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THE CURRENT SITUATION OF THE REGULATION OF EU ADMINISTRATIVE PROCEDURE LAW IN THE LIGHT OF EUROPEAN PARLIAMENT RESOLUTIONS

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1. EUROPEAN PARLIAMENT RESOLUTION NO. 1

On 23 March 2010, the European Parliament Committee on Legal Affairs set up a Working Group on EU Administrative Law to take stock of the panorama of existing EU administrative law and, as a second step, to propose the interventions which it deems appropriate.

The European Parliament Committee on Legal Affairs adopted the working document prepared by the Working Group at its session of 21 November 2012.

According to the European Parliament Committee on Legal Affairs, during the evaluation of the administrative procedures of the institutions, bodies and agencies of the EU:

- *internal inconsistencies* were found which may result in *overcomplicated administrative* procedures and formalities;
- these may also result in *deficiencies* which pose a risk of maladministration or improvisation;
- these mistakes are undoubtedly due to the fact that rules *have evolved very rapidly* over the last half century;
- they are also due to the fact that most of the EU administrative rules are based on *sector-specific* set of rules.

The Committee's findings can be summarised as follows:

- The EU *had a number of procedural rules even in 2012:* there is a kind of procedural codification methodology behind the elaboration of these procedural rules. Due to the specificities of the different sectors, there is still a need for sectoral administrative procedures. However, the rules for these procedures shall not go below the generally defined minimum standards and shall not impose unnecessary procedural burdens.
- The institutions concerned may, in most cases, unilaterally modify the various administrative procedural rules (if available) under *soft law,* therefore they shall not be regarded as providing adequate legal protection and guarantee scheme for client rights.
- *Client (procedural) rights* not properly defined at EU level may lead to different practical solutions and to different judgments of similar facts.
- Over the years, the EU administrative law has evolved due to the work of various actors, i.e. the jurisprudence of the bodies involved in EU administration, the Court of Justice of the European Union and the European Ombudsman, as well as discussions initiated by the actors of scientific public life and the citizens themselves. However, the most serious problem is that the concept of *EU administration and administrative law* has not been established at the legislative level.
- For EU administrative procedures, *consistency, transparency and legal certainty* are essential requirements. To this end, it is necessary to have general administrative regulation, which is binding on the EU bodies and institutions, and which provides a guarantee net for the citizens.

- Establishing a general procedural regulation would give greater legitimacy to the decisions of EU administration, thereby increasing the citizens' confidence in the functioning of the Union.
- Several administrative procedures are closely linked to certain *IT systems* (e.g. EU PILOT), therefore it seems practical to develop appropriate IT systems to ensure the simplicity and efficiency of the procedure.

The European Parliament resolution of 15 January 2013[1] consists of two parts: on one hand it defines the goals and the areas to be regulated which should be examined by the Commission during the legislative procedure, on the other hand, it also makes some recommendations as regards the areas to be regulated.

According to Parliament, the regulation should:

- Codify the fundamental principles of *good administration* and
- should regulate the procedure to be followed by the Union's administration when handling individual cases where the involved party has *personal contact* with the Union's administration.
- The regulation should apply to the *Union's institutions,* bodies, offices and agencies in their relations with the public. Its scope should therefore be limited to direct administration.
- The regulation also should include a universal set of principles and should lay down a procedure applicable as a *de minimis rule* where no lex specialis exists.
- Certain parts of the Parliament recommendations encourage the Commission to formulate *definite provisions of principle,* while other parts provide essential and guiding rules for certain procedural actions.

2. THE RN STUDY

In 2014 the Research Network on EU Administrative Law ('ReNEUAL') drafted the Model Rules[2] on EU Administrative Procedure also containing draft legislation and related explanation. The purpose of the Model Rules is primarily to incorporate in a document

[1] European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024 [INL]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0004+0+DOC+XML+V0//HU#BKMD-4 (Downloaded: 07.08.2017.)

[2] Hofmann, Herwig C. H. – Schneider, Jens Peter – Ziller, Jacques – Auby, Jean-Bernard – Craig, Paul – Curtin, Deirdre – Della Cananea, Giacinto – Galetta, Diana-Urania – Mendes, Joana – Mir, Oriol – Stelkens, Ulrich – Wierzbowski, Marek (2017): *ReNEUAL Model Rules on EU Administrative Procedure.* Oxford University Press. Available at: www.reneual.eu/images/Home/ReNEUAL–Model-Rules-update-2015_rules-only-2017.PDF (Downloaded: 07.08.2017.)

the already existing constitutional principles and values of the European Union relevant to administration.

The Model Rules were drafted as follows:

- firstly, the policies of the legal systems of the EU and the Member States were compared;
- secondly, a preliminary version of the possible rules was outlined, together with explanations of each decision;
- thirdly, jurists and legal practitioners were involved in the negotiation and commenting of the Model Rules.

The Model Rules are organised in six 'books' as follows:

- Book I – General Provisions
- Book II – Administrative Rulemaking
- Book III – Single Case Decision-Making
- Book IV – Contracts
- Book V – Mutual Assistance
- Book VI – Administrative Information Management

3. THE EVALUATION OF RN RULES BY HUNGARIAN RESEARCHERS

In the period of 2015 and 2016, Hungarian researchers reviewed the proposals of the RN Model Rules.[3] As a result of the research, it can be concluded that:

- the RN's *quick scientific response* to the Parliament's proposal made in 2013 is outstanding,
- the *Model Rules* drafted by the RN deserve recognition,
- *a significant portion* of the Model Rules drafted by the RN *can be supported* in an EU Code on Administrative Procedures; however, several supportive proposals were also formulated for consideration during the research:
  - Hungarian researchers propose to draft the rules of the EU Code on Administrative Procedures *in a different structure and along different priorities,* since the RN books sometimes reflect disproportion, e.g. the book entitled Single Case Decision-Making is less detailed than the book entitled Contracts;
  - in conjunction with the above, *it is not necessary to create normative rules as detailed as the RN recommends,* as the aim is to create simple, transparent, understandable and easily applicable laws;

[3] Patyi András – Boros Anita (2017): Közigazgatási eljárásjog az Európai Unióban – a ReNEUAL Modell Szabályok értékelése. (Administrative Procedure Law of the European Union – Evaluation of the ReNEUAL Model Rules). *Pro Publico Bono,* Special Edition No. 2. Available at: www.uni-nke.hu/kutatas/egyetemi-folyoiratok/pro-publico-bono-magyar-kozigazgatas/2017-2-special-edition (Downloaded: 07.08.2017.)

- in terms of *fundamental principles and general provisions,* unlike those proposed in the Model Rules, the following is recommended:
  - *more precise* definition of procedural rights and obligations and fundamental principles, given that this is the most detailed area of the case law of the Court of Justice of the European Union;
  - the principles already laid down in the *EU Charter of Fundamental Rights* or in the founding treaty should not be repeated, in this respect, the EU Code on Administrative Procedures should appear as the next level of legal source;
  - it is also advisable to place these principles and, in some cases, general provisions (e.g. interpretative provisions, the question of scope) into one section, mainly at the beginning of the Code;
- I do not consider that the details of *EU legislative issues* should be put in the EU Code on Procedures. Although it is undeniable that the legislative activity of public administration is of utmost importance, however, in my view, it should be individually stated in another EU law.
- the purpose of the *main procedure* is to adopt and properly prepare the EU decision. The following can be noted as regards Book III of the RN:
  - some of its provisions are extremely detailed, while others are vague;
  - in the course of drafting the EU Code on Procedures, it is advisable to create *basic definitions* which influence the direction of the whole process (client, EU administrative body, reference to only EU administrative bodies) and examine which part of the sector-specific regulation already drafted can be included in the general regulation;
  - certain elements of the *support of decision-making* have to be clarified: a) the initiation of the procedure; b) the phase of the preparation of the decision and the clarification of the facts; c) the rules related to the decision.
- the RN study essentially extends *the scope of the administrative contracts* to any contract which the Union's administration comes into contact with. In our view, the EU Code on Procedures should only deal with contract law issues that can be referred to as administrative authority contracts so that substantive regulatory requirements can be excluded from the Code;
- The regulation for the legal institution of *mutual assistance* is also quite extensive in the RN study, however, in some respects, it falls into the category of 'overregulation', as well as the information flow rules described in book VI. Creating conditions for broad interoperability is likely to broaden cooperation opportunities as well, and it is inevitable to define certain general rules in this context in a Code on Procedures, but not necessarily in the General Code on Procedures and certainly not in as much depth as in the RN study.

4. EUROPEAN PARLIAMENT RESOLUTION NO. 2

On 9 June 2016, the European Parliament adopted a resolution[4] on an open, efficient and independent European Union administration.

4.1. Question to the Commission

In this resolution, Parliament recalls that, in its resolution of 15 January 2013, Parliament called, pursuant to Article 225 TFEU, for the adoption of a regulation for an open, efficient and independent European Union administration on the basis of Article 298 TFEU. However, despite the fact that the motion for a resolution was adopted in plenary by an overwhelming majority, Parliament's request was not followed up by a Commission proposal.

On behalf of the Committee on Legal Affairs, in the parliamentary section, *as a reminder* from the Parliament to the Commission, Pavel Svoboda and Heidi Hautala, under "question for oral answer", asked the Commission the following:[5]

- Has the Commission analysed the suggestion for a regulation so as to be in a position to reply to its content?
- What are the reasons that have prevented the Commission from putting forward a proposal such as the suggested regulation, and
- when can a proposal be expected?

The Committee on Legal Affairs made the following points in the Parliamentary debate:

- In order for the European Parliament Committee to provide assistance to the Commission in this matter, the most important task of the Working Group was to create a *regulatory model.* This model was developed with the involvement of legal experts and contains rules which the Parliament wishes to include in the future proposal.
- The purpose of the proposed regulation is *not* to replace existing EU legislation but to fill its gaps, as well as to provide clearer and more coherent interpretation of existing rules for the citizens, the businesses, the administration and for its officials.
- Increased openness, transparency and accessibility of EU administration increase trust between citizens and institutions, and in that sense, offer an opportunity to restore the legitimacy of the EU.
- Over the years, EU administration has become more and more complex. New offices and agencies have been established and the number of tasks that are under the EU's responsibility has increased steadily. This also means that citizens and entrepreneurs are directly involved in these administrative processes. (For example, tenders for EU

[4] Resolution on an open, efficient and independent European Union administration (2016/2610 [RSP]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2016-0685+0+DOC+XML+V0//HU (Downloaded: 07.08.2017.)

[5] Available at: www.europarl.europa.eu/sides/getDoc.do?type=OQ&reference=O-2016-000079&language=HU (Downloaded: 03.08.2017.)

funds/grants or when an appeal is filed against a disadvantageous decision). Despite the fact that professionals working in the European Union are talented and dedicated, they are associated with an *incomprehensible and distant administrative system*. The scattered nature of rules, the "gaps" and uncertainties only reinforce this image.

In his oral answer, *Commission Vice-President* Jyrki Kataine stated the following:

- The Commission is committed to ensuring the right of EU citizens to an open, efficient and independent EU administration. To this end, the Transparency Portal was launched. This portal provides direct access for citizens and helps them better inform themselves and makes it easier to get the citizens involved in the EU decision-making process. The task of this Working Group is to enable national administrations, European companies to take full advantage of the opportunities offered by the internal market, common economic governance and structural funds.
- The Commission examined the proposed regulation for an open, efficient and independent European Union administration. As a result of this analysis, the Commission is not convinced that *the cost of codification would not go beyond its benefits.*
- The Commission must clarify the relationship *between existing and developed regulators,* since codification can lead to problems (separating specific and general rules), which would further complicate litigation and procedures, etc.
- Codification *would reduce the required flexibility,* which is necessary to meet individual needs.
- The proposal does not include/name gaps and inconsistencies with regard to the law in force and what it would specifically address. Furthermore, it does not determine the impact of the measures, therefore the Commission *proposes drafting an impact report.*
- Rather than initiating a very complicated codification process with uncertain outcome (added value), the Commission is of the opinion that *specific problems should be explored.* It should identify the origin of the detected problems and take measures to resolve them. The Commission will investigate all alleged cases as regards ineffective administration and will do everything to remedy them. It also commits itself to make substantial contribution to every initiative of the European Ombudsman.

The Parliament finally adopted the resolution on 9 June 2016 ('European Parliament Resolution No. 2') and called on the Commission to *submit a legislative proposal to be included in its Work Programme for 2017.*

4.2. European Parliament Resolution No. 2 and the Proposed Regulation Included in it

As mentioned, the most significant difference is that the Annex to the European Parliament Resolution No. 1 contains recommendations, while Resolution No. 2 includes a proposed regulation.

The proposed regulation consists of *7 chapters,* in addition to the detailed preamble, of the following:

1. General provisions
2. Initiation of administrative procedures
3. Management of administrative procedures
4. Completion of administrative procedures
5. Rectification or withdrawal of administrative acts
6. Administrative acts of general scope
7. Information and closing provisions

In the following, we will review the most important rules of the proposed regulation in a way that European Parliament Resolution No. 2 and the proposed regulation will be compared to European Parliament Resolution No. 1. Due to length limitations, we will not be able to analyse specific provisions contained herein; we will be discussing it in another study.

4.2.1. The Purpose of Regulation

As regards the purpose of regulation, the preamble of both resolutions and the proposed regulation emphasise in the first place, that the single EU administrative procedure law codification needs to abolish the *fragmented* nature of the legal sources of the existing EU administrative procedure law.[6] Given that, in the Parliament's view, it can achieve the goal that citizens will more easily understand their enforceable procedural rights and the procedural rules to be followed, which increases the *legitimacy, transparency and efficiency* of EU administrative procedures. In addition, a single EU regulation would improve *legal certainty, replace the shortcomings of the EU's legal system and thereby contribute to complying with the principle of rule of law and good administration.*

Recommendation 2 of European Parliament Resolution No. 1 states that the regulation should include a universal set of principles and should lay down a procedure applicable as a *de minimis* rule where no lex specialis exists. The guarantees afforded to persons in sectoral instruments must never provide less protection than those provided for in the regulation.

These rules are consistently reflected in the European Parliament Resolution No. 2, since Article 3 of the proposed regulation stipulates that the general regulation shall be applied *without prejudice to other specific administrative procedural acts,* i.e. the General Code on Procedures only completes them, and sectoral acts shall be interpreted *in accordance with the provisions of the General Code on Administrative Procedures.*

[6] Csatlós Erzsébet (2016): Az európai közigazgatási eljárásjog kodifikációja és a hatóságok együttműködése. (Codification of EU Administrative Procedure Law and Cooperation of the Authorities.) *Eljárásjogi Szemle,* 2016/2. 14–23. Available at: http://eljarasjog.hu/2016-evfolyam/az-europai-kozigazgatasi-eljarasi-jog-kodifikacioja-es-a-hatosagok-egyuttmukodese/ (Downloaded: 03.08.2017.)

4.2.2. Scope and Range of Interpretation of the New Code

Following the adoption of the European Parliament Resolution No. 1, the question arose as to whether the scope of the single EU Code on Administrative Procedures should cover the regulation of indirect administrative procedures, i.e. the administrative procedures of the Member States. The RN study itself includes certain common points of rules for procedures of EU and national administrative authorities, and some researchers considered the Regulation on EU administrative procedures a means of unification of both the direct and the indirect EU administration procedure law. In the proposed regulation, Parliament also makes a point in this matter:

the purpose of the proposed regulation is only to establish procedural rules which the *EU administration* shall comply with during the implementation of its administrative activities, in addition, in accordance with Article 298 TFEU, the regulation in question *shall not apply* to the administration of the Member States.

The RN study proposed to state the rules of legislative procedures covered by the EU administrative procedure codification in a separate book. Another peculiarity of the proposed regulation is that it clearly states that its scope should not be extended to *legislative procedures and procedures resulting in adopting non-legislative acts, delegated acts or implementing acts based directly on the Treaties.*

European Parliament Resolution No. 1 provided that the regulation should apply to the Union's institutions, bodies, offices and agencies ('the Union's administration') in their relations with the public. Regarding the scope of interpretation of *EU administrative relationship,* according to the proposed regulation, *administrative procedures* are procedures through which EU administration drafts, adopts, implements and gives effect to administrative acts.[7] *EU authority* is an institution, body or office of the EU or an organisational unit thereof or a person with a position in the EU administration who is responsible for the administrative procedure under the applicable legislation,[8] and the *party* having legal relationship with him/her/it is a natural or legal person whose status may be affected by the outcome of the administrative procedure.[9]

4.2.3. Principles

Both Parliamentary resolutions and the proposed regulation *give a prominent role to laying down the principles of the EU administrative procedure,* given that these principles have become established over a long period of time under the jurisprudence of EU administrative bodies, the case law of the Court of Justice of the European Union, the cooperation

[7] See Article 4(c) of the proposed regulation.
[8] See Article 4(e) of the proposed regulation.
[9] See Article 4(f) of the proposed regulation.

between the EU and the Member States and, last but not least, the traditions of administrative procedures in the Member States. In Recommendation 3 of European Parliament Resolution No. 1, principles which the proposed regulation will have to include are listed and briefly defined. European Parliament Resolution No. 2 *concretizes and clarifies* the content of the above recommendation in the proposed regulation, omitting some of the principles which have been identified by the recommendation (e.g. the principle of service), but they appear in current EU legislation and law implementation with less established minimum standards. In some cases, the proposed regulation addresses issues of principle which appear in the resolution following European Parliament Resolution No. 1 and appear at different stages of the process, such as the right to be heard and the right of access to documents.

In my view, *the provisions of principle of the proposed regulation are very remarkable and to the point,* as the proposed regulation lays down all the relevant EU administrative procedural principles.

4.2.4. Basic Procedural Rules

As regards the basic rules, the rules of Recommendation 4 of European Parliament Resolution No. 1 are now being specified in the form of draft legislation.

Basic provisions set out in European Parliament Resolution No. 1 are reflected in the proposed regulation, in connection with certain procedural issues, however, the proposed regulation sets out very promising rules: inter alia, the initiation of an official procedure, notice on the initiation of procedure, the details of submission of an application, definition of procedural rights, the obligation of careful and impartial scrutiny or cooperation and the conflict of interest clauses.

The proposed regulation also contains valuable findings regarding the definition and calculation of deadlines[10] and failure to comply therewith.

In the chapter entitled Completion of Administrative Procedures, the proposed regulation lays down the concept of an act, the duty to state reasons, the indication of remedies available and the notification of administrative decisions. These topics are also described in the European Parliament Resolution No. 1.

It is worth pointing out that, according to the proposed regulation, the parties have the right to request administrative review against administrative acts which adversely affect their rights and interests. The application for an administrative review shall be submitted to the superior authority and, if this is not possible, to the same administrative authority which adopted the administrative act.

Administrative acts shall describe the procedure to be followed in case of submitting an application for an administrative review and indicate the name and office address of the

[10] See Article 17 of the proposed regulation.

competent authority or member of staff to whom the review request shall be submitted. The act also contains the deadline for submitting the application.

If no application is submitted within the deadline, the administrative measure shall be deemed final.

In addition, if it is specifically defined by the EU law, administrative acts clearly refer to the possibility of initiating legal proceedings or submitting a complaint to the European Ombudsman.

It should also be noted that the proposed regulation briefly mentions in a separate chapter *the rectification or withdrawal of administrative acts* in accordance with Recommendation 5 of European Parliament Resolution No. 1.

4.2.5. Administrative Acts of General Scope

For a long period of time, in the EU law, the distinction between legislation and individual administrative acts has been difficult to determine, because as a general rule, the EU law uniformly regulates the legislation for individual decisions at present. Therefore, it is sometimes difficult to decide whether it is a legal or administrative act, given that, in some cases, it cannot be clearly defined even based on its designation whether it is a legislative or an administrative act. In the decision, it provides clarification whether the act has been adopted in a legislative procedure or not.

The first group of non-legislative acts is delegated, supplementary and amending non-legislative acts of general scope set out in Article 290 TFEU, which may be adopted by the Commission, if it is delegated to it in a legislative act.

The implementing act is a different type of general non-legislative act. Such act may be adopted by the Commission on the basis of a delegation for implementation.

Although they are not generally set out in the Treaties, non-legislative acts also include other legal acts which are adopted by the Commission or other institutions or bodies of the EU, still they have legal effect and may appear in many forms. There are (non-legislative) acts set out in the Treaties which are not generally referred to but in relation to certain contractual provisions or regulatory areas. They may be adopted by institutions directly under the Treaties through delegation, but not in a legislative procedure. These include for example Commission decisions on certain competition rules according to Article 106(3) TFEU.

According to the 43rd preamble of European Parliament Resolution No. 2, in order to ensure the coherence of EU administrative activities, *administrative acts of general scope shall comply with the principles of good administration set out in the General Code.* This is also reflected in the proposed regulation in addition to the fact that such acts shall include their legal basis and the reasons behind their issue and they shall be published in a directly accessible way, since they come into effect on that day.

4.2.6. Online Information on the Rules of Administrative Procedures

A part of the proposed regulation also worth mentioning is the *set of rules for online information* described in chapter VII, on the basis of which the EU administration, in possible and reasonable cases, can promote up-to-date online information for existing administrative procedures on an ad hoc website. Application procedures shall be prioritised.

Online information includes the following:

- the reference to the applicable legislation
- the brief explanation and administrative interpretation of the main legal requirements
- a description of the most important procedural steps
- the name of the authority having subject-matter competence to adopt the final act
- the deadline for the adoption of the act
- the available remedies
- a reference to the forms to be used by the parties in their communication with the EU administration in the context of the procedure.

Online information should be clear and simple and should be accessible free of charge.

5. CONCLUSION

On the basis of the above, it can be stated that the European Union is on the right path towards a single EU Code on Administrative Procedures: the European Parliament did not wait for the Commission, and after 2013, it adopted political decisions which resolved many issues which had been discussed in the past. We will also monitor the latest versions of the proposed regulation, as they will have an impact on existing EU procedures, on the relationship between general and special procedural rules and also on the procedural rights of the Member States.

REFERENCES

Csatlós Erzsébet (2016): Az európai közigazgatási eljárásjog kodifikációja és a hatóságok együttműködése. *Eljárásjogi Szemle,* 2016/2. 14–23. Available at: http://eljarasjog.hu/2016-evfolyam/az-europai-kozigazgatasi-eljarasi-jog-kodifikacioja-es-a-hatosagok-egyuttmukodese/ (Downloaded: 03.08.2017.)

Hofmann, Herwig C. H. – Schneider, Jens Peter – Ziller, Jacques – Auby, Jean-Bernard – Craig, Paul – Curtin, Deirdre – della Cananea, Giacinto – Galetta, Diana-Urania – Mendes, Joana – Mir, Oriol – Stelkens, Ulrich – Wierzbowski, Marek (2017): *ReNEUAL Model Rules on EU Administrative Procedure.* Oxford University Press. Available at: http://reneual.eu/images/Home/ReNEUAL–Model-Rules-update-2015_rules-only-2017.PDF (Downloaded: 07.08.2017.)

Az Európai Parlament 2013. január 15-i állásfoglalása a Bizottságnak szóló ajánlásokkal az Európai Unió közigazgatási eljárási jogáról (2012/2024 [INL]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0004+0+DOC+XML+V0//HU#BKMD-4 (Downloaded: 07.08.2017.)

Az Európai Parlament állásfoglalása a nyitott, hatékony és független európai uniós igazgatásról (2016/2610 [RSP]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2016-0685+0+DOC+XML+V0//HU (Downloaded: 07.08.2017.)

Patyi András – Boros Anita (2017): Közigazgatási eljárásjog az Európai Unióban – a ReNEUAL Modell Szabályok értékelése. *Pro Publico Bono – Magyar Közigazgatás,* 2017/2. Különszám. Available at: http://uni-nke.hu/kutatas/egyetemi-folyoiratok/pro-publico-bono-magyar-kozigazgatas/2017-2-special-edition (Downloaded: 07.08.2017.)

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GENERAL PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN THE EUROPEAN UNION, IN HUNGARY AND IN FRANCE

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1. INTRODUCTION[1]

First of all, we need to highlight the general characteristics of the principles of administrative procedure. The formation of the principles of administrative procedure is a result of a long process, which is closely linked to administrative justice. The development of the principles of administrative procedure is based on practical experiences and on the needs raised by time. The determination of the principles of administrative procedure is still an ongoing phenomenon.[2] After World War II in Europe, the modern constitutionality has consolidated and further strengthened the principles of procedural laws (within the administrative procedure law) by the declarations of human rights and the foundation of the Constitutional Courts. The international human rights documents, including the Charter of Fundamental Rights of the European Union as well as the national Constitutions state – between the fundamental rights – several procedural rights for the good functioning of public authorities.[3] These procedural rights appear in Administrative Procedure Acts as principles.[4] Consequently, the principles of administrative procedure ensure a link between Constitution and the detailed Administrative Procedure Acts in cases of the States, and in case of the European Union the principles link the primary EU legislation (Treaty on the European Union [hereinafter referred to as TEU], Treaty on the Functioning of the European Union [hereinafter referred to as TFEU], Charter of Fundamental Rights of the European Union) and the secondary legislation (regulations and directives). Therefore, the principles strengthen constitutionality in the procedures. The principles are general rules, which need to be applied during the whole procedure together with the specific procedural rules. The judicial practice plays an important role in the definition of the content of each principle of administrative procedure.

Another important question has been raised regarding the regulation of the principles of administrative procedure. Primarily, the legislators need to decide whether or not to codify expressis verbis principles in the Administrative Procedure Act. Those, who are against of the codification of the principles in Procedural Codes, argue that the principles should be reflected in the text of the Procedural Codes. Therefore, there would be no need to refer to principles in the Administrative Procedure Acts, because these procedural principles can be found in the Constitution or derived from the Constitution. Those who are in favour of the explicit declaration of the principles in the Procedural Codes highlight the fact that principles have a gap filler role and a cohesive force. They also remark that as it is not

[1] We would like to note that where there was no official translations of the law, the authors translated the text of the law themselves.

[2] For the expanding range of principles see for exemple in the Hungarian Administrative Procedure Act (Act CXL. of 2004) the principle of enhanced protection for minors, or from the area of EU procedural law the right of access to information.

[3] See for example: The right to good administration in the Charter of Fundamental Rights of the European Union, the right to a fair administration in the Fundamental Law of Hungary.

[4] Balogh-Békesi Nóra (2017): Alapelvek a Modell Szabályok I. Könyvének általános rendelkezéseiben. *Pro Publico Bono – Magyar Közigazgatás,* 2017/2. különszám, 27.

possible to define precisely all procedural rules in the Procedural Codes, the principles help to solve the non-regulated questions during the application of law. Moreover, the rules codified in the Procedural Codes need to be applied in accordance with the principles.[5]

In this context, a further question arises: if the principles of administrative procedure are mentioned in the Administrative Procedure Acts, should they only be listed in the Preamble of Administrative Procedure Acts without an explanation or should they be found in the text of the Administrative Procedure Act with an explanation? The direct applicability of the principles of administrative procedure is also a current important issue.

We seek answers to these questions on the basis of the draft regulations of the EU and of the new Hungarian and French Administrative Procedure Acts.

2. THE DRAFT REGULATIONS OF THE EUROPEAN UNION REGARDING THE GENERAL PRINCIPLES OF ADMINISTRATIVE PROCEDURE

The regulation of the EU administrative procedures has been on the EU's agenda for several years, but it has not yet been drafted. The codification of this regulation has already been urged twice by resolutions of the European Parliament. In these resolutions the European Parliament asked the European Commission to propose a regulation regarding EU administrative procedures. The first resolution of the European Parliament dates back to 2013.[6]

In the Annex of this resolution, the European Parliament defines some recommendations on the content of the regulation. The second resolution was accepted three and a half years later, in 2016.[7] In this resolution: "the European Parliament recalls that in its resolution of 15 January 2013, Parliament called pursuant to Article 225 of the Treaty on the Functioning of the European Union for the adoption of a regulation on an open, efficient and independent European Union administration under Article 298 TFEU, but despite the fact that the resolution was adopted by an overwhelming majority, Parliament's request was not followed up by a Commission proposal therefore invites the Commission to consider the annexed proposal for a regulation. In addition, Parliament calls on the Commission to come forward with a legislative proposal to be included in its work programme for the year 2017". Ergo the European Parliament emphasised its legislative demands in an unusual way by elaborating a proposal for the regulation. The third document which needs to be considered in the examination of the codification of EU administrative procedure rules is the proposal elaborated in 2014 by a group of researchers (the ReNEUAL). The proposal

[5] See the principles of Administrative Justice in comparative analysis: Rozsnyai Krisztina (2013): A hatékony jogvédelem biztosítása a közigazgatási bíráskodásban. *Acta Humana Emberi Jogi Közlemények,* 2013/1. 117–130.

[6] The European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024 [INL]) was adopted by an overwhelming majority: 572 in favour, 16 against, 12 abstentions.

[7] European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration 2016/2610(RSP).

is called the Draft Model Rules on EU Administrative Procedure (hereinafter referred to as: Model Rules). This Model Rules is a proposal for a regulation with a legal text and explanation. ReNEUAL members concluded that Model Rules for EU law of administrative procedure are best designed following a process of 'innovative codification'. 'Innovative codification' occurs when a new law establishes one source of existing principles which are usually scattered across different laws and regulations and in the case-law of courts; it may also modify these existing principles and rules, if needed, as well as add new ones. This method allows contradictions in existing laws to be resolved and gaps to be filled.[8] The Model Rules are presented in a form of their possible adoption as an EU Regulation.[9] The text of the Model Rules is more than three hundred pages and the structure of the Model Rules is divided into six books: Book I General Provisions, Book II Administrative Rulemaking, Book III Single Case Decision-Making, Book IV Contracts, Books V Mutual assistance and Book VI Administrative Information. Books II, III and IV are drafted for the EU institutions, bodies, offices and agencies, whereas Books V and Book VI have been drafted for EU authorities and Member States' authorities.[10]

These three documents presented above are closely interrelated. The European Parliament resolution of 15 January 2013 states the reasons of the codification of EU Administrative Procedure rules, which are referred to in the Model Rules and in the European Parliament resolution of 9 June 2016. The European Parliament resolution of 9 June 2016 states rules determined mostly in Book I and III of the Model Rules.

Before presenting the principles mentioned in these three documents, we should also refer to the rights and principles of the Charter of Fundamental Rights of the European Union, which have close contact to the principles of administrative procedure. The Charter of Fundamental Rights of the European Union regulates the principle of equality before the law and the principle of non-discrimination.[11] The procedural rights can be found in the Chapter V Citizens' rights of the Charter of Fundamental Rights of the European Union. The right to good administration is determined in the Charter of Fundamental Rights of the European Union as follows:

> "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
>
> 2. This right includes:
>
> a) the right of every person to be heard, before any individual measure is taken which would affect him or her adversely;

[8] Introduction/Book I – General Provisions ReNEUAL SC 2014 (17).

[9] Introduction/Book I – General Provisions ReNEUAL SC 2014 (18).

[10] See in more detail ReNEUAL Model Rules on EU Administrative Procedure, 21–24. Available at: http://reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/ReNEUAL-%20Model%20Rules-Compilation%20Books%20I_VI_2014-09-03.pdf (Downloaded: 10.10.2017.)

[11] See The Charter of Fundamental Rights of the European Union, Articles 20–21. Available at: www.europarl.europa.eu/charter/pdf/text_en.pdf (Downloaded: 10.10.2017.)

b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

The right of access to documents is also a principle declared in Article 42 of the Charter of Fundamental Rights of the European Union as follows: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

It should be highlighted that the future secondary source on EU administrative procedures should guarantee the realisation of the principle of good administration.[12] In this context, it shall be also noted that Article 47 of the Charter of Fundamental Rights defines the right to an effective remedy and to a fair trial as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article." The right to legal remedy is one of the most important procedural rights, which means that everyone whose rights have been violated has the possibility to seek legal remedy from another body (tribunal) or higher authority. Nevertheless, the right to an effective remedy before a tribunal is not an unlimited right: several conditions can be defined by the law.[13] After briefly listing the procedural rights mentioned in the Charter of Fundamental Rights, we should also refer to one of the fundamental values of the EU, the rule of law, which should be always taken into account while the codification of EU administrative procedure rules.[14]

Lastly, we should mention the legal basis of the codification of EU administrative procedure rules. Article 298 on the TFUE declares that: "1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration."[15] This Article of the TFEU provides the legal basis for the regulation for the general rules of EU administrative procedures.

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12 See Váczi Péter (2013): *A jó közigazgatási eljáráshoz való alapjog és annak összetevői.* Budapest–Pécs, Dialóg Campus.

13 See Pollák Kitti (2015): Directions for the Regulation of Legal Remedies in the Light of Model Rules on EU Administrative Procedure. In Gerencsér Balázs – Berkes Lilla – Varga Zs. András eds.: *Current Issues of the National and EU Administrative Procedures.* Budapest, Pázmány Press. 409–419.

14 Article 2 of the TEU.

15 Treaty on the Functioning of the European Union. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN (Downloaded: 10.10.2017.)

We need to note that so far, no regulation has been enacted that cites Article 298 TFEU as a legal basis.[16]

The following parts of the paper present the principles of administrative procedure mentioned in the European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union, in the Model Rules and in the European Parliament Resolution of 9 June 2016 for an open, efficient and independent European Union administration.

2.1. European Parliament Resolution of 15 January 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union

In the resolution of 15 January 2013 on a Law of Administrative Procedure of the European Union, the European Parliament requested the Commission to submit a proposal for a regulation on the European Law of Administrative Procedure. In the Annex of this resolution we can find detailed recommendations of the content of this proposal.[17] Among the six Recommendations of the Annex, the third Recommendation lays down general principles which should govern administration and which should be codified in the regulation.[18] These principles are: the principle of lawfulness, the principle of non-discrimination and equal treatment, the principle of proportionality, the principle of impartiality, the principle of consistency and legitimate expectations, the principle of respect for privacy, the principle of fairness, the principle of transparency, the principle of efficiency and service. The Recommendation 3 on the general principles which should govern the administration defines these principles as follows:

"Principle of lawfulness: the Union's administration shall act in accordance with the law and apply the rules and procedures laid down in the Union's legislation. Administrative powers shall be based on, and their content shall comply with, the law.

Decisions taken or measures adopted shall never be arbitrary or driven by purposes which are not based on the law or motivated by the public interest.

Principle of non-discrimination and equal treatment: the Union's administration shall avoid any unjustified discrimination between persons based on nationality, gender, race,

[16] Remarks by the Secretary-General of the European Ombudsman, Mr. Ian Harden, at a hearing of the Committee on Legal Affairs of the European Parliament. Available at: https://polcms.secure.europarl.europa.eu/cmsdata/upload/51d3efc7-cbdd-4a80-8cef-2042496c5ad9/Harden%20speech.pdf (Downloaded: 10.10.2017.); and Harlow, Carol – Rawlings, Richard (2014): *Process and Procedure in EU Administration*. United Kingdom, Hart Publishing. 332.

[17] (2012/2024 [INL]) www.europarl.europa.eu; Recommendation 1 (on the objective and scope of the regulation to be adopted), Recommendation 2 (on the relationship between the regulation and sectoral instruments), Recommendation 3 (on the general principles which should govern the administration), Recommendation 4 (on the rules governing administrative decisions), Recommendation 5 (on the review and correction of own decisions), Recommendation 6 (on the form and publicity to be given to the regulation).

[18] We should note that Recommendation 4 on the rules governing administrative decisions defines precise procedural rules, which are also related to the general principles of administrative procedures.

colour, ethnic or social origin, language, religion or beliefs, political or any other opinion, disability, age, or sexual orientation.

Persons who are in a similar situation shall be treated in the same manner. Differences in treatment shall only be justified by objective characteristics of the matter in question.

Principle of proportionality: the Union's administration shall take decisions affecting the rights and interests of persons only when necessary and to the extent required to achieve the aim pursued.

When taking decisions, officials shall ensure a fair balance between the interests of private persons and the general interest. In particular, they shall not impose administrative or economic burdens which are excessive in relation to the expected benefit.

Principle of impartiality: the Union's administration shall be impartial and independent. It shall abstain from any arbitrary action adversely affecting persons, and from any preferential treatment on any grounds.

The Union's administration shall always act in the Union's interest and for the public good. No action shall be guided by any personal (including financial), family or national interest or by political pressure. The Union's administration shall guarantee a fair balance between different types of citizens' interests (business, consumers and other).

Principle of consistency and legitimate expectations: the Union's administration shall be consistent in its own behaviour and shall follow its normal administrative practice, which shall be made public. In the event that there are legitimate grounds for departing from such normal administrative practice in individual cases, a valid statement of reasons should be given for such departure.

Legitimate and reasonable expectations that persons might have in the light of the way in which the Union's administration has acted in the past shall be respected.

Principle of respect for privacy: the Union's administration shall respect the privacy of persons in accordance with Regulation (EC) No. 45/2001.

The Union's administration shall refrain from processing personal data for non-legitimate purposes or transmitting such data to unauthorised third parties.

Principle of fairness: this must be respected as a basic legal principle indispensable in creating a climate of confidence and predictability in relations between individuals and the administration.

Principle of transparency: the Union's administration shall be open. It shall document the administrative procedures and keep adequate records of incoming and outgoing mail, documents received and the decisions and measures taken. All contributions from advisory bodies and interested parties should be made available in the public domain.

Requests for access to documents shall be dealt with in accordance with the general principles and limits laid down in Regulation (EC) No. 1049/2001.

Principle of efficiency and service: actions on the part of the Union's administration shall be governed by the criteria of efficiency and public service.

Members of the staff shall advise the public on the way in which a matter which comes within their remit is to be pursued.

Upon receiving a request in a matter for which they are not responsible, they shall direct the person making the request to the competent service."

According to the European Parliament resolution of 15 January 2013 these nine principles need to be codified. Two of these nine principles (the principle of respect for privacy and the principle of consistency and legitimate expectations) are not cited in the Model Rules. It is also important to note that the content of the Recommendations 4, 5 and 6 of the European Parliament resolution of 15 January 2013 identically appears in the European Parliament resolution of 9 June 2016.

2.2. Principles in the Preamble of the Model Rules

In the Preamble of the Model Rules the basic principles of the EU administrative procedure law are defined. It states that: "Public authorities are bound in administrative procedures by the rule of law, the right to good administration and other related principles of EU administrative law.

In the interpretation and development of these model rules, regard should be had especially to equal treatment and non-discrimination, legal certainty, fairness, objectivity and impartiality, participation, proportionality, protection of legitimate expectations, transparency, and due access to effective remedies.

Public authorities shall have regard to efficiency, effectiveness and service orientation.

Within European administrative procedures due respect must be given to the principles of subsidiarity, sincere cooperation, and clear allocation of responsibilities."

According to the explanation[19] of the Preamble of the Model Rules, the rules on EU administrative procedures must be based on constitutional principles. These rules are already expressed in EU treaties; therefore the Model Rules do not intend to duplicate these provisions. The Preamble of the Model Rules only shortly refers to the principles, just to remind the addressees of the constitutional background.

Firstly, in the Preamble of the Model Rules two principles are named: the principle of the rule of law and of the principle of good administration. These two principles and other related principles of EU administrative law should be respected by the public authorities in administrative procedures. These are the fundamental standards of administrative procedural law. Subsequently, in Paragraph 2 we can find a list of principles, mainly in the same order like in the European Parliament resolution of 15 January 2013. The Preamble of the Model Rules refers especially to the rights of equal treatment and non-discrimination, legal certainty, fairness, objectivity and impartiality, participation, proportionality, protection of legitimate expectations, transparency, and access to effective remedies. Paragraph 3 of the Preamble of the Model Rules lists principles which are additional important guidelines for administrative action. The last paragraph of the Preamble of the Model Rules mentions

[19] See www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf (Downloaded: 10.10.2017.)

some principles such as the principle of subsidiarity, sincere cooperation, and clear allocation of responsibilities, which should be respected in all European administrative procedures. These principles are particularly important in composite procedures.

We can summerise that the Preamble of the Model Rules provides a list of principles, which shall direct the proper functioning and the good administration conduct of EU institutions. Also the principles named in the Preamble of the Model Rules help to correctly interpret the rules of the Books II–IV of the Model Rules. The Preamble of the Model Rules refers to principles which should guide all EU administrative procedures and which are applicable through the following Books of the Model Rules. The principles stated in the Preamble of the Model Rules could be complemented and clarified in other Books of the Model Rules.[20] According to Anita Boros, the regulation of the principles in the Model Rules is far from sufficient. She suggests that the principles of EU administrative procedures should appear not only in the Preamble, but also as part of the regulation, as a legally binding norm.[21]

2.3. European Parliament Resolution of 9 June 2016 for an Open, Efficient and Independent European Union Administration 2016/2610 (Rsp)

The Preamble of the European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration 2016/2610 (RSP) specifies in twenty six paragraphs the application of principles of EU administrative procedure law and the right of good administration. The principles in the Preamble of this resolution seem like a justification of the further regulation. The principles defined in the Preamble of the European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration are the following:

"18) The principle of the rule of law, as recalled in Article 2 of the Treaty on European Union (TEU), is the heart and soul of the Union's values. In accordance with that principle, any action of the Union has to be based on the Treaties in compliance with the principle of conferral. Furthermore, the principle of legality, as a corollary to the rule of law, requires that activities of the Union's administration are carried out in full accordance with the law.

19) Any legal act of Union law has to comply with the principle of proportionality. This requires all measure of the Union's administration to be appropriate and necessary for meeting the objectives legitimately pursued by the measure in question: if there is a choice among several potentially appropriate measures, the least burdensome option has to be taken and any charges imposed by the administration should not be disproportionate to the aims pursued.

[20] For example in Book III of the Model Rules: General Duty of fair decision-making and impartiality.

[21] Boros Anita (2017): Modell Szabályok az I. Könyvben. *Pro Publico Bono – Magyar Közigazgatás,* 2017/2. különszám, 49.

20) The right to good administration requires that administrative acts be taken by the Union's administration pursuant to administrative procedures which guarantee impartiality, fairness and timeliness.

21) The right to good administration requires that any decision to initiate an administrative procedure be notified to the parties and provide the necessary information enabling them to exercise their rights during the administrative procedure. In duly justified and exceptional cases where the public interest so requires, the Union's administration may delay or omit the notification.

22) When the administrative procedure is initiated upon application by a party, the right to good administration imposes a duty on the Union's administration to acknowledge receipt of the application in writing. The acknowledgment of receipt should indicate the necessary information enabling the party to exercise his or her rights of defence during the administrative procedure. However, the Union's administration should be entitled to reject pointless or abusive applications as they might jeopardize administrative efficiency.

23) For the purposes of legal certainty an administrative procedure should be initiated within a reasonable time after the event has occurred. Therefore, this Regulation should include provisions on a period of limitation.

24) The right to good administration requires that the Union's administration exercise a duty of care, which obliges the administration to establish and review in a careful and impartial manner all the relevant factual and legal elements of a case taking into account all pertinent interests, at every stage of the procedure. To that end, the Union's administration should be empowered to hear the evidence of parties, witnesses and experts, request documents and records and carry out visits or inspections. When choosing experts, the Union's administration should ensure that they are technically competent and not affected by a conflict of interest.

25) During the investigation carried out by the Union's administration the parties should have a duty to cooperate by assisting the administration in ascertaining the facts and circumstances of the case. When requesting the parties to cooperate, the Union's administration should give them a reasonable time-limit to reply and should remind them of the right against self-incrimination where the administrative procedure may lead to a penalty.

26) The right to be treated impartially by the Union's administration is a corollary of the fundamental right to good administration and implies staff members' duty to abstain from taking part in an administrative procedure where they have, directly or indirectly, a personal interest, including, in particular, any family or financial interest, such as to impair their impartiality.

27) The right to good administration might require that, under certain circumstances inspections be carried out by the administration, where this is necessary to fulfil a duty or achieve an objective under Union law. Those inspections should respect certain conditions and procedures in order to safeguard the rights of the parties.

28) The right to be heard should be complied with in all proceedings initiated against a person which are liable to conclude in a measure adversely affecting that person. It should not be excluded or restricted by any legislative measure. The right to be heard requires that the person concerned receive an exact and complete statement of the claims or objections raised and is given the opportunity to submit comments on the truth and relevance of the facts and on the documents used.

29) The right to good administration includes the right of a party to the administrative procedure to have access to its own file, which is also an essential requirement in order to enjoy the right to be heard. When the protection of the legitimate interests of confidentiality and of professional and business secrecy does not allow full access to a file, the party should at least be provided with an adequate summary of the content of the file. With a view to facilitating access to one's files and thus ensuring transparent information management, the Union's administration should keep records of its incoming and outgoing mail, of the documents it receives and measures it takes, and establish an index of the recorded files.

30) The Union's administration should adopt administrative acts within a reasonable time-limit. Slow administration is bad administration. Any delay in adopting an administrative act should be justified and the party to the administrative procedure should be duly informed thereof and provided with an estimate of the expected date of the adoption of the administrative act.

31) The right to good administration imposes a duty on the Union's administration to state clearly the reasons on which its administrative acts are based. The statement of reasons should indicate the legal basis of the act, the general situation which led to its adoption and the general objectives which it intends to achieve. It should disclose clearly and unequivocally the reasoning of the competent authority which adopted the act in such a way as to enable the parties concerned to decide if they wish to defend their rights by an application for judicial review.

32) In accordance with the right to an effective remedy, neither the Union nor the Member States can render virtually impossible or excessively difficult the exercise of rights conferred by Union law. Instead, they are obliged to guarantee real and effective judicial protection and are barred from applying any rule or procedure which might prevent, even temporarily, Union law from having full force and effect.

33) In order to facilitate the exercise of the right to an effective remedy, the Union's administration should indicate in its administrative acts the remedies that are available to the parties whose rights and interests are affected by those acts. In addition to the possibility of bringing judicial proceedings or lodging a complaint with the European Ombudsman, the party should be granted the right to request an administrative review and should be provided with information about the procedure and the time-limit for submitting such a request.

34) The request for administrative review does not prejudice the party's right to a judicial remedy. For the purpose of the time-limit for an application for judicial review, an administrative act is to be considered final if the party does not submit a request

for administrative review within the relevant time-limit or, if the party submits a request for administrative review, the final administrative act is the act which concludes that administrative review.

35) In accordance with the principles of transparency and legal certainty, parties to an administrative procedure should be able to clearly understand their rights and duties that derive from an administrative act addressed to them. For these purposes, the Union's administration should ensure that its administrative acts are drafted in a clear, simple and understandable language and take effect upon notification to the parties. When carrying out that obligation it is necessary for the Union's administration to make proper use of information and communication technologies and to adapt to their development.

36) For the purposes of transparency and administrative efficiency, the Union's administration should ensure that clerical, arithmetic or similar errors in its administrative acts are corrected by the competent authority.

37) The principle of legality, as a corollary to the rule of law, imposes a duty on the Union's administration to rectify or withdraw unlawful administrative acts. However, considering that any rectification or withdrawal of an administrative act may conflict with the protection of legitimate expectations and the principle of legal certainty, the Union's administration should carefully and impartially assess the effects of the rectification or withdrawal on other parties and include the conclusions of such an assessment in the reasons of the rectifying or withdrawing act.

38) Citizens of the Union have the right to write to the Union's institutions, bodies, offices and agencies in one of the languages of the Treaties and to have an answer in the same language. The Union's administration should respect the language rights of the parties by ensuring that the administrative procedure is carried out in one of the languages of the Treaties chosen by the party. In the case of an administrative procedure initiated by the Union's administration, the first notification should be drafted in one of the languages of the Treaty corresponding to the Member State in which the party is located.

39) The principle of transparency and the right of access to documents have a particular importance under an administrative procedure without prejudice of the legislative acts adopted under Article 15(3) TFEU. Any limitation of those principles should be narrowly construed to comply with the criteria set out in Article 52(1) of the Charter and therefore should be provided for by law and should respect the essence of the rights and freedoms and be subject to the principle of proportionality.

40) The right to protection of personal data implies that without prejudice of the legislative acts adopted under Article 16 TFEU, data used by the Union's administration should be accurate, up-to-date and lawfully recorded.

41) The principle of protection of legitimate expectations derives from the rule of law and implies that actions of public bodies should not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest.

Legitimate expectations should be duly taken into account where an administrative act is rectified or withdrawn.

42) The principle of legal certainty requires Union rules to be clear and precise. That principle aims at ensuring that situations and legal relationships governed by Union law remain foreseeable in that individuals should be able to ascertain unequivocally what their rights and obligations are and be able to take steps accordingly. In accordance with the principle of legal certainty, retroactive measures should not be taken except in legally justified circumstances.

43) With a view to ensuring overall coherence in the activities of the Union's administration, administrative acts of general scope should comply with the principles of good administration referred to in this Regulation.

44) In the interpretation of this Regulation, regard should be taken especially to equal treatment and non-discrimination, which apply to administrative activities as a prominent corollary to the rule of law and the principles of an efficient and independent European administration."

Considering the above, it may be concluded that in the European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration the principles are not in the text of the regulation, but can be found in the Preamble of this Resolution. Meanwhile, the application of these principles should be ensured through the rules of the regulation.

After analysing the EU documents which urged the codification of the principles of EU administrative procedures, we examine the principles mentioned in the latest Hungarian and French codifications of administrative procedures. In France, the first Administrative Procedure Act called the 'Code des relations entre le public et l'administration' (hereinafter referred as CRPA) just came into force on 1 January 2016. So France joined the group of countries that have a lex generalis regarding administrative procedures. In Hungary, the first Administrative Procedure Act was the Act IV of 1957. In the last sixty years this Act has been globally modified several times. In 2016, as part of the Public Administration Reform in Hungary, a completely new Code of the General Rules of Administrative Proceedings and a new Code of Administrative Justice were presented to Parliament, which included fundamental changes. On 1 January 2018 the new Codes: Act CL of 2016 on General Public Administration Rules (hereinafter referred as Ákr.) and Act I of 2017 on Administrative Justice (hereinafter referred as Kp.) enter into force.[22] The Ákr. contains the general rules of Hungarian administrative procedures and the Kp. regulates the judicial review procedure of administrative decisions.

[22] The Code of Administrative Justice was first accepted on 6 December 2016, and abolished by the Constitutional Court by the Decision 1/2017. (I. 17.) because one part of the Act was unconstitutionally accepted by Parliament.

3. GENERAL PRINCIPLES IN THE NEW HUNGARIAN ADMINISTRATIVE PROCEDURE ACT

In Hungary, the principles of administrative procedure were first regulated in the Administrative Procedure Act in 1981 (Act I of 1981). The latest Hungarian codification regarding the general rules of the administrative procedures, the Ákr. also contains the general principles of administrative procedure. The principles are named and detailed in the text of the Ákr.[23]

Before the detailed examination of the general principles mentioned in the Ákr., we should highlight that in Article 1 of the Ákr. we can find a citation of the Fundamental Law of Hungary.[24] More precisely, the Ákr. mentions the right to good administration (Article XXIV of the Fundamental Law of Hungary) and the right to legal remedy (Article XXVIII of the Fundamental Law of Hungary). Article XXIV of the Fundamental Law of Hungary states that: "(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to give reasons for their decisions, as provided for by an Act. (2) Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act." Meanwhile, Article XXVIII of the Fundamental Law of Hungary ensures the right to legal remedy, as follows: "(1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."[25]

We shall note, that all principles mentioned in the Ákr. must be applied in all administrative procedures. These principles give guidelines in every single process of administrative decision-making and can be directly enforced.[26] Expressing the normative content of the principles is a very important issue, and it is gratifying that the legislator also regulates the principles in this way. In the Ákr., the legislator even states that all participants of the administrative procedure shall act in accordance with the principles and rules governing the administrative procedure. The general principles defined in the Ákr. have a distinctive reference to the administrative authorities or clients or other participants of the administrative procedures (such as witnesses, official witnesses, experts, interpreters, holders of

[23] See for the presentation of the general principles codified in the Administrative Procedure Act (Act CXL of 2004) before the Ákr.: Boros Anita (2014): Act on Administrative Proceedings. In Patyi András – Rixer Ádám eds.: *Hungarian Public Administration and Administrative Law.* Passau, Schenk Verlag. 425–432.

[24] See Patyi András – Téglási András (2014): The Constitutional Basis of Hungarian Public Adminstration. In Patyi András – Rixer Ádám eds.: *Hungarian Public Administration and Administrative Law*. Passau, Schenk Verlag. 209–212.

[25] Regarding the judicial review of administrative acts and the rule of law see Patyi András (2015): The Courts and the Judiciary. In Varga Zs. András – Patyi András – Schanda Balázs: *The Basic (Fundamental) Law of Hungary, A Commentary of the New Hungarian Constitution.* Clarus Press, NUPS. 204–213.

[26] See explanatory memorandum of the Ákr.

articles of inspection, clients' representatives) or all of them.[27] The principles mentioned in the Ákr. regarding admistrative authorities are the principle of legality, the principle of ex officio and the principle of effectiveness.[28] The principles regulated in the Ákr. regarding clients are the right to make statements and the right to be informed about clients' rights and obligations. Finally, the administrative authorities and the client and other participants of the administrative procedures are bound by the principle of good faith and the principle of trust.

Firstly, for administrative authorities, the Ákr. specifies several important requirements of the principle of legality. It states that the administrative authorities shall act on the basis of the law and that the powers of the administrative authorities shall be used within the framework of the law. Apropos of the exercise of the powers of administrative authorities, the legislator adds further elements: administrative authorities shall exercise their powers in a professional manner in accordance with the principles of efficiency, simplicity and in cooperation with clients of the administrative proceedings. The administrative authorities shall act in good faith. Then, the principle of equality before the law and the principle of equal treatment are also defined and linked to the principle of legality: the administrative authorities shall exercise their powers without undue discrimination, bias or prejudice. Finally, but as an important requirement, it is stated that administrative authorities shall act in reasonable time, within the deadline set by the law. The next principle regarding administrative authorities is the principle of ex officio. The Ákr. defines three cases of the realisation of this principle. Regarding the opening of administrative procedures, the Ákr. states that administrative authorities may open proceedings ex officio, apart from those which may be opened only upon request, and may continue proceedings that were opened upon request under the conditions laid down by law. Vis-à-vis ascertaining the relevant facts of the case, the administrative authorities shall ex officio ascertain the relevant facts of the case and specify the type and extent of evidence admissible. Ultimately, the administrative authorities may review their own decisions, and proceedings as well as decisions and/or the proceedings of other authorities under their supervisory competence.[29] The final principle applicable only to administrative authorities is the principle of effectiveness. Article 4 of the Ákr states that the administrative authorities shall organise their activities to entail the lowest costs for participants of the administrative procedure. The administrative authorities shall use advanced technology, and shall close out the proceedings as fast as possible.

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[27] See Balogh-Békesi Nóra (2016): Alapelvek a közigazgatási hatósági eljárásban. Új Magyar Közigazgatás, 2016. december. 12.

[28] The proposal, with the simultaneous codification of the principles of legality and efficiency ends the discussion between the two scientists, Zoltán Magyary and István Bibó with the victory of both scientists. Zoltán Magyary always emphasized the efficiency of public administration, while István Bibó the principle of legality. See Bibó István (1986): Jogszerű közigazgatás, eredményes közigazgatás, erős végrehajtó hatalom. In Vida István – Nagy Endre (eds.): *Válogatott tanulmányok I.* Budapest, Magvető. 294.

[29] See Article 3 of the Ákr.

The principles regarding clients declare the right to make a statement and present the clients' views during the whole administrative procedure. Within administrative procedures, administrative authorities shall guarantee presenting clients' and other participants' rights and obligations. Authorities have to help them to exercise their rights.[30]

Finally, the Ákr. regulates principles (principle of good faith and the principle of trust) which shall be applied to all participants of the administrative procedures. According to Article 6 of the Ákr., all participants of administrative procedures are required to act in good faith and to cooperate with each other. The principle of good faith means that participants of the administrative procedures may not engage in conduct aimed to mislead authorities, nor to delay the decision-making process or the enforcement procedure. The good faith of clients or other parties of administrative proceedings shall be presumed, and the burden of proof for bad faith lies with the authorities.

Regarding provisions stating principles of administrative procedure in the Ákr., we can conclude that although the act does not aim to be exhaustive, it draws the general characteristics of the administrative procedures. The Ákr. only details few of the principles like the principle of legality; and as we have seen, other principles are only listed. By referring to the Fundamental Law in the Ákr., all interpretations of the principles by the Constitutional Court should be also respected during the administrative procedures.[31]

4. GENERAL PRINCIPLES IN THE NEW FRENCH ADMINISTRATIVE PROCEDURE ACT

First of all, we need to note, that in France all procedures in administrative cases before Administrative Courts are regarded as administrative procedures ("la procédure administrative").[32] If we try to find the notion of proceedings of the administrative authorities – which includes the issues of administrative actions in accordance with the legislation in an individual case (ergo the Hungarian definition of administrative procedures)[33] – in French it is "la procédure administrative non contentieuse" (hereinafter for this kind of procedures we also use the expression administrative procedures).[34]

30 See Article 5 of the Ákr.

31 The Ákr. does not contain all principles (like the right of the client to the right that was acquired and exercised in good faith) which where codified before in the Administrative Procedure Act.
See Balogh-Békesi Nóra (2016): Alapelvek a közigazgatási hatósági eljárásban. Új Magyar Közigazgatás, 2016. december. 14.

32 Bailleul, David (2014): *Le procès administratif.* Lextenso éditions, LGDJ.

33 See Patyi A. et al. (2009): *Közigazgatási hatósági eljárásjog.* Budapest–Pécs, Dialóg Campus Kiadó. 19–30.

34 Gondouin, Geneviève – Inserguet-Brisset, Veronique – Van Lang, Agathe (2011): *Dictionnaire de droit administratif (6e édition), Sirey – Dictionnaires.* Édition Dalloz. 341–342.

The idea of codification of administrative procedures is quite old in France.[35] In the '70s several acts were adopted regarding the simplification of relations between the administrative authorities and the citizens.[36] From the '80s, the legislator tried to codify or partly regulate the general rules of administrative procedures under different names like the Decree 83-1025 of the 28 th of November 1983 regarding the relations between the administration and the users, the draft of the Code of Administration from the '90s,[37] the Act 2000-321 of 12 April 2000 on the rights of citizens in their relations to administrations.[38] We should also note the indispensable work of the Superior Commission of Codification in the creation of Codes – also in the creation of the CRPA – from the end of the '80s.[39] In 2011, the Superior Commission of Codification suggested to codify administrative procedures on new foundations. In December 2012, the Interdepartmental Committee for Government Modernisation put the issue of codification of administrative procedure rules again on its agenda. The Circular of 27 March 2013 of the Prime Minister Jean-Marc Ayrault mentioned the CRPA as a Code which absolutely needs to be created on new fundaments. The Act of 12 November 2013 authorised the government to simplify the relations between citizens and the public administration and to codify it by an ordonnance. The CRPA was codified by Ordonnance 2015-1341 of 23 October 2015 (CRPA part in act level) and Ordonnance 2015-1342 of 23 October 2015 (CRPA part in decree level). The CRPA came into force on 1 January 2016.[40] Consequently, France joined the countries which have a codified act regarding general rules of administrative procedures.[41]

The CRPA is a more complex code then the Hungarian Ákr.[42] It regulates all fields where the public can get in relation with administration. The CRPA contains preliminary provisions and five books. The preliminary provisions define the CRPA's relation with other acts, the notion of administration and the public (ergo to whom the code should be applied) and the principles of administrative procedure. Book I of CRPA is named: Les échanges avec

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35 Schwartz, Rémy (2004): *Le code de l'administration. Actualité Juridique de Droit Administratif.* 1860. Several theoretical studies also urged the codification of the administrative procedures see Weiner, Céline (1975): *Vers une codification de la procédure administrative: étude de science administrative comparée.* Paris, Presses Universitaires de France.

36 See Loi n°73–6 du 3 janvier 1973 instituant un Médiateur de la République, Loi n° 79–587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public.

37 In the original concept, this Code was never finished. See Gonod, Pascale (2014): *Codification de la procédure administrative, La fin de « l'exception française »?* AJDA. 395.

38 See Delaunay, Bénédicte (2000): La loi du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations. *Revue du Droit Public et de la Science Politique en France et a l'Etranger.* 1201–1221.

39 Décret n°89–647 du 12 septembre 1989 relatif à la composition et au fonctionnement de la Commission supérieure de codification.

40 See Vialettes, Maud – Barrois de Sarigny, Cécile (2016): *La fabrique d'un code.* RFDA. 4.

41 See Pollák Kitti (2017): Történeti vázlat a francia közigazgatási eljárásjogi kodifikáció mérföldköveiről. *Eljárásjogi Szemle,* 2017/1. 43–48; Pollák Kitti (2017): *Quo Vadis: Codification of Administrative Procedure Rules in Hungary and in France.* In Nemec, Juraj: 25th NISPAcee Annual Conference: Innovation Governance in the Public Sector. Kazan, Oroszország, 2017.05.18–2017.05.20. Bratislava: NISPAcee. 1–8.

42 The Hungarian Ákr. mostly regulates questions determined in the Book II of the CRPA.

l'administration, and contains all regulations related to the ways how to initiate contact between the public and administration. Book II of the CRPA gives a very detailed description of rules regarding unilateral decisions issued by the administrative bodies. The rules on access to administrative documents and the re-use of public information can be found in Book III of CRPA. In Book IV of CRPA we find alternative dispute regulations: the legal remedy possibilities against administrative decisions ("recours administratifs"), the mediation, etc. In Book V of CRPA there are provisions regarding the Overseas Territories of France.[43]

As we already mentioned, in the preliminary provisions of the CRPA the most important principles are reaffirmed. It has a more symbolic significance than a normative. In this way the CRPA is more similar to the Model Rules. Certainly, the principles expressed in the French constitution should also be respected. Article L100-2 of the preliminary provisions of the CRPA states that: "The administration acts in the public interest and respects the principle of legality. It is bound by the obligation of neutrality and it should respect the principles of laïcité. It complies with the principle of equality and guarantees impartial treatment."

We can find six principles (principles and obligations) specified in the preliminary provisions of the CRPA: the principle of legality, the principles of laïcité, principle of equality and the obligation to act in public interest, the obligation of neutrality, the obligation to guarantee impartial treatment. In the preliminary provisions of the CRPA, only some of the main principles applicable in the administrative procedures are named, but they are not explained.

We shall also note that all principles mentioned in the preliminary provisions of the CRPA create obligations for the administrative authorities only, and not for the public or other participants of the administrative procedures.[44] Finally, we should remark that other principles are also named in the Books of the CRPA, which should be applied in the scope of that Book, like in Book II Section 1: Principe of silence might be taken as a sign of acceptance (Articles L231-1 to D231-3).

In summary, we can state that the regulation of the principles mentioned in the CRPA is only a list of the most important principles which should be respected by the administrative authorities during the administrative proceedings.

5. CONCLUSION

After the detailed presentation of the principles mentioned in the latest three most important EU documents regarding the codification of administrative procedures: European Parliament resolution of 15 January 2013 with recommendations to the Commission

[43] Pollák Kitti (2016): KET. „francia módra" – Az új francia Közigazgatási Eljárási Kódex. *Eljárásjogi Szemle,* 2016/3. 26–31.

[44] See *Code des relations entre le public et l'administration annoté et commenté.* 1re édition, Dalloz, 2016. 9–10.

on a Law of Administrative Procedure of the European Union, the Model Rules and the European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration; we gave a detailed overview of the principles regulated in the new Hungarian and French Administrative Procedure Acts. We can conclude that the regulation of the principles in the Hungarian and French Administrative Procedure Acts and in the EU documents have some similarities, such as the fact that they all mention the principle of legality. Although the way of the regulation (listing only the principles or giving a detailed explanation of the principle) and also the position of the principles is still quite different. The French codification of principles of administrative procedure (just a list of principles of administrative procedure without explanation in the preliminary provisions) is more similar to the Model Rules than the Hungarian codification. Ultimately, we would like to emphasise that we find extremely important the codification of principles of administrative procedure in the administrative procedure acts, and the fact is also very welcomed that the newest codifications still regulate the principles of administrative procedure.

REFERENCES

Bailleul, David (2014): *Le procès administratif.* Lextenso éditions, LGDJ.

Balogh-Békesi Nóra (2016): Alapelvek a közigazgatási hatósági eljárásban. Új Magyar Közigazgatás, 2016. december. 12.

Balogh-Békesi Nóra (2017): Alapelvek a Modell Szabályok I. Könyvének általános rendelkezéseiben. *Pro Publico Bono – Magyar Közigazgatás,* 2017/2. Különszám, 27.

Bibó István (1986): Jogszerű közigazgatás, eredményes közigazgatás, erős végrehajtó hatalom. In Vida István – Nagy Endre (eds.): *Válogatott tanulmányok I.* Budapest, Magvető. 294.

Boros Anita (2014): Act on Administrative Proceedings. In Patyi András – Rixer Ádám eds.: *Hungarian Public Administration and Administrative Law.* Passau, Schenk Verlag. 425–432.

Boros Anita (2017): Modell Szabályok az I. Könyvben. *Pro Publico Bono – Magyar Közigazgatás,* 2017/2. Különszám, 49.

Code des relations entre le public et l'administration annoté et commenté. 1re édition, Dalloz, 2016.

Delaunay, Bénédicte (2000): La loi du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations. *Revue du Droit Public et de la Science Politique en France et a l'Etranger.* 1201–1221.

Gondouin, Geneviève – Inserguet-Brisset, Veronique – Van Lang, Agathe (2011): *Dictionnaire de droit administratif (6e édition), Sirey – Dictionnaires.* Édition Dalloz.

Gonod, Pascale (2014): *Codification de la procédure administrative, La fin de « l'exception française »?* AJDA. 395.

Harlow, Carol – Rawlings, Richard (2014): *Process and Procedure in EU Administration.* United Kingdom, Hart Publishing.

Patyi András et al. (2009): *Közigazgatási hatósági eljárásjog.* Budapest–Pécs, Dialóg Campus Kiadó. 19–30.

Patyi András – Téglási András (2014): The Constitutional Basis of Hungarian Public Adminstration. In Patyi András – Rixer Ádám eds.: *Hungarian Public Administration and Administrative Law.* Passau, Schenk Verlag. 209–212.

Patyi András (2015): The Courts and the Judiciary. In Varga Zs. András – Patyi András – Schanda Balázs: *The Basic (Fundamental) Law of Hungary, A Commentary of the New Hungarian Constitution.* Clarus Press, NUPS. 204–213.

Polláк Kitti (2015): Directions for the Regulation of Legal Remedies in the Light of Model Rules on EU Administrative Procedure. In Gerencsér Balázs – Berkes Lilla – Varga Zs. András eds.: *Current Issues of the National and EU Administrative Procedures.* Budapest, Pázmány Press. 409–419.

Polláк Kitti (2016): KET. „francia módra" – Az új francia Közigazgatási Eljárási Kódex. *Eljárásjogi Szemle,* 2016/3. 26–31.

Polláк Kitti (2017): Történeti vázlat a francia közigazgatási eljárásjogi kodifikáció mérföldköveiről. *Eljárásjogi Szemle,* 2017/1. 43–48.

Polláк Kitti (2017): *Quo Vadis: Codification of Administrative Procedure Rules in Hungary and in France.* In Nemec, Juraj: 25th NISPAcee Annual Conference: Innovation Governance in the Public Sector. Kazan, Oroszország, 2017.05.18–2017.05.20. Bratislava: NISPAcee. 1–8.

Rozsnyai Krisztina (2013): A hatékony jogvédelem biztosítása a közigazgatási bíráskodásban. *Acta Humana Emberi Jogi Közlemények,* 2013/1. 117–130.

Schwartz, Rémy (2004): *Le code de l'administration. Actualité Juridique de Droit Administratif.* 1860.

Váczi Péter (2013): *A jó közigazgatási eljáráshoz való alapjog és annak összetevői.* Budapest–Pécs, Dialóg Campus.

Vialettes, Maud – Barrois de Sarigny, Cécile (2016): *La fabrique d'un code.* RFDA. 4.

Weiner, Céline (1975): *Vers une codification de la procédure administrative: étude de science administrative comparée.* Paris, Presses Universitaires de France.

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COMMENTARIES ON RENEUAL MODEL RULES ON EU ADMINISTRATIVE PROCEDURE (BOOK IV – CONTRACTS; CHAPTER 3 – EXECUTION AND VALIDITY OF EU CONTRACTS)

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Book IV – Contracts

Chapter 3 – Execution and Validity of EU Contracts

As the introduction to Book IV highlights, the starting point of the draft is, that the 'life' of the public contracts under the scope of this Book can be divided into three main phases:

- the first is an administrative procedure leading to the conclusion of a public contract;
- the second is the conclusion of the contract;
- the third is the execution and end (expiration) of the contract.

Chapter 3 of Book IV aims to regulate the third phase of the contracts, mainly by the use of substantive legal provisions.

1. General Provisions

1.1. REPRESENTATION OF EU AUTHORITIES AND FORMAL REQUIREMENTS FOR EU CONTRACTS

The concept of EU Authority is defined by Paragraph (5) of Article I-4 of the draft. In principle the term is used for the institutions, bodies, offices and agencies of the EU. This list is in accordance with the wording of the English versions of the founding Treaties (see e.g. TEU Article 13, TFEU Article 15). The Hungarian translation of the founding Treaties however only contains a listing of institutions, bodies and offices.

The institutions of the EU are listed by Article 13 of the TEU as follows:

- the European Parliament
- the European Council
- the Council
- the European Commission
- the Court of Justice of the European Union
- the European Central Bank and
- the Court of Auditors.

The above mentioned seven main institutions of the EU are emphasized by the founding Treaties. In case of the additional elements of the organizational system of the EU, the founding Treaties use the remaining three concepts. For example, the Economic and Social Committee and the Committee of the Regions are referred to as advisory bodies. Similarly, the European Investment Bank and the European Ombudsman are to be regarded as institutions of the EU.

The distinction is less clear in the case of other types of institutions. The website of the EU most commonly uses the term 'agency' for those types of individual institutions that have a certain level of independence (such as the European Police Office – EUROPOL, the European Medicines Agency – EMA, the European Defence Agency – EDA etc.).[1]

Paragraph (1) of Article IV-20 clarifies that the representation of EU Authorities should solely be governed by EU law, even if the contract is solely governed by EU law, or by Member State Law, or by the law of third countries. In this regard the choice of the parties of the applicable law is irrelevant.

As regards Paragraph (2) of Article IV-20 it is justified to highlight – as a starting point – that Article 335 of the TFEU states the following:

[1] For a more detailed description of these organizations see https://europa.eu/european-union/about-eu/agencies_en (Downloaded: 10.08.2017.)

> "In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation."

Paragraph (2) of Article IV-20 sets up a limit for the representative power of the person representing the EU Authority. If there is any provision pertaining to the form of an EU contract which is laid down in an EU legal act, the power of the person representing the EU Authority will not include the determination of the form of the contract. The explanatory statement to this paragraph of the draft states, that this rule in principle is similar to the German – private law based – regulation of public contracts, where the rights of the representatives of the *Länder* (federated states) are limited by the rules of the federal private law, taking into consideration that the *Land* (one of the federated states) has no legislative power to impose additional formal requirements for public contracts governed by federal private law.

1.2. CLAIMS OF THE EU AUTHORITY IN THE CONTEXT OF CONTRACTS

In relation to this Article it is necessary to refer to Paragraph (1) of Article IV-7 which contains a similar rule. According to Article IV-7, the listed Articles of Book III shall apply to the conclusion of a contract. Since the draft – as referred to previously – makes a clear distinction between the phases in the 'life' of the contract, it is justifiable for Article IV-21 regulating the execution or possible termination of the contract, to once again call upon the relevant rules set out by Book III. The list of the Articles drawn up by Book III is almost identical to the list set out by Article IV-7, the only difference is, that the referral to Article III-6 has been left out from the latter. Article III-6 sets out the specific rules of application procedures, that evidently refers to the phrase preceding the conclusion of the contract.

Similarly to Article IV-7, we shall refer to the following issue: it is questionable, whether obligations regarding procedures with the aim to make individual administrative decisions are enforceable through concluding or executing contracts (in the latter case even in relation to substantive legal rules). In the field of public law relationships, where in certain cases an authority – within the remits of its public authority – may reach a decision that is obligatory for the client, the application of rules that increasingly guarantee the rights of the client, and make the position of the client more favourable, is justifiable to the fullest extent, in order to compensate for the significant inequality between the parties. Would this solution be also justifiable in case of two-sided relationships, in which several aspects are often governed by civil law? Naturally in a vast amount of public contracts the predominance on the side of the authority cannot be disputed (in several cases this occurs due to the public elements of the legal relationship); however, the question whether this could

be compensated by automatically adopting the well-tried elements of the rules of public administration procedures, should be raised.

The explanatory statement attached to this Article also accounts for these questions. Although it states, that according to the drafters' opinion, each decision made by EU Authorities in connection with the performance of a contract, should be in line with the provisions of administrative procedural regulations and the principle of fair administration (good administration). The explanatory statement refers to one of the judgements of the General Court,[2] where the court ruled in Paragraph 245 that:

> "It should be borne in mind that the EU institutions are subjects to obligations flowing from the general principle of sound administration in regard to the public only in the exercise of their administrative responsibilities. On the other hand, when the relationship between the Commission and the applicant is clearly contractual, the latter can complain, in regard to the Commission, only of breaches of the terms of the contract or of the law applicable to it."[3]

Furthermore, the drafters of the Model Rules state that this Article is also not in line with the practice of the European Ombudsman. However, the drafters uphold the statement that the principle of good administration should be applied in relation with the Treaties as well.

The principle is set out by Article 41 of Title V (Citizens' Rights) of the Charter of Fundamental Rights of the EU as follows:

> "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
> 2. This right includes:
> (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
> (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
> (c) the obligation of the administration to give reasons for its decisions.
> 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
> 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

The title of the Article is also 'Right to good administration'.

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2 Association Médicale Européenne (EMA) v. European Commission Case T-116/11.

3 Available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5946b-0b9a7d7e42679a0299f64979afae.e34KaxiLc3eQc40LaxqMbN4PaN0Ne0?text=&docid=145462&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1688695 (Downloaded: 11.08.2017.)

We can conclude that some of these rights are guaranteed by Article XXIV of the Fundamental Law of Hungary:

> "(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. This right includes the obligation of such authorities to give reasons for their decisions.
> (2) Everyone shall have the right to demand compensation, as specified in an act of Parliament, for damages unlawfully caused by the authorities in discharging their duties."

Besides that, the principles of the Hungarian Act on the General Rules of Administrative Proceedings and Services (Act CXL of 2004) describe the contents of the client's rights and the obligations of the authority in detail (Articles 1–11).

In addition to the above mentioned rules, the explanatory statement on Articles highlights the following: Article IV-21 does not constitute a legal basis for the contracting parties to challenge the decisions based on Article 263 of the TFEU before the CJEU. This so-called *annulment* or *cassation* procedure means a quasi-constitutional review (with a phrase adopted from the American constitutional litigation: *judicial review)* of EU legal acts, which can lead to the declaration that the acts are void. The draft however does not wish to pre-empt the possibility to enforce Article IV-21 in relation to disputes regarding contracts of courts that generally have the competence to do so.

1.3. DECISIONS OF THE EU AUTHORITY ON AN EXTRA-CONTRACTUAL BASIS

In relation to this Article we shall once again refer to Article 335 of the TFEU, which grants the Union legal capacity to the fullest extent. The explanatory statement attached to this Article of the draft states that the aim of the Article is to handle the uncertainty, that stems from the relationship between the Court's jurisprudence regarding contractual disputes and the enforcement of decisions of the EU Authorities. On the latter issue, the previously cited Article 299 of the TFEU states the following:

> "Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.
> Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.
Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner."

According to the draft the Article therefore has a dual aim:

- On the one hand it does not wish to allow the obligatory act of the EU Authority acting within its public authority powers to be challenged/debated by the contractual parties based on the existing contract, and
- on the other hand, it does not wish to provide an opportunity for the EU Authority to use its public authority powers to be exempted from its own contractual obligations.

In relation to this last phrase, the Article states that, if the EU Authority exercises public authority powers unrelated to the contract, the rights of parties under Article 340(2) TFEU shall remain unaffected:

"In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

Furthermore, the exercise of public authority powers shall not prevent the enforcement of any claim in relation with EU Authority by the contractor.

Paragraph (2) of this Article aims to clarify a special conjunction: it is possible for an obligation to appear both in a contract and in a different type of public authority act. In this case the fulfilment of the obligation in the public authority act will be equivalent to the proper fulfilment of the contractual obligation.

1.4. REVIEW BY THE EUROPEAN OMBUDSMAN

The institution of the European Ombudsman is of Scandinavian origin, and was established by modelling the national ombudsmen, that operate in most European countries. Among the founding Treaties, Article 228 of the TFEU is the one that contains the detailed rules of the institution, while according to the rules of Articles 20 and 24 of the TFEU, and Article 43 of the Charter of Fundamental Rights the possibility to file a complaint to the Ombudsman shall extend to any person who is a citizen of the Union.

In contrast to those national ombudsmen, whose tasks can be described with specificities related to the general protection of fundamental rights (such as the Hungarian Commissioner of Fundamental Rights), the centrefold of the European Ombudsman's activity is

the issues concerning the so-called *maladministration*.[4] In the absence of a normative definition, the content of this concept was explained by the Ombudsman himself: the term *maladministration* can – among others – mean the infringements of administrative rules, the unfair or discriminative conduct during the procedure, the abuse of power, the withhold of information or the unjustifiably prolonged decision making.[5]

The Ombudsman – similarly to the national ombudsmen – has widespread investigatory powers, while he/she cannot exercise public powers. In disputed cases the ombudsman aims to facilitate consensus, or allowed to make recommendations and proposals, furthermore submits reports to the European Parliament. The Ombudsman is allowed to examine the conduct of any EU institution, body, office or agency, except for the judicial activity of the Court.

The scope of the Ombudsman's investigatory activity includes the procedures that are related to public contracts concluded by EU institutions, bodies etc. In this however, the practice of the commissioner shows a certain amount of self-moderation, due to the fact that contractual disputes (i.e. questions of substantial legal nature) are most likely to be resolved before courts. The Ombudsman therefore only examines the issues that are related to procedural matters concerning the contracts (e.g. whether the plaintiff's right to be heard has been ensured during the enforcement of the contract, or whether the parties have been granted access to all information etc.).[6]

Article IV-23 of the draft refers back to the rules of fair administration set out by Article IV-21, meanwhile it sets out that, the scope of review by the Ombudsman includes the fulfilment obligations arising from EU contracts. It seems questionable whether the expansion of the scope of review by the Ombudsman could result in a problem of collision of rules in cases of judicial settlement of contractual disputes, although Paragraph (2) of the Article makes it clear, that the recommendation issued by the European Ombudsman does not affect the right of the parties to have their contractual dispute examined by a court (or arbitration tribunal). The issue may rise whether the recommendation of the Ombudsman could be taken into consideration by the acting court.[7]

Nonetheless, Paragraph (3) of the Article states, that an instance of *maladministration* on the part of the EU Authority revealed by the inquiry does not affect the validity of the

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4 For a more detailed information on the institution of the Ombudsman, its functioning and the complaint options see the website of the European Ombudsman: www.ombudsman.europa.eu/en/home.faces (Downloaded: 13.08.2017.)

5 For more detail see Kende Tamás – Szűcs Tamás – Jeney Petra eds. (2007): *Európai közjog és politika. (EU Law and Politics.)* Budapest, CompLex Kiadó. 342.

6 Some cases related to contracts can be found in the report of the European Ombudsman for 2012, pages 46–48. Annual reports on the website of the Ombudsman: www.ombudsman.europa.eu/activities/annualreports.faces (Downloaded: 13.08.2017.)

7 Since Model Rules – in their current form – do not wish to regulate issues concerning judicial procedures, this issue will only be resolved by examining the future practice of the courts – provided that the draft will be accepted in its current form. For further details see the comment of András Varga Zs. on this issue in: Varga Zs. András (2014): Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról. (Preliminary Assessment of the Model Rules on EU Administrative Procedure.) *Magyar Jog,* 2014/10. 549.

contract or the validity of the claims. Meanwhile the paragraph states that the remedy of the *maladministration* would be mandatory for the EU Authority and specifies the following three methods to do so:

- the Authority may use its contractual powers (for example in order to offer modification or termination),
- the Authority may accept offers from the contracting party to re-negotiate or modify the respective contract,
- the Authority may offer financial compensation.

The draft does not set up an order between the considerable options, nor define any assessment criteria. It would seem expedient to include such a measure in the text because the current situation would offer for an interpretation which would allow the Authority to choose between the measures based on its discretional power, indifferent to the solution which would be more favourable for the other contracting party. Such a one-sided decision which could be even detrimental for the other contracting party is not a favourable solution, because it would serve as a ground for filing another complaint to the Ombudsman.

1.5. ARBITRATION CLAUSES

Arbitration procedures traditionally serve as faster and more successful alternatives of settling private legal disputes, rather than forms of judicial dispute resolution.[8] Such an option is present in the TFEU, when in Article 272 it stipulates that:

> "The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law."

It has to be noted, that TFEU does not allow using the 'traditional' method of arbitration (where the parties choose the members of the tribunal), because in the case of EU contracts, one of the Union's courts will be the acting court.

As it has been noted several times already, the draft makes a distinction between the contracts to which the EU law shall be applicable and to which the national law of the Member States (or third countries) shall be applicable. Paragraph (1) of Article IV-24 clarifies that

[8] On the theoretical basis of arbitration see Horváth Éva – Kálmán György (2003): *Nemzetközi eljárások joga – Kereskedelmi választottbíráskodás. (Law of International Procedures – Commercial Arbitration.)* Budapest, Szent István Társulat. 54–63.
The Hungarian model of arbitration is regulated by Act LXXI of 1994 on Arbitration. As a general rule instead of the court of law, disputes may be settled by way of arbitration if: a) at least one of the parties is professionally engaged in business activities and the legal dispute arises out of or in connection with this activity; b) if the parties may dispose freely of the subject-matter of the proceedings; and c) if the arbitration was stipulated in an arbitration agreement [Article 3 Paragraph (1)].

validity of arbitration clauses within the meaning of TFEU should be interpreted in line with the EU law. When the arbitration clause is valid, only the CJEU has jurisdiction, even if the applicable national law conflicts with these jurisdiction rules.

According to the draft, the arbitration clause always has to be concluded in a written form, however, it should be possible to fulfil this criterion by drafting another document that contains a written arbitration clause, following the conclusion of the contract. In the absence of a written arbitration clause, the draft would establish an irrefutable presumption that there is no arbitration clause. This presumption would serve as a guideline for the judicial interpretation. (According to the explanatory statement to this paragraph, there is a need to terminate the judicial practice which allows the parties to make up for the written clause with a concordant verbal statement. This rule would protect the party entering to a contract with an Authority, and could prevent the contractor to enter an arbitration procedure due to the fear of having sued in a 'normal' judicial procedure.)

Paragraph (2) of this Article sets out a significant time limit: the arbitration clause can be concluded until the initiation of court proceedings. The submission of the lawsuit is a legal statement, which allows one of the contracting parties to declare to initiate a proceeding before a 'normal' court that has jurisdiction rather than an arbitration tribunal.

Paragraph (3) of the Article would grant an outstandingly prominent position for the party entering into a contract with the EU Authority upon allowing him – if three criteria are met – to request the mandatory annulment of the arbitration clause. The first instance (a) would apply to cases where the contractor did not have the opportunity to make a choice when negotiation an arbitration clause (i.e. the arbitration clause was part of the general terms and conditions of the contract). The second instance (b) would apply to cases where there is a 'more appropriate jurisdiction' compared to the jurisdiction of CJEU. The third instance (c) would create an opportunity for the contractor to modify his original choice and initiate a proceeding before a 'normal' court.

Analysing the second instance and the last sentence of Paragraph (3) we can conclude that the draft aims to regulate a model, which allows the contractor to refer to the existing reasons while the EU Authority is allowed to make a decision to annul the clause. If it does not grant the contractor's request it is obliged to justify its statement (see also Article III-29).

The explanatory statement to this Article highlights that if there is a valid arbitration clause, the CJEU will be under the necessity to take the place of national courts, whenever the chosen legal system is of one of the Member States. In the absence of an arbitration clause (or if the clause proves to be invalid, or gets annulled at a later stage), only the national courts shall have jurisdiction according to TFEU Article 274:

> "Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States."

In such cases the interpretation of the contract and the determination of its validity will be the task of the national judge,[9] since this power can not revert to the CJEU, not even in a preliminary ruling procedure.

1.6. EXCLUSION OF COMPENSATION

The explanatory statement attached to this Article highlights that this rule is of fundamental significance (a general clause). Its main purpose is to exclude the EU Authority from under the rules of compensation (generally compensation is a form of financial contribution) regulated in the later Articles of this Chapter.

This paragraph is a verbatim copy of the list that can be found in Article 48 Paragraph (2) of the German Administrative Procedure Act.[10] The Act in principle allows omitting the withdrawal of the unlawful administrative acts in the case of financial allowances; however, the listed cases constitute a ground for withdrawal and the client cannot plead that he trusted the validity of the act in good faith. This legal instrument is similar to the Hungarian Administrative Procedure Act's principal instrument known as the protection of the rights of clients acquired and exercised in good faith.

It is obvious that the behaviours listed in Article IV-25 are unlawful or are exercised in bad faith, where – as a sanction – the contractor who concluded a contract with the EU Authority will be deprived from gaining financial compensation.

2. EU Contracts Governed by EU Law

2.1. EXECUTION AND PERFORMANCE

2.1.1. Good Faith and Fair Dealing

In contractual law the principle of good faith and fair dealing is generally accepted (a general clause) all over the world. Good faith is a conscious (subjective) state, based on a statement which is subjectively considered to be true by the person making it (and even if it is untrue, the person making the statement should not have a knowledge of this). In legal terms good faith refers to a situation in which someone believes that his actions are lawful – and if they are not he should have no knowledge about the unlawfulness of his actions.

The term good faith has its origins in Roman law *(bona fides).* An interesting fact is that it was originally an objective state, so the concept was not about a person's inner conviction

[9] On the same issue see Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [The Regulation replaced Council Regulation (EC) No. 44/2001 on 10 January 2015.]

[10] *Verwaltungsverfahrensgesetz* (1976).

but about an action that is detectable by the external world (like reliability or trustworthiness). The opposite of good faith is bad faith *(mala fides).*

The principle of good faith (and fair dealing) can be found usually at the beginning of the modern civil codes. It can be found among others in the German, Austrian, Swiss, Dutch and French codes *(Treu und Glauben, bonne foi).*[11] The principle has moral foundations and may consist of several elements; it may mean justice, contractual loyalty, equity, morality, trust, etc.[12]

Also, the Hungarian Civil Code (Act V of 2013) states that in exercising rights and in fulfilling obligations the requirements of good faith and fair dealing shall be observed [Article 1:3 Paragraph (1)].

The draft prescribes the obligation to exercise this principle for every behaviour related to the third 'life phase' of the contracts. Besides this, it highlights that this moral principle is so significant that the general rules of contractual freedom do not affect it, meaning the principle of good faith and fair dealing can not be excluded or limited by contract.

2.1.2. Contractual Rules

This Article would create an obligation for the contracts solely governed by EU law to contain a provision that should specify a mandatory background regulation for issues that are not covered by the rules of Article IV-4 of the draft. The completion of this so-called mandatory choice of the applicable law should be ensured by the EU Authority. This however relativizes the 'exclusiveness' of EU regulation.

The explanatory statement to this Article states that the clause should make clear:

- if the clause refers to the common contract law of the relevant Member State, or
- if the EU Authority may avail itself of the specific privileges granted to public authorities in the contractual law of the relevant Member State, or
- if the contract should be treated like a contract governed by public law of the relevant Member State.

In order to ensure uniformity, the draft would prescribe that the chosen law of obligations (model rules) shall be mandatory in the future and shall be applicable to all future contracts serving the same purposes.

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[11] Földi András – Hamza Gábor (2000): *A római jog története és institúciói. (The History and Institutes of Roman Law.)* Budapest, Nemzeti Tankönyvkiadó. 176–177.

[12] Lábady Tamás (2000): *A magyar magánjog (polgári jog) általános része. [General Provisions of the Hungarian Private Law (Civil Law)].* Budapest–Pécs, Dialóg Campus Kiadó. 137–138. Lábady refers to the fact that in German law, the principle of *gute Sitten* (good morality) is a general principle of the same importance as *Treu und Glauben*.

The explanatory statement to this Article also highlights that, instead of referring to the contractual law of a Member State, the contract may refer to international model codes (such as the DCFR or the principles of UNIDROIT).[13]

2.2. CHANGE OF CIRCUMSTANCES AND RELATED CLAUSES

2.2.1. Change of Circumstances

The use of the clause referring to the change of circumstances *(clausula rebus sic stantibus)* is an ancient legal instrument, such as the rules of exclusion of contractual obligations.[14] If one of the parties' position becomes so much more burdensome – without any fault on his part – that the completion of the contractual obligations cannot be expected from him/her, the principle 'agreements should be kept' *(pacta sunt servanda)* shall not apply.[15]

The draft creates a verbatim copy of the phrase found in Article 60 Paragraph (1) of the German Code of Abedministrative Procedure. The German act allows the modification or if necessary the termination of public contracts.

The Hungarian Code of Administrative Procedure applies a similar approach when it sets out in the Article regulating public contracts that:

> "Article 77 (1) The amendment of the resolution may be requested by either party if any new circumstance that is deemed significant for the purposes of the case arises or if the conditions existing at the time of the signature of the agreement have changed significantly."

The courts often have remit to modify private contracts. The explanatory statement attached to the Article cites Article III-1:110 of DCFR, to prove its statement, but the Hungarian Civil Code can also be cited:

> "Article 6:192 [Amendment of contract by the court]

[13] UNIDROIT is an intergovernmental organization based in Rome, which, as an international institute, aims to harmonise private law (primarily the law of international trade relationships). The organization published the Principles of International Commercial Contracts. The application of the Principles can be set out by contracting parties (EU and other countries alike). See in more detail Bánrévy Gábor (2003): *A nemzetközi gazdasági kapcsolatok joga. (Law of International Trade Relationships.)* Budapest, Szent István Társulat. 25–26.

[14] In classic Roman law the principle was unknown, it was established later during the subsequent fate of Roman Law.

[15] An interesting fact is that the original text of the Hungarian Code of Administrative Procedure, containing mainly imperative provisions, used a similar legal instrument. The former Article 113 of the Act stated that, if the enforcement of the final administrative decision would constitute an unreasonably heavy burden for reasons that have occurred after the decision was adopted, and if special consideration was not allowed in the enforcement procedure, the client had the right to request the revision or withdrawal of the lawful decision via a procedure in special consideration. This procedure was regarded as a special legal remedy; however, these rules were repealed in 2009.

(1) Either of the parties shall be entitled to request to have the contract amended by court order if in the long-term contractual relationship of the parties performing the contract under the same terms is likely to harm his relevant lawful interests in consequence of a circumstance that has occurred after the conclusion of the contract, and:
a) the possibility of that change of circumstances could not have been foreseen at the time of the conclusion of the contract;
b) he did not cause that change of circumstances; and
c) such change in circumstances cannot be regarded as normal business risks.
(2) The court shall have powers to amend the contract as of the date it has determined, at the earliest from the date of enforcement of the right to amend the contract before the court, in a manner to ensure that neither of the parties should suffer any harm in their relevant lawful interests in consequence of any change in the circumstances."

The drafters of the Model Rules claim that in the case of EU contracts it would be more advantageous to apply the German solution because by those rules mandatory judicial proceedings could be avoidable.

2.2.2. Termination to Avoid Grave Harm to the Common Good

The one-sided termination of the contract by the authority is not an unknown instrument even in the French or the German law. The previously cited Paragraph (1) of Article 60 of the German Code of Administrative Procedure also allows the use of it.

The term *'common good'* – which has no normatively defined meaning – creates broad discretional power, the content of which may be defined by state organs, primarily those that are within the executive branch. In the Hungarian legal terminology the term *'public interest'* appears with a similar substance.[16] The rules of the Hungarian Code of Administrative Procedure set out that one of the conditions to enter into a public contract (a so-called administrative agreement) is to settle the case with a resolution that is best suitable for the public.

Possibly due to the above mentioned reason, the explanatory statement attached to this Article only acknowledges the reason for termination mentioned by the Article, as an exceptional, *ultima ratio* instrument in accordance with the German rules, although there are no practical experience regarding its usage.

[16] Lajos Lőrincz thinks that only the Government has the remit to define the concept of public interest, due to its power to conduct oversight on a national level. However, the *representation* of public interest is an obligation for all public administration bodies. See Lőrincz Lajos (2010): *A közigazgatás alapintézményei. (Fundamental Institutions of Public Administration.)* 3rd edition. Budapest, HVG-ORAC. 78.

2.2.3. Termination for Non-Performance

This Article mostly takes over Articles III-3:502-505 of DCFR.

In line with the *pacta sunt servanda* principle one of the main objectives of the contracts is to facilitate the completion of obligations. It is a general rule in contractual law, that the failure to perform – or the inadequate completion of – the undertaken obligations is regarded as defaulting behaviour. (In case of a fundamental change in circumstances, the modification of the contract may be requested. Besides the contracting parties can modify the contract any time, because modification is governed by the principle of the parties' contractual freedom.)

The consequence of the *non-performance* of one of the parties creates a right for the other contracting party to terminate the contract with a one-sided statement. However, it is expected for the non-performance to be *fundamental*. Paragraph (1) of the Article lists – in general – the possible cases.

If the non-performance affects an obligation that is *not fundamental,* the contract shall only be terminated on the grounds of delay in performance if the person in delay has been granted an additional period of time of reasonable length for performance and the debtor does not perform within that period.

The draft does not exclude the option of terminating the contract before the performance of a contractual obligation is due, if the non-performance of the debtor in a fundamental obligation can be unequivocally expected (e.g. if the debtor has declared that there will be a non-performance of the obligation, or if the debtor does not provide an adequate assurance).

The consequence of non-performance beyond the above mentioned is a right to seek damages, if the defaulting action has caused damage. The draft makes it clear that, the right to seek damages is not excluded by the termination of the contract.

The explanatory statement attached to this Article points out that in this case substantive provisions have been created (and been taken over) as well. The aim of this is not to define new substantive law for EU contracts, but to stick to the rules necessary for the administrative procedure of conclusion and execution of EU contracts.

2.3. CONSEQUENCES OF ILLEGALITY AND UNFAIR TERMS

2.3.1. Termination Due to an Infringement of the Provisions of Chapter 2

The Article regulates a method of contract termination which is of penalizing nature and may only be exercised by the EU Authority. The termination may occur for two reasons:

- in line with Paragraph (4) of Article IV-8 of the draft, if the CJEU has rendered the EU Authority's decision in which the contract was concluded void (this however does not affect the extra-contractual liability of the EU Authority);

- if the EU Authority becomes aware that the rules on the procedure regarding the conclusion of an EU contract have not been respected to the detriment of a third party.

In the first instance there is a judicial decision which leaves no room for discretional power. In the second instance the EU Authority will be in a position where it has discretional power, because it has to assess if there is a case of infringement and detriment of a third party.

In both instances, the termination of the contract is not necessarily equal to the final termination of the legal relationship, because the procedure that leads to the conclusion of the contract shall be restarted after the termination. In the new procedure the decision of the Court should be taken into consideration and/or the rules of the procedure to conclude a contract should be ensured.

It should be noted, that the draft does not name termination as a mandatory instrument, it is merely an optional solution (Article IV-8 allows the modification of the contract as well).

The termination has no retroactive effect; it only applies to future purposes. (So the legal instrument of *withdrawal* known by the Hungarian civil law cannot be used, not even if the service is otherwise reversible.)

Paragraph (2) of the Article lists the exceptions from this general rule, where the EU Authority can not exercise its right of termination. The draft however does not forbid the possibility of the modification of the contract in such cases.

Paragraph (4) would prescribe an obligation for the EU Authority to compensate the other party for disadvantages, suffered due to reliance on the existence of the EU contract. In this case the party's good faith and fair dealing shall also be assessed. The amount of compensation shall not exceed the benefits achieved by the fulfilment of the original contract – this would mean that the contracting party would receive the money or service set out in the contract, without actually not or only partially fulfilling the contract. (If the main obligations were wholly or mostly completed, there is no place for the termination of the contract.)

In the explanatory statement the drafters note that, this provision seems to be considered as common sense among scholars and they refer to the provisions of two EU Directives on public procurement that regulate the criteria of invalidity and termination of contracts.

The first cited EU legal instrument is Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. Article 2d of this Directive has detailed rules of the instances of ineffectiveness of contracts based on the decision of an independent review body. Such a case is, for example, when the obligation for a prior publication of a contract notice was breached, or for example when the tenderer could not exercise its right to pre-contractual remedy. Furthermore, the Directive allows the Member States to prescribe the cancellation of contractual obligations with a retroactive effect.

The second citation refers to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, more precisely to its Article 73. This – similarly to the rules of the draft – allows the contracting authorities under certain conditions to terminate a public procurement contract.

2.3.2. Renegotiation Due to an Infringement of the Specific Obligations of EU Authorities as Public Authorities

This Article contains the cases of renegotiation of contracts due to specific cases of infringement, which can be requested by any of the contracting parties. It must be highlighted that the draft does not promote automatic invalidity of a contract in the case of the specified cases of infringement, rather it aims to provide the contracting parties with an option to renegotiate the contract.

However, it is also possible to terminate the contract. In this instance the draft does not use the term 'termination' which can lead us to the conclusion that – similarly to the Hungarian law – the 'cancellation' presupposes the joint will and agreement of the contracting parties.

The draft would allow the cancellation in parallel with compensation and also without compensation. There is but one exception when a competitive award procedure was applicable to the contract (Chapter 2, Section 3), because in this case compensation is obligatory.

The explanatory statement attached to this Article highlights that the Article aims to regulate an issue which does not appear commonly in the Member States' law, and is not commonly discussed among scholars and in judicial practice. The drafters think that it would be expedient to implement the French legal formulas in this regard.

2.3.3. Invalidity

Invalidity is a sanction which terminates the exercise of rights and fulfilment of the obligations due to some kind of grace infringement and regarding the services already provided – as a general rule – aims for the restoration of the original state *(in integrum restitutio).*

In Hungarian law invalidity has traditionally two forms, nullity and avoidance. The theoretical difference between the two instruments is, that in case of nullity the contract is invalid by operation of law *(ipso iure),* while in case of avoidance the invalidity can only be determined if the contract has been successfully avoided. It is a common feature of the two instruments, that – taken into consideration that the reason of invalidity was present when the contract was concluded – the invalidity of the contract has a retroactive effect, starting from the outset of the conclusion of the contract *(ex tunc).*

The draft only discusses the issue of invalidity in a laconic manner – taking into consideration that it considers the previous Article as the "general rule" and the determination of invalidity only as a final solution. The draft only considers an EU contract invalid if:

- an equivalent contract between private persons would be considered invalid and thus not binding in accordance with the general principles common to the laws of the Member States; or
- a single case decision of the EU Authority with equivalent content would be nonexistent.

The draft would also set out that each party may request the other party to confirm the invalidity. This solution would allow the application of legal consequences without having a prior authority or judicial decision.

The '*general principles common to the laws of the Member States*' is a phrase used by Article 340 of TFEU, the content of which should be interpreted mainly by the Court.

2.3.4. Unfair Terms

Regarding the unfair contractual terms, the draft only contains a rule that refers to another piece of legislation. According to the explanatory notes to this Article of the related pieces of EU legislation, the role of *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* has to be emphasized. Article 3 of this Directive sets out, that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Annex to the Directive contains a wide illustrative list of the examples of unfair terms.

For example such terms fall under this category, that bear the following subject of effect:

- excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier

to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

In order to properly implement the rules of the Directive, the Hungarian Civil Code adopted a very similar regulation (Articles 6:102–104).

3. EU Contracts Governed by Member State Law

As referred to this fact previously, EU contracts may be under the scope of EU law, or one of the Member States' law or eventually under the scope of a third country's law. Section 3 contains the rules of EU contracts governed by Member State law.

3.1. APPLICABLE LAW

Since in the case of these EU contracts the law of one of the Member States has to be used, Paragraph (2) of this Article sets out that, if an EU contract infringes EU law, this shall not be considered a ground for invalidity or termination of the contract if a similar contract concluded between private parties would be considered valid and binding in accordance with the applicable Member State law. In other words, the parties' freedom to conclude contracts may hinder the principle of primacy of EU law.

Paragraph (3) of this Article refers to Paragraph (2) of Article IV-5. The paragraph referred to sets out, that the applicability of a Member State law to an EU contract cannot relieve the EU Authority of its obligations to comply with its public law obligations in

accordance with the founding treaties and other EU legal instruments. Therefore, if the EU Authority acts otherwise, but the relevant Member State law does not restrict it to exercise its contractual rights resulting from the contract, the EU Authority cannot be exempted from its obligations regarding the conclusion or renegotiation of the contract or regarding compensation.

This provision is similar to one of the general principles known in private law, according to which no one can invoke his own faulting (often illicit) behaviour in order to gain advantage *(nemo suam turpitudinem allegans auditur* – in Hungarian law see: Civil Code Article 1:4). If one of the contracting parties could demand the fulfilment of the contractual obligations from the other party regardless of his faulting behaviour, the principles of good faith and fair dealing – among others – would be infringed.

3.2. CONTRACTUAL CLAUSES FOR COMPLIANCE WITH EU LAW

This Article also aims to protect the rights of the party entering into contract with an EU Authority, and its objective is to prevent the Authority to exercise its public powers in an abusive manner. However, the validity of the related guarantees defined by this Article shall be determined in accordance with the applicable Member State's law instead of the EU law. It shall be regarded in this instance, that the party entering into contract with an EU Authority shall also act in good faith and show fair dealing.

MAIN ABBREVIATIONS

CJEU – Court of Justice of the European Union
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union

REFERENCES

Bánrévy Gábor (2003): *A nemzetközi gazdasági kapcsolatok joga. (Law of International Trade Relationships.)* Budapest, Szent István Társulat. 25–26.

Földi András – Hamza Gábor (2000): *A római jog története és institúciói. (The History and Institutes of Roman Law.)* Budapest, Nemzeti Tankönyvkiadó. 176–177.

Horváth Éva – Kálmán György (2003): *Nemzetközi eljárások joga – Kereskedelmi választottbíráskodás. (Law of International Procedures – Commercial Arbitration.)* Budapest, Szent István Társulat. 54–63.

Kende Tamás – Szűcs Tamás – Jeney Petra eds. (2007): *Európai közjog és politika. (EU Law and Politics.)* Budapest, CompLex Kiadó. 342.

Lábady Tamás (2000): *A magyar magánjog (polgári jog) általános része.* [*General Provisions of the Hungarian Private Law (Civil Law)*]. Budapest–Pécs, Dialóg Campus Kiadó. 137–138.

Lőrincz Lajos (2010): *A közigazgatás alapintézményei. (Fundamental Institutions of Public Administration.)* 3rd edition. Budapest, HVG-ORAC. 78.

Varga Zs. András (2014): Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról. (Preliminary Assessment of the Model Rules on EU Administrative Procedure.) *Magyar Jog,* 2014/10. 545–555.

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THE RENEUAL MODEL RULES – MAIN POINTS OF THE GERMAN DISCUSSION

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1. INTRODUCTION

The "ReNEUAL Model Rules on EU Administrative Procedure" (hereafter referred to as ReNMR) have received special attention in Germany and led to an intense discussion, in regards to both: the relation between the German and European administrative procedure law and the various aspects imminent in the system of the German procedure law. On 5 and 6 November 2015, a conference took place at the highest German administrative court, the Federal Administrative Court – or "Bundesverwaltungsgericht" in Leipzig. On this occasion the ReNMR were presented in various lectures to the German expert audience. The conference presentations are compiled in a conference transcript.

The following contribution shall give an overview of the perceived value of the ReNMR and the discussion around this model in Germany in three parts: firstly, we will give a brief overview of the German administrative procedure law. We will continue with some remarks on the discussion of the ReNMR in Germany and – thirdly – we shall close with a few comments on the possible effects of the Model Rules on Germany.

2. OVERVIEW OF THE GERMAN ADMINISTRATIVE PROCEDURE LAW

To begin, we will describe very briefly the landscape of the German administrative procedure law. Without knowing the role and significance of administrative procedure law within the German legal system, the German discussion on ReNEUAL cannot be understood properly.

International administrative science distinguishes between different types of administrative culture, Germany belonging to the so-called legalistic type of administrative culture.[1] This means that all action of officials and their decisions are strongly determined and controlled by legal norms and administrative provisions. The essential nature of the legalistic administrative culture means that by definition administrative procedure law has a strong significance. Accordingly, in Germany, the legal regulation of administrative procedures is differentiated horizontally and vertically:

- The horizontal perspective is firstly divided into the so-called three pillars of administrative procedure law,[2] and secondly into general and specific procedural law.[3] The first two of the three pillars cover codification of two specific policy areas; the tax administration[4] and the social administration.[5] The third pillar consists of the codification of procedural law for all other administrative areas; it is the so-called general administrative procedure law.

1 See König 2014, 13 (19–22).
2 Cf. Schmidt-Assmann 2008, § 27 (12).
3 Ziekow 2006, 247.
4 Fiscal Code.
5 Book X of the Social Insurance Code.

This general administrative procedure law is stipulated in the Administrative Procedure Acts of the Federation and of the 16 federal states, the so called "Länder". This article will refer only to this general administrative procedure law.

- The second horizontal differentiation is related to the distinction between general administrative procedure law and specific administrative procedure law. In addition to the provisions of the Administrative Procedure Act (APA), many specific administrative laws, for example the environmental law, include special provisions related to administrative procedure. This special administrative procedure law takes precedence over the APA.[6] However, the specific procedural provisions never provide for a comprehensive regulation of the administrative procedure in full; so for issues of administrative procedure that are not covered therein, the APA applies.

The vertical differentiation relates to the federal structure of Germany: the Federal Government and the 16 Länder. As per the German constitution, the Federal Government and the Länder have separate administrative functions.[7] This is why the Federal Government and each of the federal states have their own particular Administrative Procedure Acts. Nonetheless, on a voluntary basis, the Federation and the states develop their Administrative Procedure Acts via "the concept of simultaneous legislation" in parallel with nearly identical general laws, thereby easing the application of the law and avoiding any divergent developments.

Because of this horizontal and vertical differentiation of German administrative procedure law, from the beginning, the legal discussion is characterized by the comparison of the sectoral and federal legal subsystems, the necessity to coordinate between these partial legal orders and, in addition, is shaped by the need to examine whether any given subsystem should adopt innovations from another subsystem.

From a vertical perspective, the EU and Germany both face the complex situation of having two layers, a superordinate one in the Union or the Federation and a subordinate layer of Member States. Horizontally they both face an intricate mosaic of specific regulations and gaps not covered by specific regulations. Therefore, the approach of the ReNMR is very familiar to the German way of thinking on procedural law because the ReNMR also follow an approach of 'innovative codification'.[8] The Model Rules bring together in one source numerous existing principles which are usually scattered across different laws and regulations as well as in the case law of courts.[9]

6 Ziekow 2013, § 1 margin ref. 17–20.
7 Cf. Art. 83 sqq. German Basic Law.
8 ReNEUAL Model Rules – 2014 online publication, 2014, Introduction to Book I (4), (17).
9 ReNEUAL Model Rules – 2014 online publication, 2014, Introduction to Book I (4), (17).

3. DISCUSSION OF THE RENEUAL MODEL RULES IN GERMANY

3.1 General Notes

As already mentioned, the approach of the ReNMR corresponds to the development of German administrative procedure law to a great extent. The senior official responsible for the further legal development of the APA has concluded that the Model rules "basically meet German requirements".[10] The idea that in a multi-level system, the administrative process of the supranational level, that is the EU administration, is bound to codified legal rules, and that the other levels, here the Member States, have their own administrative procedure rules corresponds to the German tradition. The President of the German Federal Administrative Court has connected these to the idea of competition, the exchange of arguments, and learning from the best solutions,[11] which all is deeply rooted in the German federalism. For a long time, these ideas have been a driving force for the legal development in Germany. The principle is to analyse the different legal subsystems and through comparative analysis identify congruent components and extract the best elements in order to establish an optimal system on a higher level, one which subsequently establishes a set of propositions to guide the further development of the different legal subsystems. This approach follows the "counterflow principle".

It is therefore no surprise that in Germany the ReNMR were unanimously received very positively in both science[12] and legal practice.[13] Criticisms and resulting debate are primarily limited to individual questions. Therefore, in the following, we will give an overview of the key aspects of the discussions within Germany on the single books of the ReNMR.

3.2. Aspects of the Single Books

3.2.1. Preamble and Book I (General Provisions)

In regard to the relation between EU law and Member State law the ReNEUAL drafters opted for an asymmetric scope of application, generally limiting it to the EU authorities while excluding administrative actions of the Member States' authorities.[14] To the Member States the Model Rules are applicable only if sector-specific law renders them applicable[15] or if they apply as defined in Articles V-1 and VI-1.[16]

10 Cf. Schmitz 2016, 56 (61).
11 Cf. Rennert 2016a, 69 (71).
12 Cf. Augsberg 2017, 1 (3).
13 Cf. Rennert 2016a, 69 (72); Stüer 2016, 100 (105).
14 Cf. ReNEUAL Model Rules – 2014 online publication, 2014, Explanations to Book I (4).
15 Article I-1 (2) MR.
16 Article I-1 (3) MR.

As far as Member State's law provides for discretion concerning the concrete design of administrative procedures by the competent authorities or leaves normative gaps, Article I-3 reminds Member States' officials that they can find guidance in the ReNMR. Thereby, officials can set up and apply their procedures under their own Member State law yet in accordance with European best practices.[17]

The core elements of these application frameworks of the Model Rules correspond with the relationship between the administrative procedure acts of the Federation and the Länder in Germany. However, concerns have been voiced with regards to the principle of legal clarity. The recommendations of Articles 1 to 3 ReNMR that Member State authorities may use these model rules as guidance when implementing Union law in accordance with their national procedural law may risk creating an unclear blend of legal systems, a "hybrid law".[18] Going even further, the concern has been expressed that this might be an attempt to cover up the lacking competence of the EU for national administrative processes and bring about a convergence of the national administrative legal systems.[19] On the other hand, voices have also been raised to point out that such convergence is not enforced, it is but a mere offer.[20]

3.2.2. Book II (Administrative Rulemaking)

Book II addresses rule-making procedures by EU authorities acting in an executive capacity. As a result of its narrow interpretation of administrative procedure in § 9 APA, Germany lacks a general regulation on administrative rulemaking in its Administrative Procedure Act. Some regulations comparable to Book II of the Model Rules can be found in the joint rules of procedure of the federal ministries (GGO). Yet, these joint rules of procedure do not have the binding effect of an act.

While the legal regulation of administrative rulemaking procedures in Germany has long been discussed, it has not been regarded as being necessary.[21] Still, the Model Rules in Book II are seen as a reasonable proposition,[22] just not yet fully convincing.[23] Especially the central focus given to consultation and participation is seen as too narrow.[24] Thus, criticism has been voiced over:

- the absence of regulations on the course of procedures, especially the initiation and the end of the rulemaking procedure;[25]

17 ReNEUAL Model Rules – 2014 online publication, 2014, Explanations to Book I (4).
18 Cf. Ellerbrok 2016, 6.
19 On bottom-up convergence in the EU cf. for example Widdershoven 2014, 5 (9).
20 See Rennert 2016a, 7.
21 See Schmitz 2016, 56 (62).
22 Cf. Ruffert 2016, 111 (111).
23 Cf. Schmitz 2016, 56 (62–63).
24 Cf. Wallrabenstein 2016, 118 (125).
25 Cf. Wallrabenstein 2016, 118 (119).

- over the absence of material principles – such as those named in the preamble: equal treatment, legal certainty, fairness, objectivity and others[26]
- and to the absence of regulations on how to react to illegal acts.[27]
- Further concerns were expressed regarding the openness of participation procedures and whether regulations to prevent the capture of the rule-making procedures by stakeholders might be useful.[28]

3.2.3. Book III (Single Case Decision Making)

Moving on to Book III, this book is concerned with single case decision making, which is central to any regime of administrative procedure.[29] One might generally notice that many innovations found in Book III have to do with communications and especially new means of communication, ones which were not present in the 1970s when the German Procedure Act came into being but which have now found their way into the Procedure Act in recent years.[30]

Book III is regarded as a largely successful effort at systematization. The discussion mainly revolves around details. Nonetheless there are discussions on whether the use of too many ambiguous terms in the Model rules may be detrimental to the principle of legal transparency.[31]

From the German perspective, Art. III-8 (1) (e) ReNMR is regarded as having unnecessarily weakened the position of the citizen. Pursuant to this rule, every party has the right to be represented by a lawyer or some other person of their choice who has legal capacity.[32] According to the German Administrative Procedure Act, however, every citizen may arrange to be represented by any person whom he or she trusts, even if this person is not legally trained. [33]

One quite general point of criticism on the part of German scholarly jurisprudence was the omission of general rules for the exercise of discretion by the administration.[34] German scholars also noted the omission of binding indications as to the sanctions of non-compliance,[35] and, in relation to this, regulations on the validity of an act and on the cure or irrelevance of defects in procedure and form.[36] The drafters decided not to incorporate non-compliance rules as they thought that EU courts as well as national courts were managing just fine to

26 Cf. Wallrabenstein 2016, 118 (119–120).
27 Cf. Wallrabenstein 2016, 118 (120–121).
28 Cf. Ruffert 2016, 111 (117).
29 ReNEUAL Model Rules – 2014 online publication, 2014, Introduction to Book III (1).
30 For more details see Siegel 2017, 24 (24).
31 Cf. Kraft 2016, 154 (157).
32 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book III (37).
33 § 14 APA: Authorised representatives and advisers.
34 Cf. Fehling 2016, 143 (152).
35 Cf. Fehling 2016, 143 (153); Kraft 2016, 154 (161).
36 Cf. Fehling 2016, 143 (153).

adjudicate the appropriate sanctions for non-compliance with the law.[37] Within Germany there are doubts about the sufficiency of this approach.[38]

3.2.4. Book IV (Contracts)

From the perspective of German administrative law, the most exciting – in a positive sense – book of the Model Rules is Book IV on contracts.[39] Member States 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 both public and private law elements.[40] This heterogeneity makes it quite clear that there are many differences between Book IV and the corresponding German law provisions. However, it should be mentioned that some ideas for a renovation of the German system that have been discussed for over 15 years did become part of the Model Rules.[41]

The decisive factors, as far as the Model Rules are concerned, are the contracting parties and their legal nature, not the contents of the contract.[42] Thus the Model Rules do not recognize any distinction between public and private law. Germany follows a very different concept. Whether or not a contract falls within the scope of administrative law is determined in Germany by the subject of the contract. Administrative contracts are only those whose subject is a public duty or right.[43] Other contracts, regardless of the legal nature of their parties, fall under civil law and are covered largely by provisions of the German Civil Code. Most German scholars would welcome the regulation of all administrative contracts under an Administrative Procedure Act irrespective of whether these contracts and their parts belong to public or private law.[44]

The focus of German law on the substantive admissibility of a public contract has lead the provisions to be called a collection of safeguards against the abuse of state power.[45] The structure of the ReNEUAL Model Rules is, by contrast, based on the idea of a rough division of the 'life' of a public contract into three phases, of which the core elements are usually common to all legal systems. These are:

1. An administrative procedure leading to the conclusion of a public contract (which is governed by administrative procedure and public procurement rules)

37 Cf. ReNEUAL Model Rules – 2014 online publication, Introduction to Book I (18).
38 Cf. Fehling 2016, 143 (153).
39 Cf. Rennert 2016b, 19 (22).
40 Cf. Stelkens 2016, 165 (166).
41 Cf. Stelkens 2004, 193–227; Ziekow 2001b, 114–197.
42 See Art. IV-1 ReNMR.
43 Cf. § 54 APA: "legal relationship under public law".
44 Cf. Burgi 2016, 182 (190).
45 Cf. Ossenbühl 1979, 681 (684).

2. The conclusion of the contract (which is governed by the rules establishing the prerequisites for the validity of a contract and the right to invoke invalidity), and
3. The execution and end (expiration) of the contract.[46]

This distinction between several phases of the contract is maintained also where the Model Rules deal with infringements of the law.[47] This idea was highly valued by German commentators. There was praise for the regulation that stipulated that in the case of an error at the first stage the authority may terminate the respective administrative decision on the first stage, while not alone or automatically impacting the second stage.[48] Instead the administration is simply obliged on the second stage to react by amending or terminating the contract (referred to in Article IV -8 (4) and Article IV-31 et sec.).[49] This approach of graduating the consequences of errors makes it possible to take into consideration the legitimate interests of the possibly trustful contract partner.[50] It also allows for errors to be declared as irrelevant in cases where they did not have any effect on the conclusion of the contract – the idea of error causality in the scope of procedural errors, which is controversially discussed in Germany.[51]

In the case of deficiencies related to contents of the contract, German law only recognizes two possibilities: Either the contract is void, because one of the grounds for invalidity exhaustively listed in the law is applicable, or the contract is, although illegal, legally effective[52] and the obligations therein are to be met by the contracting parties. Only on the ground that the circumstances which determined the content of the agreement have altered (§ 60 APA, comparable to Art. IV-28 ReNMR) legal consequences as the right to claim for an adaptation, or the right to terminate the agreement is provided.[53]

From the German perspective, a real innovation, therefore, constitute the substantive legal provisions of the Model Rules on the fulfilment of Union law treaties in Article IV-32 and the substantive legal right for adaptation contained therein, with view on the legal consequences of illegal administration contracts.[54] This solution seems suitable for coping with the conflicts between the principle of lawfulness and legality of administrative action on the one hand, and the core principle of German law "pacta sunt servanda", on the other hand.[55]

The ReNEUAL draft breaks new ground in that Article IV-6 elaborates on the general terms of contracts and the necessary adaptations to the rulemaking procedure of Book

46 ReNEUAL Model Rules – 2014 online publication, Introduction to Book IV (5).
47 Cf. Rennert 2016a, 69, (72).
48 Cf. Rennert 2016a, 69, (72).
49 Cf. Rennert 2016a, 69, (72).
50 Cf. Rennert 2016a, 69, (72).
51 Cf. Rennert 2016a, 69, 72.
52 Cf. Ziekow 2013, § 59 margin ref. 2.
53 Cf. Burgi 2016, 182 (190).
54 Cf. Burgi 2016, 182 (188).
55 Cf. Burgi 2016, 182 (188).

II; the reason it does so is that in public contract law the elaboration of general terms of contracts may serve as a substitute for administrative rulemaking.[56] This is expected to ensure compliance in the drafting phase with the constitutional principles of participatory democracy and transparency as well as with the principles of EU administrative law – specifically participation and the obligation of full and impartial assessment of all relevant facts (the so-called 'duty of care').[57] German law, at least in the German Administrative Procedure Act, contains no special provisions for general terms of contracts. According to the general rule the respective provisions of the Civil Code for general terms of contracts have to apply.[58] An introduction of rules on general terms of contracts could also make things easier for the German administration, especially when there is a power imbalance between the parties.[59]

3.2.5. Books V and VI (Mutual Assistance, Administrative Information Management)

Book V contains regulations on mutual assistance such as exchange of information, conducting inspections and serving documents. It is supplemented by Book VI on Administrative Information Management.[60] Both books are perceived as an innovative and reasonable approach for legal recording of exchanges between administrative authorities. The inclusion of EU institutions in a uniform EU-wide rule on data protection was particularly welcomed.[61]

Including data protection rules into the general provisions on EU administrative law can contribute to the overall simplification of the legal system in that sector-specific law. Integrating data protection rules might, instead of re-regulating data protection rules, in future enable to refer to the general rules on administrative procedure.[62] On the other hand, it is precisely because of this issue, which relates to legal transparency, that the relationship between the General Data Protection Rules, to be fulfilled by the national authorities, and the Model Rules, to be fulfilled by the EU, have been criticized. Such a fragmentation of the data protection law would not be advisable.

There are doubts as to whether Book VI is currently at the point where the regulations therein could really be adopted.[63] Book VI addresses a new unconventional form of information management and cooperation, as opposed to Book V which covers conventional forms of mutual assistance.[64] Nonetheless, it might be possible to use its regulations as some kind of "best practice" models that could be introduced via sector-specific regulations.[65]

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56 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book IV (18).
57 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book IV (19).
58 Cf. Ziekow 2013, § 62 margin ref. 13.
59 Cf. Burgi 2016, 182 (191).
60 Cf. Hofmann–Schneider 2015, 29.
61 Cf. Caspar 2016, 209 (213).
62 ReNEUAL Model Rules – 2014 online publication, Introduction to Book VI (8).
63 Cf. Schneider 2016, 197, 198–199.
64 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book V (5).
65 Cf. Schneider 2016, 197 (199).

4. POSSIBLE EFFECTS OF THE RENEUAL MODEL RULES ON GERMANY

In conclusion, we would like to summarize some effects which may come about with the ReNEUAL Model Rules. From the German perspective, it would be welcomed if the Model Rules evolved into a general law of EU-administration.[66] The chances of this being implemented, however, seem to me as not being particularly high. A range of issues still to be addressed, from the legal basis in the EU treaties to the imperative of legal clarity, which, from the German perspective, still needs some optimization, as I have stated on numerous occasions.

Irrespective of the subject of normative implementation, there is the question of the relationship between the ReNMR and the administrative procedure laws of the member states and their further development. The Member States are sovereign states with a right to administrative autonomy. Throughout its history, the EU has assumed that a variety of national administrative systems is legitimate and compatible with membership and that different arrangements can do equally well in implementing EU legislation.[67] The Member States' preference for administrative autonomy has to be balanced against the Union's need for effective and uniform implementation.[68]

Hardly anybody in Germany who deals with administrative procedure law believes that national procedural law will be substituted with a uniform EU administrative procedure law.[69] It is rather a question of possible impacts and spill-over effects that the Model rules could have on national procedural law.

From the German perspective the ReNMR are in any case, whether they become EU law or not, an enormously important source of impetus for the contemplation of necessary, or at least reasonable, advancements in German administrative procedure law. The enormous work that has gone into the comparison of national legal systems of procedural law and the evaluation of sector-specific EU rules, as well as the occasionally innovative propositions for regulations, constitute a source of material for background and discussion that previously was not available. The ReNMR could be used as a toolbox, like the common frame of reference for European private law,[70] which might then feed into the diverse national legal systems.

Of course, in theory it would be possible for the authorities of the Member States to apply the ReNMR when acting in the scope of Union law, and to apply their national codification in purely domestic cases. However, in practice such a division is hard to make in many areas, for instance in the area of environmental law, where some decisions are in the scope of Union law – because they implement a Union environmental standard – while others

66 Cf. von Danwitz 2016, 247 (254).
67 Cf. Olsen 2003, 506, 513–514.
68 Cf. Olsen 2003, 506 (514).
69 Schwarze 2016, 261 (265).
70 Timmermans 2013, 7.

are purely domestic.[71] It is not realistic to expect Member State officials to observe one set of administrative processes for the making and implementing of EU law and another for the making and implementing of domestic law.[72] This is why the intended guidance for the interpretation of national administrative legal systems has to be looked at quite critically.

5. CONCLUSION

To sum up: the ReNEUAL Model Rules were very well received in Germany. They are considered as an extremely beneficial contribution to debates and discussions around procedural law. Hereby, the ReNMR can initiate a competition of ideas about procedural law that will continue well into the future.

[71] Widdershoven 2014, 5 (14–15).
[72] Bermann 2010, 595 (601).

REFERENCES

Research Network on EU Administrative Law (ReNEUAL): *ReNEUAL Model Rules on EU Administrative Procedure – 2014 online publication,* 2014. Available at: www.reneual.eu/ (Downloaded: 21.05.2017.)

Augsberg, Steffen (2017): Verwaltungsverfahrensrecht der Europäischen Union – Der Kodifikationsentwurf des "Research Network on European Administrative Law" in rechtsvergleichender Perspektive. Einige Anmerkungen aus deutscher Sicht. *Die Verwaltung,* Vol. 50, No. 1. 1–22.

Bermann, George A. (2010): A Restatement of European Administrative Law: Problems and Prospects. In Rose-Ackerman, Susan – Lindseth, Peter L. eds.: *Comparative Administrative Law.* Cheltenham (UK) – Northampton (MA, USA), Edward Elgar Publishing Limited. 595–605.

Burgi, Martin (2016): Buch IV des ReNEUAL-Musterentwurfs aus der Perspektive der europäischen Verwaltungsrechtswissenschaft. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 182–192.

Caspar, Johannes (2016): Zwischen effizienter Verwaltung und Schutz des informationellen Selbstbestimmungsrechts – Stellungnahme zu Buch V und Buch VI ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 209–213.

Ellerbrok, Torben (2016): *The ReNEUAL Rules on EU Administrative Procedure in Discussion.* Available at: www.ius-publicum.com/repository/uploads/02_02_2016_18_22-ELLERBROK.pdf (Downloaded: 15.07.2017.)

Fehling, Michael (2016): Buch III des ReNEUAL-Musterentwurfs aus der Perspektive der europäischen Verwaltungsrechtswissenschaft. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 143–153.

Hofmann, Herwig C. H. – Schneider, Jens Peter (2015): *Administrative Law Reform in the EU: the ReNEUAL Project [new].* Available at: https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_hofmann_schneider_reneual.pdf (Downloaded: 15.07.2017.)

König, Klaus (2014): Verwaltungskultur – typologisch betrachtet. In König, Klaus – Kropp, Sabine – Kuhlmann, Sabine – Reichard, Christoph – Sommermann, Karl-Peter – Ziekow, Jan eds.: *Grundmuster der Verwaltungskultur.* Baden-Baden, Nomos. 13–28.

Kraft, Ingo (2016): Der ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht: Anmerkungen eines Praktikers zu Buch III. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 154–162.

Olsen, Johan P. (2003): Towards a European Administrative Space. *Journal of European Public Policy,* Vol. 10, No. 4. 506–531.

Ossenbühl, Fritz (1979): Die Handlungsformen der Verwaltung. *Juristische Schulung,* Vol. 19. 681–687.

Rennert, Klaus (2016a): ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht aus der Sicht des BVerwG. *Deutsches Verwaltungsblatt,* Vol. 69, No. 2. 69–72.

Rennert, Klaus (2016b): Anstelle eines Grußwortes: Die Sicht des Bundesverwaltungsgerichts. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 19–24.

Rennert, Klaus (2016c): *Verwaltungsgerichtsbarkeit im europäischen Kontext*. Available at: www.bverwg.de/medien/pdf/rede_20161103_wien_rennert.pdf (Downloaded: 15.07.2017.)

Ruffert, Matthias (2016): Administrative Normsetzung als Verwaltungstätigkeit in Europa. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 111–117.

Schmidt-Assmann, Eberhard (2008): Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht. In Hoffmann-Riem, Wolfgang – Schmidt-Assmann, Eberhard – Vosskuhle, Andreas eds.: *Grundlagen des Verwaltungsrechts.* Vol. II. München, C. H. Beck Verlag, 2nd edition. § 27.

Schmitz, Heribert (2016): Der ReNEUAL Musterentwurf aus nationaler Perspektive: Deutschland. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 56–64.

Schneider, Jens-Peter (2016): Amtshilfe und Informationsmanagement als Gegenstände der Bücher V und VI des ReNEUAL-Musterentwurf. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 197–208.

Schwarze, Jürgen (2016): Der ReNEUAL-Musterentwurf als Beitrag zur europäischen Verwaltungsrechts In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 261–265.

Siegel, Thorsten (2017): Automatisierung des Verwaltungsverfahrens – zugleich eine Anmerkung zu §§ 35a, 24 I 3, 41 IIa VwVfG. *Deutsches Verwaltungsblatt,* Vol. 70. 24–28.

Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds. (2016): *ReNEUAL Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. München, C. H. Beck.

Stelkens, Ulrich (2004): Von der Nichtigkeit zur Vertragsanpassungspflicht – Zur Neuordnung der Fehlerfolgen öffentlich-rechtlicher Verträge. *Die Verwaltung,* Vol. 37. 193–227.

Stelkens, Ulrich (2016): Vertragsverfahren als Gegenstand von Buch IV des ReNEUAL-Musterentwurfs. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 165–181.

Stüer, Bernhard (2016): ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht. *Deutsches Verwaltungsblatt,* Vol. 69. 100–106.

Timmermans, Chistiaan (2013): *Developing Administrative Law in Europe: Natural Convergence or imposed Uniformity.* Available at: www.aca-europe.eu/seminars/DenHaag2013/Final_Timmermans.pdf (Downloaded: 15.07.2017.)

von Danwitz, Thomas (2016): Der ReNEUAL-Musterentwurf: Die weiteren Perspektiven. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 247–254.

Wallrabenstein, Astrid (2016): Konsultation und Partizipation in administrativen Normsetzungsverfahren und die Vorgabe des Europäischen Verfassungsrechts. In Schneider, Jens-Peter – Rennert, Klaus – Marsch, Nikolaus eds.: *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht.* Tagungsband. 118–125.

Widdershoven, Rob J. G. M. (2014): Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity. *Review of the European Administrative Law,* Vol. 7, No. 2. 5–17.

Ziekow, Jan (2001): Verankerung verwaltungsrechtlicher Kooperationsverhältnisse (Public Private Partnership) im Verwaltungsverfahrensgesetz. In *Verwaltungskooperationsrecht (Public Private Partnership).* Berlin, ed. Bundesministerium des Innern, part II.

Ziekow, Jan (2006): Allgemeines und bereichsspezifisches Verwaltungsverfahrensrecht. In Geis, Max-Emanuel – Umbach, Dieter C. eds.: *Planung – Steuerung – Kontrolle, Festschrift für Richard Bartlsperger zum 70. Geb.* Berlin, Duncker & Humblot. 247–260.

Ziekow, Jan (2013): *Verwaltungsverfahrensgesetz.* Stuttgart, Kohlhammer, 3rd edition.

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JUDICIAL EXPERIENCES – EU PROCEDURAL LAW ASPECTS[1]

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[1] The text has been edited with the contribution of dr. Kintzly Péter, Supreme Court secretary, assistant to the President of the Supreme Court.

1. INTRODUCTION

On 9 June 2016, the European Parliament adopted a resolution for an open, efficient and independent European Union administration.[2] In this resolution, Parliament calls the Commission to come forward with a legislative proposal, as well as to consider the annexed proposal made by Parliament.

In the preamble to the above resolution, Parliament pointed out that lacking coherent, codified rules of administrative procedure, citizens of the European Union are unable to understand and enforce their rights in procedures before EU bodies and authorities. Accordingly, Parliament adopted model rules on administrative procedure which shall apply together with provisions of EU law relating to specific administrative procedures. These model rules aim to implement the fundamental principles of procedural law set by different sources of EU law, including the case law of the Court of Justice.

Proposals, which had been made by experts before the present document was adopted, articulated the vision that European administrative law will necessarily lead to the Europeanisation of national administrative laws, so harmonisation of the terms of the two systems is to be expected, which can be realised primarily for the general principles governing administrative law. At conferences held during the period of preparatory research, a concept gained ground that the content of general principles governing the administrative law of the Member States should be defined at the level of EU legislation. In my opinion, this approach is not worth supporting, as the scope of functioning of the EU administration differs significantly from the types of cases handled by the Member States' administrative authorities. In the European Union, emphasis is placed on competition law, trademarks, consumer protection, public procurement law, state assistance and access to documents, while the national administrative bodies handle building law, social law matters and tax cases. Different fields of law demand obviously different views, even in relation to the content of general principles. That is why I decided to give an overall picture in my presentation of the contents given by the case law of the Curia of Hungary to the general principles acknowledged by EU administrative procedure law. For the sake of exactness, I am going to present the judgments interpreting general principles together with the facts of each case.

2. THE RIGHT TO FAIR PROCEEDING

In this case, which was completed by the judgment of the Curia in May 2015,[3] the plaintiff's previously-obtained waste-processing permit expired in 2009, without having been

[2] European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610[RSP]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0279+0+DOC+PDF+V0//EN (Downloaded: 15.07.2017.)

[3] The Curia of Hungary, Case No. Kfv.III.37.162/2015/3.

renewed. In 2010, as a result of supervision review, the regional environmental authority established and imposed fines both for illegal waste-processing and air pollution. The second-instance authority approved the findings of the first-instance decision and raised the amount of the fine.

The plaintiff filed an action against the second-instance decision, requesting its annulation. The court of the first instance abolished the decision and ordered the second-instance authority to conduct a new procedure, as it had not examined whether the plaintiff's activity could qualify as a minor violation of law. In the aftermath, the second-instance authority instructed the first-instance authority to initiate new proceedings.

In the new proceedings, the first-instance authority imposed the same amount of fine, pointing out that the plaintiff's activity was not to be considered as a minor violation of law, as an air-pollution fine had earlier been imposed. It indicated also the exact provisions of law serving as a basis for its decision. The second-instance authority approved the first-instance decision.

The plaintiff filed an action against the new second-instance decision. He stated that the second-instance authority itself should have conducted the new proceedings, in accordance with the court order. He argued also that the fines had been imposed after the expiration of the statutory period of limitation, which resulted in the violation of his right to fair proceedings.

By its judgment, the administrative court abolished both decisions. It pointed out that even though the statutory period of limitation did not apply to repeated proceedings, the fact that no substantial measures were taken for 15 months was to be considered definitely as a violation of the right to fair proceedings.

The second-instance authority, as defendant, lodged a extraordinary appeal on points of law to the Curia, arguing that even in case of respecting the principle of fair proceeding, the same decision would have been made, and thus its violation did not have any effect on the merits of the case.

The Curia established, with reference to its earlier uniformity decision, that violation of procedural law may also lead to abolishment, if it is substantial, i.e. it affects the merits of the case and cannot be remedied by the court. In this respect, the right to fair proceeding is a principle that serves as an auxiliary for the interpretation of specific legal norms and forms only exceptionally a direct cause of action. In this latter case, although there is no relation of cause and effect between the violation of a procedural norm and the merits of the case, the enforceability of the party's rights has been curtailed to such an extent that it qualifies as a substantial violation of procedural law. In the present case, the statutory deadline bound the authority in an ex officio procedure, but did not create rights for the party. Accordingly, a decision made after the expiration of a statutory deadline does not lead to substantial and direct violation of the party's rights, especially in case of imposing fines.

Considering the above, the Curia accepted the defendant's claim and abolished the decision of the administrative court, on the basis that it had wrongly referred to the violation of the right to fair proceeding.

3. LAWFUL JUDICIAL DISCRETION

In the following case, closed by the judgment of the Curia in April 2016,[4] the consumer protection authority imposed a fine on an electric power supplier, as it had stopped the supply of power, though the consumer had made an overpayment and had not actually been notified on bills due for payment. The supplier argued that it had notified the consumer by mail which had been returned as 'unclaimed'. The first-instance authority pointed out that the supplier's violation of law had concerned the consumer's fundamental rights. The supplier appealed against the decision, but the second-instance authority increased the amount of fine, explaining that the supplier stopped the supply of power within 60 days counting from the due date and violated the consumer's right to information, by failure to notify her in the first reminder on the discounts available for socially disadvantaged consumers.

The power supplier filed an action against the second-instance decision, requesting the abolishment thereof and a reduction of fine. It represented that it had abided by the statutory deadline and had stopped the supply of power after 60 days. The supplier disputed also the authority's exercise of discretion, as it had failed to consider all the relevant facts when imposing the fine.

The administrative court basically accepted the plaintiff's arguments and altered the second-instance decision by decreasing the amount of fine. The court established that the supplier met the statutory deadline, but failed to comply with the lawful duty to inform the consumer on the available discounts and the possibility to register as a 'consumer to be protected'. Considering all circumstances of the case, the court found that the authority had exercised its discretion inconsistently and, as the facts to be considered had duly been revealed, remedied the violation of law by decreasing the amount of the fine. The court considered the small number of the consumers concerned (only one) and the lack of any advantage on the plaintiff's side arising from the violation of law as mitigating circumstances.

The second-instance authority, as defendant, filed an extraordinary appeal on points of law to the Curia, explaining that it had considered all the relevant circumstances and both the first and second-instance decisions detailed the reasons serving as a basis for exercising its discretionary power.

The Curia allowed the defendant's appeal, underlining that decisions on fines made at the discretion of an administrative authority may be subject to judicial reconsideration only in case of express violation of law. Otherwise, reconsideration of facts and circumstances, once evaluated by the authority, is not allowed. The consumer protection authority imposed the fine with respect to the relevant legal provisions and gave a detailed reasoning from which the aspects of consideration are identifiable. The administrative court, however, drew incorrect conclusions from the relevant legal provisions, because instead of establishing

[4] The Curia of Hungary, case No. Kf.III.37.083/2016/4.

the violation of a specific legal norm, it judged only that the fine had been exaggerated. In addition, circumstances considered by the administrative court as mitigating ones were partially evaluated by the authority earlier, partially unable to qualify as mitigating (e.g. fulfilling obligations set by law, or the lack of any advantage arising from a violation of law). The Curia also pointed out that in administrative cases, judicial review is restricted to the points of law, so only unlawful administrative acts can be abolished or altered.

In accordance with the above reasoning, the Curia abolished the administrative court's decision and rejected the plaintiff's claim.

4. NON-DISCRIMINATION RULE

The next case was ruled by the Curia in May 2010.[5] Fines were imposed on two Hungarian online media providers for advertising foreign gambling companies on their websites.

Both media providers filed an action against the administrative decision, representing that the freedom to provide services applied also to Gibraltar pursuant to the Treaty establishing the European Community, and they had been providing their services within the territory of the European Union. The plaintiffs referred to the primacy of European Union law and the direct effect of the Treaty, and pointed out also that prohibition of advertising service providers settled in the Community qualifies as restriction of the freedom to provide services and, as such, must fulfil the requirements of necessity and suitability in accordance with the test implemented by the European Court of Justice. According to their standpoint, the measure taken by the Hungarian authority did not meet these requirements, as it was obviously discriminatory.

The court of the first instance decided in favour of the plaintiffs, underlining that pursuant to Article 49 of the Treaty of Rome, the defendant should have ignored the discriminatory provision of national law, as it was contrary to Community law.

The defendant filed an extraordinary appeal on points of law to the Curia, requesting the abolishment of the first instance decision. The authority argued that the aim of the administrative procedure was not to restrict the provision of services, but to decide the question whether the advertising activities were in accordance with national provisions of law. It added also that fines were imposed in relation to the advertisements published on the websites operated by the media providers (and not by the gambling companies). The defendant represented furthermore that one of the online gambling companies is based outside the European Community.

The Curia refused the defendant's appeal. It accepted the legal arguments presented by the court of first instance, according to which the respective provision of the Act on Business Advertising violates the non-discrimination rule, as it prohibits only advertisements related to gambling games organised abroad, while it does not imply any prohibition

[5] The Curia of Hungary, case No. Kfv.IV.37.757/2009/6.

related to gambling games organised in Hungary. The Curia referred also to ECJ case law, underlining that the prohibition in question realises a restriction of the freedom to provide services, as it affects the services provided by the gambling companies and it is suitable for restricting them directly and actually. In addition, the Curia underlined that the provision of services may be subject to restrictions by Member States for public-order, public-security, public-health purposes. Nevertheless, even these restrictions should abide by the non-discrimination rule.

As to the defendant's statement concerning the head office of one gambling company, the Curia referred to its own case law, confirming that new circumstances which were not subject of earlier proceedings cannot be referred to in the revision procedure before the Curia.

5. EQUAL TREATMENT

A very interesting case was ruled by the Curia in October 2016,[6] where the grand hall of a restaurant was used in the evening hours by a circle of friends, organised by a natural person who made a table reservation. The plaintiff entered the restaurant that evening and wanted to sit in the grand hall. The manager of the restaurant, knowing that there was bad blood between the plaintiff and the organiser of the company at table, provided catering services for him in another hall. Therefore, the plaintiff made a complaint to the consumer protection authority for violation of equal treatment, which was then refused by both the first and second instance authorities.

The plaintiff filed an action against the administrative decision, arguing that there was no private event in the restaurant at that night, so he should have been served in the hall in which he demanded.

The administrative court refused the plaintiff's action and accepted the authority's legal arguments, according to which disputes of a personal nature do not fall within its competence and even if provisions of the Act on Equal Treatment applied to the organiser, the restaurant manager's conduct would qualify as reasonable, and not as a violation of equal treatment.

The plaintiff filed an extraordinary appeal on points of law to the Curia, explaining that the defendant failed to fulfil its duty to reveal the facts of the case, and requested the abolishment of the judgment and the administrative decisions equally.

The Curia, however, rejected the plaintiff's appeal, underlining that it is considered in particular as violation of equal treatment, if the provision of services or the sale of goods is denied or neglected by reason of a certain characteristic set by law, or if labels or signs are put indicating that certain individuals are excluded from the provision of services or the sale of goods. It was clear that the manager had not denied or neglected the provision

[6] The Curia of Hungary, case No. Kfv. III.37.519/2016/6.

of services in the restaurant, and that was neither disputed by the plaintiff. As the plaintiff agreed to be served in another hall and no findings were recorded about any negative consequences to be applied by the manager in case the plaintiff would not accept his offer, the acceptance itself excludes any violation of equal treatment.

6. PROPORTIONALITY

The next case, ruled by the Curia in February 2014,[7] has EU-law relevance. The defendant administrative authority rejected a company's application for state aid available for micro-enterprises within the framework of the European Agricultural Fund for Rural Development (EAFRD). The authority argued that the plaintiff, when procuring means necessary for his project, gamed the application conditions artificially to double the amount of the aid.

The plaintiff filed an action against the administrative decision, but the court of first instance rejected his claim and rejected also his attempt to initiate proceedings before the European Court of Justice (ECJ) and the Constitutional Court of Hungary, deeming those unnecessary. The plaintiff then filed an extraordinary appeal on points of law to the Curia, stating that the court of first instance ignored the EU-law aspects of the case without due reason, and that the judgment thus violated the Treaty on the Functioning of the European Union.

The Curia allowed the plaintiff's petition, abolished the judgment and ordered the court of the first instance to rehear the case. In the reasoning part, the Curia underlined that EAFRD aid is paid from the EU budget, consequently the authorities of the Member States bear great responsibility to prevent any illegal transaction. In this respect, the Member States are also entitled to adopt implementation rules to protect the efficient use of EU funds. The Curia accepted the legal arguments of the court that the parallel nature of the relevant provisions of EU law and national law excludes any conflict between them. In accordance with the Fundamental Law of Hungary, such conflicts can be settled by ignoring provisions of national law, so it is not necessary to launch any proceeding before the ECJ or the Constitutional Court.

As one of the plaintiff's arguments was that the provisions of the respective EC Regulation enacting sanctions violate the principle of proportionality, and thus the invalidity thereof shall be established by the ECJ as a result of a preliminary ruling procedure, the Curia recalled the proportionality test developed by the ECJ, which makes any reference to preliminary ruling unnecessary. According to this test, the measure must be necessary and suitable to achieve a legitimate aim. The test implies also the legislator's obligation to choose the less restrictive measure, if available, so any disadvantage caused must not be disproportionate to the aim pursued. The restriction set by the respective EC Regulation

[7] The Curia of Hungary, case No. Kfv.IV.35.166/2013/8.

aims to prevent any misuse of the funds of the EU and its Member States. This is a legitimate aim, and the legal measures pursuing it are necessary and cannot be considered as disproportionate.

Nevertheless, as the facts of the present case had not been fully revealed, the Curia had to abolish the judgment.

7. IMPARTIALITY

In September 2016, the Curia ruled a construction law case[8] where the principle of impartiality was the subject matter of revision. The plaintiffs were obliged by the first-instance authority to remove 3 advertising panels and 13 posters from a location which was their property. The authority argued that the panels and the posters did not fit into the townscape, and referred to the provisions of municipal regulations on advertising and townscape protection.

The plaintiffs filed an action against the administrative act, but the administrative court rejected their claim by reason of unsuccessful taking of evidence, as the photos taken in the course of the administrative procedure duly supported the lawfulness of the decision. In their extraordinary appeal on points of law submitted to the Curia, the plaintiffs represented that the administrative decision actually ordered them to demolish a stone boundary wall while the court established the facts of the case contrary to the files, as the property concerned does not belong to the zone covered by the relevant municipal regulation. Finally, they raised an objection that the second instance decision was made by persons who had taken an active part in making the decision of the first instance.

The Curia, however, rejected the plaintiffs' appeal. It underlined that every person has the right to have his or her affairs handled fairly, which implies the right to an impartial procedure. Consequently, there must be an impartial body in every appeal case. Another important guarantee is that persons who took part in making the first-instance decision are excluded from the second-instance proceedings. The second-instance body cannot be considered as impartial, if the persons who took part in the first-instance procedure take part in making the second-instance decision. Accordingly, the application and the appeal cannot be handled by the same person in the same capacity, and it must be indicated in the decision itself which body or organ has made the decision.

The Curia referred also to its earlier case law, according to which the delegation of a competence to a specific unit of the administrative authority is allowed, yet does not affect the personal responsibility of the original addressee of that competence. The administrative act is lawful if it was issued by a person who was entitled by the internal rules of procedure to proceed on behalf of the original addressee of the competence, and these circumstances are clearly proved in the decision. In the present case, it was evident from the documents

[8] The Curia of Hungary, case No. Kfv.IV.37.984/2015/4.

that the first-instance decision had been issued by a department leader who acted on behalf of the mayor, and then the second-instance decision was issued by the mayor himself who was entitled to represent and act on behalf of the body of municipal representatives. Consequently, the principle of impartiality has not been violated.

For the sake of completeness, the Curia accepted the administrative court's arguments on the points of substantial law, confirming that the plaintiffs' property was subject to the municipal regulation on advertising.

8. LAWFUL EXPECTATIONS

The next case concerned local taxation.[9] In June 2015, the plaintiff company obtained sites in an industrial park. According to the municipal regulation on local taxes in force, properties located within the territory of the industrial park were exempt from real-estate tax for a period of three years dated from the acquisition. Accordingly, the municipal tax authority established the property tax at 0 HUF for the year 2015. After that, a new regulation on local taxes was adopted, which enacted 'tax districts' in the municipality area, including also the industrial park. Pursuant to the provisions of this new regulation, the company was obliged to pay a property tax of HUF 1,575 million per property for the year 2016.

The plaintiff filed an action against the decision of the municipal tax authority, arguing that the regulation enacted a confiscation tax and did not provide due time to prepare for the application of the new legal provisions. The administrative court stayed the proceedings and referred the case to the Municipality Panel of the Curia which is entitled to examine the compliance of municipal regulations reliant on higher-level provisions of law (except the Fundamental Law). The administrative court pointed out that the new municipality regulation was adopted on 30 November 2015 and entered into force as of 1 January 2016, so no due preparation time was given.

The Curia accepted the arguments presented by the administrative court, underlining that the plaintiff expected on good grounds that he would be exempted from property tax until 2018. Consequently, the Curia had to examine whether the modification of local taxation provisions affected lawful expectations. In Hungary, legislative 'promises' can be withdrawn only in conformity with the principle of legal certainty. According to the case law of the Constitutional Court, a tax discount already obtained for a definite period implies a lawful expectation following from the legislator's promise, so decreasing or withdrawing them before the expiration of the definite period violates legal certainty. It is important to distinguish between short-term and long-term tax discounts. In case of short-term discounts, legal certainty is a clear barrier to any decrease or withdrawal, while in case of long-term discounts, opportunity shall be given to the legislator to decrease or

[9] The Curia of Hungary, case No. Köf.5036/2016.

even withdraw the discounts in case of fundamental changes in circumstances given at the time of providing the discounts. A tax exemption for a period of five years was to be considered by the Constitutional Court as a short-term discount.

In the present case, the municipality abolished the tax exemption by providing a preparation time of one month only, although the plaintiff trusted on lawful grounds that he would remain exempt from taxation until the expiration of the given period, so he had a lawful expectation.

Besides the above, the Curia examined and accepted the plaintiff's argument concerning the discriminatory nature of the new regulation. The Curia established that in the 'industrial park' district, only the plaintiff's properties were subject to taxation, so the abstract legal norm applies to one taxpayer, and that qualifies as negative discrimination. As a result, the Curia abolished the municipality regulation with a retroactive effect to 1 January 2016.

9. THE RIGHT TO PRIVACY

The next case[10] involves a municipality regulation again which was abolished by the Municipality Panel of the Curia. The procedure falls within the exclusive competence of the Curia and can be initiated also by the Government Office of the county concerned. The Office initiated proceedings against a municipal regulation about social-aid payments. The Curia partially allowed the petition, for the following reasons.

In Hungary, a specific type of social aid or benefit can be granted to inactive young people and their families. This benefit is subject to terms and conditions set partially by the Social Assistance Act, partially by the municipality regulation adopted by authorisation of the former Act. The municipality can define, as a condition of granting, the applicant's obligation to maintain the habitat (apartment, house, garden, pavement) etc. in a good and hygienic condition.

The municipality regulation in question prescribed the verification of lawful use of the property in which the applicant lives by indicating the specific legal title. Nevertheless, the regulation did not define what should be understood under the term 'lawful use', neither did it regulate how the lawful use should be verified. The regulation set a specific term in case for applicants living in newly built apartments: social aid was subject to a valid certificate of usability or a valid operation permit (the latter in case of illegal construction), as well as to due lighting, ventilation and heating facilities. These are specific rules of construction law and the municipality had no authorisation to set such rules as a condition of granting social aid. Consequently, the Curia abolished them.

The applicant also had to make declarations in respect of the property, e.g. to make lawful use of public utility services, to pay all the utility bills no later than two months after due date, to install waste bins etc. By prescribing these rules, the municipality had not

[10] The Curia of Hungary, case No. Köf.I.5.051/2012/6.

gone beyond its authorisation given by the Social Assistance Act, so the Curia refused to abolish these provisions.

Besides the above, the municipality regulation included a long sentence stipulating the exclusion of all circumstances from the property which would jeopardise the child's socio-cultural environment and would be harmful to the development of his or her personality. The Curia confirmed that the protection of future generations has been given high priority by the Hungarian legislation, but the sentence in question was hardly understandable, so this provision violated the legislator's obligation to adopt clear and understandable legal norms.

The regulation prescribed also that neither industrial nor business activities are allowed on the properties concerned, and it is forbidden to keep materials, instruments or animals which fully occupy at least one room in the property. The Curia pointed out that these provisions, restricting the freedom of enterprise, cannot be deduced from the authorising provisions of the Social Assistance Act, as there is only a weak relationship between the obligation to maintain the property in good condition and the storage of goods or livestock.

The Government Office in charge referred also to the municipality going beyond its authorisation by stipulating that the applicant and all other persons living in the property should care for their own personal hygiene. The Curia established first that this provision applied not only to the applicant but to other persons as well, thus it violated the Social Assistance Act. In addition, this provision affects privacy as well, which is protected by Article 8 of the European Convention of Human Rights. Pursuant to resolution No. 428/1970 of the Parliamentary Assembly of the Council of Europe, this right implies the integrity of and minimum interference with every person's private life. Personal hygiene and clothing are covered by terms protecting privacy, as being closely connected to physical integrity. According to the case law of the Constitutional Court of Hungary, personal autonomy has a core which neither the state nor other persons can interfere with, and which can only exceptionally be subject to legislation. Prescribing the maintenance of personal hygiene is irrelevant to the granting of social aid payments, and counts also as a violation of privacy. Accordingly, the Curia abolished the provision in question.

10. LOSS OF OBTAINED RIGHTS

In this case, finished in March 2014,[11] the Curia had to decide whether a bricked-up doorway could lawfully be reopened. The plaintiffs filed an action against the decision of the construction authority ordering them to brick up the doorway, as it had been erected without construction permit and in violation of rules of construction.

The court of the first instance abolished the decision of the defendant authority, accepting the plaintiff's argument that the doorway had existed already in 1969, before

[11] The Curia of Hungary, case No. Kfv.II.37.064/2014/4.

the neighbouring site was divided from their property, so construction provisions in force do not apply to it. The court also agreed with their argument that the reopening of the doorway did not affect any element of structure, so it was not subject to permission. The defendant authority filed a extraordinary appeal on points of law to the Curia, explaining that by bricking up the doorway decades ago, the plaintiff lost their right to use it, so the reopening of same could be allowed only in accordance with the legal provisions in force, in particular those relating to the distance between buildings.

The Curia allowed the defendant's appeal, pointing out that the court of the first instance drew incorrect legal consequences from the matters of fact. The doorway had been bricked up for decades, until it was reopened in 2011. Accordingly, the plaintiffs had to abide by the legal provisions which were in force in that year. Namely, even in case of construction activities which can be pursued without permission or notification, the construction authority shall examine whether the activity in question complies with the relevant legal norms. The Curia underlined that by bricking up the doorway, the plaintiffs lost their right to it, so the fact that it had been existed before the neighbouring house was erected has no relevance, and neither has the fact that anyone had knowledge about the earlier situation. And in the absence of any obtained rights, the construction authority had to order the elimination of that building part, as it violated the provisions concerning the minimum distance between buildings.

REFERENCES

The Curia of Hungary, case No. Kfv.II.37.064/2014/4.
The Curia of Hungary, case No. Köf.I.5.051/2012/6.
The Curia of Hungary, case No. Köf.5036/2016.
The Curia of Hungary, case No. Kfv.IV.37.984/2015/4.
The Curia of Hungary, case No. Kfv. III.37.519/2016/6.
The Curia of Hungary, case No. Kfv.IV.35.166/2013/8.
The Curia of Hungary, case No. Kfv.IV.37.757/2009/6.
The Curia of Hungary, case No. Kf.III.37.083/2016/4.
The Curia of Hungary, Case No. Kfv.III.37.162/2015/3.
European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610[RSP]). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0279+0+DOC+PDF+V0//EN (Downloaded: 15.07.2017.)

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EVALUATION OF THE RENEUAL MODEL RULES ON CONTRACTS (BOOK IV) FROM THE POLISH PERSPECTIVE

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1. INTRODUCTORY REMARKS

Similarly to Hungary, the publication of the results achieved by the ReNEUAL working group – Model Rules on EU Administrative Procedure – generated keen interest among the legal doctrine of public law in Poland.[1] It is crucial that the debates concerned with the ReNEUAL Model Rules held in Poland overlap with debates concerned with reforms of the Polish law of administrative procedure. The Polish administrative procedure is currently regulated by the Code of Administrative Procedure of 1960. Although it remains widely appreciated because of the high quality of its provisions and high standard of security granted to the parties to proceedings, many representatives of the legal doctrine assess that it needs to be gradually modernised. It is enough to say that the Code essentially lacks provisions concerned with contracts concluded by the public administration, which are the subject of Book IV of the ReNEUAL Model Rules. The provisions of the Polish Code of Administrative Procedure focus on the traditional scope of activities conducted by the public administration – the procedure of issuing administrative decisions.

2. ASSUMPTIONS AND FUNDAMENTAL REGULATORY FEATURES OF BOOK IV OF THE RENEUAL MODEL RULES

Discussions held among the Polish legal doctrine concerned with Book IV of the Model Rules on EU Administrative Procedure focus on some more general issues which constitute a background for analysing assumptions and fundamental features of the regulation proposed by the authors of the Model Rules. To simplify, it can be said that the debate touches on six such issues: axiology of the proposed regulation, its legal basis in the Treaties, scope of the Model Rules, scale of the proposed regulation, its structure and the types of contracts referred to in the Model Rules on EU Administrative Procedure.[2]

First of all, referring to the axiology of the regulation, it is noted in Poland that in line with the assumptions adopted by the authors of the Model Rules, the regulation of the draft act serves to implement and strengthen the efficiency of the general principles of EU law. In this context, particular importance is assigned to two principles: the rule of law and the right to good administration.[3] The remaining general principles of EU law – including such fundamental ones for the area of public contracting from the perspective of the Treaties as: equal treatment and non-discrimination, transparency, proportionality,

[1] An academic conference on this project (model) was held in April 2016 at the University of Wrocław. See Supernat, J. – Kowalczyk, B. eds. (2017): Kodeks postępowania administracji Unii Europejskiej. Warszawa, passim.

[2] See Cieślik, Z.: Księga IV modelu kodeksu postępowania administracyjnego UE: umowy – założenia i cechy regulacji In Supernat, J. – Kowalczyk, B. eds. (2017): *op. cit.* 363–373.

[3] Wierzbowski, M. – Kraczkowski, A. eds. (2015): *ReNEUAL. Model kodeksu postępowania administracyjnego Unii Europejskiej.* Warszawa. 5.

subsidiarity and sincere cooperation – were presented at the background of the first two principles as "detailed principles", "additional, important guidelines for administrative activities."[4] Moreover, the authors of the Model Rules intended those principles of EU law – referred to in the preamble of the document – to determine the normative horizon for interpretation and developing the content of its provisions. This remark fully applies to the provisions of Book IV. The general principles of EU law are therefore the justification for – and simultaneously determine the content of – detailed measures concerned with contracts, as proposed by the authors of the Model Rules. The drafted law of public contracts is therefore – also in terms of its axiological assumptions – a law of EU public contracts. In consequence, the normative horizon of the regulation is not determined by other regulations of fundamental character. Therefore, it is not determined in particular by constitutional principles for the functioning of the public administration applicable in the Member States (except their recognition in Article 6 (3) of TEU as fundamental rights resulting from constitutional traditions common to the Member States). This objection resonates particularly loud when the solutions of the ReNEUAL Model Rules are compared to local measures adopted in the area of public contracting.

With regard to the legal basis for regulation, it is carefully noted that the authors of the Model Rules assume that the codification of the EU administrative procedure would have to be based on a principle specified in Treaties which provides for the creation of regulations of a general, non-sector-specific nature.[5] Also in Poland it is analysed whether the rule-making competency laid out in Article 298 of the Treaty on the Functioning of the European Union includes the right to impose obligations on administrative bodies of the Member States and not only on EU entities. Due to doubts on this subject, many people advocate for the solution proposed by the authors of Book IV – which is rather reserved in its regulatory ambitions and focuses on the legal relationships engaging mostly EU administrative authorities.

Doubts regarding whether the Model Rules are based on the legal basis of Treaties have direct impact on the considerations related to the regulatory scope of Book IV. It is pointed out in this context that Book IV goes gradually beyond the traditional area of the EU law on public contracting – beyond the law of public procurement and concessions. Firstly – provisions of this Book apply to all contracts and legally binding agreements concluded by the EU administrative authorities with private entities (and administrative bodies of the Member States when such a body acts as a service provider on the market and concludes the contract as a private entity). Therefore, they are actually not exclusively

[4] Ibid. 31.

[5] Discussions on the possibility of creating a general regulation in administrative law, also in procedural law, have been held in the legal doctrine for a long time. Before the Treaty of Lisbon entered into force, they had been focused on the flexibility clause included in Article 358 of TFEU (former Article 308 of TEC). See Schwarze, J. (1988): *Europäisches Verwaltungsrecht.* Baden-Baden, Nomos. 47; Craig, P. (2012): *EU Administrative Law.* Oxford. 259; Kahl, W. (1996): *Hat die EG die Kompetenz zur Regelung des Allgemeinen Verwaltungsrechts?* NVwZ. 869. See also Wierzbowski–Kraczkowski (2015): *op. cit.* 19.

limited to public procurement and concession contracts. Secondly – the regulation of Book IV covers all three phases of the life of a contract: 1. procedure leading to the conclusion of a contract, 2. conclusion of the contract and 3. execution and end (expiration) of the contract. Therefore, it is not limited, as in the EU law of public contracts and concessions, generally to the first phase, but it also addresses the next phases, especially dealing with the subject of a contract's validity (and the right to invoke its invalidity) and the execution of contractual obligations, including the question of subcontractors.

Attention of the Polish legal doctrine is also drawn to the scale of the drafted regulation in the area of contracts concluded by public entities. It is striking that Book IV is one of the most extensive parts of the ReNEUAL Model Rules. From the Polish perspective it is particularly symptomatic that this part is longer (although not significantly: by three provisions) even than the Book devoted to typical issues of local administrative procedures, that is – in accordance with the nomenclature adopted in the project – single case decision-making. At this point one should point out that the Polish Code of Administrative Procedure which has been in force (with many amendments thereto) since January 1961, generally does not contain any provisions regarding consensual forms of public administration activities (with the exception of a limited regulation regarding the so-called administrative agreement).[6]

The normative structure of Book IV is also interesting from the Polish perspective. The detailed regulation contained in this Book is complemented by numerous legal rules referred to by the provisions of the Book. Firstly – the provisions of Book IV provide for an adequate application of the provisions contained in Book II, that is provisions on administrative rulemaking (Article IV-6). This solution is based on an assumption that in public contract law, drafting general terms of contracts may act as a substitute to issuing administrative rules. In line with this assumption, applying procedural rules which determine the rulemaking process is supposed to guarantee the observance of general EU principles in this field: equal treatment, transparency, participatory democracy.[7] Secondly – each of the three detailed chapters of Book IV relating to subsequent stages of a contract's life contains a provision which requires the application of numerous, explicitly stated provisions of Book III to the subjects mentioned therein, that is rules regarding single case decision-making (Article IV-7, Art. IV-21, Art. IV-39). This solution is in turn based on an assumption that all decisions made by administrative authorities in relation to the execution of a contract are subject to the rules of administrative proceedings and

[6] Articles 114 and 116 of the Polish Code of Administrative Procedure: In any case being dealt with by proceedings before a public administration body, the parties may reach an agreement – if the nature of the case supports it, if it would simplify or quicken proceedings and if it is not contrary to the provisions of law. The agreement has to be authorised by the public administration body before whom it was concluded (the body is not a party to the agreement).

[7] Wierzbowski– Kraczkowski (2105): *op. cit.* 179.

the rule of good administration – on terms analogical to those which apply to individual administrative acts.[8]

At last, it is also characteristic how types of contracts are distinguished in the drafted regulation. Book IV divides EU contracts into two basic categories, distinguished with regard to the legal regime which is applied to them: contracts concluded by the EU administrative authorities which are regulated exclusively by EU law and contracts concluded by EU administrative authorities which are regulated by the law of a Member State (or of another state). This way, the authors wish to achieve a duality of legal regimes for EU contracts;[9] the indicated distinction of the two contract categories is necessary in the Model Rules for the matters of validity of contracts, invoking their invalidity and court control (phase two of a contract's life) – all of which are covered by the Model Rules. This distinction is virtually of no importance in the administrative procedure leading to the conclusion of a contract (phase one of a contract's life – matters regulated by the law of public orders) or in the subject of executing and ending contracts (phase three of a contract's life – matters regulated by the law of obligations).

In view of these remarks which relate to the most important elements, assumptions and fundamental features of the ReNEUAL Model Rules, the impact of the proposed solutions on the local debates is being assessed in Poland – debates which (also) relate to matters important from the perspective of the local administrative procedure. The first such matter consists in the criteria for qualification of public contracts; the second one – the scope of the regulation for the public contracting law.

3. CRITERIA FOR QUALIFICATION OF PUBLIC CONTRACTS IN THE EU LAW

Regardless of the above-mentioned discrepancies in the axiological assumptions of the regulations, the solutions of the Model Rules on EU Administrative Procedure impact the discussions on the law of public contracting which are held in Poland. From this perspective, the provisions of the Model Rules which govern the qualification of given contracts to the category of public contracts are the most interesting ones.[10] The category of public contracts which is present in various acts of the EU law and is connected by the authors of the ReNEUAL Model Rules to the notion of "EU contracts" refers, if only nominally, to the fundamental distinction between the public and private law regulations in local law. This distinction generally reflects the method of regulation which the local lawmaker adopts

[8] Ibid. 180, 186, 196

[9] Ibid. 149. See HOFMANN, H.C.H. *et al.* (2011): *Administrative Law and Policy of the European Union*. 651.

[10] See Szydło, M. (2017): Kryteria kwalifikacji i kategoryzacji umów publicznych w prawie Unii Europejskiej. In Supernat–Kowalczyk eds. (2017): *op. cit.* 375–383; Różowicz, K.: Umowa publicznoprawna a umowa prywatnoprawna w świetle rozwiązań modelu kodeksu postępowania administracyjnego Unii Europejskiej. In Supernat–Kowalczyk eds. (2017): *op. cit*. 385–392.

in a given field of legal relationships: distinguishing between a method of administrative law and civil law – and it is a starting point for the organisation of the entire legal system. It is therefore not surprising that discussions related to the criteria of qualifying contracts concluded by the public administration in Poland are held in the context of a broader debate on the general criteria for distinguishing public law (and administrative law being its primary branch). The solutions related to the criteria of qualifying contracts adopted in the ReNEUAL Model Rules may be inspiring in this regard. They are of particular importance in the context of debates on regulating the general rules of public contracting and introducing a notion of an administrative contract to the administrative law – which is not used in Poland but is known in many other countries (a contract concluded between an administrative body and a private entity in the field of administrative law).

From this perspective, specified by regulatory challenges faced by public administration in Poland, the question on criteria for qualifying contracts to the public contract category in the ReNEUAL Model Rules reveals certain difficulties. There are many indications that in singling out the category of EU contracts, the creators of the Model Rules have adopted the view assumed in in EU legislation which concerns public contracting (in particular in directives on public procurement). And those acts typically qualify public contracts by means of subjective criteria, granting such a nature to contracts where one of the parties is an entity which is a representative of the European Union or of a Member State. Such a conclusion results from an analysis of EU law provisions which apply to different categories of contracts, which the EU legislator calls public agreements[11] and the definition of an EU contract, specified in Article IV-2 (c) of the ReNEUAL Model Code. In EU regulatory framework, the entity concluding the contract is more essential than the subject matter of the contract. The aforementioned view is fundamentally different from the view adopted in the Polish doctrine – and as it seems, many other national doctrines – with regard to qualification of legal actions against the background of the criteria differentiating between public law and private law. It is far from qualifications which refer to the subject of the steps taken and are made in accordance with criteria such as "performing public tasks" or "public service".

From the national perspective it seems that the subjective approach to the public contracts category is too conventional and does not fully meet the regulatory objectives expected from administrative law. Those objectives are in particular of protective and structural nature – and they apply to all actions of the public authorities, regardless of the entity. To a large extent they are determined by the national constitution – rather than EU law. Apart from this last reservation, which refers to differences in the axiological framework of regulations, one should note a certain difficulty associated with solutions adopted by creators of the Model Rules, related to their reference to national regulations. Namely it is not clear whether the EU definition of a contract adopted on the basis of the ReNEUAL Model Rules,

[11] See Szydło, M. (2017): *op. cit.* 377. Compare Article 2 section 1 point 5 in conjunction with Article 2 section 1 point 1 of Directive 2014/24/UE and Article 101 section 1 b) in conjunction with Article 117 and Article 190 of Regulation 966/2012.

which emphasises subjective selection criteria, guarantees a similar standard of protection to solutions which are characteristic of national legislation in the area of public contracts. In this context it is worth to point out – to follow the doctrine – certain features of the ReNEUAL Model Rules. On the one hand, contracts which are the model solution of the model: "public contracts governed by the EU directives on public procurement, called and qualified by these directives that way do not lose their qualification due to the fact that the purpose or object of the contract is not to perform public tasks."[12] On the other hand, the notion of "administrative activity" indicated in the introduction to Book IV of the Model Rules as an obligatory subject of public contracts is not present in the content of the proposed regulation and does not specify the scope of the concept of an "EU contract".[13] As a result – at least potentially – some contractual activities taken on behalf of a public authority and in connection with the implementation of public tasks, however not by public entities, can get beyond the scope of the regulations on public contracts. It is indicated in the doctrine that the reported qualification difficulties associated with public contracts can have far-reaching practical significance. This happens "particularly in the cases when EU provisions regulating a given contract category are applied – including also after their implementation into the national legal order – by specific national bodies or entities, and the relevant provisions of national law applied which associate specific legal consequences with whether a case (issue) of a given contract is a public matter or a public administration matter. In Polish law the question of qualification of a given contract (regulated by EU law) as a public contract can be legally relevant even on the basis of provisions of the Law on proceedings before administrative courts or the Act on access to public information."[14] It seems that structural differences which exist between the selection criteria applied to legal systems of the EU and the Member States (Poland) constitute a significant challenge for the national legislator. After all, the national legislator is obliged, on the one hand, to comply with EU law in accordance with the requirements of the Treaty, and on the other hand, to provide individuals with protection in accordance with the rule of law standard arising from the national constitution. The indicated difficulties – resulting from the need to find a common denominator for the EU and Polish protection system in the area of public contracts – lead the doctrine to considerations about the (desired) scope of public contract law regulation which would meet both the objectives laid down in the Treaties and in national constitutions.

4. SCOPE OF PUBLIC CONTRACT LAW REGULATION

The discussions on the scope of regulation of national public contract law held in Poland are strictly connected with regulatory concepts which have been developed in connection

[12] Szydło, M. (2017): *op. cit*. 378.
[13] Introduction to Book IV of the ReNEUAL Model Rules, point 14 In Ibid.
[14] Ibid. 383.

with the postulated reform of the Polish administrative procedure law. In contrast to the applicable public administrative procedure, which – notably – draws solutions from the March 1928 regulation on administrative procedure (calling to mind the Austro–Hungarian Empire tradition),[15] all significant proposed amendments that are the subject to debates contain chapters on contractual forms of operation of public administration. Two such projects should be mentioned. The first of them is a bill on general administrative procedure dated 2010. In accordance with the assumptions of its creators, General provisions would constitute a parallel legal instrument in relation to the code of administrative procedure and will regulate basic principles and institutions of administrative law in Poland.[16] The second project is a project of the administrative procedure law reform dated 2016, assuming a thorough revision of the Code of Administrative Procedure.[17] The status of both these projects is similar to the status of the ReNEUAL Model Rules. Those projects are the result of the administrative law doctrine and the case law of the national administrative courts – and have been submitted to the authorities responsible for law-making as analytical material for their legislative work.

From the viewpoint of the considerations in question it should be noted that both projects of reforming the Polish administrative procedure refer differently to the scope of regulation of public contract law. In the newer project, contracts are referred to solely as an alternative to an individual administrative act. It is therefore a typical administrative contract – and that is the name used in the project. Pursuant to the project assumptions, an administrative case can be settled not only by way of issue of an administrative act, but also by the conclusion of a contract between the authority conducting the proceeding and the party to this proceeding. The older project provides for a broader scope of public contract law. A basis for the conclusion of administrative contracts by public authorities – which is currently not applicable in Poland –can also be found in its stipulations. However, additionally this project provides for the introduction of the general competency of administrative bodies to conclude administrative agreements with other bodies in order to carry out public administration tasks. Such agreements could – optionally – apply to taking actions (of the administration in its sovereign capacity) agreed upon by the parties thereto. Thus it would also be possible to conclude agreements in situations where the implementation of a specific public task did not require the undertaking of any actions of the administration in its sovereign capacity. It should therefore be considered that the scope of regulations of that project will cover both administrative agreements and agreements which the Polish doctrine currently classifies as civil law contracts. Such a qualification concerns

[15] Regulation of the President of the Republic of Poland of 22 March 1928 on administrative procedures (*Journal of Laws,* 1928, No. 36, item 341, as amended).

[16] Commission bill – General provisions of administrative law, Sejm paper No. 3942 dated 29 December 2010, Sejm of the 6th term. Compare the draft chapter No. 6 of the Act: Administrative agreements and contracts.

[17] Expert report on Administrative procedure law reform available at: www.nsa.gov.pl/wydarzenia-wizyty-konferencje/raport-ekspercki-nt-reforma-prawa-o-postepowaniu-administracyjnym,news,24,313.php (Downloaded: 12.05.2017.) Compare the draft chapter 7b of the Code of Administrative Procedure: Administrative contract.

contracts under which an administrative authority entrusts the performance of a public task to a public entity (thus meeting the criteria of functional privatisation of a public task). It is important to note that this broader definition of the scope of public contract law is associated – on the basis of the draft General administrative proceedings provisions – with guarantees of protection of the public interest which, in turn, are typical for administrative and legal solutions. The project in particular specifies the means of supervision for the parties to the agreement (Article 39–40 of the draft act).

The debates on the scope of public contract law which are ongoing in Poland in connection with the aforementioned bills touch upon an issue which was taken also in the ReNEUAL Model Rules. Regulating both public law contracts and private law contracts with this law is inspiring from Poland's perspective. One assumption which seems to have been adopted by creators of the ReNEUAL Model Rules seems particularly important: "administration, adopting the form of private law, continues to be bound and limited by public law, since the application of private law does not change the administration into an autonomous entity and thus does not exempt it from the rules and obligations of public law, since private law, in the situation in question, is not the basis, but a measure of the administration's operation".[18] This assumption can be reflected in a statement from the introduction to Book IV of the Model Rules: "even with regard to EU contracts governed by the law of a Member State, the EU authority does not enjoy the contractual freedom (in the sense of the German concept of 'Privatautonomie') typical of private persons."[19] A similar point is justified by the view expressed in the Polish doctrine on the criteria of separating public contracts under EU law. In line with this view, "the criterion of formal qualification by the EU legislator of certain categories of contracts governed by EU law as public contracts – and certainly one of the criteria which the legal education could potentially present as a criterion for the classification of certain categories of contracts as public contracts, not only those regulated by EU law – is the criterion used by the EU legislator to regulate a given category of contracts, the so-called hybrid regulation method."[20] This method consists in combining public law elements with civil law elements, i.e. the linking of the authority of a particular entity to take unilateral acts with the authority of a particular entity to undertake non-authoritative actions. Such a situation is the case of regulation in Book IV of the ReNEUAL Model Rules, which – in provisions on general terms and conditions of the contract – assumes i.a. that the renewal of a particular right or obligation of one party to a contract takes place by mutual consent of the parties, but the content of that right or obligation is determined exclusively, though not authoritatively, by the other party – an administrative authority.[21] It is worth noting that this type of criterion for the qualification of contracts as public contracts – and thus the criterion for separating

[18] Różowicz, K. (2017): *op. cit.* In Supernat–Kowalczyk: *op. cit.* 390; Strzyczkowski, K. (2007): *Prawo gospodarcze publiczne.* Warszawa. 189.

[19] Point 24 of Introduction to Book IV. Wierzbowski, M. – Kraczkowski, A. eds. (2015): *op. cit.* 150.

[20] Szydło, M.: Ibid. 383.

[21] Szydło, M.: Ibid. 382.

the field of regulation of public contract law – would eliminate the aforementioned (in the statement on the criteria for qualification of public contracts in EU law) difficulties with regard to different assumptions regarding such qualifications under the EU law and national law.

The scope of regulation of the IV Book of the ReNEUAL Model Rules can be compared to the draft codification projects of public contract law which are formulated in Poland, not only – as was just the case – because of the legal nature of the contracts, to which their provisions apply, but also in other regards. Important results can also be obtained by combining these acts in view of the normative objectives of the individual solutions. The axiological perspective for the regulation of these acts reveals an important pattern. The issues raised with respect to public contracts at European Union level do not fully coincide with the issues which the national lawmakers are confronted in the same regulatory area. This is justified by differences in the admissible regulation of national legal orders and the EU law. The scope of the impact of national law is much broader – also with regard to public contracts, as the EU's regulatory policy is limited to specific areas and focuses on those areas which are important for the functioning of the internal market. This, in turn, means that issues which are essential for national legislators, in particular the problem of providing public-legal guarantees of protection of the rights of individuals against abuse of public authority remain outside of the focus of the EU legislator – and beyond the competence of the EU legislator. In the European Union, public contract law is primarily an expression of the Treaties rules which protect competition in the field of internal market freedoms: the principles of equality, transparency, proportionality and mutual recognition. In EU Member States, the role of this law is different. The national public contract law is primarily a formula for incorporating constitutional guarantees of the rule of law into the field of public administration contracts. The axiology of regulation determines its scope. From this point of view, it is not surprising that the EU and national regulations of public contract law differ in terms of which aspects are emphasised. In the EU law, regulation of public procurement and concession rights, with its development for the purpose of implementation of the general budget of the European Union, like the one which can be found in the provisions of the EU Financial Regulation[22] and its (proposed) generalizations is of pivotal importance – as the one specified in Book IV of the ReNEUAL Model Rules. From this perspective, stipulations on the obligation to publish advertisement of contract the contract, use of the negotiated procedure, equal access for economic operators from all Member States or subcontracts (Article IV-11, 13, 14, 37), elaborated on in the ReNEUAL Model Rules are not surprising. The proposed national codifications of public contract law do not take into account these issues – they treat them as matters belonging to a special area of law – public procurement law. In the national law, the basic public contracting instrument is an administrative contract which is one of form of public

[22] Title V of Regulation (EU, EURATOM) No. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002. (*Official Journal,* L 298 of 26.10.2012. 1.)

administration operation, frequently used in national administrative procedures. The form of administrative operation plays a role in the legal system called the "guarantee of the rule of law vehicle". Thanks to the form of administrative operation, these guarantees refer to various areas of public authority activity. Without doubt, Book IV of Model Rules reveals regulatory ambitions regarding those areas of regulation which are typically the domain of Member States, which is evidenced i. a. by rules regarding termination to avoid grave harm to the common good (Article IV-29). However, those ambitions are restrained by axiological assumptions of this regulation which are expressed in its legal basis in Treaties. As a result, the scope of the said authorisation is limited solely to EU administration authorities.

The different horizon of EU and national regulations on public contract law leads to the conclusion that the final and comprehensive form of regulation applicable in the EU in this area is the result of a complex medley of patterns which are presented by different – EU and national – regulatory authorities. It can even be said that the public contract law in the EU is created as "crossroads" of different legal orders and fits into the process of the emergence of a "multilevel" public administration in the EU – and describing the principles of its functioning in the European law of administrative cooperation. The submitted regulation in Book IV of ReNEUAL Model Rules, which assumes a differentiation between EU contracts governed by the EU law and EU contracts which are governed by the Member State law takes these phenomena into consideration.

5. SUMMARY

To summarise and generalise remarks on Book IV of the EU administrative procedure Model Rules developed by ReNEUAL, it can be assumed that – as assessed by the Polish doctrine – the proposed unification of the rules of the administrative procedure in the EU strengthens the rule of law – it defines the instruments of effective performance of public tasks, at the same time protecting the rights of individuals. The requirements of the rule of law and good administration apply equally to administrative law-making and application of law – and that applies also to the contracts concluded by the public administration.

REFERENCES

Craig, P. (2012): *EU Administrative Law.* Oxford.

Kahl, W. (1996): Hat die EG die Kompetenz zur Regelung des Allgemeinen Verwaltungsrechts? *NVwZ (Neue Zeitschrift für Verwaltungsrecht).*

Supernat, J. – Kowalczyk, B. eds. (2017): *Kodeks postępowania administracji Unii Europejskiej.* Warszawa.

Strzyczkowski, K. (2007): *Prawo gospodarcze publiczne.* Warszawa.

Wierzbowski, M. – Kraczkowski, A. eds. (2015): *ReNEUAL. Model kodeksu postępowania administracyjnego Unii Europejskiej.* Warszawa.

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VII. SUBCONTRACTS

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1. ADMISSIBILITY AND SCOPE OF SUBCONTRACTS[1]

Subcontracts are one of the concepts (elements) of private law (civil law). Featuring it in ReNEUAL Model Rules is adequate by reason that the cases related to subcontracts,[2] *(subcontratación*[3]*)* are also relevant for the EU administrative organs.[4]

Subcontracts are such contractual doctrinal (dogmatic) constructions *('dogmatischen Konstruktion')* the prefiguration of which has already existed in Roman private law. However, its real content is difficult to unfold. At present, it is only revealed that in case of *locatio conductio operis* (lease [of creation */opus/*] or enterprise) we can only speak about – with the non-sourceful term – *sublocatio* (subcontracts/sublet).

There are legal scholars who mentioned that only one type of a case should be highlighted, that is the responsibility of the employees (Gai. D. 19, 2, 25, 7). This source stated indistinctly the responsibility of employees (in case of business contract), but it was controversial by pandectists (entrepreneurs culpability as prerequisite).[5]

In a wider sense, there is a significant rule of Roman law on the subject that a ship owner is obliged to deal with all the acts of the sailor *(nauta)* as he applied the sailor at his own risk (Ulp. D. 4, 9, 7 pr.).[6] Besides this rule there is a conflicting rule too – based on an interpolated source – which states that the entrepreneur does not belong to his/her own risk *(adhibuit)* practically for employees with non-professional properties (improper work) (Ulp D. 4, 9, 7, 4).[7]

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1 The author of the sub-chapter is Gyula Koi.

2 ReNEUAL (EN version) 173.

3 ReNEUAL (ES version) 239. (At the time of writing this paper, the text of Model Rules was available only in English and Spanish *(Código ReNEUAL de procedimiento administrativo de la Unión Europea).* Currently there are many other language versions, which are based on the updated English version from 2015: French *(La codification de la procédure administrative de l'Union européenne – Le modèle ReNEUAL);* German *(ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahrensrecht*); Italian *(Codice ReNEUAL del procedimento amministrativo dell'Unione Europea);* Polish *(ReNEUAL Model kodeksu postępowania administracyjnego dla Unii Europejskiej);* Romanian *(Codul reneual de procedura administrativa a Uniunii Europene).* The updated version of 2015 is the basis for the English print version of the Model Rules – including linguistically improved introductions and explanations. The English print version has been published containing an additional comparative chapter *(Administrative Procedure Acts: History, Features and Reception.)* in 2017 by Oxford University Press (OUP). Our citations in this paper refer to the draft versions.

4 For the connection between administrative law and civil law see Koi Gyula (2008): A közigazgatási jog szerepe a megalkotandó Polgári Törvénykönyv tükrében. (The Role of Administrative Law in the Mirror of the New Hungarian Civil Code.) *Polgári jogi kodifikáció,* 2008/2. 3–12. It is worth drawing attention to the appearance of the German specialty *private administrative law (Verwaltungsprivatrecht; Derecho privado administrativo)* in the regulation. ReNEUAL (EN version) 152–153; ReNEUAL (ES version) 217.

5 On the problem see Windscheid, Bernhard (1879): *Lehrbuch des Pandektenrechts.* Stuttgart, Ebner–Seubert. 509; Zimmermann, Reinhard (1996): *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford, OUP. main text1124; footnote 218. On the cited Gaius text see Földi András (1997)*: Kereskedelmi jogintézmények a római jogban. (Commercial Legal Institutions in Roman Law.)* Budapest, Akadémiai Kiadó. 37, footnote 50.

6 Földi (1997): *op. cit.* 79.

7 Földi (1997): *op. cit.* main text 80; footnote 79. See also Schulz, Fritz (1911): *Die Haftung für das Verschulden der Angestellten im klassischen römischen Recht.* Wien, Hölder.

The modern, clear regulation of subcontracts is contained in the article[8] of the French *Code civil* (1804) article 1797 according to which the entrepreneur's (contractor's) liability is valid for the subcontractor and it is irrespective of the entrepreneur's (contractor's) fault.[9] The current French law regulates the issue of subcontracts *(sous-traitance)* in the Law 75-1334. (31 December 1975).[10] In the German law *Bürgerliches Gesetzbuch* (1896) the rules of subcontracts *(Subunternehmen)* are not specifically included,[11] similarly to the solution of the old and new Italian *Codice civile* (1865 and 1942)[12] and the Spanish *Código civil* (1889).[13]

The four titles (*titre*) of the French law mentioned above regulates the questions of the general definitions *(dispositions générales)* /1–3. §§/, direct payment *(paiement direct)* /4-10. §§/, direct action *(action directe)* /11–14. §§/, and diverse provisions of dispositions *(dispositions diverses)*.

A subcontract[14] under this legislation is the case where the entrepreneur (contractor) entrusts, on his/her own responsibility, subcontractors who are wholly or partly obliged (as contractual parties) to comply with the contract of business or the public contract (public contract)/public procurement contract *(marché public)*.

The contract is recognised to be small-valued till 600 euros based on the exercise of the French *Conseil d'État*. The cancel (resignation) from the direct (customer's) entrepreneurial fee payment is required to be accepted also orally by the other party.

The commencement of the action, the joinder, and the amendment refer to all types of subcontracts. The miscellaneous provisions refer to the territorial scope of the act; these questions will be examined in the analysis of relevant provisions of ReNEUAL Model Rules. The theoretical prefiguration of ReNEUAL Model Rules of that practice-based, subcontract-related[15] legal literature, which exist from the time of *European Communities* (EC),[16] but this has only a legal history significance.

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8 This article entered into force in 17 March 1804 by the 7 March 1804 codification.

9 „L'entrepreneur répond du fait des personnes qu'il emploie." On this problem see Néret, Jean (1979): *Le sous-contrat*. Paris, LGDJ.

10 Wiederkehr, Georges et al. (2014): *Code civil*. Dalloz, Paris. 2278–2280. Also available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000889241 (Downloaded: 15.10.2015.)

11 Schulze, Reiner (2014): *Bürgerliches Gesetzbuch. Handkommentar.* Baden-Baden, Nomos.

12 di Majo, Adolfo (2003): *Codice civile. Con la constitutzione i trattati U.E. e C.E. e le principali norme complementar.* Milano, Giuffrè.

13 Agencia Estatal Boletín Oficial del Estado (2013): *Código civil de Espana actualizado*. Available at: www.boe.es/buscar/act.php?id=BOE-A-1889-4763 (Downloaded: 15.10.2015.)

14 For legal literature see Néret (1979): *op. cit.* 169–194.

15 Commission of the European Communities (1989): *Practical guide to legal aspects of industrial sub-contracting within the European Community* I. *The sub-contract.* Luxemburg, OOPEC; *European guide to alliances between subcontracting SMEs.* Luxemburg, Eur-Op. 1998.

16 On this topic see G. Toth Akos (1990): *The Oxford Encyclopaedia of European Community Law I. Institutional Law II. The World of Internal Market.* Oxford, Clarendon.

The fifth Hungarian Draft Civil Code from 1928 (referred as HDCC) regulated subcontracts, too.[17] The first three expressions of article 1599 of HDCC stated that on a subcontractor: "Any person who is involved in creation of works, especially as employee, subcontractor, or supplier of materials in a building construction, which is based on a conclusion with a contractor who is obliged to create a work (but not with the customer of the work): he [the employee, the subcontractor, or the supplier of materials] shall be entitled to demand wages or other considerations from the customer of the work only to the extent that he is debtor of the contractor in respect of producing of the work."[18]

Primarily in a construction (building) contract, the subcontractor was mentioned together with others involved in (employee, supplier of materials). The claim for consideration (salary or other – fee is not named by the HDCC draft) is basically possible against the contractor (and against the customer only if the customer becomes the contractor's debtor). The first adopted Hungarian Civil Code (Act IV of 1959, article 398; referred as HCC) is very remarkable in the later Hungarian regulation; it stated, that the contractor enforces his rights based on the defective performance of the subcontractor, when the contractor has an obligation to honour his liabilities, provided that he examined the quality.

The so-called *Grand Commentary of HCC*[19] named that regulation appositely and validly the 'extended' liability of a subcontractor (collaborator). On the basis of this regulation, the liability of a subcontractor (in case of emergence of the conditions of the text of the article) will be 'extend' to the duration of the liability of the contractor. The reason of this regulation was the complexity of activities (one contractor versus numerous subcontractors with different special tasks). But the activity of a contractor was possible after the acting of subcontractors, shared in time, and after the completing of the work will come to light the liabilities of the single subcontractors. This liability extinguishes by the period of limitation.

The regulation extended to those cases, when the abeyance of limitation was not applicable. Currently, the guaranteed times became limitation times, and the abeyance of the term is limited to the recognition of the error. In the life of the regulation of present days, the regulation of *New Hungarian Civil Code* (Act V of 2013, referred as NHCC) is similar to the old one, that concerns the rules of contracts of professional services to subcontracts. But the Hungarian civil law supports the dispositive nature of the law of obligations, and the rules are statutory *(cogent).*

The article 6:129 of NHCC is applicable to the regulation of avail of collaborators (former auxiliary performance in HCC). It has not a special provision to requisition of

[17] *500. számú Törvényjavaslat Magyarország Magánjogi Törvénykönyve. (No. 500 Draft Civil Code of Hungary.)* s.l., (1928) s.n. See also the German version: *Ungarns Privatrechtsgesetzbuch. Entwurf. Amtliche Übersetzung.* s.l., (1928) IM.

[18] *Törvényjavaslat Magyarország Magánjogi Törvénykönyve. op. cit.* 423.

[19] Havasi Győző (1981): *XXXV. fejezet A vállalkozás. (Chapter 25. Contract for Professional Services.)*= In Eörsi Gyula – Gellért György eds.: *A Polgári Törvénykönyv magyarázata II. (Commentary on the Hungarian Civil Code II.)* Budapest, KJK.

subcontractors, or the subcontracts, and the new regulation does not apply to the old regulations on general (principal) contractors.[20]

The article IV-37 of ReNEUAL Model Rules regulates the admissibility (*admisibilidad*) and scope (ámbito) of subcontracts. The ReNEUAL Model Rules give a concept in the basis of Continental Roman law-based (civilian) traditions of the civil law: "'Subcontractor': any person who/that has entered into a contractual relationship with the contractor for the purpose of implementing an existing EU contract."

It follows to the expression "who/that", that the subcontractor is a natural person, or business association with (or without) legal personality (or other type of organisation).

In the regulations of ReNEUAL Model Rules, paragraph (1) discusses the question of admissibility, with the same wording as DCFR IV. C. – 2:104 and IV. D. – 3:302, furthermore article 161 of EFR (Regulation 966/2012). In case of an enactment, several legal texts with similar wording will contradict the principle of the unity of the legal system, therefore this practice is unnecessary and counterproductive. The draft text on admissibility stated that the permit (approval) of the EU authority is unnecessary for the signing of the subcontract, except, that the contract is bound to a personal performance (*intuitu personae* – nature). In fact, the legal text expresses concrete and rigorous (but well-founded) conditions applying to the subcontractors. In the personal field, the regulation naming the expertise (adequate competence), in the property field, the quality of using of tools and materials will be in harmony with EU rules (EU contract, and the applicable laws), teleologically (goal-based interpretation) the tools and materials fit to achieve the particular purpose for which they are to be used.

The application (applicability) means the main quality of the thing (this quality can be natural quality or legal quality). For example, the performance is not possible with a bakers' shovel, when the object of the contract is rowing, but in an emergency case, rowing is possible with a bakers' shovel. The EU Financial Regulations is applicable to the financial accountability.

Paragraph (2) in a four element-based system (contractor – subcontractor – customer – EU authority) is a main rule, excluding the direct relationship between the subcontractor and the EU authority. EU contracts give an exception from this main rule, but only from the scope and consequence of the relationship.

Paragraph (3) states the contractor as a main obligor of the contract, and expresses the unlimited liability of the subcontractor to EU authority. The regulating of two non-inclusive rules in the same paragraph is a codification mistake.

Paragraph (4) excludes the liability of EU authority for third parties (consumers and others) in case of negligence of a subcontractor.

[20] Bartal Géza (2014): Vállalkozási szerződés az új Ptk.-ban. (Contract for Professional Services in the New Hungarian Civil Code.) *Gazdaság és Jog* 2014/1. 9–16. On subcontract see especially page 10.

2. CHOICE OF THE LAW APPLICABLE TO SUBCONTRACTS[21]

Questions of law applicable to subcontracts are discussed in paragraph (1) of the ReNEUAL Model Rules. Two possible cases shall be separated by the rule: the first case – not explicitly articulated – is where the law applicable to subcontracts is related to specific provision, although it is mentioned by the wording of the rule 'in a negative way'. The regulation does not mention explicitly, but it seems likely that the specific provision with sufficient legal ground shall be interpreted as the determination of the applicable law. A fault of the rule is that these specific provisions are not mentioned in that part of the EU law where they may be found. The other branch of the regulation is where the law applicable to subcontracts are defined by national law, which is the law applicable to entrepreneurial activity. Obviously the law applicable to enterprise due to its formation, namely the national law of enterprise, might be like this. Consequently, it follows that the EU law excludes its applicability. Theoretical background of this article is theory of the choice of law of international private law (conflict of laws)[22] – obviously supplemented by the characteristics of EU law. In practice, the theoretical background of the widest nature, based on Roman Law and through this on the codification of European Civil Law, is provided by Contractual Law. In relation to its paragraph IV-38, the regulation (2) contains only one exclusive rule, with regard to which it explains that article IV-37. is not touched upon by the content detailed in paragraph (1) of our analysis, meaning that basic rules considering subcontractors are not modified by the law applicable by the choice of law. From all this it may be derived that European Union stipulates the application of regulation incorporated in the Model Rules.

3. DUTIES OF THE EU AUTHORITIES TOWARDS SUBCONTRACTORS[23]

Despite its seemingly voluminous nature, paragraph (1) is a technical rule on the merits. The reason for its creation is the lack of direct relationship between EU law and subcontractors, which may be derived from the speciality of subcontractors.

In the same place, numerous obligations of the European Union regarding the legal procedures of subcontractors are also detailed. As of now, subcontractor legal procedures cover: the investigation of the lawfulness of EC's legislation or other orders (article 263., TFEU), actions at law to ascertain violation of law before the EC, the contractual responsibilities of the EU (article 340., TFEU). Based on the lack of direct relationship and because of the legal proceedings of subcontractors, the regulation articulates many obligations towards European authorities. These may be summed up as the principles of the adequate administration and are specified in the commented paragraph (articles III-3., III-5., III-7.,

[21] The author of the sub-chapter is Dániel Iván.

[22] For details see Mádl Ferenc – Vékás Lajos (2012): *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga. (The Law of Conflicts and of International Economic Relations.)* Budapest, ELTE Eötvös Kiadó. 555.

[23] The author of the sub-chapter is Dániel Iván.

III-8., III-9., III-10., III-11., III-13., III-14.,[24] III-15., III-22., III-23., III-29., III-30., III-31., III-32.). Most of the principles incorporated in this article are part of the domestic regulations of most of the EU countries, at the same time, several principles have been taken over from other branches of law (articles III-10., III-11., III-14. in the principles of criminal procedural law),[25] furthermore numerous principles function as basis for all legal proceedings (articles III-3., III-9., III-13., III-15., III-22., III-23., III-29., III-30.), otherwise there are several principles, which are not interpretable in this construction (articles III-5., III-31.), eventually there is a principle that was incorporated in the Model Rules based on technical progress (article III-32.).

Paragraph (2) servers as the warranty rule for the usability of paragraph (1), in other words this means that the EU authority needs to enable the contractor to satisfy its informative obligations towards the subcontractor – as per the principles regarding adequate administration registered in paragraph (1).

In paragraph (3) there is the regulation of a legal situation, where the authority being one of the parties in an EU contract – without specific constraints – says that the performance of the subcontractor may be objected in any case. With regard to this, the regulation declares the obligation of the EU authority to provide information towards the subcontractor. Based on this, and in connection with impingement, the subcontractor is entitled to hearing. The EU authority has the possibility to substitute any subcontractors, but in this case the EU obliges the subcontractor to provide information beforehand. On top of the declaration of intent, the EU shall also provide reasoning for the same matter. Furthermore, the subcontractor shall be supplied with the possibility to articulate his/her observations, since the submission of the request for the substitution of subcontractors shall be preceded by the transaction of these proceedings.

Paragraph (4) in relation to the contractor and the subcontractor obliges the EU authority to execute continuous controlling – this concerns the financial stability of the contractor. This obligation is already established prior to the awarding of the EU contract

[24] It is important to notice the decision of EFTA Surveillance Authority on privilege against self-incrimination (442/12/COL, 29 November 2012.): "In assessing claims made in relation to the privilege against self-incrimination, the hearing officer may consider whether undertakings make clearly unfounded claims for protection merely as a delaying tactic." [Paragraph (9)] "Where the addressee of a request for information pursuant to Article 18(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement refuses to reply to a question in such a request invoking the privilege against self-incrimination, as determined by the case-law of the Court of Justice and the EFTA Court, it may refer the matter, in due time following the receipt of the request, to the hearing officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director of the Competition and State Aid Directorate of the conclusions drawn, to be taken into account in case of any decision taken subsequently pursuant to Article 18 (3) of Chapter II of Protocol 4 to the Surveillance and Court Agreement." [Chapter 2. Article 4. Paragraph (2) Point b)]

[25] For details see Belegi József – Berkes György eds. (2015): *Büntető eljárásjog* I–III. *Kommentár a gyakorlat számára. (Criminal Procedural Law I–III. Commentary for Practice.)* Budapest, HVG-ORAC; Belovics Ervin – Tóth Mihály (2013): *Büntető eljárásjog. (Criminal Procedural Law.)* Budapest, HVG-ORAC. 596.

to the contractor and endures the whole term of the contract. Practically this lasts until the fulfilment of the contract, until the perfection of the so called *'contractus'*.

REFERENCES

500. számú Törvényjavaslat Magyarország Magánjogi Törvénykönyve. (No. 500 Draft Civil Code of Hungary.) s.l., (1928) s.n.

Agencia Estatal Boletín Oficial del Estado (2013): Código civil de Espana actualizado. Available at: www.boe.es/buscar/act.php?id=BOE-A-1889-4763 (Downloaded: 15.10.2015.)

Bartal Géza (2104)*:* Vállalkozási szerződés az új Ptk.-ban. (Contract for Professional Services in the New Hungarian Civil Code.) Gazdaság és Jog 2014/1. 9–16.

Belegi József – Berkes György eds. (2015): *Büntető eljárásjog* I–III. *Kommentár a gyakorlat számára. (Criminal Procedural Law I–III. Commentary for Practice.)* Budapest, HVG-ORAC.

Belovics Ervin – Tóth Mihály (2013): *Büntető eljárásjog. (Criminal Procedural Law.)* Budapest, HVG-ORAC.

Commission of the European Communities (1989): *Practical guide to legal aspects of industrial sub-contracting within the European Community* I. *The sub-contract.* Luxemburg, OOPEC

di Majo, Adolfo (2003): *Codice civile. Con la constitutzione i trattati U.E. e C.E. e le principali norme complementar.* Milano, Giuffrè.

European guide to alliances between subcontracting SMEs (1998). Luxemburg, Eur-Op.

Földi András (1997)*: Kereskedelmi jogintézmények a római jogban. (Commercial Legal Institutions in Roman Law.)* Budapest, Akadémiai Kiadó.

G. Toth Akos (1990): *The Oxford Encyclopaedia of European Community Law I. Institutional Law II. The World of Internal Market.* Oxford, Clarendon.

Havasi Győző (1981): *XXXV. fejezet A vállalkozás. (Chapter 35. Contract for Professional Services.)* In Eörsi Gyula – Gellért György eds.: *A Polgári Törvénykönyv magyarázata* II. *(Commentary on the Hungarian Civil Code.)* Budapest, KJK.

Koi Gyula (2008): A közigazgatási jog szerepe a megalkotandó Polgári Törvénykönyv tükrében. (The Role of Administrative Law in the Mirror of the New Hungarian Civil Code.) *Polgári jogi kodifikáció,* 2008/2. 3–12.

Mádl Ferenc – Vékás Lajos (2012): *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga. (The Law of Conflicts and of International Economic Relations.)* Budapest, ELTE Eötvös Kiadó.

Néret, Jean (1979): *Le sous-contrat*. Paris, LGDJ.

ReNEUAL (2017): Administrative Procedure Acts: History, Features and Reception. Oxford University Press (OUP).

ReNEUAL Código ReNEUAL de procedimiento administrativo de la Unión Europea, Spanish version

ReNEUAL Model Rules on EU Administrative Procedure, English version

Schulz, Fritz (1911): *Die Haftung für das Verschulden der Angestellten im klassischen römischen Recht.* Wien, Hölder.

Schulze, Reiner (2014): *Bürgerliches Gesetzbuch. Handkommentar.* Baden-Baden, Nomos.

Ungarns Privatrechtsgesetzbuch. Entwurf. Amtliche Übersetzung. s.l., (1928) IM.

Wiederkehr, Georges et al. (2014): *Code civil*. Dalloz, Paris. Also available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000889241 (Downloaded: 15.10.2015.)

Windscheid, Bernhard (1879): *Lehrbuch des Pandektenrechts*. Stuttgart, Ebner–Seubert.

Zimmermann, Reinhard (1996): *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford, OUP.

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THE DEVELOPMENT OF DATA PROTECTION AND PRIVACY POLICY IN THE LIGHT OF PRACTICE OF THE CURIA AND OF THE CONSTITUTIONAL COURT OF HUNGARY

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1. THE FIRST STEP OF RULES OF DATA PROTECTION AND PRIVACY POLICY

There was a special aspect of development of data protection and privacy policy in the early 1990s. On the one hand there was no basis for this (law)area in the rules and practice, on the other hand the legislator had to produce new institutions of democracy.[1] At first the new and democratic Parliament had to declare the principles of human rights, civil and political liberties, despite the fact that legal continuity between socialism and the new democratic legal system was disclosed by the decision of the new Parliament. This meant that the socialist acts had not been overruled, but were kept enforced and were changed step by step. The deficit of data protection and privacy policy was caused by the fact that the primacy of human rights and the importance of privacy had not been accepted by the socialist legal order. In addition, to keep the legal continuity (between socialism and the transition to a democratic system) the legislator had to pass into law a few new acts (about data protection and privacy policy) and modify the old act (e.g. Civil Code), and the importance of data protection and privacy policy became more and more important as information technology developed in the 1990s. We can observe three effects of the establishment and development of data protection and privacy policy in Hungary. Additionally, the new offices (especially the Constitutional Court of Hungary, and the Ombudsman) had not enough experience and practice about this area, keeping in mind that Hungary would be member of the European Union in the immediate future.[2] The legislator had to be attentive to the directives and legal practice of the European Union. There was another problem: the hiatus of knowledge and practice of new institutions concerning privacy policy. This area was considered unnecessary and therefore did not exist in the socialist law; it caused the deficit of acts, decisions and judgements about data protection and privacy policy. The courts and other offices had to start to create the real content of these by new acts without adequate theoretical and practical history and basis. The only source being the European Union's point of view on this matter.

At first I will show the development of this (law) area and acts in Hungary. Secondly I will present the new direction of data protection and privacy policy according to the specifically new Civil Code and judgements of courts of the European Union. Finally, will I try to analyse the reason and consequence of contradictory decisions handed down in connection with a concrete incident.

[1] E.g. Constitutional Court, Ombudsmen etc.

[2] 1 May 2004.

2. ACTS ON DATA PROTECTION AND PRIVACY POLICY FROM THE BEGINNINGS TO THE PRESENT

I would like to show the development of the system of data protection and privacy policy from the early 1990s to the present in Hungary. It was very interesting because the new tendencies caused difficulties in dealing with cases in all law areas (e.g. labour law, civil law, compensation for non-material damages and injury cases). We could see the effect of legislation to practice and the practice to acts. The outcomes of several litigations and legal disputes were not too satisfactory because courts had not enough experience to the area of privacy policy, so lots of defendants and plaintiffs went to superior courts (High Court of Justice) and the Constitutional Court of Hungary. The first in this line was Act LXIII. 1992 on protection of personal data and publicity of data of public interest[3] which tried to subsume the privacy policy and data protection. This aspiration was not too successful, because the proportions being enormous, it was not possible to rule it within one act. On the other hand, it had effect on another law area, i.e. the civil law in particular. But in fact, the Civil Code did not contain the solutions to problems of data protection and privacy policy despite the fact that the courts had to implement the Civil Code in most cases. They had to try to use the old legal institution, the compensation for non-material damage. The claim to create new solutions and institutions were caused by the development of this field and the effect of the principles of the European Union. Firstly, when realizing that the old point of view, better to say thinking regulated all parts of this area, the legislator enacted new acts on several fields of data protection and privacy policy. Secondarily, step by step new acts entered into force instead of old judgements and this process accelerated as the entry to the European Union approached. There were significant examples of these, in respect to various fields of law: defence of health data,[4] contract on defence of the person.[5] We must not forget lots of acts, which modified the rules of a field of law.

After Hungary entered the European Union, the development of the area of public person accelerated. This had two reasons. First, there were the obligations of the European Union; second, the institutions, offices and courts were able to gain adequate knowledge and practice about this field of law and they could refer to the directions and decisions of the European Court of Human Rights.

The most significant change was the new act on privacy policy[6] and the rules of a new Civil Code[7] about the consequences in case of privacy violation, particularly in opposition with more lenient provisions of old acts.

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3 It was enforced on 1 May 1993.

4 Act XLVII. 1997 on management and protection of medical and personal data connected to it.

5 Publication of the Contract on protection of individuals in the case of automatic processing of personal data, in Strasbourg on 28 January 1981.

6 Act CXII. 2011 on the right to informational self-determination and freedom of information, entered into force on 1 January 2012.

7 Act V. 2013 on Civil Code, it was enforced on 15 March 2014.

Other fields of private security and data protection were realized by the practice and direction of the European Union. The legislative thinking changed and developed, so the will of the legislator was able to give adequate answers to acute questions of practice. On one hand, the legal term and jurisprudence were developed by the effects required by practice, on the other hand the system of data protection and privacy policy became relevant and modern, containing relevant European Union regulations in the field of law in Hungary. We can conclude that the relationship between legal theory and practice in Hungary were beneficial for each other.

Formation of numerous acts[8] took place as a result of the cooperation of legal practice and theory.

Recently, the principles and requirements of data protection have started to predominate in the field of administration in Hungary. They are regulated by a new act.[9]

This law is very interesting, because it contains some new obligations for offices; it is responsible for the appointment of personnel for electronic information system security, for the issue of information security policy (regulation), for ensuring the training of employees (i.e. civil servants) for the knowledge of information system security duties and responsibilities, systematic risk assessment and the control of compliances with laws and risks.[10]

This act governs the new national authorities which are responsible for the inspection of security of electronic information systems.[11] This authority must supervise the offices, and if one of them does not comply with the obligations or rules of the procedure, they must call on them to do it, then they must appeal to the information security inspector, commissioned by the Minister (who is responsible for the e-government).[12]

We can see the continuous and fast development of the field of data protection and privacy policy in the administration, as well. Similar developments can be observed in the field of the labour law, the special rules concerning professional persons (policemen and fire fighters),[13] particularly.

8 E.g. Act CLV. 2009 on the protection of classified data, Act CLVII. 2010 on the protection of classified data covered by national data assets, Act CI. 2007 on accessibility to ensure decision of preparation of the required data.

9 Act L. 2013 on e-information security of national and local authorities.

10 a) – n) point (1) Section a) 11. Paragraph Act L. 2013 on e-information security of national and local authorities.

11 (1) Section 14. Paragraph Act L. 2013 on e-information security of national and local authorities.

12 16–17. Paragraph Act L. 2013 on e-information security of national and local authorities.

13 Their status is ruled by the Act XLII. 2015 on the legal relationship of professional staff of performing law enforcement duties.

3. THE DEVELOPMENT OF DATA PROTECTION AND PRIVACY POLICY IN HUNGARY – THROUGH THE ANALYSIS OF A PARTICULAR LEGAL INCIDENT

In spite of the fact that the rules and law and the legal practice are coherent and adequate and they correspond to the rules of the European Union, there are some questions – in the area of data protection – raised by practice. These are minor problems, but if we examine their results and effects on the national economy (i.e. on the budget of Hungary), we come to realize that, on one hand these cases are significant and on the other hand suitable for the development of legal practice and theory of data protection and privacy policy. One of them is the question of the use of photographs, taken of professional staff at work. These photos can be used by the media without the consent of the subjects of (persons in) the photos according to one point of view, but according to the other viewpoint, these photos can only be used if the people (appearing on them) consent to it. The relevance of this problem is partly caused by the change of acts, because with the new acts, there would be more sanctions now than in the past in the case of violation of personal rights (the use of photos means a violation of the right of personal data). The violation fee is the new sanction, which is to be paid by the violator.

I would like to show the development of Hungarian data protection and privacy policy by the analysis of the above case. First, I analyse the rules of the old Civil Code, then the new sanctions of the new Civil Code parallel with the old and new information acts. Secondly, I mention the uniformity decision of the Curia, then the decision of the Constitutional Court of Hungary, which eliminated the uniformity decision of the Curia. Thirdly, I show the new uniformity decision of the Curia. Finally, I analyse a rule of the Appeal Court, which opposes the point of view of the Constitutional Court of Hungary.

3.1. The Principles of Data Protection and Privacy Policy in the Old Civil Code[14] *and the Old Informational Act*

These acts had not contained the detailed rules of privacy policy and data protection about the use of photos of professional people who participated in an intervention. The courts had to make decisions based on underlying principles; this problem was solved by the practice of law. But this problem did not arise among the judges, only the Informational Ombudsman had to deal with the questions of personal data of civil servants in the light of petitions about the financial position of public figures. The main question was the following: Should they be regarded as civil servants in their public operations, like politicians are? If the answer is yes, the salary of civil servants is knowable to everybody, if not, it is not knowable. By both the old Civil Code and Act LXIII. 1992 on protection of personal data and publicity of data of public interest, the civil servants were not qualified as public

[14] Act IV. 1959 on the Civil Code.

persons. This viewpoint gradually changed over time, because lots of law philosophers thought that all civil servants were qualified as public people when working. But this appeared only in the old acts.

On the other hand, the general rules enabled the vindication of compensation in the case of violation of data protection and privacy policy by the old Civil Code based on the old informational Act.

There was one way of compensation in the old Civil Code of Hungary, and that was the non-pecuniary damages. If the privacy of a person was violated, he could require non-pecuniary damages from the contravener. The problem of this system was the following: the insulted person had to prove the damage and the extent of it. The fact of the violation of privacy policy was not enough to validate the non-pecuniary damages. This meant that the data protection and privacy policy were not affirmed as a value per se. Furthermore, the violation of the privacy policy and personal data did not mean damage and did not eventuate in compensation per se.

3.2. The Data Protection and Privacy Policy Principles of the New Civil Code and Informational Self-determination and Freedom of Information Act

We can see that all three main acts have changed, which has determined the question of privacy protection of public people.

At first, we have to write about the main basis of privacy policy, the rules of the Fundamental Law of Hungary.[15] The right of personal data protection and the right to cognition of data of public interest are authenticated[16] by this act; and the emergence of the law of personal data protection and cognition of data of public persons are ensured by the Hungarian National Authority for Data Protection and Freedom of Information.[17] Secondarily, other rules about privacy policy have entered into force, so the system of data protection of the new Civil Code has gradually built the basis of the main acts in this area. The new Civil Code partly contains the principles about privacy policy, the sources of these rules are in these acts cumulatively.

The new Civil Code regulates the protection of individual rights on two levels. One of them is the enumeration of individual rights, though it is not complete, only illustrative.[18] One form of violation of the individual right is the violation of the right to privacy and the protection of personal data. The other is the exact regulation of the consequences of their violation.[19]

According to the legislator, the consequences of the violation of the individual rights in the Civil Code show the importance of this area. On the other hand, a new legal instrument

[15] It is the new Constitution of Hungary, entered into force on January 1, 2012.
[16] VI. Article (2) Fundamental law of Hungary.
[17] VI. Article (3) Fundamental law of Hungary.
[18] 2:42 (2) new Civil Code of Hungary.
[19] XII. Article new Civil Code of Hungary.

is instituted by the Civil Code. This is the violation paid.[20] Instead of the rules of the old Civil Code of Hungary, according to the violation paid, the damnification of personal rights means damage per se, and the contravener has to pay due to the action itself. "The violation paid is an indirect consideration of damnification of personal rights to property in satisfaction and private legal punishment at the same time".[21]

The new system of data protection and privacy policy is very interesting, because it is partly based on the old system. The legal continuity is guaranteed, because in the case of damnification of privacy policy, the injured person can require violation paid, and then if he has damage to property by the damnification of privacy policy, the injured person can demand non-pecuniary damages.

The new Civil Code of Hungary and Act CXII. 2011 on the right to informational self-determination and freedom of information contains the options of injured people. The main elements of the system of data protection and privacy policy are determined by these acts.

The act on the right to informational self-determination and freedom of information[22] provides the following options to those harmed: protest against personal data management, turning directly to the court to ask for the stopping of infringement; restore the original state, turning directly to the Hungarian National Authority for Data Protection and Freedom of Information to ask for the data protection authority procedures. Anybody can initiate the procedure of the Authority for free, due to a violation (or imminent danger of violation) of personal data, or the right to the knowledge of public interest items. The Authority has the right to inspect documents, enter rooms; anyone may request information orally and in written form, and initiate the procedure.[23] Depending on the result of the procedure, the Authority can do the following: call to remedy the injury or eliminate it, make recommendations to the supervisor of the offending organ and to perform an official data protection procedure.[24] Finally, the Authority is able to bring about an action to follow the procedure of writ of the Authority.[25]

The main possibilities of victims, provided by the new Civil Code of Hungary, are the violation paid and the non-pecuniary damages. There is a new element in the privacy policy which I consider very important – a special rule of the procedure of the prosecution. In case of violation of individual laws, which are contrary to public interest, the prosecutor is able to enter into action with the victim's consent.[26]

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20 2:52 new Civil Code.

21 Commentary of the new Civil Code.

22 22.§, 52–60.§

23 (1) 54.§ Act CXII. 2011 on the right to informational self-determination and freedom of information.

24 *op. cit.* 55.§

25 *op. cit.* 64.§

26 2:54.§ (4) new Civil Code.

Parallel with the rules of the Civil Code, the Criminal Code of Hungary[27] contains many elements of personal data protection. For example, it specifies the misuse of personal and public data.[28]

Eventually, Act CXII. 2011 on informational self-determination and freedom of information brought about changes in the question of the use of photos of performing professional service personnel. Policemen started to argue that their photos (on which they were recognizable, taken while in action) were not publishable in the news. As they did not qualify as public persons while in action, (since there was the law of personal data), their portraits counted as personal data, which were protected by acts. At first, the Curia of Hungary made a uniformity decision, and then another decision was made by the Constitutional Court of Hungary contradicting the previous one. What were the results of these conflicting decisions?

3.3. The Uniformity Decision of the Curia[29]

All courts must follow the uniformity decisions of the Curia of Hungary.[30] The Curia's principle has caused some interesting actions. Along this, "The persons who work in public service at public places are not public actors while performing these activities, therefore the images or audio recordings taken of them (suitable for identification), may not be disclosed without their consent."[31] A lot of policemen started to demand the compensation of violation paid, if they portraits – taken during action – were recognizable. The courts had to comply with the application of the uniformity decision of the Curia.

The courts started to inflict injury fees in their judgements along this uniformity decision of the Curia. It meant a deficit of budget to Hungary, because the law enforcement authorities are financed by the state.

3.4. The Decision of the Constitutional Court of Hungary[32]

One of the judgements of the Appeal Court of the Capital has been eliminated by this decision of the Constitutional Court. By this judgement[33] the portraits of policemen, who acted at political events could not be disclosed, and this principle was violated by the news portals. According to this judgement, the policemen's demand of violation paid was legitimate. This judgement was challenged by a constitutional complaint of the news portal.

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27 Act C. 2012 on Criminal Code.

28 *op. cit.* 219–220.§

29 1/2012 BKMPJE uniformity decision.

30 25. (3) Art. Fundamental Law of Hungary.

31 *op. cit.*

32 28/2014. (IX.29.) Decision of the Constitutional Court.

33 Pf.20.656/2012/7. Judgement of the Capital Appeal Court.

The Constitutional Court of Hungary predicated that this judgement was unconstitutional and eliminated it.

The Constitutional Court of Hungary settled the questions, and stated the principle that the professional person (policeman, fire-fighter etc.) qualified as a public person when intervening and working. So their portraits are not personal data and they are not entitled to defence, as in the case of individuals. The main demand is the justice of the freedom of press, but it must not harm the human dignity of professional people. For example, the portraits of traumatized policemen or fire-fighters must not be disclosed.

On the other hand, we can see an opinion, claiming that the policemen wearing uniform must not refer to their private sphere because they have power and represent the authority of the state. Though they are private people, when they are in action they visualise the power of the government and the state against the citizens who have the right to identify the professional people. It is a guarantee to prevent abuse, because if people can see e.g. an identification number of a professional, the professional person must comply with the rules when they act.

3.5. The New Uniformity Decision of the Curia[34]

After the decision of the Constitutional Court, which was contrary to the point of view of the court, the Curia had to make a new decision in this question last year. Since the courts must follow the principle of uniformity decision of the Curia, which was eliminated by the Constitutional Court of Hungary, a significant disagreement emerged. Solving this was very important, undoubtedly.

The 1/2012 BKMPJE uniformity decision of the Curia was eliminated by this new uniformity decision on the basis of the following:

The Curia asked the opinion of the General Prosecutor of Hungary. He said that the work and public appearance of professional staff was a special field and it was necessary to regard them as different from others (civilians). On the other hand, some dispute is caused by the lack of concept of public appearances, persons in public and persons working as the public authority of law, in the opinion of the General Prosecutor of Hungary. He explained the need to modify the new Civil Code.

On the other hand, the Curia investigated the differences between the old rules and the new Civil Code and informational law. The annulment of 1/2012 BKMPJE uniformity decision of the Curia is reasonable along the new principles of new informational act and partly the Civil Code. At the same time with the rules of the new acts it is necessary to define the real content of public appearances, persons in public and persons working as public authority, because there is not enough and precisely adequate concept of these to decide in particular litigations. According to the decision of the Curia, this question is not settled permanently, the legislator must modify the acts.

[34] 1/2015 BKMPJE uniformity decision.

3.6. Judgement of the Appeal Court of the Capital[35]

The Appeal Court of the Capital has a surprising verdict in Hungary on 29 October 2015 against the decision of the Constitutional Court. This is not a judgement-at-law and it is very interesting, because it says that the policemen who work in public have personal attributes and these attributes are personal data. The violation of rights to private sphere is realized when personal data (e.g. emotions on one's face) are visible to anyone. The judgement obligated the web site operator (who published the photos) to pay violation fee to the policemen.

The website operator appealed against the judgement; the procedure of appellate is under way now.

4. SUMMARY

Analysing this case, we realize that there are some remaining questions of data protection and privacy policy in Hungary, and solving these is difficult. On one hand the rules are not too exact to give adequate solutions; on the other hand, the points of view of the Hungarian authorities are not unitary. There have been changes in the field of law (new principles and the new Civil Code and informational act), so the development of data protection and privacy policy has happened quickly. There are some particular cases which are examined by the courts and the Constitutional Court of Hungary. Though it causes problems in law enforcement, we can see very significant developments in this field of law because of the disputes. I hope the adequate solution to this problem will be constructed by the courts or the Constitutional Court coincidentally. It is necessary to modify the rules (the Civil Code and the informational act) by the legislator on the basis of legal practice (judgements and decisions of the Curia and the Constitutional Court of Hungary).

At first we can see the result of the appeal against the judgement at the Appeal Court of the Capital, then the procedure of the Constitutional Court of Hungary in the case of constitutional complaint of the defendant or plaintiff. I am sure it will happen and will contain very interesting principles in the field of data protection and privacy policy. In my opinion, this dispute can show the development of this field of law in Hungary.

[35] http://index.hu/belfold/2015/10/30/itelotabla_rendor_kepmas_meglepo_itelet/ (Downloaded: 07.01.2018)

REFERENCES

Constitution of Hungary.
Fundamental Law of Hungary.
Act IV. 1959 on Civil Code.
Act XLVII. 1997 on management and protection of medical and personal data.
Act CXII. 2011 on the right to informational self-determination and freedom of information.
Act C. 2012 on Criminal Code.
Act V. 2013 on Civil Code.
Publication of the Contract on protection of individuals in the case of automatic processing of personal data, in Strasbourg on 28 January 1981.
Commentary of the new Civil Code.
1/2012 BKMPJE uniformity decision.
Pf.20.656/2012/7. Judgement of the Capital Appeal Court.
28/2014. (IX.29.) Decision of the Constitutional Court.
MG (2015): *Váratlan fordulat a rendőrarcok kitakarása ügyében* Available at: http://index.hu/belfold/2015/10/30/itelotabla_rendor_kepmas_meglepo_itelet/

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Endre Juhász

ADMINISTRATIVE PROCEDURAL LAW OF THE EUROPEAN UNION FROM THE VIEWPOINT OF THE COURT OF JUSTICE[1]

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[1] Presentation by Dr. Endre Juhász, Judge of the Court of Justice of the European Union, on 25 May 2017 at the conference "Procedural Law in the EU? Evaluation of the Reneual Model Rules" held at the National University of Public Service in Budapest.

1. First of all, I have to correct the title of my presentation. The correct title should be: Administrative procedural law of the European Union from the viewpoint of a judge and not from the viewpoint of the Court. I cannot talk about the position or the opinion of the Court since these are expressed in judgments which are formulated in the course of very precise, specific procedures, in chambers and if needed by majority votes. This is not the case. On the other hand, you have before you a judge of the Court of Justice of the European Union who has held this office for 13 years now and therefore might have acquired some experience. But the opinions he will express are strictly personal.

2. We have at hand six books which are the result of the efforts of many experts over many years. This has been an enormous undertaking and I pay tribute to all those who have participated in it. I agree with the authors of the Model Rules that the difficulties of transforming these rules into legislative texts should not prevent academic thinking, discussions and drafting. What cannot be used now or in the foreseeable future could be perhaps used later. Nevertheless, I hope it is excusable if I would like to focus on that part of the Model Rules that has a good chance or a better chance of becoming legislation.

3. As for the legal basis of the codification, I am convinced that the only provision in the Treaties that seems to be appropriate is Article 298, paragraph 1, TFEU which provides that "in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration" although the Parliament and the Council have not yet fulfilled the task laid down in paragraph 2 of this Article to establish specific provisions. I am convinced that this Article does not confer the power to the Union to adopt legislation establishing binding rules for the Member States. The same interpretation could be drawn from Article 42 of the Charter of Fundamental Rights which establishes a right to good administration since it expressly states that the principles and rules laid down by this Article should be respected "by the institutions, bodies, offices and agencies of the Union". Therefore, Book V and VI seem to have no chance to be put on the legislative agenda for the time being. Certainly the revision of the Treaties may become possible one day, but personally I do not see it coming soon. Now, the Brexit negotiations are the priority.

4. Concerning the four other books, the European Parliament has made a political decision. In its resolution of 9 June 2016, the Parliament called on the Commission to present a legislative proposal and invited that institution to consider the text of a regulation which the Parliament has elaborated itself and annexed to its resolution. I think it was an unusual step from the Parliament but it should be accepted as a political reality. The content of the proposal of the Parliament corresponds to that of Book III of the Model Rules meaning that the Parliament seems to have at this moment no interest to deal with Books I, II and IV. In fact, if Books V and VI are dropped, Book I becomes mostly irrelevant. Book II would lose most of its content because, according to the proposal of the Parliament, delegated and implementing acts and other nonlegislative acts based on the Treaties would not fall within

the scope of the proposed regulation. It is true that the proposed regulation includes two articles (Article 26 and Article 27) on administrative acts of general scope. However, they are of an extremely general nature with very little practical meaning.

5. The Parliament seems to show no interest either for Book IV dealing with the public contracts. Personally, I also have my doubts about the necessity of such codification at this time. While the concept, the theory and the practice of public contracts are well developed in certain Member States, such as in France and in Germany, I am not sure that this is generally the case for the whole of the Union. For example, in this country that is in Hungary, the concept of administrative contracts was only introduced into law for the first time at the beginning of this year and it only applies to contracts that are specifically designated as such by law or decree. In my view such codification or harmonization at Union level only becomes necessary or useful once there is more widespread recognition of the concept of public contracts in the legal orders of the Member States. I have doubts in particular about the category of contracts referred to as "EU contracts solely governed by EU law". I have some difficulties to understand for example Article 4 of Book IV according to which these contracts would be governed in addition to the respective contractual provisions and the sector specific EU legislation by "general principles of EU contract law". I am sorry to say that I simply do not know these general principles of EU contract law. According to the explanation of the Article, in practice the general principles of EU contract law will be derived from the French law on public contracts. However, I do not think that this could be an appropriate solution. Moreover, we have to acknowledge that the public procurement procedure is already well regulated at EU level. On the one hand, the rules of public procurement of EU institutions, bodies, offices and agencies are laid down in the financial regulation applicable to the budget of the EU (at present regulation n° 966/2012) and on the other hand, the public procurement by public bodies of the Member States are regulated by EU directives (Directives n°2014/24 and n° 2014/25) and the case law attached to them. Personally I feel no need for further codifications. In general, I am convinced that in the area of public contracts, the public law and the civil or private law can well coexist. No doubt the rules governing the preparation of these contracts form part of the public law but once the contract is concluded the terms of this contract should govern the relationship between public bodies and private persons and rules expressing a dominant position of public bodies should be avoided as much as possible. I admit that my reluctance might stem from the past, namely from the time before the change of the political regime in Hungary in 1989 and 1990. In that era, the state and the state property had privileges in the area of civil law and the abolition of those privileges was a political achievement.

6. As far as the area of the single case decision making is concerned, it is impossible not to see the very strong similarity between the provisions contained in the Parliament's proposal and Book III of the Model Rules. It is evident that parts of the Parliament's proposal take over the content of book III. It is therefore certain that in this respect, the authors of the Model Rules have already offered a very useful contribution. As an outsider, I am

not entitled to give advice regarding the future work of the authors of the Model Rules, but it seems to me that at this moment, the most efficient contribution could be made by criticizing, commenting on and proposing modifications or supplementary provisions to the text of the Parliament.

Personally, I find the proposal of the Parliament a very good basis for codification. As a starting point, it may be useful to keep in mind the observation or warning laid down in recital 11 of the proposed regulation which states that "an excess as well as a lack of rules and procedures can lead to maladministration". I fully subscribe to it.

7. Looking in more detail at Book III, in conjunction with the reasoning regarding the legal basis, I see no possibility to include provisions on the obligations of the Member States. Consequently, in my view, Article 1, paragraph 2, should be left out as well as provisions on the so called composite procedures. In view of the proposal of the Parliament, the scope of Book III should be reconsidered. In the regulation proposed by the Parliament, large areas are excluded which otherwise fall within the scope of Article 1, paragraph 1 of Book III. The most important exclusion is constituted by the procedures in which the partner of the EU institutions is one of the Member States and which results from the provision that activities based on the provision stating that acts directly based on the Treaties are not within the scope of the regulation. I fully agree with such an exclusion because in the relationship between the Member States and the EU institutions there cannot be any hierarchical superiority. Consequently, the following procedures would be excluded:

- Infringement procedures based on Articles 258, 259, 260 and 265 TFEU;
- State aid procedures based on article 107 TFEU except when the Commission takes measures imposing obligations on undertakings or associations (Article 6a and 6b of Council regulation 659/1999);
- Procedures in the area of economic and monetary policy (Title VIII of Part Three of the TFEU).

By the way, I think that a Member State cannot be considered simply a legal person and therefore a party in the sense of Article 4, point f, of the proposed regulation. It follows that even if an administrative procedure is not based on the Treaties but on the secondary legislation, a procedure involving a Member State is excluded of the scope of the regulation. Such an example is provided by directive 2015/1535 which provides for a procedure for notification by the Member States to the Commission in the field of technical regulations and standards.

8. The approach of the Model Rules and the proposal of the Parliament are essentially identical regarding the relationship of the new rules to the specific EU rules existing or to be adopted. Book I, in Article 1, paragraph 2 states that the Model Rules shall apply where no specific procedurals rules exist, while according to Article 3 of the proposed regulation of the Parliament, the regulation shall apply without prejudice to other legal

acts of the Union providing for specific administrative procedural rules and the regulation shall supplement such legal acts of the Union.

In my view, this is a correct solution but it raises the question about the real need for the general procedural rules presently under consideration. I have no precise information about the workload of the EU institutions, bodies, offices and agencies. On the other hand, I am aware of the caseload of the EU courts namely the General Court and the Court of Justice of the European Union and this provides some indications about the situation at the EU institutions, bodies, offices and agencies in general. Without entering the realm of statistics, I would mention some categories in which the number of litigations is high: intellectual property rights (trade marks), competition, state aid, antidumping measures, and access to documents requests. But in fact, these areas are already well regulated by EU legislation and the case law of the courts. Although I do not exclude that some specific rules now to be elaborated could be applied in the absence of existing EU rules, but in general, to be frank and without the intention of discouraging the academic work, I see no particular need for further regulation.

In my view, it would be very useful to have an inventory of the institutions, bodies, offices and agencies which would apply the new rules and the sectors and fields in which this application would take place. This inventory could demonstrate the lack of regulations or disclose contradictions in regulations in some areas and thus we could come more convincingly to the conclusion that codification is really needed. Certainly this inventory should not be exhaustive, the example could be the list of the public law bodies which are set out in the public procurement legislation of the EU (Annex III of the directive 2004/18/EC).

9. Strictly from a judicial perspective, I can say that we are particularly interested in the legal remedies in the event of a breach of the new rules. It is obvious that the new rules will be valuable if they are respected. It is also clear that the introduction of the new rules includes the potential for judicial reviews and litigations. In this respect, we have to observe that neither Book III nor the Parliament's proposal contain provisions on judicial remedies except for the obligation to mention this possibility, if it exists, in the administrative act concluding the procedures (Article 20, paragraph 4 of the proposed regulation and Article 30, paragraph 2 of Book III). In this way, neither the proposed regulation nor the Model Rules provide for a general right of judicial action in case of violation of the new rules.

It is true that many specific sectors of EU legislation contain provisions on legal remedies. This is the case for example in the area of the trade marks (regulation n° 207/2009), civil aviation (regulation n° 2016/2008), medicinal products (regulation n° 726/2004), chemicals (regulation n° 1907/2006), and financial supervision (regulations nos 1093/2010, 1094/2010 and 1095/2010). But even if there is no specific reference to legal remedies in sectorial legislation, we have Article 263 TFEU which entitles any natural or legal person to institute judicial proceedings against an act addressed to that person or which is of direct and individual concern to that person.

Nevertheless, in case of establishing a new code of procedure for the EU institutions, bodies, offices and agencies, the issue about the possibility or need to provide some rules

for judicial remedies deserves reflection. The starting point should be that according to the case law, the Union has a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the acts of the institutions. Therefore, a text which mentions the obligation of an administrative authority to include in an act the possibility of judicial remedies "where the Union law so provides" might not be correct.

Moreover, to obtain judicial review, the parties must prove the existence of an "acte attaquable" or a "challengeable measure", normally a decision. But only some of the bodies, offices and agencies take challengeable measures, many others only have a preparatory or advisory role, although it is true that this advisory role is sometimes decisive for the final decision. In this field as well, it would be useful to have a clear picture about the acts which are challengeable and which are not.

10. Another question arising concerns the sanctions or consequences of the violations of the procedural rules. This depends largely on the gravity of the violation. There is no doubt that there are differences as regard to the weight of the rules, for example between the obligation to hear the parties in the procedures or the rules about time limits or language requirements. According to the case law of the Court, only the violation of essential procedural requirements can justify an annulment or a declaration of invalidity. As regards other breaches, it should be examined whether in the absence of such a breach, the procedure could have led to a different decision and if not the annulment is not justified. I think that academic work could also take up this question and provide an appreciation of the procedural rules enabling differentiation.

In the end, I would like to say that, of course, the mission of the Court is to interpret and apply European Union law, but the Court does not participate in its formulation. The legislators are the European Parliament and the Council. At Court, we welcome new rules provided that they satisfy a real need, are of good quality, help citizens and businesses in their contacts with the EU administration and also facilitate judicial work.

REFERENCES

Charter of Fundamental Rights of the European Union.

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance.

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance).

European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610 [RSP]).

Presentation by Dr. Endre Juhász, Judge of the Court of Justice of the European Union, on 25 May 2017 at the conference "Procedural Law in the EU? Evaluation of the Reneual Model Rules" held at the National University of Public Service in Budapest.

Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No. 1592/2002 and Directive 2004/36/EC.

Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (codified version).

Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC.

Regulation (EU) No. 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC.

Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC.

Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002.
ReNEUAL Model Rules on EU Administrative Procedure.
Treaty on the Functioning of the *European Union*.

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ON THE REGULATIONS OF INFORMATION MANAGEMENT

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1. INTRODUCTION

The legal regulation of information management can be considered a key issue in administrative (authority) procedures and this fact relies mainly on three factors. As a first step the general concept of technical development has to be highlighted including its effect on the operations of the authorities. It goes without further clarification that the IT boom does not leave (and cannot leave) public administration untouched and the application of new technologies is both suitable to accelerate procedures as well as to create a new participation scheme of those who are concerned. Nevertheless, with due respect to the dangers of the data volume managed by IT systems and the characters of such data, some guarantee regulations are worth mentioning in connection with information management.

The identification of relevant legal regulations among Model Rules is also justified, because information management is in close connection with people's participation in the procedures and in a general sense also with the right to information. Some aspects to fundamental rights in information management can also be stressed and this fact requires a detailed regulation that also offers guarantees. Article 8 of the Charter of Fundamental Rights of the European Union illustrates this properly, when it says "everyone has the right to the protection of personal data concerning him or her", and "such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."[1]

It is also to be noted that the legislator must create a balance between two interests of different natures, when the data protection regulation is prepared. These are information self-determination and the freedom of information. This is why the national legal systems of the member states also separate the protection of personal data and the legal regulation of the publicity of public data.[2] The working group preparing the Model Rules has basically dealt with three topics, therefore the relevant legal material is also to be divided into three: the technical and organisation side of information management, appealing against public administration decisions in connection with data management and the harmonisation of data protection and the freedom of information are the three topics in this sense.[3]

1 Charter of Fundamental Rights, article 8., par. (1)–(2).

2 Cf. Fábián Adrián (2011): *Közigazgatás-elmélet.* Budapest–Pécs, Dialóg Campus Kiadó. 162–164.

3 Cf. *Toward Restatements and Best Practice Guidelines on EU Administrative Procedural Law.* European Parliament Directorate General for Internal Policies, 2010. 12–13. Available at: www.europarl.europa.eu/RegData/etudes/note/join/2010/425652/IPOL-JURI_NT%282010%29425652_EN.pdf (Downloaded: 12.10.2015.)

2. ACCESS TO DATA AND INFORMATION

2.1. Information and Access for Persons Concerned

To introduce information management regulations, the Model Rules start with the general rule that "the data providing authority shall inform the person concerned about storing and processing his/her data according to the relevant data protection regulation". The cited regulation, thus, clearly makes it the authority's responsibility to give information, while the phrase "according to the relevant data protection regulation" means that the information must be given following the data protection regulation relevant for data management. Therefore it can be seen that the Model Rules do not determine a material data protection minimum, but set a liability for the data management authority according to valid material law regulations. In order to set the direction of authority practice and to ensure proper information providing the norm text includes that information providing must cover at least:

- the categories of data being processed about the person concerned
- the authority in charge that provides the data
- the addressees of the data and
- the purpose of data processing including the legal basis of data processing according to relevant national law.

It is also a basic interest that the person concerned should not only be informed of the data management of his/her personal data, but this person should also receive real information on the process of data processing. Recognising this, the norm text sets that "the person concerned is entitled to submit an application any time to get a certificate from the authority that provides the data or – with the conditions determined under article VI-30. and VI-33. – from the supervisory authority, if the data on him/her are being processed or not".

Let us have three remarks in connection with the cited regulation. First it must be stressed that in this respect it is the obligation of the application that prevails, the certificate on the process of data processing is issued on the request of the person concerned, therefore the principle "ex officio" does not work here. Secondly it can be stated that the master rules regulate the guarantee of a concrete authority service in this case and the essence of this is to issue a certificate on the process of data processing on a request. Thirdly it is worth discussing from what authority the person concerned may request the issue of the certificate. Based on regulations in reference, the certificate can be obtained from the authority providing the data or – in case of specifically determined conditions– from the supervisory authority. According to articles VI-30. and VI-33. of the norm text this can happen, if the information management is carried out by the support of an information system. Thus, in this case the supervisory authority informs the person concerned about data put into the information system.

The regulation on the obligatory content items of information, which is included in paragraph (3) of article VI-15 of the norm text is important for guarantee. It says that "the data providing authority in charge informs the person concerned about its access right to

his/her personal data, including his/her right request the rectification of non-correct data and the cancellation of unlawfully processed data within the shortest time possible and also his/her right to be informed of the procedures aiming the exercise of such rights." Reflecting these it can be stated that the concerned person's right to information (i.e. the authority's obligation to give information) includes the following sub-rights (i.e. the authority is obliged to cover these, when it gives information):

- information on the right of access to personal data
- the initiation of rectification of cancellation of non-correct or unlawfully processed data
- information on the procedures aiming to exercise the above rights.

The procedural guarantee of the real practice of these rights is expressed by the regulation included in paragraph (5) of article VI-15, which says that "the supervisory authority makes sure that the persons concerned can use their access right according to the relevant data protection law effectively".

It is also to be noted that the issuance of a certificate on the application of the person concerned is allowed by the norm text only with limitations, thus only a limited right is created here. Paragraph (5) of article VI-15 of the norm text declares that "information (…) can only be retained with the following purposes:

- prevention and investigation of crimes and the start of a criminal procedure
- national security, public security of the defence of the member states
- protection of an important economic or financial interest of a member state or the EU, including financial, budget and taxation issues
- protection of other people's rights and freedom."

In connection with this limitation the information liability towards the person concerned is of guarantee importance and the Model Rules declare that the authority must inform the person concerned about the reason of retaining information and that he/she has the right to appeal to the data protection ombudsman in charge.[4]

2.2. The Access Right of Relevant Authorities

In connection with the data management of authorities the regulation touches two subject circles of a legal relationship with an authority and they are entitled to different rights. Based on the above, on one hand the right of information for the persons concerned and their right of command that is to be discussed eventually, is of vital importance. On the

[4] It should be noted that paragraphs (3)–(5) of the relevant article 20 of the 45/2001/EC regulation are appropriate to be applied to submit an appeal or to turn to the European Data Protection Ombudsman. In connection with this see more in Boros Anita (2014): Úton egy európai közigazgatási (eljárási) jog felé. *MTA Law Working Papers*, 2014/58. 41. Available at: http://jog.tk.mta.hu/uploads/files/mtalwp/2014_58_Boros.pdf (Downloaded: 12.10.2015.)

other hand it must be clarified to what extent the authorities have an access right and it is the legislator's duty to decide what data and to what extent the relevant authorities may have access to.

Knowing this, the regulation of the norm text is of theoretical importance, in which it declares that "access to information provided upon an information obligation or information stored in a database is limited to authorities that have an inevitable necessity in having the information to fulfil their duties and the access to such information cannot be larger than the necessity to carry out their tasks in harmony with the purpose of sharing the information." The cited regulation actually refers to two basic principles that can be found homogenously in the data management regulations of the member states: these are proportionality and purpose necessity. The principle of proportionality appears in the norm text, when it says that "data management can reach only an extent, where the necessity to carry out the tasks is in harmony with the purpose of sharing the information." The purpose necessity of data management basically means that access to information provided is limited to authorities that have an inevitable necessity in having the information to fulfil their duties.

It is connected to the above mentioned that the regulation in paragraph (2) of article CI-16. of the norm text is of guarantee importance, when it says that "clear and thorough rules must be created in the base legal act as well as for execution orders of any information obligation or databases for the authorities that have access to underlying information and have the right of use to them and the conditions must be set, by which access and use can be permitted". There are two remarks concerning the cited regulation. First it can be seen that the regulations for data management that are placed among Model Rules suppose the existence of a "basic legal act" that can make the regulation of data management and its execution orders more concrete and with a "clear" and "thorough" character.

In relation with that it should be noted that the rules in the examined structure unit are of a general character, because their application can only take place, if the base data management regulation that the norm text also refers to is already finished.[5] This norm must clearly and thoroughly determine the content, purpose necessity and form of data management, the obligations of authorities in charge and the law to be applied.

2.3. Rules of Access Management in IT Systems

A regulation of the norm text emphasises the importance of structural and procedural guarantees of data management activities for persons concerned. It says that clear and thorough access management rules must be set in the relevant base law act and in the relevant execution orders for all information systems, through which public administration

[5] For more about this see Varga Zs. András (2014): Gyorsértékelés az európai közigazgatási eljárási modellszabályokról. *Magyar Jog,* No. 10. 547.

organs may exchange data based on their information obligation or systems that may create a database.

3. AMENDMENT AND CANCELLATION OF DATA AND INFORMATION

The draft discusses the topic of amendment and cancellation of data and information from two aspects. First from the aspect of decision making competence, when it declares what authorities are entitled to modify or delete information of a certain database in given cases. Second, respecting the principle of officiality the authorities are given obligations in the norm text for amendment and cancellation.

3.1. The Amendment and Cancellation Competence

It is recognisable that the norm text gives data base amendment and cancellation competence to three (types of) authorities. According to this, these acts can be carried out by:

- the relevant authority that has provided the information or put them into a database based on its information obligation
- the supervisory authority, and
- the competence to modify or cancel information in a database can also be empowered to one of the bodies listed in article VI-6., as far as this is explicitly allowed by the base law act.

In order to promote the full understanding of the previous regulations please mind paragraph (1) of norm article VI-6, when it says that "each affected member state shall create or appoint an authority or authorities with the task of carrying out the information management activity. Each member state shall inform the Committee or –if established – the directing authority of the list of authorities in charge as well as the modification of the list within the shortest time possible of appointment Should a member state appoint several authorities in charge, it must then clearly define the task distribution on the list."

3.2. Obligation to Update, Correct or Cancel Data

Reviewing the regulations of the draft it can be stated that there are four case circles in connection with updating, correcting or cancelling information stored in databases. These case circles both include authority acts that are carried out ex officio or on request. Ex officio updates, corrections or cancellations take place by the authority in the following cases:

- First, the authority in charge that provides information is obliged to check information and data and to correct or cancel them immediately, if the authority in charge decides that the information forwarded to other authorities or the data put in databases are not correct or their processing violated the relevant national or EU law.

- Secondly, the base law act may oblige the authority providing the information to update the information regularly, in well-defined periods.
- Thirdly, should a participating authority that is not the data providing authority have evidence that the data are incorrect or their processing violated the relevant national or EU regulation, then this authority shall inform the data providing authority immediately. The data providing authority shall then check the data and correct or cancel them, if necessary.

The procedures started upon request should be treated beyond these cases. The request procedure means that "any person concerned may request that the data providing authority should immediately correct non-correct data of the underlying person and unlawfully recorded data or overdue data should be blocked". Finally, the guarantee regulation of paragraph (5) or article VI-19 of the norm text is also to be noted, when it says that the data providing authority is obliged to mark data referring to underlying debate on the request of the person concerned, if the person concerned or another participating authority doubts the correctness of the data, but the true correctness of the data cannot be verified. If the mark has been placed, it can only be removed with the consent of the person concerned or the other participating authority, but with no violation of this limitation the mark can also be removed with the proper decision of the relevant court or independent data protection authority.[6]

4. SUMMARY

As a summary of the above it can be highlighted that the Model Rules that can be perceived as "basic documents" of the EU public administration procedure law are highly abstract, when they approach (?) the public administration (authority) procedural rules. When the above mentioned legal institutions were surveyed, the endeavours of the EU legislators are surely to be appreciated or even praised, because information management is an inevitable and very sensitive issue of the operation of public administration. It is easy to understand that the management and storage of well-defined data requested on purpose is highly essential from the perspective of the state's (public administration's) operation and the establishment of the guarantee rules is also fundamental.

Since besides the national regulation, the valid (i.e. data protection) law material's regulation is based on several international and supranational norms, it is obvious to discuss this topic among the Model Rules and after a content investigation one can state that the regulations in reference are of guarantee importance, which can be suitable to achieve the legislators' goals.

[6] To be noted that this regulation does not affect the relevant scope of the supervisory authority.

REFERENCES

Boros Anita (2014): Úton egy európai közigazgatási (eljárási) jog felé. *MTA Law Working Papers,* 2014/58. Available at: http://jog.tk.mta.hu/uploads/files/mtalwp/2014_58_Boros.pdf (Downloaded: 12.10.2015.)

Fábián Adrián (2011): *Közigazgatás-elmélet.* Budapest–Pécs, Dialóg Campus Kiadó.

Toward Restatements and Best Practice Guidelines on EU Administrative Procedural Law. European Parliament Directorate General for Internal Policies, 2010. 12–13. Available at: www.europarl.europa.eu/RegData/etudes/note/join/2010/425652/IPOL-JURI_NT%282010%29425652_EN.pdf (Downloaded: 12.10. 2015.)

Varga Zs. András (2014): Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról. *Magyar Jog,* No. 10.

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