2003_u.pdf (12.12.2017)

[47] Journal of Laws of 2018, item no.50.

[48] Kumaniecki, Kazimierz Władysław: *Ustrój państwowych władz administracyjnych na ziemiach polskich z dodatkiem – zawierający postępowanie administracyjne*. Wydawca: Frommer, Leon, Kraków, 1921. 138.

[49] Karcz-Kaczmarek 2017, 9.

Conference_2.indd 26 2018. 01. 29. 14:56:33

Finally, it should be emphasized that there is no doubt that the profession of legal adviser and its self-government meets the constitutional criteria established in Article 17 for professional self-governments and can certainly be included into category of professional self-governments of public trust professions. What more, nowadays in Poland, in the legal consciousness of society, the importance of the profession of legal adviser is systematically growing. It is influenced by, among others, recently introduced provisions of Act of 5th August, 2015,[50] which obliging the self-government of legal advisers to participate in the provision of free legal assistance and to carry out tasks in the field of legal education of the society. In the current legal status, the participation of legal advisers in the justice system is also growing. This is evidenced by the latest legislative changes from Act of 27th September, 2013 amending the *Code of Criminal Procedure* and some other acts,[51] enabling legal advisers to act as counsel in criminal proceedings and in proceedings in cases concerning fiscal offenses. The activity of the self-government of legal advisers also applies to participation in the system of observing the rights of patients by indicating candidates for provincial commissions for deciding on medical events.[52]

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[50] Journal of Laws of 2015, item no. 1255.

[51] Journal of Laws of 2013, item no 1247.

[52] Act of 6th November 2008 on Patients' Rights and the Patient's Rights Ombudsman, Unified text Journal of Laws of 2017, item no. 1318.

Conference_2.indd 27 2018. 01. 29. 14:56:33

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Conference_2.indd 29 2018. 01. 29. 14:56:33

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VERTICAL COOPERATION OF AUTHORITIES AND CONSULAR PROTECTION PROCEDURE IN THIRD STATES[1]

I. Introduction: the nature of consular protection policy of the EU

Mainly the domestic aspects of public administration are discussed, however, the execution of public policies also has external branches. Foreign representations ensure, among others, certain administrative services for their nationals on the territory of another State including consular protection.[2] It means various types of help, advice, and service for the citizen in trouble like contacting relatives and it can also include the performance of authority acts of consular agents, like the issue of emergency travel documents. Basically, this kind of State service is generally acknowledged by international law to national and as its theoretical concept is strictly linked to the personal sovereignty of States over its citizens, it is a prerogative of the State to decide upon its regulation. Correctly, it used to fall under absolute State discretion whether and how to ensure it to its citizens but since the EU declared consular protection of EU citizens in third States as a fundamental right and enabled the citizens to ask consular authorities from any available foreign representations of any Member State's in case of the lack of own State's representation. However, in principle, the relevant EU norms made no changes to the substantive rules of consular protection and instead of harmonisation, they introduced an *equal treatment* clause in specific situations[3] when the consular authority of the Member State shall ensure the same protection to any EU citizens whose State has no available representation to help as it would ensure to its own nationals.[4]

In general, Member States do not need the involvement of the EU level organs as consular assistance and protection are after all exclusive national competencies and only the equal treatment is required whatever the laws and regulation of the Member State is on consular protection measures. Meanwhile, ensuring consular protection for a non-national EU citizen

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1 Supported by the UNKP-17-4 New National Excellence Program of the Ministry of Human Capacities.

2 See, Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261. [VCCR] Article 5.

3 95/553/EC: Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. OJ L 314, 28.12.1995, 73–76. [Consular Protection Decision] Article 5.1.; Council Directive 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC. OJ L 106, 24.4.2015. [Consular Protection Directive] Article 9.

4 Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 47–390. [TFEU] Article 23., Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012. 391–407. [EU Charter] Article 46.

Conference_2.indd 30 2018. 01. 29. 14:56:33

requires the contacting with other Member States' competent authorities[5] and crisis situations with numerous beneficiaries of the fundamental right to consular protection in Third States supposes the collaboration with EU organs and authorities for an effective assistance.[6] The EU neither has competency to regulate consular protection, nor its institutions and organs are entitled to perform as consular authorities but the common foreign and security policy (CFSP) shall be defined and implemented by the European Council and the Council acting unanimously except where the TEU/TFEU provide otherwise, and shall be put into effect by the *High Representative of the Union for Foreign Affairs and Security Policy* (HR/VP) and by Member States.[7]

EU nationals make more than 180 million journeys outside the EU per year, that was the motif to strengthen cooperation and coordination on consular protection,[8] as a matter of fact, according to data of 2016, all Member States are represented in only four countries in the world: the US, Russia, India and China. The Commission noted that in 2015 almost 7 million EU citizens travelled in or lived in a country where their national State has no representation and this number is expected to increase.[9] So, the relevance of such basic right is getting revaluated. Meanwhile, not only fundamental rights protection is getting increasing importance in the EU but the EU's foreign policy is continuously expanding and consular protection policy leads to the engagements of different kind of EU policies of different legislative competences. Notably, common foreign and security policy (CFSP) with crisis management and the involvement of foreign policy organs of the EU creates a unique system of collaboration of organs and authorities while the *de facto* performance of consular tasks remains in the hands of consular authorities of the Member States. However, in the procedure, other organs and authorities can take place which has relevance in a procedural law point of view and in an organisational aspect concerning the autonomy of classical state administration of foreign policy.

Therefore, the functioning of the system and the legal relationship between the components of this organisation shall be examined, notably, the administrative relationship between the direct level organs and the executors at indirect level.

II. The structure of the European administrative system

To describe the organisational background of a certain policy, the general features of European administration shall be clarified first.

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5 Consular Protection Directive, Article 10.

6 See, Consular Protection Directive, Article 11–13.

7 TEU Article 24. (1).; 3. Article 26. (2)–(3). TFEU Article 2. (4).

8 In April 2006 the COCON Group estimated these trips at some 180 million per year. Green Paper Diplomatic and consular protection of Union citizens in third countries. Brussels, 28.11.2006. COM(2006)712 final. 4. footnote no. 6.

9 European Commission – Press release EU consular protection rules: better protection for European citizens abroad. Brussels, 20 April 2015. http://europa.eu/rapid/press-release_IP-15-4803_hu.htm (10.10.2017.) See also, Kaczorowska-Ireland, Alina: *European Union Law*. Routledge, London, 2016. 704.

Conference_2.indd 31 2018. 01. 29. 14:56:33

II.1. The nature and features of the European administrative system

"*International organizations are unusual creations: generated by and for their member-states, at the same time they often have to compete with those very states that created them*."[10]

The powers transferred from Member States enable the EU institutions to legislate. In certain policies, the EU has exclusive competences,[11] while in others the competences are shared between the EU and the Member States and the latter can act only if the EU has chosen not to,[12] and the EU has the weakest powers when it has competence to support, coordinate or supplement the actions of the Member States.[13] There is no general competence in the entire policy area but only with regard to matters specified by the TEU-TFEU provisions.[14] However, the executive organisation is not regulated by the EU. Member States are required to have administrative systems and public administration institutions capable of transposing, implementing and enforcing the acquis according to the *principle of* "*obligatory results*" (*obligation de résultat*).[15]

The EU's own executive capacity (*direct administration*) is relatively small.[16] The execution, the process of individual cases is, therefore, left to the administrative capacity of Member States' (*indirect administration*).[17] The correlation of the different levels allows to describe the EU as a *multilevel administrative system* known as *European administrative space* (*EAS*)[18] which is held together by common constitutional principles rooted in

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[10] Klabbers, Jan: *An Introduction to International Institutional Law*. CUP, Cambridge, 2002. Introduction.

[11] TFEU Article 3.

[12] TFEU Article 4.

[13] TFEU Article 6.

[14] See Treaty on the European Union – Treaty on the Functioning of the European Union. List of decision-making procedures by article (updated 17/12/2009) http://ec.europa.eu/codecision/docs/legal_bases_en.pdf (10.10.2017.)

[15] SIGMA 27. 1999, 6.

[16] As the guardian of the Treaties, the European Commission is responsible for the proper execution of EU law, in fact, each Commissioner is responsible for specific policy areas to defend the interests of the EU as a whole while they are in charge with drafting and monitoring proper execution by the Member States. The Commission is entitled to establish *agencies* for technical, scientific, or administrative function to help EU institutions in policy formation, law-making and execution. TFEU Art. 352. Sometimes they are called decentralized agencies as their seats are in different Member States although they are considered central supranational organs and not local ones placed on the territory of all the Member States. European Agencies – The Way forward. Brussels, Communication from the Commission to the European Parliament and the Council, 11.3.2008. COM(2008) 135 final. 4.; Chiti, Edoardo: *EU and Global Administrative Organizations*. Springer-Verlag, Berlin Heidelberg, 2011. 21.

[17] Ficzere Lajos: *Európai közigazgatás – nemzeti közigazgatás*. In Gerencsér Balázs – Takács Péter (eds.) Ratio legis, ratio iuris: ünnepi tanulmányok Tamás András tiszteletére 70. születésnapja alkalmából. Szent István Társulat, Budapest, 2011. 383–84.

[18] Dezső Márta – Vincze Attila: *Magyar alkotmányosság az európai integrációban*. HvgOrac, Budapest, 2012. 490.; Heidbreder, Eva G.: *Structuring the European Adminstrative Space: Channels of EU Penetrations and Mechanisms of National Chance*. KFG Working Paper Series, No. 5. 2009. 5.; Torma, András: *Az Európai Közigazgatási Térségről – magyar szemmel*. Miskolci Jogi Szemle, Vol. 6. spec. ed. 2011. 197.; Kárpáti, Orsolya: *Az európai közigazgatási tér kialakulása* (*I. rész*). Sectio Juridica et Politica, Miskolc, Tomus XXIX/1. 2011. 234.; Koprić, Ivan– Musa, Anamarija – Novak, Goranka Lalić: *Good Administration as a Ticket to the European Administrative Space*. Zbornik PFZ, Vol. 61. No. 5. 2011. 1545–1546.; Curtin, Deirdre – Egeberg, Morten: *Towards a New Executive Order in Europe?* Routledge, London. 2013. 30–32.

Conference_2.indd 32 2018. 01. 29. 14:56:34

democratic traditions. These are *legal principles* whose main function is the attribution of the binary qualification of legal/illegal in light of overarching values and ignoring them leads to the loss of legitimacy.[19] All of them can be traced back to the principle of *rule of law* and they pervade the functioning of institutions and organs as well as the administrative procedures at all levels.[20] Direct and indirect administration form relatively separated organisational systems with their own institutional norms, they are mainly connected via governance issues. The system formed by the two levels also assumes the principle of *administration through law* which means that public administration ought to discharge its responsibilities according to law.[21]

The concept of EAS comes from the intergovernmental history of the integration when administration was a sphere for domestic affairs and only the uniform implementation was under the supervision of EU level institutions. The key for a successful execution of the *acquis* has always been a properly functioning public administration applying the common constitutional principles.[22] Recently, the number of policies which requires intensive cooperation and an intermediate networking of the competent authorities at national and supranational level is increasing.[23] Direct and indirect administration is linked together, and the complexity of this relationship depends on the level of Europeanisation of a certain policy. The various forms of transnational interaction define the concept of *composite administration*. The administrative cooperation – first in the history of integration – got its legal framework in the Lisbon Treaty as a new competence.[24] The existence of such relationship between the executive apparatus requires the re-thinking of the concept on a simple *European administrative space* towards a multilevel *European administrative organisation*.[25]

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[19] Bogdandy, Armin von: *General Principles of International Public Authority: Sketching a Research Field*. German Law Journal, Vol. 9. No. 11. 2008. 1912.

[20] Particularly important principles set forth in the jurisprudence of the European Court of Justice, which all Member countries must in turn apply domestically when applying EU law, are, among others: the principle of administration through law; the principles of proportionality, legal certainty, protection of legitimate expectations, non-discrimination, the right to a hearing in administrative decision-making procedures, interim relief, fair conditions for access of individuals to administrative courts, non-contractual liability of the public administration. Basically, main administrative law principles which are set as standard are the following: reliability and predictability (legal certainty); openness and transparency; accountability; and efficiency and effectiveness. SIGMA 27. 1999, 8. See also: Bauer, Michael W. – Trondal, Jarle: *The Administrative System of the European Union*. In: Bauer, Michael W. – Trondal, Jarle (eds.): The Palgrave Handbook of the European Administrative System. Palgrave Macmillan, Basingstoke, 2015. 10.

[21] SIGMA 27, 1999. 9.

[22] The Lisbon Special European Council (March 2000): Towards a Europe of Innovation and Knowledge. Presidency Conclusions Lisbon European Council 23 And 24 March 2000. point 9. and 17. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:c10241 (10.10.2017.) Drechsler, Wolfgang: *Towards a Neo-Weberian European Union? Lisbon Agenda and Public Administration*. Halduskultuur, Vol. 10. 2009. 7.; 10.

[23] Jordan, Andrew – Schout, Adriaan: *The Coordination of the European Union: Exploring the Capacities of Networked Governance*. OUP, Oxford, 2017. 3.

[24] Csatlós Erzsébet: *Perspectives of the Cooperation of National Administrative Authorities in the EU*. Jogelméleti Szemle, 2016/3. 45–55.; Csatlós Erzsébet: *Az európai közigazgatási eljárási jog kodifikációja és a hatóságok együttműködése*. Eljárásjogi Szemle, 2016/2. 14–23.

[25] Hofmann, Herwig C.H.: *Which Limits? Control of Powers in an Integrated Legal System*. In: Barnard, Catherine – Odudu, Okeoghene (eds): The Outer Limits of European Law. Hart Publishing, Oxford, 2009. 45.

Conference_2.indd 33 2018. 01. 29. 14:56:34

The key for the proper functioning of the EU lies in its execution and its organisation is a crucial element for that.[26] Organisation as such has certain objectives and goals to achieve and is structured on *certain principles* with a view to achieve these objectives. Therefore, the principles that determine the European administrative organisation shall be examine. Due to the nature of EU as a *sui generis* international organisation,[27] the principles are also unique to those which characterise the administrative organisation of a State. Due to the different competencies and powers in different policies transferred by its Member States, the EU's legislative competences and the influence on their execution are different in each branch. However, they meet at one point: the organisational concept of European administration shall also correspond to the *rule of law* as being one of the major values in the EU.

Despite the common values, the EU is *not an administrative union* in the sense of a centrally organised administrative system with deconcentrated bodies at sub-levels. The relationship between the actors who have administrative competences in a policy area is unique, and cannot be described by the classical principles of State administration. The mere fact that the institutions and organs of direct administration is above domestic administrative structure and are supranational in that sense does not make national authorities subordinate in hierarchy. It does not entitle EU institutions and organs to *act with authority power* or practice *direction* or other powers deriving from the *principle of hierarchy* within an organisation. Hierarchy "*should be understood as asymmetric interaction between principals and agents in a vertically differentiated structure, rather than as governing by command and control*."[28]

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[26] Improving implementation of EU policies from the (a) *functional perspective* by ensuring that rights and policy objectives can be pursued and balanced against each other; (b) *organisational perspective* by ensuring that institutions and bodies are equipped with means to pursue the tasks; (c) *procedural perspective* by ensuring that the core values and rights are fulfilled and realised through procedural provisions and forms of act; and (d) *accountability perspective* by ensuring that acts are reasoned and justified, and that there is proper review and control of activities. Hofmann, Herwig C.H.: *The future of Article 298 TFEU. Administrative procedures for EU institutions and bodies and integrated administration in the EU*. Presentation for the EU Ombudsman / ReNEUAL conference Towards an EU administrative procedure law? Brussels, March 15-16th 2012. http://www.reneual.eu/images/Events/ED_Conference_March2012/6.6.pdf (15.09.2017.) 4.

[27] Accepting *Bogdandy's* concept, international institutions should be understood as concretizations of general principles of public law formulated in the tradition of liberal constitutionalism and adapted to the structures and requirements of multilevel systems. In the formulation of international principles for the exercise of public authority, there are three ways to interpret. The (1) basic rule of law principles govern activities of international institutions which need to be implemented by domestic institutions to have legal effects with respect to the individual. Different principles occur for international institutions whose acts directly affect private subjects. These (2) principles force domestic administrations to consider extra-territorial interests as a response to global interdependence. The (3) third type consists of international legal principles for domestic administrative activity. These are the principles regarding the cooperation of domestic administrations within composite administration. The EU, being a unique political system built on supranational and intergovernmental principles, includes all the three types and their application varies according to policies but the third version's importance is growing. Bogdandy, 2008. 1921–1922.

[28] Benz, Arthur – Zimmer, Christina: *The EU's competences: The 'vertical' perspective on the multilevel system*. Living Reviews in European Governance, Vol. 5, No. 1. 2010. 20.

Conference_2.indd 34 2018. 01. 29. 14:56:34

II.2. The organisational law of the European administrative system

At local level, Member States' administrative authorities are engaged of the task of execution, the EU has no deconcentrated authorities in Member States to execute EU law. Due to the lack of constitutional basis in the funding treaties for the organisation of execution, *structural principles* are there to override the former concept of executive federalism towards a unified executive power. These are scholarly abstractions which define legal structures within the positive law in the sense of significant regularities,[29] and help to fix the margins of interpreting obligations to achieve an "*open, efficient and independent European administration*"[30] The key for such is the *solidarity* among all actors and *principle of loyal and sincere cooperation* and the *coordination* making it effective along with the obligation for all actors. Principles cannot create competence and, anyway, measures taken at the EU level must also comply with the *principle of subsidiarity*.[31] Principles fill the legal gaps and directs interpretation to achieve the common goal: evaluation of EU goals.

There are many examples for policy areas with procedures in which decisions are taken on the basis of a procedure with composite elements. Cooperation is the process of entering into a relationship with another institution or organ to achieve a system derived goal. It means that in many cases, both Member State authorities as well as EU institutions and bodies contribute to a single procedure, irrespective of whether the final decision is taken on the national or the European level. The complexity of *composite procedures* and the competences of the indirect actors, so as their influence on the work of the national authority in charge to proceed in each case, depends on the policy area and the legislative competence of the EU to regulate it. Judicial review of composite decisions is thus often challenging.[32] Therefore, the word '*cooperation*' is used to describe in general the relationship between the actors as the content of it differs considerably from one policy area to another but basically, all of them have the *information sharing mechanism* at the heart.[33] Pure *vertical cooperation* takes place between the EU Member States' assigned central authorities with the EU institutions and organs in governance issues; while *horizontal cooperation* is an activity between the actors of the same level: direct level ones among each other and Member States' competent administrative authorities. The mixture of the two forms a network to a better realisation of EU aims and execution of EU law with a coordination

[29] Bogdandy, 2008. 1911.

[30] TFEU Article 298.

[31] McDonnell, Alison: *Solidarity, Flexibility, and the Euro-Crisis: Where do Principles Fit in?* In: Rossi, Lucia Serena – Casolari, Federico (eds): The EU after Lisbon Amending or Coping with the Existing Treaties? Springer, Heidelberg, 2014. 66.

[32] Hofmann, 2009. 136. Composite procedures, makes the exercise of judicial review has become significantly more difficult. The reason is that the system of judicial review of administrative action in the EU is established in a traditional two-level approach: national courts or as courts of the CJEU. Judicial supervision of the actions of the integrated executives in the EU is generally undertaken by member-state courts. Without definitive structural and procedural rules for cooperation, the question of responsibility and finding adequate remedies for judicial review in procedures of composite nature is challenging. See, Hofmann, Herwig C. H.: *The Court of Justice of the European Union and the European Administrative Space*. In: Bauer, Michael W.– Trondal, Jarle (eds.): The Palgrave Handbook of the European Administrative System. Palgrave Macmillan, Basingstoke, 2015. 301.

[33] Hofmann, 2009. 138.; Trondal, Jarle – Peters, B. Guy: *The Rise of European Administrative Space: Lessons Learned. Journal of European Public Policy*, Vol. 20. No. 2. 299–300.

Conference_2.indd 35 2018. 01. 29. 14:56:34

centre at direct administration level; this is a common form of composite administrative procedure. Such procedure has existed for a long time in policy-specific rules but were not based on any coherent and comprehensive legal basis until the adoption of the Lisbon Treaty. It introduced supporting competence in administrative matters for the EU in the form of ordinary legislative procedure[34] without any substantive harmonisation of national laws or regulations and left the involvement of EU institutions remains limited to policies for which EU-level intervention is explicitly delegated.[35] Detailed procedural rules are missing in this area and the network -relation is detailed in a guidance concerning Lead State concept and is supposed to be under further negotiations of the Member States.[36]

Due to the general obligation deriving from the fact effective implementation of EU law is a matter of common interest,[37] principle of *loyal* cooperation can be regarded to include, among others, a duty to consider, to cooperate, to comply and the duty to assist.[38] Loyalty, namely, is a general principle that has a function as an aid to interpretation in light of Union primary law and as a basis for gap filling.[39]

Cooperation supposes the ordering of the different activities of different actors in the system to enable them to work together effectively. *Coordination* is managing interdependencies between activities;[40] the process of interaction that integrates a collective set of independent tasks.[41] As cooperation, coordination also has a *vertical* and a *horizontal* dimension, depending on whether it takes place between the actor of different or the same level in the multilevel European administrative system. The modes of coordination can be distinguished as to whether they rule out exit options (coercive), aim for voluntary adjustment or agreement (cooperative), or establish normative frames of reference (persuasive), depending on the policy and the EU powers on it.[42] Horizontal capacity pooling is regulated by EU law at direct level and means an institutionalized, compulsory, direct networking between competent authorities that is facilitated by supranational technical coordination tools. Under horizontal coordination, administrative capacities (and costs) remain national and are not conferred to the Commission or EU-level agencies.[43] Regulating vertical coordination is rare in the system and characterise mainly the relationship between

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[34] TFEU Article 6 and 197.

[35] Heidbreder, Eva G.: *Horizontal Capacity Pooling: Direct, Decentralized, Joint Policy Execution*. In: Bauer, Michael W. – Trondal, Jarle (eds.): The Palgrave Handbook of the European Administrative System. Palgrave Macmillan, Basingstoke, 2015. 370; 376.

[36] Consular Protection Directive, preamble (10), (19) – (20); (27); Article 7; 12.

[37] TFEU Article 197 (1).

[38] Klamert, Marcus: *The Principle of Loyalty in EU Law*. OUP, Oxford, 2014. 141. See also, Amerasinghe, C. F.: *Principles of the Institutional Law of International Organizations*. CUP, Cambridge, 2005. 176–187.

[39] Klamert, 2005. 247.; 251.

[40] Debaere, Peter: *EU Coordination in International Institutions: Policy and Process in Gx Forums*. Palgrave Macmillan, Basingstoke, 2015. 24.

[41] Lequesne, Christian: *At the Centre of Coordination: Staff, Resources and Procedures in the European External Action Service and in the Delegations*. In: Balfour, Rosa – Carta, Caterine – Raik, Kristi: The European External Action Service and National Foreign Ministries. Convergence or Divergence? Ashgate, Farnham, 2015. 46.

[42] Benz, Arthur: *European Public Administration as a Multilevel Administration: A Conceptual Framework*. In: Bauer, Michael W. – Trondal, Jarle (eds.): The Palgrave Handbook of the European Administrative System. Palgrave Macmillan, Basingstoke, 2015. 35.; 37; 38–40.

[43] Heidbreder, 2015. 378–379.

Conference_2.indd 36 2018. 01. 29. 14:56:34

EU institutions and their subordinated organs, however, "*pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*."[44] This means a general definition of the *principle of solidarity*[45] among all actors of European administration.

The common element of all the activity of composite administration shall correspond to the principles that are the basics of EU and whose respect is also required by Member State administration is *rule of law* and the *principle of good administration*.[46]

III. Vertical relationship between the actors performing tasks related to consular protection in Third States

The procedure and function of a consular authority basically falls under its sending State's material and procedure rules as representations are external organisational units of the State administration. Therefore, they are under the direction of a higher authority in a hierarchical system. In Hungary, consular authorities are divisions of the Ministry of Foreign Affairs and the consular officer is under the direction of the *minister of foreign affairs* (MFA).[47]

III.1. Organs and authorities as actors in consular protection procedures in third States

EU legislative competences are the weakest in foreign policy as the main actor is the group of Member States in the European Council and the Council of the European Union (*Foreign Affairs Council formation*) with unanimous decision-making system.[48] It is essential to declare that none of the EU institutions or organs are entitled to perform authority acts including consular tasks. At direct level, mainly coordination of EU policies is ensured, and different infrastructural and operational mechanisms are insured as support, but *de facto* legal application is done by the authorities of Member States.

Close cooperation and efficient coordination between the directorates general and the departments involved are essential to ensure the quality and consistency of the work of the Commission. This coordination extends from the design of an initiative to its presentation to the Commission and during the interinstitutional phase. The executive power in case of common foreign and security policy is conducted by a special vice-president of the Commission, the *High Representative of the Union for Foreign Affairs and Security Policy* (HR/VP).[49] Being appointed by European Council, acting by a qualified majority, with the

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[44] TEU Article 4(3). *cf*. Article 3.

[45] See the definitive provisions on solidarity in the Treaties: McDonnell, 2014. 61–64.

[46] TEU Article 6.; EU Charter Preamble and Article 41.; Bogdandy 2008. 1919.; See also Wakefield, Jill: *The Right to Good Administration*. Kluwer Law International, Alphen aan den Rijn, 2007. 21–26.

[47] Act XLV of 2001 on Consular protection [CPA] 2 (1)–(2); Csatlós Erzsébet: *Az általános konzuli hatósági együttműködések elméleti kérdései.* Eljárásjogi Szemle, 2017/1. 34.

[48] TEU Article 22; 25–26.

[49] TFEU Article 18. 2; 4. At present Frederica Mogherini fills this position. High Representative (2014-2019) https://ec.europa.eu/commission/commissioners/2014-2019/mogherini_en (10.11.2017.)

Conference_2.indd 37 2018. 01. 29. 14:56:34

agreement of the President of the Commission,[50] the HR/VP ensures the consistency of the Union's external action and responsible within the Commission for external relations and for coordinating other aspects of the Union's external action, including crisis management.[51] Consular protection policy might touch other commissioners' tasks: the fundamental right to consular protection in third States as a part of citizenship policy falls under the competence of the Commissioner of *DG Migration, Home Affairs and Citizenship* or via crisis management the *DG Humanitarian Aid & Crisis Management*, but the *DG Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights* can also be mentioned. Being a Commissioner, the HP/VP is bound by Commission procedure rules to achieve coordination[52] and basically, the Council and the HR/VP shall ensure the unity, consistency and effectiveness of action by the EU while the CFSP shall be put into effect by this latter and by the Member States, using national and EU resources.[53] The HR/VP chairs the Foreign Affairs Council and responsible proposals towards the preparation of the CFSP and shall ensure implementation of the decisions adopted by the European Council and the Council.[54]

HR/VP in her function is supported by the *European External Action Service* (EEAS), a functionally autonomous body of the European Union separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.[55] It is a bureaucratic actor comprised of units and staff from the former European Commission Directorates General (DGs) for external relations and development, the external affairs parts of the European Council Secretariat and Member State secondments.[56] The EEAS is made up of a central administration and of the EU delegations to third countries and to international organisations. It is managed by an *Executive Secretary-General* under the authority of the High Representative. Consular protection issues fall under the competence of the *Consular crisis management centre* (INTCEN 4) which is a sub-division of *EU intelligence and situation centre* (INTCEN). This latter belongs to the *Deputy Secretary General for CSDP and crisis response* (DSG-CSDPCR) under the *Secretary General* who is superior to the person responsible for policy coordination. The Executive Secretary-General shall take all measures necessary to ensure the smooth functioning of the EEAS and the effective coordination between all departments in the central administration as well as with the *EU delegations*.

The *EU delegations* are hybrid administrative constructs that combine diplomatic tasks and operational tasks such as development cooperation and trade. They are not supposed to perform consular protection activity. They are under the direction of the head

[50] TEU Article 18.1.

[51] TEU Article 18. 2. TEU Article 26 (2); Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU) OJ L 201, 3.8.201. [EEAS Decision] Article 4. (3) a).

[52] Rules of Procedure of the Commission [C (2000) 3614] OJ L 308 , 08.12.2000. 26–34.

[53] TEU Article 26. 2–3.

[54] TEU Article 27.1.

[55] EEAS Decision, Article 1. 2.; Lequesne, 2015. 36.; See autonomy of EEAS in detail: Gatti, Mauro: *European External Action Service: Promoting Coherence through Autonomy and Coordination*. BRILL, Leiden, 2016. 105–190.

[56] Furness Mark: *Who Controls the European External Action Service? Agent Autonomy in EU External Policy*. European Foreign Affairs Review, Vol. 18. No. 1. 2013. 103.

Conference_2.indd 38 2018. 01. 29. 14:56:34

of delegations who are responsible for the HR/VP for the overall management of the work of the delegation and for ensuring the coordination of all actions of the Union. The *Head of Delegation* receives instructions from the High Representative and the EEAS, and shall be responsible for their execution. Delegations work in close cooperation and share information with the diplomatic services of the Member States but shall not substitute them in their work. EU Delegations are responsible for coordinating and chairing all EU working groups and meetings in third countries. The EEAS does the same at the level of the Council of the European Union, for external relations working groups.[57] There are more than 140 *delegations*[58] of the EU at local level which are hybrid administrative constructs that combine diplomatic and operational tasks such as development cooperation and trade[59] but have no competence to provide consular protection. The consular tasks – help and assistance – are performed by the *consular authorities of the Member States*, delegations have a complementary role.[60]

Upon request by Member States consular authorities, the delegations support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.[61] They can also request to be supported by existing *intervention teams* at Union level, including consular experts, in particular from unrepresented Member States and by instruments such as the *crisis management structures of the EEAS* and the *Union Civil Protection Mechanism.* The Member States concerned should, whenever possible, coordinate such requests among each other and with any other relevant actor to ensure the optimal use of the Union Mechanism and avoid practical difficulties on the ground.[62] The *Lead State*, if designated any, shall be in charge of coordinating any support provided for unrepresented citizens.[63] If more Member States are represented at site a *Lead State* might be entitled with a coordination role for a better sharing of work among representations as none of the supranational organs are neither entitled to perform authority acts nor to pursue consular protection procedure instead of Member State consular authorities. It is a domestic competence, although, EU institutions and organs have direct impact on the evaluation of EU policy in this field in case of crisis.

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[57] Helly, Damien – Herrero, Alisa – Knoll, Anna – Galeazzi, Greta – Sherriff, Andrew: *A closer look into EU's external action frontline Framing the challenges ahead for EU Delegations.* ECDPN, Briefing Note, No. 62 – March 2014. 9.

[58] See the EU delegations in the world: https://eeas.europa.eu/headquarters/headquarters-homepage/area/geo_en (10.10.2017.)

[59] Before the Lisbon Treaty entered into force, this role was fulfilled by the Member State holding the rotating EU Presidency. It might be seen the loss of power and visibility in comparison to the rotating presidency system. Helly [et al.] 2014. 9.; see also: Reynaert, Vicky: *The European Union's Foreign Policy since the Treaty of Lisbon: The Difficult Quest for More Consistency and Coherence*. The Hague Journal of Diplomacy, Vol. 7. 2012. 224.

[60] Austermann, Frauke: *European Union Delegations in EU Foreign Policy. A Diplomatic Service of Different Speeds*. Palgrave Macmillan, Basingstoke, 2014. 57.

[61] EEAS Decision, Article 5. 10.

[62] Decision No 1313/2013/EU of The European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ L 320, 6.11.2014. [CPM Decision] Article 16. point 17.

[63] Council European Union guidelines on the implementation of the consular Lead State concept (2008/C 317/06) OJ C 317, 12.12.2008. [Lead State Guidelines] Article 2.1–2.4.

Conference_2.indd 39 2018. 01. 29. 14:56:34

III.2. Vertical relationship between the element of the organisation

The cooperation of the competent institutions and organs is mainly based on coordination. Horizontal coordination is done at two main levels. (a) At direct administrative level, the coordination of all the foreign policy issues is the responsibility of the HR/VP[64] assisted by the EEAS which also has its own coordination system among its different divisions.[65] (b) *In situ* coordination has three main potential actors each of them having their own coordination mechanism: The first actor responsible for coordination is (b1) the local *EU delegation*. The second one is (b2) the group of represented Member States who shall closely cooperate with each other and with the delegation and other potential bodies of the Commission.[66] They can assign a (b3) *Lead State* among themselves for making the coordination with the other actors of the organisation easier. Hereby it need to be noticed Member States can take on the role of Lead State on a voluntary basis,[67] and apart from the Lead State concept which is defined in a guideline and not a binding legal norm, there is no reference to which of the represented Member State organ is responsible for coordination. According to the Consular Protection Directive elaborated in 2015, Member States represented in a third country shall closely cooperate with each other and share information to ensure efficient assistance for unrepresented citizens and coordinate contingency plans among themselves and with the EU delegation to ensure that unrepresented citizens are fully assisted in the event of a crisis.[68] Further details, like the assignment of one responsible actor to manage the process of an evacuation for instance and the deal with the involvement of the EU capacities, is the subject of further intergovernmental negotiations of Member States.[69] In addition, event such negotiation does not create a right to give orders for the delegations or in reverse, does not sub-ordinate consular authorities to EU organs in the system. Upon request by Member States' consular authorities, the delegations support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.[70] They can also request to be supported by existing *intervention teams* at Union level, including consular experts, in particular from unrepresented Member States and by instruments such as the *crisis management structures of the EEAS* and the *Union Civil Protection Mechanism*.[71] The Member States concerned should, whenever possible, coordinate such requests among each other and with any other relevant actor to ensure the optimal use of the Union Mechanism and avoid practical difficulties on the ground. The *Lead State*, if designated any, shall be

[64] TEU Article 26 (2).

[65] EEAS Decision, Article 4.

[66] Consular Protection Directive, Preamble (16)– (17), Article 10.1.; 11.

[67] Lead State Guidelines, introduction (2); (5).

[68] Consular Protection Directive, Preamble (2); Article 13.

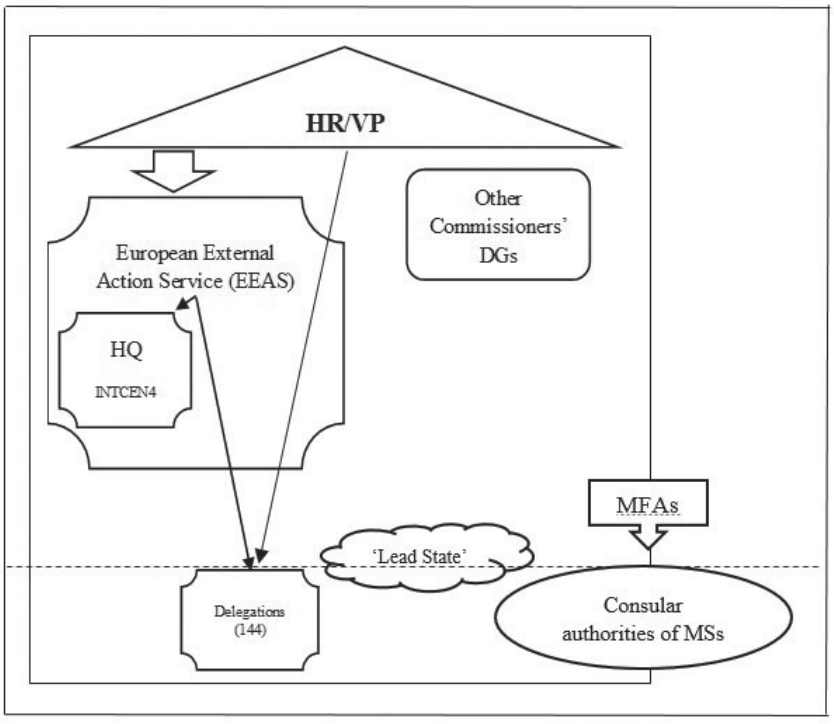
[69] Consular Protection Directive, Preamble (19); Article 7 (2)–(3).

[70] See EEAS Decision, Article 5(9). Helly, 2014. 8–10.

[71] Consular Protection Directive, Article 13 (4).; CPM Decision, Article 16. point 17. The civil protection mechanism is an operative instrument, which essentially aims at facilitating the mobilisation of immediate in-kind assistance for disasters both within and outside the EU. Gestri, Marco: *EU Disaster Response Law: Principles and Instruments*. In: Guttry, Andrea de (ed.): International Disaster Response Law. Asser, The Hague, 2012. 118.

Conference_2.indd 40 2018. 01. 29. 14:56:34

in charge of coordinating any support provided for unrepresented citizens.[72] The following table shows the major actors.



1. Figure: Actors of consular protection policy. (Author)

To describe the relationship between the different levels and different actors of European administration of consular policy, the word '*coordinate*' and '*support*' is used often. Even if none of these words are defined by any normative texts, they shall not suggest obligation. It aims to synthesize efforts but does not involve the coercive force of persuasion or direct order to make obligations although it supposes accountability, predictability, and common understanding.[73]

The system of European administration on consular protection lacks the classical hierarchical structure of state administration and vertical coordination is regulated in form of decision only in the case of the EEAS and its delegations. According to the relevant legal and non-legal acts of the EU acquis, none of the EU institutions or other bodies is entitled to direct consular authorities of Member States and practice such influence that reduces their autonomy, nor to receive their consular tasks. The consular authorities stay under the direction of their domestic superior authority although the Member States' authorities

[72] Lead State Guidelines, 2.

[73] Lequesne, 2015. 46.

Conference_2.indd 41 2018. 01. 29. 14:56:34

should closely cooperate and coordinate with one another and with the EU, in particular the Commission and the EEAS, in a spirit of *solidarity*.[74]

Under these general principles, in absence of harmonisation on material rules on foreign policy and consular protection, would vertical cooperation have an indirect impact making the EU organs a coercive power on external Member State organs? The principle of *loyal cooperation* might urge the effective execution and evaluation of a fundamental right of citizenship to overrule the shortage on organisational rules but meantime, neither the implementation of foreign policy, nor the charter may extend the field of application of EU law or establish any new power or task for it, or modify powers and tasks as defined in the TEU-TFEU. The rules for EEAS and foreign policy shall not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of EU foreign policy, national diplomatic service, and relations with third countries.[75] In fact, such persuasion issuing from principles is similar in effect to that of soft law which has also been common in the former second pillar area. Consular authorities' activities concerning their visa issuing tasks,[76] is detailed by a guideline, and the networking in consular protection cases is also ruled by such norms.[77] In principle, soft law has no building effect, but in fact, they are significant sources of information and interpretation to hard law. Therefore, even if soft law cannot create obligation, it contributes to the proper implementation of hard law embodied in primary and secondary EU law sources.[78] In addition, as judicial practice clarified, the "*conferral of the power to adopt acts having no binding legal effect shows that voluntary compliance with the rules of the Treaty and non-binding acts of the institutions is an essential element in the achievement of the goals of the Treaty*".[79] Together with the principles that shall govern the activities of Member States to properly realize EU goals, they can fill the some legal gaps although such role is limited.

Many debates support the expansion of the delegations' competency to take over some administrative functions to issue of Schengen visa and performance of some basic consular

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[74] Solidarity is a constitutional and European value. Chronowski Nóra: *Dignity and solidarity – lost in transition. The case of Hungary*. MTA Law Working Papers, 2017/15. 3–5. See also: TEU Article 2.; See in particular for CFSP: TFEU Article 222 1 (b).; Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU) OJ L 192, 1.7.2014. Article 4.; 5. On the meaning of solidarity see: Klamert, 2005. 35–41.

[75] 14. declaration to the Treaties, EU Charter Art. 51. (2); TEU Article 40 (1); EEAS Decision Article 4(3)(a); cf. TFEU Article 352. See, Dashwood, Alan: *Article 308 EC as the Outer Limit of Expressly Conferred Community Competence*. In: Barnard, Catherine – Odudu, Okeoghene (eds): The Outer Limits of European Law. Hart Publishing, Oxford, 2009. 43.

[76] Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts (2005/C 326/01). OJ C 326 22.12.2005.

[77] Guidelines on consular protection of EU citizens in third countries. Brussels, 5 November 2010, 15613/10. COCON 40 PESC 1371.; Common practices in consular assistance and crisis coordination. Brussels, 9 June 2010, 10698/10. COCON 28, PESC, 745; Guidelines for further implementing a number of provisions under Decision 95/553/EC. Brussels, 24 June 2008, 11113/08, PESC 833 COCON 10.

[78] Ştefan, Oana: *Soft Law and the Enforcement of EU Law*. In: Jakab András – Kochenov, Dimitry (eds): The Enforcement of EU Law and Values Ensuring Member States' Compliance. OUP, Oxford, 2017. 200–202.

[79] Ştefan, 2017. 205. See legal reasoning on the effect of non-binding sources: Case T-113/89 Nefarma and Others v. Commission [1990] ECR II-00797, para. 45; 79–82; Case T-116/89 Vereniging Prodifarma e.a. v Commission [1990] ECR II-00843, para. 46; 85.

Conference_2.indd 42 2018. 01. 29. 14:56:34

protection activity.[80] In the name of subsidiary principle and the constitutional allocation of competences in the Treaties, along with financial and institutional simplification prospects, the smaller states welcome the idea and would happily save some money with closing their consulates or being represented by EU delegation where they were not before, but absolutely rejected by the dominant large States who are afraid of losing the rest of their external sovereignty and political interests by such step.[81] It shall be noted that the principles and soft law cannot create new competences or expand existing ones, their role is restricted to interpretation of EU policies in good faith.

IV. Concluding remarks on the nature of vertical relationship of European administration of consular protection

European administrative organisation is a multilevel structure which is more than a European administrative space with different kind of networks of authorities in different policies. Its structure is based on the transfer of power from the Member States and it shall function on the basis of rule of law ensuring an open, efficient and reliable administration. However, the relationship between the different institutions, organs and authorities within the system has no uniform organisational rules; existing rules are sector specific, often soft law rules or just simply non-existent. Basically, the driving force of the functioning of the European administration of consular protection is *loyal cooperation* of competent authorities of both level with an intense horizontal *coordination* at a supranational centre. The strength of influence of the supranational level on the local executor is determined by the transferred competence in a certain policy.

Many questions and contradiction arise about the institutional and structural system of consular protection. As the EU acquis is continuously developing, the classical structural thoughts on European administration shall be re-considered. Given the fact that in the area which significantly affects foreign policy, external sovereignty, and international relations of a State to which the EU has strictly limited competences, the strongest coordination force is the basic principle of *loyal cooperation* and *solidarity*, but it does not make the structure effective, operational and conform to the rule of law. The challenging part is vertical relationship of the actors. In fact, at local level, only delegations are under the effective direction of the HR/VP and the president of the EEAS who both represent EU interest, but the consular tasks are done by the consular authorities of the member States because they are empowered to do so, however, these latter category falls outside the scope.

Principles cannot create a competence and cannot provide a direct legal basis for a measure at EU level. Indeed, principles primarily indicate how a competence should be used and therefore they orient those who fulfil obligations.[82]

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[80] Balfour, Rosa – Raik, Kristi: *Equipping the European Union for the 2*1st century. National diplomacies, the European External Action Service and the making of EU foreign policy. FIIA Report 36. 2013. 37–38.

[81] Lequesne, 2015. 48–49.; cf. Whitman, Richard: *Europe's Changing Place in the World and Challenges to European Diplomacy.* In: Balfour, Rosa – Carta, Caterine – Raik, Kristi: The European External Action Service and National Foreign Ministries. Convergence or Divergence? Ashgate, Farnham, 2015. 25.

[82] McDonnell, 2014. 66.

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Conference_2.indd 47 2018. 01. 29. 14:56:34

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Conference_2.indd 48 2018. 01. 29. 14:56:34

PANEL II – CONTRACTS AND PUBLIC ADMINISTRATIVE LAW IN HUNGARY

Conference_2.indd 49 2018. 01. 29. 14:56:34

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PPP CONTRACTS IN HUNGARY[1]

I. Introduction

Since the very first social communities, there have been numerous needs the satisfaction of which is vital for every individual. With the evolvement of the State, this meant that there was demand for performing certain medical, educational, social etc. tasks on a macro level. Due to this phenomenon, it was necessary to establish such institutions which were able to serve these demands. In the 20th century social needs were multiplied and individuals expected that the State perform these task more effectively. Certainly, it was very costly, moreover, the economic and social changes of that century made this more difficult. Responding to these processes searching for methods of alternative public task performance was started in the second half of the 20th century.[2] This created opportunity for getting private parties and their capital involved in the public task performance.[3] Most of the States recognised in time that satisfying social needs only with traditional administrative methods was not enough and that finding new solutions (ergo different methods of alternative public task performance) was necessary. One method of alternative public task performance is the cooperation of the public and the private sector, namely the Public-Private Partnership (hereinafter: PPP or P3).

The aim of this study is to represent the legal institution of PPP focusing on the Hungarian conditions. For this purpose, the meaning, the main characteristics and the origin of PPP contracts are described below. The research also extends to clarify the theoretical questions as the definition and the dogmatic classification. Besides I would like to create an image of the Hungarian situation of PPP. To understand that, it is necessary to examine other countries' PPP practise.

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[1] It is necessary to notice in advance that the base of this study is another study (named: Typically atypical or public contract? The theory and practise of the Public-Private Partnership) which was written with Szabolcs Hajdu for the XXXIIIth *National Conference of Scientific Students' Associations* in 2017.

[2] Horváth M. Tamás: *Közmenedzsment.* Dialog Campus Kiadó, Budapest-Pécs, 2005. 151.

[3] Varga Judit: *A partnerség* (*PPP*) *szerepének változása a közpénzügyek jogában*. (Doktori PhD értekezés) Marton Géza Állam- és Jogtudományi Doktori Iskola, Debrecen, 2016. https://dea.lib.unideb.hu/dea/handle/2437/230895 (2016.09.05.) 13.

Conference_2.indd 50 2018. 01. 29. 14:56:34

II. PPP as a method of alternative public task performance

The legal institution of P3 is a method of alternative public task performance as it was mentioned above. But what is a public task? And what is its alternative performance compared to the traditional way?

According to *Tamás M. Horváth* public tasks means providing the performance of such tasks which (under determined conditions) necessitate common organization to a certain extent and which reserve the satisfaction of common social needs.[4] We speak about traditional public task performance if it happens from public funds, budgetary resources and via budgetary organization.[5] Alternative public task performance means service organizing solutions which are provided by parties outside the public sector under State control involving resources which are not part of the public finances. So, in that case the State cooperates with parties of the private sector. There are several methods of alternative public task performance which are substantial instruments in satisfying common needs.[6] These are summarized in the table below:

<table>
<tr><th>PURELY PUBLIC LAW SOLUTION</th><th>PUBLIC AND PRIVATE LAW SOLUTION</th><th>PURELY PRIVATE LAW SOLUTION</th></tr>
<tr><td rowspan="5">reduction of aid</td><td>contracts (e.g. sale contracts, lease contracts etc. above certain public procurement thresholds)</td><td>contracts (e.g. sale contracts, lease contracts etc. below certain public procurement thresholds)</td></tr>
<tr><td>administrative contracts (e.g. PPP)</td><td rowspan="4">volunteering, self-help organisations (if there is no state aid)</td></tr>
<tr><td>associations</td></tr>
<tr><td>volunteering, self-help organisations (if there is state aid)</td></tr>
<tr><td>instruments of charging policy</td></tr>
</table>

1. Classification of methods of alternative public task performance. Source: Varga, 2016. 71.

The aim of this short part was to make the role of PPP contracts in administrative law more understandable.

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[4] Horváth M. Tamás: *Helyi közszolgáltatások szervezése*. Dialog Campus Kiadó, Budapest-Pécs, 2002. 15.

[5] Varga, 2016 18.

[6] Varga Judit: *3P: Életképtelen jogalkotási vadhajtás vagy a közösségi igények kielégítésének működőképes alternatívája?* 2015.
http://kozjavak.hu/3p-eletkeptelen-jogalkotasi-vadhajtas-vagy-kozossegi-igenyek-kielegitesenek-mukodokepes (2017.09.03.).

Conference_2.indd 51 2018. 01. 29. 14:56:34

III. PPP contracts in general

Before the dogmatic questions, namely the definition and dogmatic classification of PPPs, it is useful to describe PPP contracts in general.

III. 1. What is a PPP contract?

In my own words P3 is a special contract made between the public and the private sector for performing a public task. Such public task can be building prisons, educational institutions, dormitories or highways. However, in this case the State does not perform the public task by itself and only from state budget but with the help of the private sector and its capital and at the same time the two sectors share the liability. It should be noted that these are highly complex contracts since the performance of these huge projects are divided into two different sectors in such a way that they both are able to benefit from the relationship. So basically this legal institution means strong and tight cooperation between the public and the private sector. This relationship is definitely a complex one as it was mentioned before and it needs a long and detailed preparation due to the dissimilar features, dissimilar legal instruments and solutions of the two sectors. With the PPP the boundaries which separate the two sectors are blurred and reaching common goals requires as effective cooperation between them as it is possible.

III. 2. Why were PPPs created?

One of the reasons of P3s is the so called 'Value for Money' principle which is applied for measuring cost-effectiveness. The point of it is that the highest value shall be got for the same amount of money.[7] It is very important whether a certain PPP contract make the expected results or not. Although it is also important whether the result with the help of PPP was made more effectively and in better quality than if the project had been performed with the traditional method of public task performance.[8] Based on the 'Value for Money' principle, it is calculable which of the following solutions the best are: the one time purchase of equipment (when expenditure is arisen all at once) or purchasing equipment with PPP (when expenditure is not arisen all at once). In this case expenditure is examined and the public law party chooses the option which is (under the same conditions) suitable for performing a public task in a lower price.

The other reason of PPP is the convergence criteria of the European Union (hereinafter: EU). According to one of the criteria, debt level of a State cannot exceed 60% of GDP. Thus in order to fulfil this condition the State could not provide enough financial support only from state budget for public investments. But with the help of PPP investments connected

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[7] Tasi Péter: *A PPP – alkalmazási lehetőségek, tapasztalatok, avagy: Csodaszer vagy divatos kényszer?* 2004. http://www.sze.hu/etk/_konferencia/publikacio/Net/eloadas_tasi_peter.doc (2017.09.02.) 2–3.

[8] Kozma Miklós Attila: *Értékteremtés Public-Private Partnership keretében – különös tekintettel a vállalkozó szempontjaira*. (Doktori PhD értekezés). Budapesti Corvinus Egyetem Gazdálkodástani Doktori Iskola, Budapest, 2009. http://phd.lib.uni-corvinus.hu/529/1/kozma_miklos.pdf (2016.09.23.) 52.

Conference_2.indd 52 2018. 01. 29. 14:56:34

to performing a public task can be carried out from private capital without encumbrance of state budget at once.[9]

For 2010, the number of PPP investments had increased. The explanation of this is the lack of State resources on the one hand, and on the other hand the cost saving feature of PPP contracts.[10]

III. 3. Why are PPP contracts useful?

Before the overview of advantages, an example can be very useful in order to understand the point of PPP. A societal need arises to a highway however the State has no resources enough to carry out the project. State has two options to satisfy this need. The first option is that the State orders a construction plan, requires credit and chooses a building contractor during a procurement procedure. This building contractor will carry out the investment and get the consideration of the construction. Later, the operating costs (renovation, repair etc.) will burden the State. The second option is to use the help of PPP. In this case building contractor is also chosen during a procurement procedure, but construction plans will be made by the building contractor and not by someone else as in the first case. Why is it better? The answer is very simple. After the process of construction operation will be the obligation of the building contractor for a long time (these are long term contracts), therefore the building contractor's interest is to minimise the operating costs. Plans will be made in the light of this because from the aspect of the building contractor the lower costs are, the higher profit realise. State will pay a fee as a consideration yearly which is fixed in advance. The sum of this fee is depend on the agreement of the parties and the type of the PPP contract. Subsequently, the building contractor's interest to perform its obligation in a way that all its costs will be covert by this fee. After the expiration of the contract, the ownership of the instrument will transfer to the State.[11]

This short example makes a lot of advantages of the State perceptible, but they should be examined more precisely.

From the fiscal side of this legal institution, it is necessary to highlight again that with P3 the financial burden and some part of the risks are incumbent on the private sector and operating costs also burden the parties of the private sector. The consideration of the State is a fee which is obviously higher than the operating costs so operating costs borne by the State indirectly through this fee. The financial burden of the State will be arisen during a longer period by small and small, therefore state budget will be borne not all at once.[12] Moreover, during this cooperation the attitude of the private sector has an effect on the public sector. This means that a profit-making attitude appears in the public task performance which inspires the public sector to work more effectively from fewer expenditure just like

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[9] Tasi, 2004 2–3.

[10] Csonka Zsuzsa: *PPP beruházások Magyarországon, az M6-os autópálya esettanulmányán keresztül*. Budapesti Gazdasági Főiskola Külkereskedelmi Főiskolai Kar, Budapest, 2011. http://elib.kkf.hu/edip/D_15762.pdf (2017.09.02.) 8.

[11] Tasi, 2004. 3–4.

[12] Ibid. 2.

Conference_2.indd 53 2018. 01. 29. 14:56:34

in case of a party of the private sector.[13] Valuable innovation from the private sector can raise the quality of the result of the cooperation and the flexibility of the private sector is also very useful.[14]

From the aspect of the private sector the following question is arisen: why is it worth taking part in such cooperation? One of the most important advantages from the aspect of the private sector is that the State probably will perform its obligation to pay, therefore the private sector is not threatened by breach of contract.[15] P3 projects are started due to perform a public task and if the State does not pay the prior determined fee it will fail to fulfil its obligation to perform a public task.[16] Besides, it is very likely that service as the result of the cooperation will have demand.[17]

Finally, risk-sharing is something which is useful for both parties.

III. 4. What can be the danger in a PPP contract?

PPP contracts mean high risk as in case of every complex legal institution. These can be different of course based on the abilities and degree of the cooperation of the parties. It is necessary to highlight the possible disadvantages and dangers of this relationship.

The first problematic element is that these are long-term cooperations[18] which can cause several uncertainties for example economic[19] or political changes. The government power is very inconsistent and governments tend to undertake an obligation which seems to be very useful at the first time but performance will be burden the State, but not necessarily the same government, for a long time.[20] Risk-sharing as an advantage was mentioned before, but it can be a danger as well since it requires very detailed P3 contract. If the parties cannot guarantee this detailed contract, the balance of this risk-sharing can be disturbed. Some experts say that PPP can ensure transparency in spending public funds.[21] However, in this case public task performance is bipolar, therefore both parties are need to be supervised which can make the monitoring tasks longer and more complex. Last but not least, absence of specific legal rules can also cause uncertainty. This refers to most countries where PPP contracts are applied. Uniform legislation could ensure that both parties enjoy the advantages of the cooperation.[22] Although it is necessary to note that the absence of this uniform legislation can provide many advantages at the same time.

[13] Varga, 2016. 41.

[14] Csonka, 2011. 9.

[15] Varga Judit: *PPP a börtönben*. In: Horváth M. Tamás (szerk.): Kilengések – Közszolgáltatási változások. Dialog Campus Kiadó, Budapest-Pécs, 2013. 311.

[16] Tasi, 2004. 15.

[17] Varga, 2013. 311.

[18] Leiner Vera (szerk.): *PPP-kézikönyv: a köz-és magánszféra sikeres együttműködése*. GKM, Sajtó és Protokoll Főosztály, Budapest, 2004. 17.

[19] Varga, 2016. 47.

[20] Varga Mihály: *A PPP Magyarországon – Árt nekünk vagy használ?* Pénzügyi szemle 2005/1. 56.

[21] Varga, 2016. 45.

[22] Lehmann Marianna: *A Public-Private Partnership alkalmazásának jelentősége és elszámolása az uniós módszertanban.* In: Simon István (szerk.): Tanulmányok Nagy Tibor tiszteletére. Szent István Társulat, Budapest, 2009. 121.

Conference_2.indd 54 2018. 01. 29. 14:56:34

IV. The dogmatism of PPP

Hereon the theoretical side of PPP contracts are examined, namely, the definition of the PPP and the dogmatic classification. These topics are important and exciting because there are many debates about them both here and abroad. Definition is studied at international level, whereas dogmatic classification is examined between the Hungarian legal framework.

IV. 1. The definition of PPP

Begin with the first issue if we would like to find an appropriate definition we can easily figure out how hard task it is. A uniform definition was not made neither in the Hungarian nor in the foreign legal sciences and the meaning of P3 can be different from state to state.[23] One of the reasons of that is the strange features of the PPP, namely that these contracts are usually not regulated by any acts therefore there is no a uniform definition from the legislator.[24] Several definitions were created of course both in Hungary and abroad, but these are not widely accepted because every definition highlights something else than the others. However finding a proper definition is one of the most important components when somebody makes a scientific research related to a legal institution, therefore an own definition was created based on the most important Hungarian and foreign definitions. According to it *PPP is (1) a long-term cooperation (2) between the public and the private sector (3) which is always made with the aim of providing a public task effectively and (4) which is always connected to public interests (5) therefore the final beneficiaries are the citizens*. In my point of view these factors are the substantive parts of the definition and other factors need to be examined case-by-case.

IV. 2. The dogmatic classification of PPP

After the clarification of the definition we can deal with the next issue: the dogmatic classification. The point of the debate is that whether a P3 contract is an atypical contract of the private law or an administrative contract of the public law? This is hard to tell if features of the atypical contracts, the administrative contracts and PPP contracts are observed. It can be concluded that basically PPP belongs to the private and the public law since PPPs are characterized by certain features of the atypical contracts and certain features of the administrative contracts at the same time. Therefore, one of the typical features of PPPs is that kind of dichotomy. Although if PPP is characterized by the features of the atypical contracts and also by the features of the administrative contract what type of contract and what type of law does the P3 belong to after all? Does it belong to the atypical contracts and private law or does it belong to the administrative contracts and public law? The question of dogmatic classification is definitely not so important from the aspect of performing a PPP project. However, on the one hand the result of dogmatic classification can be an

[23] Varga, 2016. 21.

[24] Papp Tekla (szerk.): *Atipikus szerződések*. Opten Informatikai Kft., Budapest, 2015. 237.

Conference_2.indd 55 2018. 01. 29. 14:56:34

effective guidance during the decision making in a legal dispute and on the other hand this is a basic issue of a scientific research, this question cannot leave opened.

First, it can be useful if the most important features of the public and the private law are summarized. The following table enlists them:

DISTINGUISHING CRITERIA	PUBLIC LAW	PRIVATE LAW
FUNCTIONAL	*ensuring the organisation of the State*	promotion of individuals' legally recognised rights
HIERARCHICAL	subordinate relationship	*interdependent relationship*
EQUALITARIAN	institution exercising public authority has extra rights	*equality of parties*
AUTONOMOUS	*public law relationship is independent of the intention of the obligated party*	*private law relationship is dependent of the intention of the parties*
INTEREST BASED	*public interest is primary*	private interest is primary
COMPULSORY BASED	direct compulsion can be applied	*direct compulsion cannot be applied, sanction is usually compensation*
FORMAL	usually cogent rules	*usually dispositive rules*

2. Distinction between the public and the private law. Source: Trócsányi László – Schanda Balázs (szerk.): *Bevezetés az alkotmányjogba*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2013. 24–25. (Author)

The features of P3 are highlighted on the table which shows that PPP contracts have features of the public law and features of the private law at the same time.

The next table is about the distinction between the atypical contracts and administrative contracts.

ATYPICAL CONTRACTS	ADMINISTRATIVE CONTRACTS
long-term business relationship	we cannot speak about a long-term business relationship necessarily
one of the parties is always a business	*one of the parties is an entity regulated by public law*
the aim of the contract is always to gratify private interests	*the aim and the subject of the contract is special: performing public tasks*
f*oreign practise is important during the legislative procedure*	foreign practise is not particularly important during the legislative procedure

3. The most important features of atypical and administrative contracts from the aspect of PPP. Source: Papp (2015) 37–39., Fazekas Marianna (szerk.): *Közigazgatási jog Általános rész III*. ELTE Eötvös Kiadó, Budapest, 2013. 89. (Author)

After most important features of the atypical and the administrative contracts are examined, features of PPP are highlighted again, it can be concluded that (1) PPP belongs to both side, (2) PPP is mostly belong to the atypical contracts, (3) PPPs are administrative

Conference_2.indd 56 2018. 01. 29. 14:56:34

contracts. One of the purposes of this study is to prove with an own argumentation that PPP contracts should considered as administrative contracts in Hungary.

Maybe the most important factor is that one of the parties is always the State itself. This is also one of the basic features of the administrative contracts, while State normally does not take part in an atypical contract. When State takes part in an administrative contract, it is considered as a public entity. When State takes part in an atypical or a typical contract it has to be considered as a private person except when the subject-matter of the contract is public property, because in this case State remains a public entity.[25] In PPP contracts the State performs from budgetary resources (although not at the same time as it was mentioned before), therefore the subject-matter of a P3 contract is always connected to public properties and this is why the State remains public entity. Besides, all the examined definition says that PPP is a cooperation between the public and the private sector. If State had to be considered as a private person, all definition would be senseless.

General provisions pertaining to contracts of the Act V of 2013 on the Civil Code (hereinafter: Hungarian Civil Code) shall be applied to the atypical contracts. One of the most important principle relating to contracts is the freedom of contract which says that "*the parties are free to conclude a contract and to choose the other party*."[26] Since in PPPs one of the parties is always the State the private person cannot choose freely who it makes a contract with, the other party is necessarily the State. So, it can be called basically the restriction of the freedom of contract.[27]

Other important factor is that administrative contracts are made due to satisfy public interests. However the main reason of making an atypical contract is always gratifying private interests. Since the final beneficiaries of PPP contracts are the citizens as a group of people and not individuals, it can be concluded that PPPs are made due to satisfying public interests and not private ones just like in case of the administrative contracts.

The Hungarian Civil Code governs that the property and personal relations of persons under the principle of interdependence and the principle of equality,[28] so interdependence is an important principle of atypical contracts as well. After the description of the previous factors can we really speak about the interdependence of the parties in a PPP contract? During the examination I concluded that the answer is no. A PPP contract cannot be made at all as long as State does not decide that it wants to perform certain public task with the help of the private sector and the capital of the private sector and not on its own and not totally from budgetary resources.

These are the factors which support my opinion that P3 contracts should be considered as administrative contracts and not as atypical ones in Hungary despite the fact that these do not have all of the features which characterise administrative contracts.

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[25] Lehmann, 2009. 120.

[26] Book 6 section 59 paragraph (1) of the Hungarian Civil Code.

[27] It has to be highlighted that freedom of contract is not applied fully in many cases of classical civil law contracts either, for example: standard contract terms (book 6 chapter XV of the Hungarian Civil Code) or obligation to contract (book 6 chapter XIII of the Hungarian Civil Code).

[28] Book 1 section 1 of the Hungarian Civil Code.

Conference_2.indd 57 2018. 01. 29. 14:56:34

V. PPP in practise

In order to describe the situation of PPP in Hungary it is necessary to examine the PPP practise in Hungary and abroad as well. In the first subsection the foreign PPP practise is described.

V. 1. PPP abroad with special focus on the European Union

It should be noted in advance that PPP was used first in the 1960s in the United States of America (hereinafter: USA). Its application was started in the 1990s in Great Britain and it was widespread in countries of the continental Europe a little later.[29] In general PPP has no legal definition and it is codified in a low degree but of course there are some exceptions (e.g. Spain or Portugal).[30]

To understand the situation of PPP at international level, some countries' practise is examined. In these countries PPP contracts play relatively important role in the economy. According to a study on the official website of Canada, there have been over 220 infrastructure projects across different sectors delivered by the PPP approach, representing over $70 billion of capital investment. Canada states that P3 projects have had a positive impact on the national economy over the past decade. Based on the PPP projects from 2003 to 2012, they found that the economic impacts of the Canadian infrastructure PPP projects support direct employment, earning $19 billion in direct income/wages and benefits, and contributing $25.1 billion in direct GDP to Canada.[31] But Australia's P3 market also continues to grow and evolve. The number and value of PPP transactions reached historical highs: there were 9 new PPP projects in the value of $12 billion in 2015.[32] And according to Indian Department of Economic Affairs from 2005 to 2017 220 PPP projects started there.[33]

Although PPP contracts are not so developed and common used everywhere. A study for example says that while the United Kingdom's National Audit Office reports over £4 billion a year on average in capital investment from P3s over the past 15 years, in the US, where the economy is more than six times bigger, only five P3 deals worth a total of $2.4 billion closed in 2015.[34] Although P3 contracts in the USA has become more popular, their usage are far less significant than the countries mentioned before.

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[29] Papp, 2015. 236.

[30] Papp, 2015. 237.

[31] Yuan, X.-X.– Zhang, J.: *Understanding the Effects of Public-Private Partnerships on Innovation in Canadian Infrastructure Projects*. 2016. http://www.p3canada.ca/en/about-p3s/p3-resource-library/report-on-construction-innovation-in-p3s-by-the-ryerson-institute-for-infrastructure-innovation/ (2017.09.13.) 10–11.

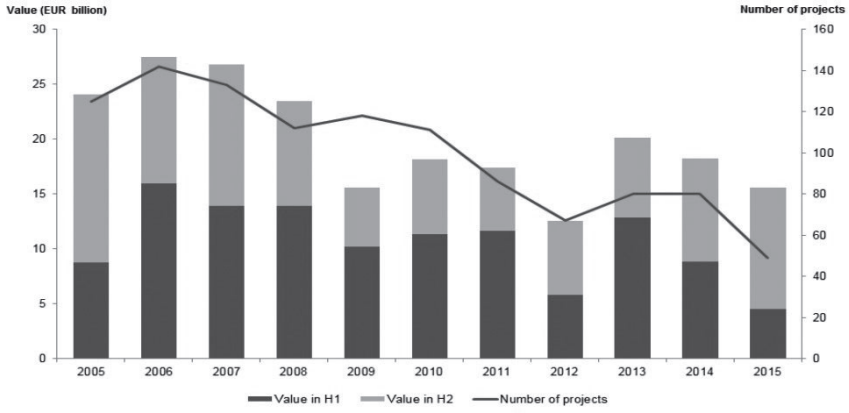
[32] Ernst & Young: *Australian infrastructure: some facts and figures*. 2016. http://www.ey.com/Publication/vwLUAssets/ey-australian-infrastructure-some-facts-and-figures/$FILE/ey-australian-infrastructure-some-facts-and-figures.pdf (2017.09.13.) 18.

[33] List of PPP projects in India. https://www.pppinindia.gov.in/project-list (2017.09.13.)

[34] PricewaterouseCoopers: *Public-private partnerships in the US: The state of the market and the road ahead*. 2016. https://www.pwc.com/us/en/capital-projects-infrastructure/publications/public-private-partnerships.html (2017.09.13.) 1.

Conference_2.indd 58 2018. 01. 29. 14:56:35

In the European Union, which has very significant role in case of member states, the following figure shows well that although the number and value of PPP projects decreased in 2016 compared to the period from 2005 to 2007, there are still huge PPP projects.



4. European PPP Market 2005-2015. Source: European PPP Expertise Centre: Market Update Review of the European PPP Market in 2016. 2017. http://www.eib.org/infocentre/publications/all/epec-market-update-2016.htm (2017.09.14.) 1.

According to the European Parliament, Europe leads the infrastructure PPP market, concentrating more than 45% of the nominal value of all PPPs worldwide which shows the growing significance of this legal institute.[35] Despite this growth there is no sui generis sources of law, but the institutions of the European Union regulated PPP with framework instruments.[36] It seems anyway that more specified legal rules have not been required by the private sector up to this day.[37] The so called 'Green Book' made by the European Commission has outstanding importance because it determines the most important features of P3s[38] and its aim, inter alia, to discover the uncertainties of PPPs and to discover which framework instruments are accordance with the special features of P3.[39] European PPP Expertise Centre as an institution of the European Investment Bank plays an important role in PPP. Its mission is to support the public sector across Europe in delivering better

[35] European Parliament: *Addressing conflicts of interest in public-private partnerships* (*PPPs*). 2015. http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545722/EPRS_BRI(2015)545722_REV1_EN.pdf (2016.10.14.) 2.

[36] Jenovai Petra: *Public Private Partnership az egyes nemzeti jogokban és az Európai Unió jogában különös tekintettel az Egyesült Királyságra és Németországra*. Jogelméleti Szemle, 2011/4. http://jesz.ajk.elte.hu/jenovai48.html#_ftn1 (2016.10.10.)

[37] Commission of the European Communities: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions*. Brussels, 15.11.2005. COM(2005) 569 final 5.

[38] Commission of the European Communities: *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*. Brussels, 2004. COM(2004) 327 final point 1.

[39] Ibid. point 18.

Conference_2.indd 59 2018. 01. 29. 14:56:35

P3s.[40] The European Investment Bank is one of the most important financier of PPPs and it promotes the broader usage of P3. The primary reason of this financing activity is that the European Investment Bank shall contribute to the balanced and steady development of the internal market in the interest of the Union and PPP is a great tool for this.[41]

In my opinion it becomes perceptible with the data above that the legal institution of PPP is broadly used worldwide. Now we can examine the Hungarian situation of PPPs.

V. 2. PPP in Hungary

First, it should be noted that PPP contracts cannot be made freely, the prior consent of the Government or the Minister of State for Public Finances is needed.[42] So, this is sort of the rejection of PPP contracts in Hungary. What can be the reason of this rejection when we saw that P3 is quite a popular legal institution abroad and it was used in Hungary before?

In order to answer this question it is necessary to study the Hungarian PPP practice. After the examination of the Hungarian PPP projects, it can be concluded that in general they were unsuccessful. There are numerous reasons like the lack of the economic stability, the lack of impact studies and the lack of regulation by act. Moreover, the dogmatic confusion of the theoretical side affected the practice because we cannot speak about a clear Hungarian PPP model. According to the title of these contracts, they are P3s but based on the content it cannot be decided that:

- whether these contracts are clearly PPP contracts one of the basic features of which is the dichotomy, namely that they are characterized by the features of the atypical and the administrative contracts at the same time or
- whether these contracts are administrative contracts or
- whether these contracts are atypical contracts or
- whether they are typical contracts regulated by the Hungarian Civil Code.

The theoretical and practical difficulties resulted unsuccessful Hungarian projects, and there is not a strong and stable PPP culture. Therefore, in 2010 the support and application of PPPs came to end. However of course it is necessary to find a reason for that in the science of the public administration. This reason can be the strengthening of the conception of Neo-Weberian state from 2010 in Hungary and this led to the rejection of the PPP which belongs to the New-Public Management. These ideas, the Neo-Weberian state concept and the New Public Management represent completely different priorities. The central element of the prior one is the empowerment of the state and the public administration and according to this in order to reach common good the market is not enough.[43] While the aim of the New Public Management is the reduction of the role of the state and in order

[40] Welcome to EPEC. http://www.eib.org/epec/ (2016.09.05.)

[41] Varga, 2016. 118.

[42] Section 9 paragraph (1) of Act CXCIV of 2011 on the Economic Stability of Hungary.

[43] Stumpf István: *Szakmai alapú közigazgatás – A neoweberianus állam*. In: Halm Tamás – Vadász János (szerk.): A modern állam feladati. Magyar Közgazdasági Társaság és a Gazdasági és Szociális Tanács konferenciájának előadásai, Budapest, 2009. 93.

Conference_2.indd 60 2018. 01. 29. 14:56:35

to reach effectiveness and make profit in the public administration it seems necessary to enhance the role of the private sector and market mechanisms.[44]

With the strengthening of the Neo-Weberian state in Hungary, the legal institution of the P3, as an element of the New Public Management, was "necessarily" restricted while in Europe and in the other parts of the world both the public and the private sector can make profit from this kind of cooperation.

VI. Consequences

Today tasks of the State are multifaceted the performance of which needs effective tools. Because of this different methods of alternative public task performance were created which provide facilities to get parties outside the State involved. One of the methods of alternative public task performance is the Public-Private Partnership which is a special contract made between the public and the private sector for performing a public task. In this case, the State does not perform the public task by itself and only from state budget but with the help of the private sector and its capital and at the same time the two sectors share the liability.

Reasons of creating the legal institution of PPP is the so called 'Value for Money' principle on the one hand and the convergence criteria of the European Union on the other hand. Advantages of the application of PPP from the aspect of the State are (inter alia) the following: the financial burden and some part of the risks are incumbent on the private sector and operating costs also borne by the parties of the private sector; during this cooperation the attitude of the private sector has an effect on the public sector; valuable innovation from the private sector can raise the quality of the result; the flexibility of the private sector is also very useful. Cooperation is also worth for the party of the private sector because the State probably will perform its obligation to pay, therefore the private sector is not threatened by breach of contract. PPP projects are started due to perform a public task and if State does not pay the prior determined fee it will fail to fulfil its obligation to perform a public task. Besides it is very likely that service as the result of the cooperation will have demand. And finally risk-sharing is something which is useful for both parties. But risks should not be forgotten neither. PPP contracts are long-term cooperations which can cause several (inter alia economic and political) uncertainties. Risk-sharing can be considered as an advantage but is can be a danger as well since due to this a very detailed PPP contract is required. If the parties cannot guarantee this detailed contract, the balance of this risk-sharing can be disturbed. Besides, in this case public task performance is bipolar, both parties are need to be supervised which can make the monitoring tasks longer and more complex.

If it is necessary to find an appropriate PPP definition it has to be noted that a uniform one was not made neither in the Hungarian nor in the foreign legal sciences and the meaning of PPP can be different from state to state. Several definitions were created of course both in Hungary and abroad, but these are not widely accepted because every definition highlights something else than the others. However finding a proper definition is one of

[44] Krizsai Anita: *A szociális szolgáltatások szervezésének szabályozása a közszektor szereplőinek feladatai szemszögéből*. (Doktori PhD értekezés). Marton Géza Állam-és Jogtudományi Doktori Iskola, Debrecen, 2014. 39–41.

Conference_2.indd 61 2018. 01. 29. 14:56:35

the most important components when somebody makes a scientific research related to a legal institution. This is why an own definition was created which says that *PPP is (1) a long-term cooperation (2) between the public and the private sector which is (3) always made with the aim of providing a public task effectively and which is (4) always connected to public interests (5) therefore the final beneficiaries are the citizens*.

In Hungary PPP divides the legal literature and the legislation as well. It divides the legal literature because there is no united position regarding the dogmatic classification, namely whether it is an atypical or an administrative contract. It divides the legislation because during the application of PPP detailed regulation was widely required and because due to the current government there is no possibility to apply PPP contract today in Hungary.

Regarding the dogmatic classification, it was tried to prove with an own argumentation that PPP contracts should be considered as administrative contracts in Hungary.

Regarding the suspension of application of PPP contracts, it has to be admitted that the usage of this legal institution was not proper. On the one hand there is not a clear Hungarian PPP model and on the other hand most of the PPP projects were unsuccessful which has several reasons. Problem of unsuccess arises abroad as well but as it was represented before the application of PPP is very common and significant in many countries. Therefore, it is necessary to find a reason for that. In my opinion this reason is the strengthening of the conception of Neo-Weberian state from 2010 in Hungary. This led to the rejection of the P3 which belongs to the New-Public Management because these ideas represent completely different priorities. With the strengthening of the Neo-Weberian state in Hungary PPP, as an element of the New Public Management, was "necessarily" restricted while in Europe and in the other parts of the world both the public and the private sector can make profit from this kind of cooperation.

The aim of the study was to examine the legal institution of PPP as a special contract made between the public and the private sector. There are very interesting theoretical issues about P3 which are well worth an examination. However, it is more important that in my point of view PPP can be a very effective method of public task performance and it can be very advantageous not just for the public and the private sector but for the citizens as well. This is why it would be necessary to study the Hungarian PPP failures and after that to reconsider the application of P3 contracts.

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Conference_2.indd 64 2018. 01. 29. 14:56:35

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THE DOGMATIC BASICS OF ADMINISTRATIVE CONTRACTS AND ITS CURRENT ISSUES IN THE HUNGARIAN LAW

I. Introduction

Despite that the administrative contract[1] is a well-known legal institution in the Hungarian and also in the international legal literature, it cannot be said that the theories or the studies of these contracts would be complete. The reasons of it is that the perceptions of administrative contract vary from state to state (where they are codified) on the one hand and on the other hand the legal situation of these contracts is not clarified, neither in the European Union (EU), therefore, a set of general rules of administrative contracts does not exist. It should be noted that due to these factors, it is very complicated to discourse about this kind of contracts, although it will be explained more precisely in the further part of the study.

It should be mentioned, regarding the dogmatism, that nowadays the administrative contracts are outstandingly relevant for the jurisprudence and also for the practice. This is due to the fact that from the date of 1 January 2018, two new administrative procedural codes will enter into force: the *General Public Administration Procedures* (AP)[2] *and the General Public Administration Actions* (AA)[3] *expressis verbis* declare the theme of the writing. For all these reasons, the aim of this study is to provide a general overview about the administrative contracts. Three separated parts are included in it: in the first part, the general characterisation of administrative contracts are discussed, namely the definition, the main features and the well-known types. In the second part, the main dogmatic problems are in focus. In this part, a highly subjective self-made argumentation proves that the dogmatism of administrative contract is still at an embryonic stage. Last but not least, in the third part, the Hungarian legal situation is discussed, namely the two new codes are taken into examination. It should be emphasised that this topic highly affects other segments of the public administration; however, this study aims to cover only the most important parts of this legal institution.

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[1] It is necessary to note from the very beginning of this study that the definition of administrative contracts is hardly relative. As in the Hungarian or in the international legal literature, a wide variety of terminology is used by the experts. Public contract or public administration contract can be mentioned as examples however many experts restrict these terms only to the contracts made during the public procurement procedure. On the following text, term of administrative contract will always be used, as a generic term.

[2] Act CL of 2016 on General Public Administration Procedures (AP).

[3] Act I of 2017 on General Public Administration Actions (AA).

Conference_2.indd 65 2018. 01. 29. 14:56:35

II. The historical background of administrative contracts

In advance, it is necessary to review shortly the historical aspects of this kind of contracts to ensure the coherency. In general, administrative contracts were born simultaneously with the public administrative law in France in the 19th century.[4] This was primarily due to the fact that the control of administrative activities, as in the states of the continental law system, were not carried out by ordinary courts. These indicated tasks were carried out by the administrative courts, which showed a certain separateness in the judicial system.[5] It is not necessary to explain more precisely that in the 19th century administrative tasks were growing extremely fast, the economic governance and the public service role of the administrative organizations became more and more general. These factors have determined the spread of the administrative contracts.

In the 20th century, factors described before having escalated in the administrative systems of the states. Because of this, the contracts became standard in the public administration. This was further compounded by the fact that in the second part of the 20th century, several theories and doctrines have spread in the jurisprudence of public administration (for instance New Public Management), which have targeted to reform the whole public administration. The method of the reform would have been the use of the instruments of the private sector. These doctrines have assigned a huge role to contracts.

Generally speaking, the administrative contracts of the previous times – as it will be discussed – show a relatively high similarity with the current types. It is worth mentioning that one of the most well-known contracts were so-called communal work contracts, which has had a hard influence of public law, but its subject was special, and the administrative elements have manifested in them.

III. The dogmatism of administrative contracts

III.1. The definition

After the historical aspects, it can be concluded that nowadays administrative contracts play a huge role in the world of public administration. To day to day, the public administration, more precisely the organizations of public administration rely on using a huge number of contracts, they are involved in several legal relationships; however, these contracts are not necessarily administrative contracts. This is due to the fact that the authorities of public administration take part in different legal relationships (for example international relations), which differs from the classical administrative legal relationships. Although examination of it exceeds the scope of the study. On the other hand, it is notable that there are cases when authorities of public administration take part in a legal relationship as a private person. These organizations conclude several contracts, but these contracts belong to the rules of the private law.

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[4] Fazekas Marianna (szerk.): *Közigazgatási jog – Általános rész III.* ELTE Eötvös Kiadó, Budapest, 2013. 84–85.

[5] Harmathy Attila: *Szerződés, közigazgatás, gazdaságirányítás*. Akadémia Kiadó, Budapest, 1983. 19–20.

Conference_2.indd 66 2018. 01. 29. 14:56:35

If a general definition of administrative contracts need to be found, the following can be a proper one: this contract is generally a special legal relationship, in which the elements of the public and private law are combined.[6] On the other hand, the specific legal definition is slightly different. Because of this reason, it is necessary to analyse the concept of a Hungarian legal book.[7] This concept approaches the definition from the dogmatic basis of acts. According to this, the administrative contract is a special or unique individual administrative act.[8] This speciality, as in every contract, is the bilateralism. It is perceptible how broad concept this definition is; therefore, several contracts can be included in this category. Due to these factors it is very important to distinguish between each types of contracts.

III.2. The main dogmatic features

Despite this broad concept, the dogmatic features of administrative contract are clear and coherent. The following part tries to describe the most important and well-known parameters of these contracts.

The first and probably the most important feature is bilateralism, as it was mentioned above. Bilateralism means that instead of the general characteristic of public administration, which is, as it is known, the unilateral declaration of intent, administrative contracts are always made by the bilateral agreements of the parties. If the analysis of administrative acts is continued, it is obvious that public authority is manifested in any decision which are made by the organizations of public administration regardless the fact that under what kind of procedure the decisions are made. However, in the administrative contracts this feature is broken: as in the case of ordinary civil law contracts, the bilateral agreement is strictly necessary to conclude the contract.

The second indispensable feature is that one of the parties is always an entity regulated by the public law.[9] Analysing this criterion is completely unnecessary because this feature can relate to any organization in the system of public administration. However, distinction can be made between these authorities based on that how frequently they conclude contracts. Local governments and state administrative organs can be mentioned as examples.

What is interesting, that the person or body who is responsible for the duties in connection with the subject-matter of the contract acts on behalf of the organizations what concluded the contract. In case of elected organs, the body is the highest authority (for example representative body), in case of non-elected organs the person is the head of the organization. Last but not least, it is notable that the above described organizations occasionally have an obligation to make the contract.

The next criterion relates to the aim and the subject of the administrative contracts. Generally accepted dogmatic parameter is that the aim and the subject of the contract is always a public task performance. Nowadays, it is impossible to exhaustively enumerate

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[6] Horváth M. Tamás: *A közigazgatási szerződések szabályozási koncepciója*. Magyar közigazgatás, 2005/3. 142.

[7] Fazekas, 2013. 84–97.

[8] Fazekas, 2013. 89.

[9] Ádám Antal: *A közjogi szerződésekről.* Jura, 2004/1. 7.

Conference_2.indd 67 2018. 01. 29. 14:56:35

the tasks of public administration. However, we can mention for instance the provision of public service or granting aid. These two examples just illustrate the criterion, tasks are usually regulated by law.[10]

The fourth specific feature is that the entity of the administration has, without exception, some kind of privileges in the legal relationship. Hence, in this case the ordinary civil law principle is broken, and it does not prevail the equality of the parties. It is mentionable for example the right to terminate the contract without notice or the right to control the other party's activities.

Related to the previous concept, administrative contracts occasionally would have some special validity requirements. It is interesting that in this case, another civil law principle is limited. The immanent meaning of contractual freedom is that the parties can stipulate freely the content of the contract. Administrative contracts usually go beyond this principle, and the codifier could prescribe for example the prior consent or the post approval of the supervisory organ.

Last but not least, the sixth special feature of administrative contracts is that if there is a legal dispute over the administrative contract, the authority of the procedure is a separated organ with special competences. As it was already mentioned, this special organ is the administrative court.[11]

Dogmatic features	
Conclusion	administrative contracts are always made by the agreements of the parties
Parties	one of the parties is always a public entity
Subject	public task performance
Content of the contract	the entity of public administration always has some kind of privileges the contract would have special validity requirements
Legal dispute	administrative court's competence

1. Dogmatic features of administrative contracts (Author).

In my point of view, the above-mentioned features are the most important to tell regarding the dogmatism of administrative contracts. The 'dogmatic line' definitely cannot be closed because there are several other provisions and clauses in the administrative contracts which are not fitting into the world of classic civil law.

III.3. The most well-known types

As it was stated in the introduction, this study is trying to analyse the most well-known types of administrative contracts, focusing on the Hungarian law. Above all, it should be noted that the following standardization is highly subjective. Because of this factor this study discusses only three categories. Later, it will be discussed what kind of special legal issues belong to the administrative contracts in case of classification.

[10] Fazekas, 2013. 89.

[11] F. Rozsnyai Krisztina: *Közigazgatási bíráskodás Prokrusztész-ágyban*. ELTE Eötvös Kiadó, Budapest, 2010. 86.

Conference_2.indd 68 2018. 01. 29. 14:56:35

The first and in my point of view one of the most well-known types of these contracts is the so-called coordinating and cooperation contract.[12] Without any broad analysis, it is notable that the organizations of public administration make several relations to day to day, so their cooperation and coordination is completely natural. The system of public administration would be unimaginable and perhaps deficient, if its organs would not make connections and relations with each other. Because of all these reasons it can be declared that this type of administrative contract relates any organs. On the other hand, distinction can be made between organs based on how frequently these organs conclude this kind of contract. For instance, the cooperation between local governments[13] (their common cooperation is the so-called inter-municipal association) and the cooperation agreements between local-governments and police can be mentioned.[14]

The next category is the so-called aid and financing agreements. Due to the multidisciplinary feature of them, which is caused inter alia the strong influence of the financial law, a detailed examination cannot be made here. Although it is notable that due to this strong financial law influence, a very complicated system developed at the boarders of the two areas, which makes the theories of administrative contract increasingly complex.

Last but not least, the third well-known type of administrative contract is the public service delegation contract. Nowadays there, several acts in Hungary which contain, more or less, regulation about these contracts: for instance, the law on protection of environment or the law on healthcare.

To summarize the part with a final thought, it can be easily found out that discussing the dogmatism of administrative contract is a hard task. In my point of view, the next part of this study will prove this statement.

IV. The legal problems of administrative contracts

It can be concluded from the previous part that the experts are able to determine uniformly the dogmatic and the special elements of those contracts but only to a certain point. However, after the dogmatic characterization, in this part three entirely subjective factors are enumerated which can prove that the dogmatism of the administrative contracts is still on a rudimentary level.

IV.1. Influence of the civil law

Maybe the most basic problematic factor is the influence of the civil law which can be called ‘the entry of civil law into the public administration’. During this process several legal institutions, legal principles, and ordinary elements of private law, which are the keystones of civil law, appear in public administration law. The simplest example of this process is evidently the contracts. As it was described before, the organizations of public administration make several contracts, but despite of this, it cannot be surely asserted that

[12] Fazekas, 2013. 89.

[13] See in details: Art. 87–95. of Act CLXXXIX on Local governments of Hungary.

[14] See in details: Rozsás Eszter: *Közigazgatási jog, különös rész II.* Dialóg Campus Kiadó, Budapest, 2014. 32.

Conference_2.indd 69 2018. 01. 29. 14:56:35

all of them would the examined legal institution, even though some of the features, what were detailed before, can be found in the contractual construction. Due to this progression, it is very complicated to find out the affiliation of private or public law. Pursuing that line of thought, it complicates the situation further that a 'proved' administrative contract usually uses the terminology of civil law.

IV.2. Difficulties of classification

The second issue, which actually comes from the first, can be called as the difficulty of the classification of administrative contracts. In Hungary, a number of classifications were made by the theorists. In this study, I would like to review two illustrious conceptions.

Tamás M. Horváth differentiated more than ten types of administrative contracts.[15] Omitting the whole enumeration, it is notable that the writer has analysed the legal milieu in those days, making an exhaustive list about administrative contracts.

Antal Ádám has declared several types of administrative contracts similarly to the previous concept.[16] Interesting fact that in his study, he used the terminology of *public contract* and he rated the so-called 'mixed' public contract as an administrative (precisely public) contract.[17] (In his opinion, the 'mixed' public contract is a special contract in which the elements of public and private law can be found.)

It shall be highlighted that only the most well-known types of administrative contracts, which were detailed before, can be found in both classifications. It shows that how multi-coloured the classifications of administrative contracts are. In my point of view, the reason of it is primarily the frequent changes of legislation. Secondly, and perhaps it is more important, the legal literature knows several mixed contracts affiliation of which is undefinable. Here are two simple examples: the concession contracts and the contracts made during the public procurement procedure. Both procedures are the special types of administrative procedures. Despite this fact the legal literature cannot identify the affiliation of the contracts which are made under these procedures therefore the standpoint in this question is unclear. It is notable that *Horváth M.* and *Ádám* consider that the concession contracts and even the procurement contracts are administrative (or public) contracts.

IV.3. Absence of codification

Last but not least, the third issue of dogmatism is the absence of codification. In my point of view, codifying a legal institution would always facilitate the work of the experts and the jurisprudence. Nowadays, unfortunately there are only a few states, where administrative contracts have well-developed legal culture and where these contracts can be found codified. Due to the broadness of the topic, only two legal systems are discussed which are the most important regarding this part.

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[15] Horváth, 2005. 144.

[16] Ádám, 2004. 7–9.

[17] Ádám, 2004. 8.

Conference_2.indd 70 2018. 01. 29. 14:56:35

In the French legal system, the administrative contracts are handled like a separate legal institution, since France codified them first. This means that the administrative contracts were created by the French law, which facilitated the scientific researches in connection with the dogmatism of these contracts. French law requires the coexistence of two conditions to qualify a contract as an administrative contract: a structural and a material requirement. In the case of the first requirement, one of the parties in the contractual relationship is needed to be an entity, governed by the public law. According to this requirement if two private legal entities conclude a contract, the rules of private law shall be automatically used. Although if a public entity makes a contract with a private party, it shall be examined whether this contract is an administrative contract. To be able to decide this question it shall be analysed the next requirement. The material requirement means that the subject of the contract shall be a public task.[18] If both requirements are fulfilled, the contract can be qualified as an administrative contract. It is mentionable that the French legal system strongly focuses on the public procurement contracts.[19]

As for Germany, the German legal system also knows the administrative contracts. In this state, the administrative procedural code (*Verwaltungsverfahrensgesetz*, VwVfG) generally regulates this legal institution, makes differences between each type. Basically, the VwVfG regulates two types of administrative contracts and it says generally that the administrative contract (*öffentlich-rechtlicher Vertrag*) can establish, modify, and terminate a public legal relationship.[20]

The two types are the so-called *Vergleichsvertrag* and the *Austauschvertrag*.[21] It is interesting that in the case of *Vergleichsvertrag*, the condition for the conclusion of the contract is the indefinability of the legal situation. In the case of *Austauschvertrag,* the client assumes a sort of consideration to the public authority. It is notable that the VwVfG knows a special administrative contract (so-called act replacement contract,[22] which is in Hungary the administrative agreement and it will be discussed later) and the code allows for the authority to make a contract with the client, if it had made an administrative act.[23]

IV.4. Conclusion

The legal problems of administrative contracts make the work of the experts more difficult. In my humble opinion, if you want to provide a more advanced dogmatism, it has to be started with resolving the problems described before. There are some factors which cannot be influenced by the public administration, for instance the process of civil law. However, the public administration should take the opportunities to make a more advanced dogmatism.

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[18] Vallée, Pierre-Hugues: *Le problème de la qualification juridique de l'action administrative négociée : un défi aux catégories classiques du droit?* Les Cahiers de droit, Vol.. 49.numéro 2. 2008. 175-330.

[19] Várhomoki-Molnár Márta: *A közigazgatás szerződéseinek típusai az Európai Unióban és Franciaországban.* Fazekas Marianna (szerk.): Jogi tanulmányok, az Eötvös Loránd Tudományegyetem Állam és Jogtudományi Kar Doktori Iskoláinak III. konferenciája, II. kötet Budapest, 2012. 427-430.

[20] Art. 54 of Verwaltungsverfahrensgesetz (VwVfG).

[21] Art. 55–56 of VwVfG.

[22] Art. 55 of VwVfG.

[23] F. Rozsnyai, 2010. 117.

Conference_2.indd 71 2018. 01. 29. 14:56:35

Last but not least, another factor has to be highlighted: the above-mentioned list of issues cannot be closed. It means that there are a lot of other issues which make this task harder. It is notable that although the Hungarian legal system regulates several administrative contracts, it cannot be said that this regulation would be coherent or uniform.[24] On the other hand, issue of terminology, which was described before, is also a very problematic element. It shall be highlighted that in this study a coherent terminology tried to be used.

V. The current issues of administrative contracts in the Hungarian law

As it was stated in the introduction, in the last part of the study, the current legal situation of Hungary is discussed, focusing on the administrative contracts. The starting point is that at the end of 2016 and in the early 2017, the Hungarian Parliament, with the spirit of expediency and efficiency, adopted two completely new proceeding codes: the above-mentioned AP and AA. With these codes, the legislator has essentially changed the system of administrative action and procedure. AP is much shorter and recognisable than its ancestor (Act CLX of 2004 on the General Rules of Administrative Proceedings and Services) and regulates many new legal institutions. AA replaces the rules of the Code of Civil Procedure and it exhaustively regulates the most important rules of administrative action. Naturally, the codes must be analysed one by one, but only those provisions of them which are connected to the topic.

Basically, both acts contain only minimum standards of administrative contracts. In my point view, despite these minimum rules, this is a very huge step, because Hungary enters among the states, which regulates the legal institution of administrative contracts in law. On the other hand, until this time, legal regulation of administrative contracts was missing in Hungary. In the next parts, the rules of the codes are analysed, starting with AA.

V.1. General Public Administration Actions

One of the most important innovation of AA is that it, although laconically, defines the administrative contracts. According to this, each contract is an administrative contract which is declared by an act or a government decree.[25] This means that from 1 of January of 2017 only an act or a government decree can qualify a contract as an administrative contract. It is very interesting that the bill of the AA contained a completely different definition of administrative contract.[26] The current regulation uses a general clause regarding the definition. In spite of that, the bill made an open exhaustive list the first part of which gave examples of the most well-known types of contracts and at the end of that the current definition could be found. To make it most understandable, the whole list can be read below. According to this list, administrative contracts are:

– administrative agreements;

[24] Horváth, 2005. 143.

[25] Art. 4 paragraph (7) point 2 of AA.

[26] See in details: Number T/12234. Bill of General Public Administration Actions http://www.parlament.hu/irom40/12234/12234.pdf (28.11.2017.).

Conference_2.indd 72 2018. 01. 29. 14:56:35

- contracts and agreements according to Act on Local Governments of Hungary;
- a long-term and complex contract made by the public authority to perform service or investment pubic tasks, according to which the contracting party undertakes obligation to design, building, operation and funding of the subject matter of the contract with or without bearing the operational risk connected to the public task performance and transferring the instruments, established under the performance, to the public authority when the contract expires; and
- each contract which is declared as an administrative contract by an act or a government decree.

This implies that there are significant differences between the definition of the bill and the code. In this part, the first element of the definition namely the administrative agreement, will not be explained because this task belongs to the next part. As for the second conceptual element, according to the bill, the different agreements between local organisations would have been administrative contracts. One of the most well-known type of this kind of settlement is the inter-municipal association with legal personality.

In case of inter-municipal association, the representative bodies of the local governments actually make an association in order to provide more effectively and expediently one or more municipal duties and powers of the representative body or state administrative jurisdiction of the mayor or the clerk.[27] This legal institution provides advantage for small populated local governments because the high-prized compulsory tasks are performed not by the small local government itself but by the association with legal personality.

As it was mentioned before, this kind of association is established by the written agreement of the participating representative bodies.[28] If this agreement is under a detailed examination, it can be obvious that this has to be considered an administrative agreement: it is concluded by the authorities of public administration in order to perform public task and certain element of the agreement are regulated by act. This is confirmed by the fact that according to the act, the administrative courts have competence over the dispute of the agreement.[29]

As the third conceptual element, this long definition is unambiguously referring to the *Public-Private Partnership* (PPP or P3) as the contract made during the application of alternative public task performance.[30] In general,[31] PPP means a form of agreement between the public and the private sector for a long term in which parties bear equally the responsibilities and risks of the public task performance.[32] Very fundamental dogmatic issues belong to P3. Perhaps, one of the most important one is about whether the PPP is an atypical contract of the private law or an administrative contract of the public law. Detailed examination of it exceeds this study but it needs to highlight that PPP has very

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[27] Art. 87 of Local Governments of Hungary.

[28] Art. 88 paragraph (1) of Local Governments of Hungary.

[29] Art. 92 of Local Governments of Hungary.

[30] Horváth M. Tamás: K*özmenedzsment*. Dialóg Campus Kiadó, Budapest–Pécs, 2005. 151.

[31] This is only the tightest definition of PPP. One of the most important issues about P3 is the difficulties of dogmatic classification derived from the lack of proper definitions.

[32] Leiner Vera (szerk.): *PPP-kézikönyv: a köz- és a magánszféra sikeres együttműködése*. GKM, Sajtó és Protokoll Főosztály, Budapest, 2004. 9.

Conference_2.indd 73 2018. 01. 29. 14:56:35

significant private law effects.[33] However, this problem would have been clarified properly by the bill and finally this question would have been closed: it would have declared PPP as an administrative agreement.

The last conceptual element is the currently effective definition. This element would have opened the exhaustive list because the two types of law could have declared every kind of agreement as administrative contract.

The following question can be arisen: why the current code rejected the definition of the bill? In my point of view, the latter could have represented better the general definition of the administrative contracts. However, due to the current definition legislation can decide almost freely about which agreement needs to be declared as administrative contract. It could mean that the legislator may ignore the well-established dogmatism of private and public law.

Following the rules, AA says that the dispute over the contractual relationship is an administrative legal dispute.[34] If any act or government decree qualify a contract as an administrative contract, that administrative court has venue where the contract was concluded. However, the parties may set another court with venue. Related to the previous rule, it is notable, that in this dispute legal representation is obligatory.[35]

The code allows to make a settlement in case of legal dispute over the administrative contracts,[36] and it declares in detail, what kind of decisions the court can make.[37] The previous rule may be applied if sectoral legislation does not lay down any other sanctions.

V.2. General Public Administration Procedures

This code consists only one provision about the administrative contracts, but in my point of view, this provision closed a long-standing dogmatic debate.

In several continental legal systems (for example in Germany) administrative agreement have been regulated for a long time. It was introduced to the Hungarian legal system by the earlier code of administrative procedures,[38] as a completely new legal institution. The aim of this special settlement is that the authority does not provide a right or prescribe an obligation for the client, but if the agreement is best suitable for both parties and also for the public interest, the case can closed by this bilateral agreement.[39] It seems that the administrative agreement is a sort of unusual legal institution, because the case can be closed without the unilateral decision of the administrative organization.

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[33] The question of the distinction of public and private law is very significant in the legal literature. Because of this, there is a legal debate between the authors. Some authors (*Horváth M. Ádám*) consider that this kind of agreement between the state and the private sector is unambiguously administrative contract, others consider PPP contract as an atypical contract, for example see it in details: Papp Tekla (szerk.): *Atipikus szerződések*. Opten Informatikai Kft., Budapest, 2015. 236–264.

[34] Art. 4 paragraph (2) of AA.

[35] Art. 27 paragraph (1) of AA.

[36] Art. 68 paragraph (1)–(3) of AA.

[37] Art. 94 paragraph (1) point a–d. of AA.

[38] Act CLX of 2004 on the General Rules of Administrative Proceedings and Services.

[39] Fazekas, 2013. 96.

Conference_2.indd 74 2018. 01. 29. 14:56:35

Administrative agreements have several advantages. The first, and maybe the most important one, is that it may facilitate the client's performance, guaranteeing the fulfilment of the contract. It is doubtless that concluding this kind of settlement could be more practical than a unilateral decision because with administrative agreement the client can feel himself/herself as an equal party. With making such agreement, the client and the authority basically create a partnership to satisfy a general interest.[40] However, it is necessary to pay attention to the disadvantages as well. These days, public authorities are trying to close the cases effectively and fast, therefore conclude a contract with the client could seem to be promising. Although this could let to the situation when relevant facts remain undiscovered which, if they had been discovered, could have had an influence on the 'classical' decisions of the authorities.

It is notable that according to AP, as the previous regulation, there are certain conditions of making an administrative agreement:

- it can be concluded when the settlement is best suitable for both parties alike and also for the public interest;[41]
- it can only made in written;
- AP prescribes mandatory conditions.[42]

The code settles the cases when the authority or the client does not fulfil the contract. If the authority does not perform its obligation the client can go to the administrative court after its unsuccessful request for performance.[43] If the client breaches the contract, the authority arranges for the enforcement of contractual sanctions and if it is necessary, it initiates the execution.[44]

Returning to the administrative contracts, the administrative agreements are hardly classifiable. This is due to the fact that the form and the content of this bilateral settlement contains the elements of the public and private law at the same time. AA ignores this situation, because it *expressis verbis* says that the administrative agreement is an administrative contract.

V.3. Conclusion

The aim of this part was to provide an overview about the current legal situation of Hungary, focusing on the administrative contracts. It is quite obvious that the regulation of the codes sets only a minimum standard about this kind of contracts. Furthermore, sectoral legislation is able to make a more detailed regulation in light of the general rules.

The question is if this minimum standard is sufficient or not; only practice would take a side. However, it is clearly obvious that the codification and the judicial practice would provide a great opportunity for the experts to make a development in dogmatism.

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[40] Tilk Péter: *A hatóság döntései és a hatósági szerződés az új eljárási törvény alapján*. Magyar jog, 2006/2. 89–90.

[41] Art. 92 paragraph (1) of AP.

[42] Art. 92 paragraph (2) of AP.

[43] Art. 93 paragraph (4) of AP.

[44] Art. 93 paragraph (3) of AP.

Conference_2.indd 75 2018. 01. 29. 14:56:35

VI. Consequences

Reaching the end of the study, it should be summarized to set the main conclusions and consequences. At the beginning, the definition of administrative contract was analysed the base of which is the administrative acts. The most important and well-known features were also detailed. Regarding to this, the study has dogmatically placed the contracts in the field of public law, and related to the characterization, the most relevant types of administrative contracts were shortly discussed.

Knowing the dogmatic basis, the aim was to prove with subjective elements that several issues appear when administrative contracts are construed. On the one hand, these factors always make the work of the theorists more complicated and on the other hand, it makes uncertain whether the dogmatism of administrative contracts even exist. As it was stated in my point of view, the answer is yes; however, as long as the relevant problems are not resolved researches of the topic remain in an elementary stadium.

At the end of the study the current Hungarian legal situation was taken under examination focusing on the relevant provisions of two new codes.

It can be concluded easily from the study that this legal institution is Janus-faced. However, it cannot be forgotten that administrative law is one of the most frequently changing legal area because of which several new legal institutions appear. This factor may become visible in case of administrative contracts.

It should be noted that this short study covers a small part of the administrative contracts, several other parts could have been examined. The purpose of the study was to provide a general overview with special focus on the recent codification process and the expectable consequences of the near future.

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Conference_2.indd 76 2018. 01. 29. 14:56:35

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Conference_2.indd 77 2018. 01. 29. 14:56:35

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LEGAL ASPECTS OF LOCAL PUBLIC SERVICES: PROCEDURES LEADING TO THE CONCLUSION OF PUBLIC SERVICE CONTRACTS

I. Introduction

Local self-governments are not only organizations of local authority, but have the right and obligation to provide local public services. Local self-governments are responsible for developing public tasks required by law. The scope of public tasks performed by local self-governments changes from time to time and also shows a diverse picture State by State. In the meantime there is a diverse picture of the tools, serving performance of public responsibilities. Public contracts have been given a higher priority especially in welfare societies, with the strengthening of the New Public Management and the widespread application of business methods. Procedural issues of public contracts are not only relevant to the realization of decentralized public service provision, beyond globalization and Europeanization effects could also be detected. It is necessary to premise, that these latter effects are the subject of further research, the paper only refers to globalization and Europeanization tendencies.

The study is first an attempt to identify those requirements imposed by law, prevailing in procedure leading to the conclusion of local public service contracts. Regarding this subject, the public law elements of contracts and the special administrative procedural provisions leading to the conclusion of these types of contracts should be considered also. It is noteworthy, that in these types of contracts more restricting elements could be identified relating to the principle freedom of contract and public law components are prevailing as well. Since always an administrative body is one of the contracting parties, the substantive law matters, but the contract award procedures also have particular attention. Administrative bodies manage public funds, their legal status is also special, and therefore procedural matters are at the centre of investigation, as well. Therefore, issues of public service contracts within the framework of the paper are approached from the view of administrative procedural rule but not primarily from substantive legal provisions. Because of these aforementioned specialties, the study focuses only those contract award procedures, which serve providing local public services. The limit principle of freedom of contract would also be interesting, related to public law elements. Consequently, evaluation of public contracts primarily focuses on administrative procedural but not substantive legal provisions.

Provisions regulating public service contracts on one hand deserve special attention due to evolving European legislation of ReNEUAL Model Rules on EU Administrative

Conference_2.indd 78 2018. 01. 29. 14:56:35

Procedure (Model Rules)[1] and on the other hand the changes in domestic law, the adoption of new *Code on Administrative Procedure* and *Code on Judicial Review of Administrative Acts* in 2016 and 2017 is also worth mentioning.[2] Therefore, latter part of the study is devoted to new regulation of this type of contractual litigation.

The paper is thus also an attempt for discussion both the issues and traceable tendencies of local public services and public contractual law relations; thus the aim is to demonstrate that public service contracts are mainly public contracts; elements of this type of contract defined dominantly by the public law and rules of civil law have minor importance.

II. Context between historical and dogmatic elements of local service supply and public contracts

Where historical elements of the evolutionary process of public service contracts are studied, two important features should be highlighted. Public service contracts were initially concluded at local level in the 19th century, especially in Anglo-Saxon legal system, but also in France. British public organization had a rapid and significant change in the 19th century, the city's administrative system was primarily intended to respond for technical development and the population' moving to larger cities. The subject-matters of the public contracts covered public service provision. Taking into account the peculiarities of English legal system development, detailed elements of public contracts' dogmatism were developed admittedly in French legal system and even more in case law.[3] Furthermore, it can also be concluded that there are several organizational and operational system of public service delivery, like the Anglo-Saxon, French, and German model.

Historical development process of public service contracts were accompanied by the following considered issues at that time, whether (1) the State is a legal entity on its own, (2) the competence of the State shall be limited, (3) may be enforced. Development of French, Anglo-Saxon and German social and legal system provided various responses to the questions raised, basically defined the improvement of public administrative law. Whereas the interest of Romanist lawyers and scholars traditionally was based on substantial law, the Anglo-Saxon-based lawyer's focused for centuries on procedure and procedural law, and it had slowly turned to the rules of substantive law.[4] Considering results of public administrative comparative law researches it should also be noted, that these differences could be interpreted nowadays only historically, the real picture is combination and amalgamation of diverse elements.[5] The strong attachment to the central government, to

[1] The ReNEUAL Model Rules 2014 are designed as a draft proposal for binding legislation identifying – on the basis of comparative research – best practices in different specific policies of the EU, in order to reinforce general principles of EU law. http://reneual.eu/index.php/projects-and-publications/reneual-1-0 (10.09.2017.)

[2] Act CL of 2016 on General Rules of Administrative Procedure, Act I 2017 on Judicial Review of Administrative Acts. Both Codes will enter into force on 1 January, 2018.

[3] Harmathy Attila: *Szerződés, közigazgatás, gazdaságirányítás*. Akadémiai Kiadó, Budapest, 1983. 17., 20., 27.

[4] David, René: *A jelenkor nagy jogrendszerei. Összehasonlító jog*. Közigazgatási és Jogi Könyvkiadó, Budapest, 1977. 289–291.

[5] Szamel Katalin – Balázs István – Gajduschek György – Koi Gyula (szerk.): *Az Európai Unió tagállamainak közigazgatása*. Complex Kiadó, Budapest, 2011. 32.

Conference_2.indd 79 2018. 01. 29. 14:56:35

the authority of the State may cause a relative disadvantage for States with continental legal system contrary to the Anglo-Saxon legal system, because of the ability to respond to changes especially in the commercial law issues.[6]

A public service contract might be the public law form of public service provision or management and implementation of public responsibilities. Public services have major importance from the view of public spending; therefore attention is focused from time to time to efficiency, equality and availability of public services. The definition and implementation of services of general economic interest (instead of general public service) is common in the European Union legislation, it will be addressed in Chapter IV.

Governments provided public services, especially those public services, attached to infrastructure. In order to provide high-quality public services, governments operate different bodies and processes. Those public services have different structural and also market features, like supply of water and sewage services, waste management, public transports require different approaches. The OECD countries use different regulatory tools in these service provision fields, but the main focuses are the same: (1) controlling market entry, (2) controlling prices, and (3) controlling service quality.[7]

The procedural issues of public service provision contracts are essential; however, the substantive provisions also have relevance along with specialities of local service supply as aimed by the public service contract.

Public service delivery serves meeting the common needs of society. These responsibilities require common organizational activities.[8] By another approach "[*T*]*he most important public services are manifested in Fundamental Laws of certain States as fundamental rights. Service are classified public service by the State law, by application of certain procedural rules, these public services are supplied, financed or regulated by the State*."[9]

III. Globalization – long is on rhetoric and short is on facts?

Due to the general spread of globalization in economic life, contractual relationships have been given a higher priority. Sweeping and rapid changes in social and economic life are hardly followed by the national law, because the domestic legislation is not capable to cover all of dimension of swift transformations.[10]

It is also have to be highlighted, that contracts are not legal sources in the classic sense, but have important role in the modernising process of law. As a result of the

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[6] Shapiro, Martin: *Globalization of Law*. Indiana Journal of Global Legal Studies, Vol. 1. No. 1. 1993. 38–42. https://www.repository.law.indiana.edu/ijgls/vol1/iss1/3/ (29.09.2017.) *Shapiro* on one hand examined the globalization process of commercial and contract law, in this context set against different law systems and affected the 'proliferation process' of lawyers, and the globalization of public law.

[7] The Regulation of Public Services in OECD Countries: Issues for Discussion. Nov. 2007. http://www.oecd.org/gov/regulatory-policy/41878847.pdf (10.09.2017.) 4.

[8] Horváth M. Tamás: *Közmenedzsment*. Dialóg Campus Kiadó, Budapest-Pécs 2005. 281.

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[10] Galgano, Francesco: *Globalizáció a jog tükrében. A gazdaság jogi elemzése*. HVG-ORAC Lap-és Könyvkiadó, Budapest, 2006. 92–104.

Conference_2.indd 80 2018. 01. 29. 14:56:35

globalization process, the framework of the traditional national legislation could become overwhelmed because of the international aspects of the economic life. Globalization may have a weakening impact for sovereignty, but the scope of implementation of so-called 'globalised law' is the territory of a national state. Beyond the territorial aspect the globalization could be applied only certain range of legal relationships.[11] The formal general authorisations of national legislators shall not be contested, the content changes are traceable. The requirements of competitiveness shall be accomplished by national legal legislator proactively. These progresses affect not only private law, but also public law therefore respect public service contracts, as well.

In interpreting *globalization concept* it could be established, that significant literature on economic aspects of globalization defined it as an (1) internationalization, (2) liberalization, (3) universalization, (4) Westernization or modernization and (5) deterritorialization process. This type of the approach of globalization is referred by *Wade Jacoby* and *Sophie Meunier.* However they referred to another approach, according to it globalization 'while long on rhetoric, is often short on facts.'[12]

Globalization is a controversial issue among scholars and researchers, in particular when the effects of the Europeanization are also being investigated. In the case of Europe, the causes and effects of globalization are difficult to isolate from Europeanization, from a deeper regional integration as well. The Europe's relationship with globalization is even more complex. In the early days of European integration the European institutions were inward-looking, reactive to outside pressures. In several countries, the phenomenon of globalization was received as a threatening. In the beginning of 2000 years another rhetorical mainstream has been raised, the so-called '*managed globalization*'. Managed globalization could mean that the EU expanding policy scope, exercising regulatory influence, empowering international institutions, enlarging the territorial sphere of EU influence, and redistributing the costs of globalization, but some authors dispute this point of view.[13] Furthermore attention should also be drawn to the importance of the neo-Weberian state organization model, according to certain approaching it may be interpreted as a political, a state-centred response by the elites of continental European countries to the pressures of global capitalism. The neo-Weberian state model could be considered as a *territorially localized* model against the New Public Management model, as a *territorially delocalized* model.[14]

If the phenomenon of globalization is examined in the field of administrative law, the definition of *global administrative law* could be concluded as "*mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing*

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[11] Serák István: *Polgári jog és civiljogi jogalkotás a globalizáció korában és a jogrendszerek versenyében.* Iustum Aquum Salutare, Vol. XII. No. 2. 2016. 92–93.

[12] Jacoby, Wade – Meunier, Sophie: *Europe and Globalization*. In: Egan, Michelle – Nugent, Neill – Paterson, E. William (eds.): Research Agendas in EU Studies. Stalking the Elephant. Palgrave, Basingstoke, 2010. 355–356., 366.

[13] Jacoby, Wade – Meunier, Sophie: *Europe and the Management of Globalization*. Journal of European Public Policy, Vol. 17. No. 3. 2010. 299., 302.

[14] Bauer, Michael W. – Trondal, Jarle (eds.): *The Palgrave Handbook of the European Administrative System.* Palgrave Macmillan, Basingstoke, 2015. 113.

Conference_2.indd 81 2018. 01. 29. 14:56:35

effective review of the rules and decisions they make."[15] The rule of law theory in this global context comprises principles and values, like the accountability, transparency and access to information, participation, the right of access to an independent court, due process rights.[16]

In sum, the sweeping economic changes could result the contractual relations, including the service contracts as well. Principles and values shall prevail in the contract concluding procedures and in the implementation and in monitoring of service performance processes.

IV. Europeanization of service providing and contracts concluding procedure

As has been indicated above, in the outline of the specificities of globalization, not only globalization but Europeanization effects also prevail. In the vast majority of conclusion public service contracts, rules of public procurement procedure shall be applied. In this chapter the purpose of examination is the question of how to fit both the public procurement procedure and the rules of administrative procedure in one picture.

Regarding Europeanization effects, public law elements of public service contracts and the special administrative procedural provisions – leading to the conclusion of these types of contracts – should be considered. On one hand European public procurement rules are worth to refer. On the other hand, public contracts regulating supply of public services deserve special attention due to evolving European legislation of Model Rules. These Model Rules on contracts are to be understood as a contribution to the debate on EU contracts, the administrative procedure which are leading to their conclusion and their execution. First of all, public procurement rules are referred, and then the Model Rules are discussed.

Public procurement, in generally, refers to the process by which public authorities, such as government departments or local authorities purchase work, goods or services from companies. The *EU Public Procurement Directive*[17] establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests. This Directive determines inter alia the definition of public contracts,[18] and especially the public service contract.[19] Beyond this *Public Procurement Directive* the specific related Directives shall be applied, as well.[20]

Public procurements have significance, hence every year; over 250.000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies. In many sectors such as energy, transport, waste management, social protection and the provision of health or education services, public authorities are the principal buyers. From 18 April, 2016, new rules have changed the way EU countries and public authorities which

[15] Kinsgsbury, Benedict – Krisch, Nico – Stewart Richard B.: *The Emergence of Global Administrative Law.* Law and Contemporary Problems. Vol. 68. No. 15. 2005. 17.

[16] Harlow, Carol: *Global Administrative Law: The Quest for Principles and Values.* The European Journal of International Law, Vol. 17. No. 1. 2006.189.

[17] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing. 2004/18/EC OJ L 94, 28.3.2014.

[18] Public Procurement Directive Article 2. par. (5).

[19] Public Procurement Directive Article 2. par. (9).

[20] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. OJ L 76 23.3.92.

Conference_2.indd 82 2018. 01. 29. 14:56:35

spend a large part of the €1.9 trillion paid for public procurement every year in Europe. This date was the transposition deadline for three directives on public procurement and concessions adopted two years ago. In other words, it was the date by which EU countries must have put in place national legislation conforming to the directives. The new rules will make public procurement easier and cheaper to bid public contracts, they will ensure the best value for money for public purchases and will respect the EU's principles of transparency and competition. To encourage progress towards particular public policy objectives, the new rules also allow for environmental and social considerations, as well as innovation aspects to be taken into account when awarding public contracts. But the success of the new legislation also depends on its effective enforcement in EU countries and the readiness of the 250.000 public buyers in the EU to make procurement processes more efficient and business-friendly for the benefit of citizens.

From the view of subject matter, the new Model Rules[21] is remarkable. The general scope of application of Model Rules to all contracts and legally binding agreements concluded between an EU authority and a private entity, between an EU authority and a Member State authority, if the Member State authority acts as a service provider on the market and concludes the contract with an EU authority as a private person would. An EU contract is governed by either EU law or by the law of a Member State or by the law of a Third State is distinguished by the Model Rules. The contracts will have a special significance in domestic case law, which are governed by the law of Member State.

The contracts and agreements concluded at the framework of public administrations show a very diverse picture at European Union level. This landscape becomes even more complex when the national levels are taken into account. Member States of the EU apply very different national concepts to public contracts, regardless of whether these contracts are governed by national public or national private law, or by a mixture comprising public and private law elements, as it is stated in report, drawn up by the *Model Rules Preparatory Committee*.[22] How can be determined the scope of Book IV in that case where there is no consensus on the substance of '*public contract law*' itself, at all.[23] General scope of application of Model Rules is to all contracts and legally binding agreements concluded between an EU Authority and a private entity, between an EU Authority and a Member State authority, if the Member State authority acts as a service provider on the market and concludes the contract with an EU Authority as a private person would. An EU contract is governed by either EU law or by the law of a Member State or by the law of a Third State, is distinguished by the Model Rules.[24] For the purpose of correct interpretation of Model Rules it should be highlighted, that only contracts regarding administrative activity concluded between EU authorities and private entities or with Member State administrations fall within the scope of Book IV. Therefore those public contracts concluded by Member State authorities with other parties than EU authorities are not covered by Book IV. These

[21] See in details: Kovács László – Várhomoki-Molnár Márta – Szilvásy György Péter – Koi Gyula – Iván Dániel: *IV. Könyv. A közigazgatási szerződések*. Pro Publico Bono – Magyar Közigazgatás, No. 2. 2017. 134–179.

[22] ReNEUAL Model Rules on EU Administrative Procedure Book IV – Contracts. 2014. Version for online publication. 147. http://www.reneual.eu/images/Home/BookIV-Contracts_online_version_individualized_final__2014-09-03.pdf (31.08.2017.)

[23] Model Rules 147.

[24] Model Rules IV-1. Scope of application. 155.

Conference_2.indd 83 2018. 01. 29. 14:56:35

contracts might have a special significance in domestic case law also governed by the law of Member State. This Chapter of Model Rules principally recalls the French system of public contracts hence the power of contracting derived from the first level legal act or from the second level legal act, the CJEU jurisprudence. In the latter case the effect of French model is traceable outstanding.[25] European Union bodies can only exercise tasks and competences where they are duly endowed with powers, delegated from Member States. All their activities based on provisions of the founding Treaties or acts of European secondary law. The implementation process of European public policies by general application of Model Rules through administrative action may result certain indirect effects on national public contracts law.

After the discussion of public procurement rules and Model Rules attention has to be drawn on provisions related to public service delivery. The Amsterdam Treaty of 1997 determined the application of a liberalization policy in the field of public service delivery. After this period the government and political factors have risen to the forefront, affected to the public service policy. The two most important measures prevailing typically could be highlighted as follows: allowing State grants, the possibility of exemption from public procurement rules. These features would be referred in relation to Hungarian public service regulations, as well. Reference should also be made on services of general economic interest. The general rules on these services are regulated in the *Treaty on the Functioning of the European Union*.[26]

Examining the globalization and Europeanization processes there could be concluded that both globalization effects and acts of the European Union have an unavoidable impact on national legislation, case-law and administrative practice.

V. A short dogmatic background of public contracts: different classifications – common points

Designation of contracts included public law elements and aimed implementation of public, state or local self-government tasks may be various, therefore the public contract, public law contract, administrative contract or administrative law contract equally are used, in Hungary as well because of the absence of a single legal normative regulation. The diversity of denominations also indicates that the contents of these types of contracts are not clearly clarified. Systematization of contracts could be established on the basis of different considerations, detailed description of them is not the subject of the paper.[27]

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[25] Hofmann, Herwig C.H. – Schneider, Jens-Peter: *Administrative Law Reform in the EU: the ReNEUAL Project.* https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_hofmann_schneider_reneual.pdf (31.10.2017.) 24.

[26] Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. [TFEU] Article 106.

[27] Highlighting examples of classification: Harmathy, 1983 13–64., 75–101.; Horváth, 2005 123–133.; Horváth M. Tamás: *A közigazgatási szerződések szabályozási koncepciója*. Magyar Közigazgatás, Vol. LV. No. 3. 2005. 142.; F. Rozsnyai Krisztina: *Közigazgatási bíráskodás Prokrusztész-ágyban*. ELTE Eötvös Kiadó, Budapest, 2010. 84–122.; Molnár Miklós – Tabler , Margaret M. : *Gondolatok a közigazgatási szerződésekről*. Magyar Közigazgatás, Vol. L. No. 10. 2000. 597–610., Olajos István: *A közjogi szerződés mint a támogatásokkal kapcsolatos jogalkalmazás egy útja*. Sectio Juridica et Politica, Miskolc, Vol. XXIX. No. 2. 2011. 503–506.;

Conference_2.indd 84 2018. 01. 29. 14:56:35

However, in setting this type of classification, the following characteristic *particularities* of the legal relationship should be taken into consideration. (1) Parties of the contract; (2) the object of the contract; (3) the content of the contract; (4) contract awarding procedure; (5) the implementation of contract; (6) relationship between the parties during the performance of the contract; (7) termination of contract; (8) litigation on public service contract.

In sum, assessing listed factors can be concluded, that one of the Parties of the contract is always an administrative body, a State or local self-government organization. The object and content of the contract is performance of public tasks, generally defined as public service by a legally binding act, or may also be directed towards the implementation of constitutional fundamental right. Certain type of tendering is also present in the contract award procedure, usually under the public procurement law regulation. Specific legal rules shall be applied during the performance of the contract; one of the Contracting Parties may also exercise its power of public authority. Termination of contracts, in particular termination with immediate effect is subject to specific provisions. Litigation relating to public service contracts generally falls within the jurisdiction of the administrative courts.

VI. Tendencies in local public service providing in Hungary

VI.1. Scope of local public services

Local self-governments in Hungary are primarily responsible for providing public services to their population. Due to the political transition, local self-governments had general competence with a wide range of public service provision responsibilities. However it come to be realized that at an early stage financial conditions required for the local self-government to fulfil their responsibilities set out by law, were not always sufficient. The tools available to local self-governments have been steadily narrowing.

In the period following the change of government in 2010, tasks belonging to local government responsibilities were formerly transferred to the state's tasks, which could lead to the abolition of the local government's administration and local public affairs. Local public services have increasingly become state responsibility and this process does not seem to be over yet. It can also be seen that the public service of public tasks did not entail the necessity of rationalization, the requirement of economies of scale, and the higher level of public service quality, which were primarily the reasons for the transformation.

Public services – as were referred above – are mandatory tasks of the local governments, but the statutory legislation may regulate requirement of majority state or local government property in corporations providing certain public services, by way of examples, healthy drinking water service, water drainage or waste disposal, as well. There is another important change: local government does not have empowerment to define the pricing of the public community services.

Settlements had the choice of fulfilling their mandatory tasks: they could set up their own local government institutions or enter into contracts with business entities, civil bodies,

Olajos István: *A közjogi szerződések jelentősége az agrár-és környezetjogban. A támogatási szerződések eljárásjogi helye és szerződési létszakai*. Pázmány Péter Katolikus Egyetem. 14. http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2012/2012-26-Olajos.pdf (10.11.2017.)

Conference_2.indd 85 2018. 01. 29. 14:56:35

and municipalities could freely associate with the task of performing their tasks more efficiently and cost-effectively. The contracts with business entities or civil bodies are in the scope of our topic, contracting on performance of public tasks.

VI.2. Procedures of contract conclusion

Concluding public contracts on local public services provision is common in the field of communal services. The area of waste management is worth for mention, where to conclude a public service contract is obligatory for local self-government, as usual between the owner and the provider of service. There is an obligation as well for participators involved in district heating service, but in this case the public service contract is established between the service provider and the consumer. These latter contracts do not fall in the examination of this study.

It is often the case, that local self-government as an owner and the public service provider stipulate contractually legal relationships between themselves. In these public contracts they can determine reasonably the objective requirements of public services, evaluation criteria, indicators or metrics and the order of the data supplying. These contracts and the performance of the mandatory tasks were investigated by State Audit Office in recent years.

Through the example of the *waste collection and management supply* could be described the procedure of contracting in the implementation of local public service tasks. Local self-government is obliged to carry out a tender procedure under the public procurement law in order to award a local public waste management service contract.[28] Related rules are in compliance with the Acquis and serve the execution and implementation of the European Union legislation. The *Act on Waste* contains the main rules of contract award procedure in details, these provisions could be considered as public law elements, are obligatory, required by law. These conditions have been set out as follows:

Municipal governments shall obtain to carry out the waste management public function at the local level by means of a public service contract signed with a public service operator. The municipal government shall conduct a public procurement procedure for awarding the contract for carrying out the waste management public function at the local level, in accordance with the provision of *Procurement Act*.[29] The *Act on waste* provides, that the contract shall be concluded in writing.[30] Only one public service contract shall be concluded. The municipal government may enter into a public service contract for waste management only with an economic operator that has a classification permit.[31]

The *Act on Waste* provides the mandatory element of public service contract, as follows: the identification data of the public service operator, or its members; a description of the public service; the particulars of public service areas; the duration of the public service contract.[32] Relating to the latter, the maximum duration of public service contracts for

[28] Act CLXXXV of 2012 on Waste, directly linked Decree of Government 317/2013.

[29] Act CLXXCV of 2012 Section 33 par. (1)-(2). Act CXLIII of 2015 on Public Procurement.

[30] Act CLXXXV of 2012 Section 34 par. (1).

[31] Act CLXXXV of 2012 Section 34. par. (2)-(3).

[32] Act CLXXXV of 2012 Section 34. par. (5).

Conference_2.indd 86 2018. 01. 29. 14:56:35

waste management is ten years.[33] Public waste management services may be suspended or restricted exclusively in cases provided for by an act of Parliament or government decree, and may be suspended at the property user's request in cases defined by municipal decree. The Act provides the publicity of the contract as well.

The council of representatives of the municipal government empowered to establish a municipal decree on waste management.[34] Municipal governments may form associations in fulfilling their waste management responsibilities.[35] Prior to making decisions relating to waste management, municipal governments may hold public hearings so as to learn the opinion of the general public.[36] Municipal governments may hold public hearings before making a decision in connection with the separate collection of municipal waste. In addition to the grounds for termination contained in the *Civil Code*, the municipal government may terminate the public service contract for waste management under this Act.[37]

The following summary table presents three special public service contracts, especially the public law elements of them.

Public service	Special rules	Procedure	Implementation	Termination	Other specialities
Waste management	Act CLXXXV of 2012 on Waste; Decree of Government 317/2013	tender procedure under the public procurement law	one public service contract shall be concluded	municipal government may terminate the public service contract for waste management under this Act	in writing; maximum 10 years duration of contract
District heating	Act XVIII of 2005 on district heating	there is no requirement for the selection of licensees	there is no provision for contract between municipal government and licensees	–	local government decree contains provisions
Public water supply	Act CCIX of 2011 on supply of public water	public water supply legal relationship is based on asset management contract or concession contract or hire-operation contract; tender procedure	the content of contract is under the national asset management act, or concession act, or public procurement act	special conditions in the case of termination	duration of contract min. 15, max 35 years; contract shall be in writing

1. Figure Public law elements of local public service contracts. (Author)

[33] Act CLXXXV of 2012 Section 34. par. (7).

[34] Act CLXXXV of 2012 Section 35. par. (1).

[35] Act CLXXXV of 2012 Section 36. par. (1).

[36] Act CLXXXV of 2012 Section 36. par. (2).

[37] Act CLXXXV of 2012 Section 37. par. (1)–(2).

Conference_2.indd 87 2018. 01. 29. 14:56:36

VII. Litigation issues related to public contracts

Issues related to legal controversy, it should be noted that the *Code on General Rules of Administrative Procedure* shall not be applied on the awarding procedure of public contracts. The administrative action (case) is falling within the scope of the Code; it means where the authority brings a decision to define a client's right or obligation, to settle a client's dispute, to establish a client's infringement, to verify a fact, status or data, or to keep records, and where it moves to enforce such decisions.[38] From the analysis of the definition it can be concluded that the procedural issues of public contracts are falling outside the scope of the Code. The only normative regulation on public contracts is contained in the *Code Judicial Review of Administrative Acts*.[39] This provision is quiet brief, includes only that is considered to be a public contract, which is qualified by a law or government decree. According to the provision of the Code, the subject-matter of an administrative legal dispute is the lawfulness of the administrative action. The administrative contractual relations, the public contracts are considered administrative legal dispute.[40] However, it also should be added that the only type of public contract is now the so-called administrative agreement[41] In accordance with provision concerning administrative agreement, the authority should be allowed or ordered by law to enter into an administrative agreement with the client, instead of passing a resolution, with a view to settlement in cases within its competence that is best suitable for the public and for the client alike. Administrative agreements are agreements concluded by the authority.

It must be pointed out that, under this definition, contracts concluded public administrative bodies under the *Public Procurement Act* are of the highest number of contracts, are falling outside the scope of the Code. Classification of public procurement contracts is controversial. Known is a position that this type of contracts belongs to the private law contract but a public law contract. The public procurement contract is a special private law contract type, this speciality resulted from the selection procedure, and these selection rules belong to the public law provisions.[42]

In the view of certain authors, the absence of administrative jurisdiction impeded the becoming autonomous legal institution and dogmatic development of public contracts.[43]

VIII. Concluding remarks

The public contract has an importance in the field of economic governance; hence it is a tool for the State or for the local self-government to influence directly the operation of service

[38] Act CL of 2016 Section 7. par. 2.

[39] Act I of 2017 Section 4. par. 7.2.

[40] Act I of 2017 Section 4. par. 13.

[41] Act CL of 2019 Section 92–93.

[42] Juhász Ágnes: *A közbeszerzési szerződés főbb jellemzői és a vonatkozó szabályozás új irányai*. 12. http://www.uni-miskolc.hu/~wwwdeak/Collegium%20Doctorum%20Publikaciok/Juh%E1sz%20%C1gnes.pdf (12.09.2017.)

[43] Fazekas Mariann: *Hatósági ügy – közigazgatási jogvita* (*Az Ákr. és a Kp. tárgyi hatályának néhány kérdése*). Jogtudományi Közlöny, Vol. LXXII. No. 10. 2017. 455.

Conference_2.indd 88 2018. 01. 29. 14:56:36

provider, to ensure high level service providing for citizens. The study has attempted to outline globalization and Europeanization effects having impact on administrative contracts.

Nowadays in Hungary the State plays an increasingly important role in the performance of public tasks. However this tendency does not result, that supply of the highest level of public services would not be in focus. Contracts on supply public services still deserve attention, because the regulation of the examined local public service contracts and the contract award procedures could not be regarded as standard, regulating the highest level quality services for the population.

The adoption of new *Code on Judicial Review of Administrative Acts* provides an opportunity to consider these types of contracts as public administrative contracts in the future, to extend the scope of the administrative court's jurisdiction, in order to establish the single, high quality judgement.

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Conference_2.indd 91 2018. 01. 29. 14:56:36

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