21 Did Not Lose Their Public Asset Quality

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One of the most discussed issues in March 2016 was that of the opinions on the asset management data of the economic entities owned by and the foundations of the Hungarian National Bank. On 1 March 2016, the Hungarian Parliament passed the amendment of Act CXXXIX of 2013 on the National Bank of Hungary (MNB), which restricted access to these data. The various statements explaining the amendment often included the argumentation that public funds donated to a foundation "lost their public asset quality", which explanation soon became a catchphrase and a target of mockery in the media. The President of the Republic refused to sign the amended act passed; instead, on 9 March he sent it to the Constitutional Court, which ruled by its Decision[1] passed on 31 March 2016 that the contested provisions were unconstitutional. Considering that the MNB foundations had failed to treat the several billion forints donated to them as public funds before the amendment already, and, accordingly, they had avoided public procurement procedures when spending these public funds, several proceedings were launched as a consequence of the Decision (partly at the foundations' own request, partly initiated by the public prosecution), as a result of which the Arbitration Council of the Public Procurement Council imposed fines of a total amount of HUF 80 million.[2] After the Constitutional Court's decision, the MNB foundations disclosed the details of their grant agreements.

The issue of whether or not the "public asset quality" is lost is, however, much more complex examining the legal framework than it may first seem; furthermore, the financial management of and the agreements signed by the economic entities are viewed differently from those of the foundations. According to the argumentation of the President of the Republic, the economic entities whose exclusive or majority owner is MNB as well as the foundations set up by the Bank are financed from public funds, and the related data are, by virtue of the Fundamental Law of Hungary, data of public interest; thus, restricting access to these data involves violating the fundamental right of access to data of public interest. Furthermore, by having to apply the provisions to the ongoing procedures as well, the ban on the retroactive application of legislation is violated.[3]

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1 Decision 8/2016 (6 June) of the Constitutional Court.

2 Megbírságolták az MNB-alapítványokat ezer szerződés közül 66 miatt http://hvg.hu/gazdasag/20160809_mnb_alapitvanyok_kozbeszerzes (24.08.2016).

3 This study does not discuss retroactive effect; it merely discusses the opinions on the data.

The first question that may arise is what qualifies as public funds. In the financial law approach, regulations on public finances, tax law, asset management and state debts qualify as public funds regulations. In the broad sense, regulations on the currency and its stability in value, the creation of money and the supervision of the latter also belong to this category.[4] Specific constitutions regulate on fundamental budget issues, the rights of tax charging and collection, money issuing, the legal status of the bank of issue and of specialised financial control organs, as well as on the fundamental questions of budget law.[5] In its task performance as a central bank (preserving the value of the currency, money issuing, influencing financial processes, etc.), the Hungarian National Bank performs state duties.[6] Thus, the constitutional regulations on public finances are applicable to MNB's activities as well; considering its activities it performs public duties just like any other state organs, but at the same time we must realise that the funds managed by the bank do not come from the central budget. The bank is financially independent, which also means independence from the state budget. Its revenues come from interests and similar revenues, exchange rate changes, financial operations and the Bank's supervisory activities.[7]

By virtue of Article 39 of the Fundamental Law of Hungary – also quoted by the President of the Republic – every organisation managing public funds shall be obliged to publicly account for its management of public funds, and data related to public funds and national assets shall be data of public interest. The Fundamental Law declares these data to be data of public interest irrespective of the identity of the data controller, which leaves no room for questions basically. The Constitutional Court emphasised first of all that MNB was a legal entity operating as a private company limited by shares, its subscribed capital was provided by the state and its shares were held by the state exclusively as well, and Article 38(1) of the Fundamental Law ruled that the property of the State shall be national assets. The Court then examined the tasks of MNB, of which it established that they were public duties. From these two the Court concluded that the bank of issue managed public funds. This is a remarkable final conclusion because one starting point is that it has no significance what entity the public funds are managed by, what is important is where the funds came from; but the reason why MNB funds are public funds is that MNB itself is owned by the

4 L. Klicsu, 'Közpénzügyek', in: L. Trócsányi, B. Schanda (Eds.), *Bevezetés az alkotmányjogba. Az Alaptörvény és Magyarország alkotmányos intézményei* HVG-ORAC Budapest, 2005, pp. 453-478, 456.

5 Zs. Halász, 'Public Finances', in: A. Zs. Varga, A. Patyi, B. Schanda (Eds.), *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Clarus Press Dublin, 2015, pp. 321-345, 321-327.

6 Klicsu, Id., p. 469.

7 A. Magyar, 'Nemzeti Bank eredménykimutatása', in: A. Magyar (Ed.), *Nemzeti Bank* 2015. évről szóló üzleti jelentése és beszámolója, p. 83 https://www3.mnb.hu/letoltes/mnb-eves-jelentes-2015.pdf (24 August 2016).

state and must be considered state asset accordingly, irrespective of the fact that its revenues do not necessarily come from the state.[8]

MNB may establish economic entities of its majority ownership or foundations in accordance with its tasks and primary objectives. As follows from the above, the contribution of assets during the foundation of an economic entity, as well as the funds donated to a foundation in order to finance its operation, also qualify as public funds. The fact that economic entities have independent legal personalities has no significance, on the one hand because the identity of the data controller is irrelevant: what is important is the source of the assets. On the other hand, the Constitutional Court considered the economic entities, too, as indirect public assets, i.e. as national assets in the first place. By virtue of the Act on National Assets, corporate shares held by the state and accordingly the shares held in the Hungarian National Bank, too, are national assets, and it is the state-owned MNB that has shares in the economic entities. By and large the same conclusions hold for foundations, too, even though the founder cannot be regarded as the owner or supervisor of the foundation. The assets donated to them are public funds all the same, and their duties are public duties as well, since foundation may be established in accordance with the duties and primary objectives of the Hungarian National Bank exclusively.

Thus the above data are data of public interest. The amendment passed, however, was to restrict access, for thirty years, to all data managed, generated or registered in relation to MNB's fundamental duties at the economic entities in MNB's (majority or exclusive) ownership. On the whole, the provisions of the Act on the National Bank of Hungary on data management were to be amended in a way that access to data would have depended on the identity of the data controller: if the specific (non decision-support) data were managed by MNB, these were to be made public; if the data controller was a foundation of MNB, the data were not to be disclosed. What is more, in the case of economic entities the amendment did not specify the reason for withholding the data from the public, so it was not to be established in the first place if restricting the fundamental right of access to the data was justified.

8 It had thus no significance for the Constitutional Court, either, from what source exactly MNB had provided the grants. The Act on the Hungarian National Bank rules that revenues from fines imposed by the bank may be spent on subsidising foundations. According to some other views, money issuing or foreign currency reserves served as the bases of the grants, which violated the Act on the Hungarian National Bank. http://mno.hu/gazdasag/alapitvany-devizatartalekbol-1335014. Originally, the foreign currency reserves had come from loans [cf. Cs. László, 'A nemzetközi pénzügyi szervezetek és a keleteurópai rendszerátalakító politika', *Közgazdasági Szemle*, Year XLII, 1995, No. 2 (pp. 117-138) http://epa.oszk.hu/00000/00017/00002/0201.html (26 August 2016)], still from the time when the bank of issue had participated in financing the state. At the same time, the current Act on MNB also says that, if the consolidated balance of the equalization reserves is negative and there is no coverage provided by the balance sheet total or the profit reserves, funds are to be provided from the central budget. Thus, in these cases, too, the conclusion can be reached that these cases involved public funds, while at the same time these questions should be examined by the State Audit Office primarily.

The amendment was to also restrict access to the data managed by the foundations established by MNB. The only data whose publication was declared as required were the data on exercising the founder's rights, including the deed of foundation and the data on performing the contribution of assets undertaken in the deed of foundation and required for attaining the foundation's objectives. As regards access to other data managed by the foundations, the amendment was to order the application of the provisions of the Act on the Freedom of Association for public benefit organisations only. By this it excluded the applicability of the Act on the Freedom of Information on the one hand and, on the other hand, the amendment of the Act on the National Bank of Hungary would have further restricted the already restrictive provisions applicable to public benefit organisations.[9] The amendment did not specify the reason or the purpose of this all, either; the circle of the data to be restricted was to be broad and undifferentiated and the period of the restriction was not specified, either.

Thus the Constitutional Court established in the cases of both economic entities and foundations that they operated from public funds so the related data were data of public interest. Restricting access to these data contradicted the fundamental right of access to data of public interest: in the case of economic entities because the necessity of the restriction was not to be established due to deficiencies in the regulations and, in the case of foundations, because the restriction would have been so broad that the opportunity to establish its necessity was excluded in the first place. The Constitutional Court noted in just one sentence that, irrespective of the above, there could be reasons justifying restrictions in the case of economic entities, but did not provide any details. Such data could be, to a limited extent, the business secrets of economic entities.[10] This is what the constitutional judge Béla Pokol referred to in his dissent: in his view, MNB's economic entities, too, have the right to the opportunity of fair economic competition by virtue of Article M(2) of the Fundamental Law. In view of this he would support control by the State Audit Office, the prosecutor's office or the police in these cases.

The constitutional judge András Varga Zs. has a totally different approach pointing out that the Fundamental Law does not include any – basically procedural – rules regulating the actual procedure of access to data of public interest; the rules appear at the level of acts, which, however, lack constitutional force. In his view, unconstitutionality is measured by the opportunity of actual access to the data rather than the way of access (procedure). Therefore, by a legal interpretation different from the majority interpretation he reaches the conclusion with reference to economic entities that even though data of economic entities cannot be requested from the economic entities themselves, they can be requested

9 E.g. it would have excluded the opportunity to submit requests for data of public interest and MNB foundations would have only been obliged to publish annual reports of a limited content.

10 MNB's economic entities include a debt management company, a bank and a security company, too.

from the relevant MNB organs. In this way, the contested regulation does not exclude, it merely restricts access, and as the reason for the restriction he accepts the protection of economic entities' market role, as well as the reason of concentrating the information on the decisions and their publication. He found it a shortcoming that the Constitutional Court had failed to make it clear whether the data concerned were data of public interest or data subject to disclosure due to overriding public interest. Originally, considering their nature, data subject to disclosure due to overriding public interest are not data of public interest and are not public. It is a law that makes them public by depriving them of their original quality. At the same time, restricting publicity in the case of data of public interest must stay within the framework of the Fundamental Law. Beyond these, it was not the first time that a constitutional judge had urged ensuring the publicity of data by ordering the publication of certain data by law in the first place, instead of relying on requests of data of public interest for access.

Thus the Constitutional Court made the decision that the great majority had expected within three weeks. This was not the first decision related to data of public interest that had been passed since the Fundamental Law took effect in 2012, and yet there was some kind of uncertainty and the lack of a uniform interpretation regarding the concept of data of public interest and the level of restricting access to these. It appears in the practice of the Constitutional Court that if an organisation performing public duties manages certain data, the data concerned become data of public interest as a consequence.[11] According to the majority opinion, furthermore, the obligation of providing data of public interest is not dependent on what type of organ the organ possessing the data concerned is, what the ownership of the organ is and what activity it pursues.[12] It is related to this latter that the presence of state funds makes certain data data of public interest, too, as has been shown also in this case. In spite of this, a great proportion of the private sector, where economic interests are also present, can be considered managers of data of public interest as well. In the quoted decisions, the Constitutional Court basically rejected the opportunity to restrict access to data of public interest from the point of view of some other interest.[13] At the same time, the contradictory quality of the dissenting opinions related to specific decisions, the debates conducted and the legal interpretations of the data controllers and courts implies that there is demand for the simplification of the regulation and the setting of reasonable limits, because it can be established beyond doubt that there arise numerous disputed

11 E.g. Decision 6/2016 of the Constitutional Court (11 March), Justification [28], Decision 7/2016 of the Constitutional Court (6 April), Justification [27]-[34].

12 E.g. Decision 21/2013 (19 July) of the Constitutional Court, Justification [35], Decision 3026/2015 (9 February) of the Constitutional Court, Justification [19].

13 Even though there was a decision, too, where in the course of control for legal compliance performed in relation to the prosecution office's activity protecting public interest public interest quality was not established, while here, too, there was a constitutional judge who did not share the position [Decision 3016/2016. (2 February) of the Constitutional Court].

issues in practice, which does not serve the requirement of transparency in the operation and management of the state.