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THE SPECIAL REQUIREMENTS APPLICABLE TO THE MANAGEMENT OF NATIONAL ASSETS, WITH A SPECIAL RESPECT TO THE REQUIREMENT OF TRANSPARENCY*

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Abstract: The Fundamental Law of Hungary states that the property of the Hungarian State and of municipal governments shall be considered national assets. National assets shall be managed and protected for the purpose of serving the public interest, satisfying common needs and preserving natural resources, taking also into account the needs of future generations.[1] Economic operators – such as companies - owned by the State or municipal governments shall conduct business prudently and independently, in accordance with the relevant legislation, under the requirements of legality, efficiency and effectiveness.[2] The special requirements regarding the management and safeguarding are laid down in Act CXCVI of 2011 on National Assets (hereinafter: National Assets Act) and Act CVI of 2007 on State Property (hereinafter: State Property Act) also contains a few requirements in its preamble.

Based on the above, national assets shall be managed and protected in a special way, compared to privately owned assets. Publicly owned enterprises play a very important role in the national economy, since they provide a significant amount of GDP, they employ numerous people, they usually provide public services and last but not least they manage public funds. As a consequence, these companies shall also manage their assets with respect to the special requirements. In our article, we introduce these requirements by examining their content and also their relationship towards each other.

One of the most important requirements is transparency, since these enterprises manage public funds and according to the Fundamental Law, every organization managing public funds shall publicly account for the management of those funds. Public funds and national assets shall be managed according to the principles of transparency and of corruption-free public life. Data relating to public funds or to national assets shall be recognized as data of public interest.[3] We lay a special emphasis on transparency by introducing the relating regulation and also by summarizing the most prominent statements of court decisions from the last few years. In their judgements the courts interpreted the requirement of transparency in connection with state-owned enterprises and the relationship between transparency and the protection of business secrets and business interests of the companies. With respect to the fact, that the Supreme Court of Hungary created a special group in order to examine the practice of these proceedings, we only analyse a few of the related judgements, adjudicated by the Metropolitan Regional Court. The reasons of this method are twofold, firstly, the thorough examination of more relevant court decisions would extend beyond the purpose of the present paper that is to present a more general summary related to the legal requirements applicable to the management of public assets. Secondly, the judgements chose to be analysed in this paper and brought by the Metropolitan Regional Court are final and binding decisions, hence their content may not be appealed by any of the parties.

*The author hereby wishes to say thank you to Professor Tekla Papp for her comments and remarks on the manuscript of the essay.

[1] The Fundamental Law of Hungary (hereinafter: Fundamental Law) Article 38 (1)

[2] Fundamental Law Article 38 (5)

[3] Fundamental Law Article 39 (2)

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Keywords: transparency; publicly owned enterprise; national assets; business secret; asset management

Absztrakt: Magyarország Alaptörvénye rögzíti, hogy az állam és a helyi önkormányzatok tulajdona nemzeti vagyonnak minősül. A nemzeti vagyon kezelésének és védelmének célja a közérdek szolgálata, a közös szükségletek kielégítése és a természeti erőforrások megóvása, valamint a jövő nemzedékek szükségleteinek figyelembevétele.[4] Az állam és a helyi önkormányzatok tulajdonában álló gazdálkodó szervezetek – így a gazdasági társaságok is - törvényben meghatározott módon, önállóan és felelősen gazdálkodnak a törvényesség, a célszerűség és az eredményesség követelményei szerint.[5] A vagyonkezelésre és a vagyon megőrzésére irányadó speciális követelményeket a nemzeti vagyonról szóló 2011. évi CXCVI. törvény határozza meg, továbbá az állami vagyonról szóló 2007. évi CVI. törvény preambuluma is tartalmaz bizonyos követelményeket.

A fentiek alapján a nemzeti vagyonba tartozó vagyonelemek kezelése és védelme a magántulajdonban álló vagyonelemekhez képest sajátos elvek szerint zajlik. A köztulajdonban álló gazdasági társaságok nemzetgazdasági szempontból kiemelt jelentőséggel bírnak, tekintettel arra, hogy a GDP meghatározó részét ezek a szervezetek állítják elő, jelentős szerepet töltenek be a foglalkoztatásban, jellemzően közszolgáltatásokat biztosítanak, továbbá közpénzzel gazdálkodnak. Ebből következően ezeknek a társaságoknak a saját vagyonukat is a speciális gazdálkodási követelményekre tekintettel kell kezelniük. A jelen tanulmányban ezeket a követelményeket mutatjuk be és azok tartalmát vizsgáljuk meg, kitérve az egymáshoz való viszonyukra is.

Az egyik legfontosabb vagyongazdálkodási követelmény az átláthatóság, mivel ezek a társaságok közpénzzel gazdálkodnak és az Alaptörvény szerint a közpénzekkel gazdálkodó minden szervezet köteles a nyilvánosság előtt elszámolni a közpénzekre vonatkozó gazdálkodásával. A közpénzeket és a nemzeti vagyont az átláthatóság és a közélet tisztaságának elve szerint kell kezelni. A közpénzekre és a nemzeti vagyonra vonatkozó adatok közérdekű adatok.[6] Különös figyelmet fordítunk az átláthatóság követelményére azáltal, hogy bemutatjuk a vonatkozó jogi szabályozást és összefoglaljuk az elmúlt évek releváns bírósági döntéseinek a legmeghatározóbb megállapításait. A bíróságok határozataikban értelmezték az átláthatóság követelményét a köztulajdonban álló gazdasági társaságokkal kapcsolatban, továbbá az átláthatóság követelménye és az üzleti titkok védelme közötti kapcsolatot is elemezték. Tekintettel arra, hogy a Kúria joggyakorlat-elemző csoportja átfogóan vizsgálta a témakörhöz kapcsolódó döntéseket, a jelen dolgozatban csak egyes, a Fővárosi Ítélőtábla által hozott ítéleteket vizsgálunk. Ennek ez oka kettős, egyrészt a vonatkozó bírósági döntések részletes elemzése túllépné a jelen dolgozat által elérni kívánt célt, amely a köztulajdonban álló vagyonelemek kezelésére irányadó alapelvekhez kapcsolódóan egy általános összefoglaló nyújtása. Másrészt, a vizsgálatra kiválasztott, a Fővárosi Ítélőtábla által hozott döntések jogerős határozatok, így azok ellen a felek további fellebbezéssel nem élhettek.

Kulcsszavak: átláthatóság; köztulajdonban álló gazdasági társaság; nemzeti vagyon; üzleti titok; vagyongazdálkodás

Summary: The present article aims to introduce and interpret the special requirements applicable to the management of national assets. These requirements are listed in the Fundamental Law of Hungary and in other acts as well, however it is hard to define and to establish their precise content and their relationship towards each other. In our article we examine the mentioned requirements based on the text of the relevant laws and also by analysing the relevant professional literature and judicial practice.

The article highlights one special requirement in particular, namely the requirement of transparency. The reason of this special emphasis is that in the last couple of years a special attention has been drawn to this criterion, since several litigation procedures have been initiated or are still pending related to the disclosure of certain data concerning the operation and the asset management of state-owned enterprises.

[4] Fundamental Law Article 38 (1)
[5] Fundamental Law Article 38 (5)
[6] Fundamental Law Article 39 (2)

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Összefoglaló: A jelen tanulmány célja a nemzeti vagyonba tartozó vagyonelemek kezelésére irányadó speciális vagyongazdálkodási követelmények bemutatása és értelmezése. Ezeket a követelményeket részben Magyarország Alaptörvénye, részben pedig más törvények nevesítik, azonban ezeknek az alapelveknek és a tartalmuknak, valamint az egymáshoz fűződő viszonyuknak a meghatározása meglehetősen nehéz. Tanulmányunkban az említett követelményeket a vonatkozó jogszabályok szövegéből, a releváns szakirodalomból és bírósági joggyakorlatból kiindulva vizsgáljuk.

A tanulmány különös figyelmet fordít egy alapelvre, nevezetesen az átláthatóság követelményére. A hangsúly oka abban keresendő, hogy az elmúlt években kiemelt figyelem irányult erre a követelményre, mivel számos peres eljárás indult, illetve van a mai napig függőben a köztulajdonban álló gazdasági társaságok működéséhez és vagyongazdálkodásához kapcsolódó bizonyos adatok nyilvánosságra hozatalához kapcsolódóan.

Introduction

In retrospect to the last couple of decades, the management of publicly owned assets in Hungary changed dramatically. Previous to the political regime change, the state dominantly took part in the economy by owning and controlling almost every undertaking (Menyhárt, 2017, p. 357). However, this position of the state has progressively changed and it became one of the members of the economy by managing public funds and encouraging innovations and developments which it considers beneficial (Kovács, 2010, p. 302). It shall be pointed out, that following the political regime change, the state aimed to sell many assets – including shares in companies – to the private sector, however many of these transactions did not take place for one reason or another. One of the reasons was that the planned transaction may not have been prepared properly, or the "subject" of the transaction was not desirable enough to the potential investors (Horváth M., 2020, p. 129). Hence the state and local municipalities still own plenty of shares in companies, which entities they shall manage with due care, as explained in this paper. The management of public funds shall be considered a special activity, therefore several requirements prescribed by acts shall be applicable. However, the content of these requirements is not regulated by the mentioned acts, they do not unfold the true substance of these fundamental principles.

In our article, we briefly summarize the relevant rules and their interpretations of the Fundamental Law, the National Assets Act and the State Property Act. During the examination of the mentioned principles we mainly focus on publicly owned enterprises,[7] since these entities manage public funds during their operation. Regarding these enterprises, we shall point out that in spite of the state or a local government having membership rights in them, they are also regulated by the Civil Code,[8] since they do not operate in a special form. Consequently, the basic principles of the Civil Code[9] are also applicable to these companies and the general principles of company law (Papp, 2011, pp. 25-39) as well.

1. The main principles of asset management

1.1. The requirements laid down in the Fundamental Law

National assets shall be managed and protected for the purpose of serving the public interest, satisfying common needs and preserving natural resources, taking also into account the needs of future generations. According to Gábor Bende-Szabó, national assets shall be considered special-purpose assets (Bende-Szabó, 2014, p. 4), because their usage and utilization serve special, determined purposes. The Fundamental Law also states that the requirements for safeguarding and protecting national assets, and for

[7] The term „publicly owned enterprise" is defined by Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises Section 1 point a)
[8] Act V of 2013 on the Civil Code
[9] CC § 1:3-1:5

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the prudent management thereof, shall be laid down in an implementing act.[10] Therefore the Fundamental Law establishes the purposes of managing and safeguarding national assets, emphasizing that the management of national assets shall never serve private interests and the manager shall always act in accordance with public interests.

The Fundamental Law also prescribes special requirements for economic operators owned by the Hungarian State or local governments, since these entities shall conduct business prudently and independently, in accordance with the relevant act, under the requirements of legality, efficiency and effectiveness.[11] According to our interpretation, the order issued by a certain local government shall not contain any rule regarding the economic operation of local governmentally owned enterprises, since the asset management of these companies are regulated by acts and the orders of local governments shall under no circumstances to be considered acts. In our opinion, this regulation fails to take into account the fact that these orders might prescribe more special and unique rules for the enterprises, since they are not applicable to every publicly owned enterprise in Hungary, only the ones owned by the local government is question. Another question arises from the special regulation of the Hungarian Civil Code, since the members of companies have the right to derogate from the provisions of the Civil Code regarding the relations between the members or between the members and the company and regarding the organizational structure and the operational arrangements of the company, if these derogations are not prohibited by law, or they do not harm the interests of the creditors, employees or minority members of the company or do not block the effective supervision over the legal person (Auer, 2018, pp. 9-28).[12] According to the grammatical interpretation of the cited section of the Fundamental Law, the internal regulations and organizational rules of the companies may also not contain any special regulation regarding the asset management of the company, since these documents shall also not be considered acts. In our opinion, the companies shall have the right to work out special rules and regulations for asset management and economic operation, as long as these documents are in accordance with the fundamental principles of the National Assets Act.

As we previously mentioned, publicly owned enterprises manage public funds, therefore they shall publicly account for the management of these funds. National assets shall be managed according to the principles of transparency (Miczán, 2013, pp. 165-186) and of corruption-free public life.[13] Also, data relating to public funds or to national assets shall be recognized as data of public interest.[14] We are examining this requirement more thoroughly in one of the upcoming chapters. We shall point out that the Fundamental Law regulates the so-called transparent organizations,[15] but in our opinion the requirement of transparency and the question whether an organization shall be considered transparent are not identical, therefore the requirement of transparency is rather a fundamental principle, which shall be exemplary for every organization managing public funds and / or national assets.

1.2. The requirements laid down in the National Assets Act

The National Assets Act prescribes that the primary purpose of national assets is to ensure the fulfilment of public tasks, such as providing public utilities to the people and to provide the infrastructure necessary to carry out these tasks. National assets shall be managed properly and in a responsible way.[16] According to Gábor Bende-Szabó, the substance of the principle of responsible management is filled by other requirements, such as effectiveness, transparency, cost-efficiency and proportionality (Bende-Szabó, 2014, p. 49). The Act repeats itself by stating that the utilization of national assets shall be proper.[17] In our view,

[10] Fundamental Law Article 38 (1)
[11] Fundamental Law Article 38 (5)
[12] CC § 3:4 (2)-(3)
[13] Order nr. 21/2013. (VII. 19.) of the Constitutional Court, Metropolitan Regional Court Pf. 21.039/2017/5.
[14] Fundamental Law Article 39 (2)
[15] A transparent organization is an organization, that is able to fulfil the requirement of transparency in terms of ownership structure, organization, and the activities relating to the management of the alienated or utilized national assets. See: Fundamental Law Article 38 (4).
[16] National Assets Act § 7 (1); Metropolitan Regional Court Pf. 20.633/2018/4.
[17] National Assets Act § 7 (2)

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the proper utilization and the proper asset management shall be considered identical requirements, which refer to those provisions of the Fundamental Law and the National Assets Act which establish that the primary purpose of national assets is to serve public interests and to ensure the fulfilment of public services. We took the view that the principle of proper asset management shall be considered fulfilled when the decision makers decide in line with the public interest and serve the public, instead of serving their own interests and purposes. We would like to point out that business property is also a part of national assets.[18] In our opinion, relating to these assets, the purpose of serving public interests is somewhat questionable, since these assets are to be transferred free from any restrictions and they are not special assets, referred separately by the National Assets Act, contrary to the non-tradable assets.

The three most concrete and important fundamental principle regarding asset management are transparency, effectiveness and cost-effectiveness. However, the Act does not define these terms and does not establish any rules regarding how these principles shall be interpreted or when these requirements shall be considered fulfilled or failed. Although we would like to highlight that a separate act regulates the cost-effective operation of publicly owned enterprises.[19] This law sets the promotion of more cost-effective operation of publicly owned companies as a goal; however, the preamble of the act only uses the term cost-effectiveness related to the management pays.[20]

1.3. The requirements laid down in the State Property Act

The preamble of the State Property Act also prescribes special requirements connecting to the managements of state-owned assets. According to the preamble, the assets of the State shall be managed in a more effective, more efficient and more cost-effective way and the most important assets shall be protected and preserved for future considerations. Firstly, we would like to point out that the State Property Act does not define a point of reference, so it does not establish a period or a point, from which the asset management shall be better, more cost-effective and more efficient. The preamble refers to the conclusion of the period of broad-scale privatization, however it does not define it as a point of reference. Also, it shall be noted that it is hard to precisely define the exact period of privatization. It is in question, whether the period of the so-called "spontaneous privatization" (Sárközy, 2009, pp. 35-67) shall be considered as a part of this period or not. Furthermore, in case we define privatization as a process during which the ownership rights of state-owned assets are transferred to private persons, the period shall not be considered concluded until any assets are owned by the state or local governments. Another note is that according to our opinion, these fundamental requirements shall not be fulfilled better compared to another time period. They shall prevail in the best possible way during the period when the State Property Act is in force.

The State Property Act also fails to define the terms cost-effectiveness, efficiency and effectiveness. This Act is applicable to assets owned by the Hungarian State, but it is not applicable to assets owned by local governments. Act CLXXXIX of 2011 on Local Governments of Hungary does not establish any requirement regarding the management of local governmentally owned assets. However, assets owned by local governments are part of national assets, therefore the rules laid down in the Fundamental Law and in the National Assets Act are applicable to these property items as well.

1.4. The relevant principles of the Civil Code

State-owned enterprises are also business associations and as a consequence of this, the relevant rules of the Civil Code are also applicable to these legal persons. Furthermore, most of the operational and organizational rules of these entities are regulated by the Civil Code and only a few special norms are prescribed by other acts. As an example of the latter, we would like to mention Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises, which contains special rules inter alia to the

[18] National Assets Act § 3 Point 18.
[19] Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises
[20] See the Preamble of Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises

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management and the supervisory board of publicly owned enterprises.[21] The introductory provisions of the Civil Code are concerning the whole codex. Out of these provisions, the interpretative principle concerning the whole codex and the legislation relating to civil law,[22] the principle of good faith and fair dealing (Nochta, 2017, pp. 3-8),[23] the principle of reasonable conduct (Zlinszky, 2003, pp. 281-290)[24] and the prohibition of abuse of rights (Hajdu, 2018, pp. 54-60)[25] shall be considered relevant related to our topic. Another important rules established in the introductory provisions of the Civil Code is that unless otherwise provided for by law, the rights afforded in the Civil Code may be enforced by way of judicial process.[26] It is complicated to define the substance of these principles, since they are mostly filled by elements out of the field of law (Vékás, 2014, p. 53), but it shall be emphasized that these principles shall also be fulfilled during the operation of every business association, so during the operation of publicly owned enterprises as well.

The Fundamental Law, the National Assets Act and the State Property Act are laws from the field of public law. The asset management requirements established by these acts are fundamental provisions from the field of public law, which are extended with the classic principles of the private law. However, we shall not forget about the fact that publicly owned enterprises are special companies with unique features, since they manage public funds, provide public services and are owned by the state or local governments. Therefore, in our opinion, the fundamental principles laid down in the public law acts shall be considered primarily applicable and the principles of the Civil Code shall be considered secondary requirements, which shall prevail when the primary requirements shall be complemented or specified. In our view, in that hypothetical case, when the principles of the Fundamental Law or the National Assets Act or the State Property Act are in collision with the principles of the Civil Code, the public law requirements shall prevail.

1.5. Assessment of the fundamental principles regarding the management of national assets

In our paper we examined the asset management requirements based on the texts of the relevant acts and as a consequence, we point out that none of the reviewed acts contains any exact definition regarding the fundamental principles of asset management. The acts do not establish the substance of these fundamental principles or do not list those cases, when the principles are fulfilled or when the asset management of the company is not in compliance with these requirements. As a result of this, in our view, the substance of these principles is hard to define, since the relevant acts and laws name these requirements but fail to give any further information on them. On the other hand, we would like to point out that both the National Assets Act and the State Property Act contain several legally binding rules related to the management of national assets. Therefore, if these rules are fulfilled during the operation and asset management of the company, the fundamental principles are also met.

During the examination of publicly owned enterprises, it must be pointed out that a company shall be considered publicly owned in those cases as well, when the state or a local government is not a sole member of the company. If the state or the local government owns more than 50 % of the voting rights, the enterprise is a publicly owned one, even if it has other, non-public members. Therefore, it is a question, whether the private members of the company must also comply with the special asset management requirements or they do not have a special obligation to do so. In our opinion, during the decision-making process of the company, the state or the local government shall always act accordingly to the fundamental principles of national asset management, so these requirements influence the operation of the enterprise. The other, private members are most likely not obliged to always act upon these principles, but they shall also be aware of them. However, most publicly owned enterprises do not have any non-public members or for example natural person members, so this dilemma is rather a theoretical

[21] For example, Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises § 3-6
[22] CC § 1:2
[23] CC § 1:3
[24] CC § 1:4 (1)
[25] CC § 1:5
[26] CC § 1:6

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one.

In the previous chapter, we introduced the special asset management requirements laid down in the Fundamental Law, in the National Assets Act and is the State Property Act and we also briefly summarized the relevant general principles of the Civil Code. We would like to assess the relationships between these acts and also between the fundamental principles established by them. First of all, being the fundamental act of the national legal system, the Fundamental Law and the principles stated by it shall be considered the basis of the management of national assets. Also, the Fundamental Law states that the requirements for safeguarding and protecting national assets, and for the prudent management thereof, shall be laid down in an implementing act,[27] and this act is the National Assets Act. As a result of this, the Fundamental Law itself names the National Assets Act as a special legal instrument establishing the main principles of asset management. Therefore, the National Assets Act lays down principles not listed in the Fundamental Law, for example cost-efficiency and effectiveness. On the other hand, the National Assets Act does not contain the requirement of efficiency, but the Fundamental Law does. Also, certain principles, such as transparency are listed in both acts. As a consequence of this, in our view the Fundamental Law and the National Assets Act jointly establish the special requirements applicable to the management of national assets. The fundamental principles listed in the preamble of the State Property Act are also listed either in the Fundamental Law or in the National Assets Act. Therefore, the legislator carefully detected that assets owned by local governments are also part of national assets, so the act regulating only state property and not municipal property shall not contain any new principles, which are not established in one – or both – of the previously mentioned acts.

The general principles of the Civil Code are applicable to the whole private law codex and to every business association, so compared to the requirements laid down is the Fundamental Law, in the National Assets Act or in the State Property Act, the principles of the Civil Code shall be considered general, secondary principles in our opinion. Therefore, during the operation and asset management of publicly owned enterprises, primarily the principles of acts from the field of public law shall prevail.

2. The requirement of transparency and its collision with the protection of business secrets

2.1. General provisions, legal regulation

As we previously mentioned, transparency is a key element for publicly owned enterprises, since they manage national assets and these assets shall be handled transparently. The main reason of this is the fact that state-owned enterprises manage public funds and a significant portion of these funds comes from taxes. Therefore, citizens shall have the right to know how the state and local governments handle, manage and safeguard their "contributions". Another reason is that these companies often carry out public services. In this point, we briefly discuss the special transparency requirements regarding publicly owned enterprises by introducing the relevant legal regulations and summarizing the general statements of court decisions from the last couple of years.

Firstly, it shall be noted that based on the fundamental principle of publicity of companies (Papp, 2019, pp. 78-80) every company shall disclose several data and information regarding its operation and organization and these data are publicly available in the company register and the annual accounts of the company shall also be published yearly. State-owned enterprises must disclose more data and information than privately owned companies, for example they shall publish management pays and the remuneration of supervisory board members. However, publicly owned enterprises frequently decline the publication of data requested from them,[28] which often leads to litigation. In the recent years, more and more proceedings started in connection with the denial of disclosing information of public interest and a result of this, the Curia – the Supreme Court of Hungary – created a special group in order to examine the practice of these proceedings, whether they find any problems or inconveniences regarding these

[27] Fundamental Law Article 38 (1)

[28] As a reason for denial, companies often refer among others to the protection of business secrets, bank secrets or to the lack of the data requested.

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proceedings.[29] Another significant sign of importance is that the Hungarian National Authority for Data Protection and Freedom of Information published two recommendations regarding the publicity of business information of business associations managing of using public funds.[30]

The Fundamental Law states that everyone shall have the right to the protection of his or her personal data, as well as to have access to and disseminate information of public interest.[31] Also the constitution establishes that every organization managing public funds shall publicly account for the management of those funds. Public funds and national assets shall be managed according to the principles of transparency and of corruption-free public life. Data relating to public funds or to national assets shall be recognized as data of public interest.[32] Besides the Fundamental Law, the State Property Act also contains important regulation regarding our topic. According to section 5 of the Act, all data that relates to management and disposition of State property, other than public information, shall be treated as information of public interest. Access to these data may be restricted by specific other legislation. The second paragraph of this section establishes that a body or person that is vested with powers to manage or control State property shall be treated as a person or body exercising public functions pursuant to the act on access to information of public interest. Based on the interpretation of the cited sections, all data related to the management of state assets shall be considered information of public interest, even if they are not public data by law.

Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereinafter: Info Act) defines public information and information of public interest as follows. Public information shall mean any known fact, data and information, other than personal data, that are processed and/or used by any person or body attending to statutory State or municipal government functions or performing other public duties provided for by the relevant legislation (including those data pertaining to the activities of the given person or body), irrespective of the method or format in which it is recorded, and whether autonomous or part of a compilation, such as, in particular, data relating to powers and competencies, organizational structures, professional activities and the evaluation of such activities covering various aspects thereof, such as efficiency, the types of data held and the regulations governing operations, as well as data relating to financial management and to contracts concluded.[33] Information of public interest shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public.[34] According to the Info Act, any person or body attending to statutory State or municipal government functions or performing other public duties provided for by the relevant legislation (hereinafter referred to collectively as "body with public service functions") shall allow free access to the public information and information of public interest they have on file to any person, save where otherwise provided for in this Act.[35] Any data related to the management, control or use of assets of the state or local governments shall be considered information of public interest, therefore is shall be published. However, the publication of the mentioned information shall not include any data pertaining to protected know-how that, if made public, would be unreasonably detrimental for the business operation to which it is related, provided that withholding such information shall not interfere with the availability of, and access to, information of public interest.[36] In our view, this rule places a complicated burden on the party denying the disclosure of information, since it shall prove hypothetically, that in case of publication, its business operation would

[29] The group started working on 1/Febr/2017 and published its summary opinion on 3/Dec/2018. The group examined the proceedings on the broader scale than the present paper, since they analysed every decision connected to the disclosure of public information. The group identified a few problems and questions regarding these processes, but any modification of the legislation was found unnecessary. The summary opinion of the group: https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_adatvedelem.pdf [Downloaded: 17/Febr/2020]
[30] The first recommendation was published on 31/Aug/2012 and the second was published on 11/Mar/2016.
[31] Fundamental Law Article VI (3)
[32] Fundamental Law Article 39 (2)
[33] Info Act § 3 Point 5
[34] Info Act § 3 Point 6
[35] Info Act § 26 (1)
[36] Info Act § 27 (3)

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suffer harm. Since it is only a presumption and not a fact, proving it might be difficult.

As we mentioned above, publicly owned enterprises often decline the requests for disclosing certain data and information referring to the protection of their business secrets and interests. Therefore, we briefly review the current regulation of the protection of business secrets, since it has changed significantly in the last few years in order to implement the provisions of EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets), against their unlawful acquisition, use and disclosure. Business secrets are carrying a value of great significance for business entities, in those cases, when these secrets become public, the competitors of the given enterprise gain advantage and the company is question suffers disadvantages.

The protection of business secrets is regulated by Act LIV of 2018 on the Protection of Business Secrets (hereinafter: Business Secret Act), which entered into force on the 8th of August, 2018. Previously, business secrets and know-how were regulated by the Civil Code. The definition of business secret is different is the new act than it was in the Civil Code. According to the Business Secrets Act, business secrets shall include any confidential fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known in whole or in the complexity of its elements, or which are not easily accessible to other operators pursuing the same economic activities, where the proprietor of the secret has taken reasonable efforts that may be expected in the given circumstances to keep such information confidential.[37] The act contains both material and procedural rules, among the latter it establishes the special rules of procedure, different than the general rules of the Code of Civil Procedure.[38] Related to our topic, an important provision of the Business Secret Act is that the acquisition of the business secret shall not be construed an infringement where the acquisition, use or disclosure of a business secret is prescribed or made possible by a legal instrument of the European Union which is binding and directly applicable, or by an act.[39] As we mentioned above, business enterprises managing public funds or providing public services has a legal obligation to disclose several information connected to their operation and asset management. Therefore, the disclosure of these information shall not be considered an infringement of the protection of business secrecy, since a legal instrument, and act gives the legal base of publication and disclosure.

2.2. Court decisions establishing the rules of disclosing public information

As we mentioned above, publicly owned enterprises often decline to publish certain information or data requested from them, even though the certain information is connected to their operation and asset management. As a result of this, a large number of court decisions were published related to this topic. In this article, we do not examine these decisions thoroughly, rather summarize some statements of the proceeding courts. These statements are to be often read in court rulings related to the disclosure of public information, therefore we presume that they are a reflection of the general legal interpretation.

Courts – especially regional courts – often state in their judgments that everyone shall have the right to have access to and disseminate information of public interest, since it is a fundamental law for everyone. The defendants - companies, who decline to disclose the requested information – regularly state that the publication of data or information would cause competitive disadvantages to them, since their competitors would gain information about their asset management, operation and so on. The courts usually react to these statements by saying that the companies shall effectively prove that the disclosure of information would cause them disadvantages and would result a competitive advantage to their competitors.[40] Without proving exact facts and data, general reflections are not effective enough to prove the mentioned disadvantages.

Defendants often decline the disclosure by saying that the requested document contains personal data as well, which shall be protected, therefore they are unable to publish the document in question. Courts

[37] Business Secret Act § 1 (1)
[38] Act CXXX of 2016 on the Code of Civil Procedure
[39] Business Secret Act § 5 (3) point c)
[40] See among others Metropolitan Regional Court Pf. 21.039/2017/5.

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usually reflect to this statement by saying that just because a document contains personal data as well, the publication of the whole document shall not be denied, rather the personal data shall be deleted or shall be made unrecognisable and the document without personal data shall be disclosed.[41]

Publicly owned companies frequently reason that among their assets, public funds and business funds are handled separately, therefore those assets, which come from their business activities and not from fulfilling public tasks and providing public services shall not be disclosed. Courts often reflect to this statement by saying that the assets of a company cannot be separated by different activities, it shall be considered a whole sum, containing every asset owned by the given company. Also, if a company is solely owned by the Hungarian State, every income of the entity shall be considered state property, regardless of the fact that which activity of the company resulted the certain income in question. Therefore, a company is not entitled to decline the disclosure of certain data by saying that the requested information concerns assets of the company resulting from fulfilling business activities and not public tasks.[42]

As we mentioned above, publicly owned enterprises shall disclose more information than privately owned companies, according to the provisions of Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises. As a consequence, defendants often state that they fulfilled their obligation of disclosure by publishing that information established in the previously mentioned act. However, as courts pointed out, disclosing data and facts based on the regulation of Act CXXII of 2009 on the cost-effective operation of publicly owned enterprises does not mean that the company also complied with its obligation of information publication based on the provisions of the Info Act.[43] Therefore, if somebody requests additional information from a publicly owned enterprise regarding its asset management, generally the company shall disclose the requested information.

After the examination of the relevant court decisions, we shall state that courts usually order the defendant to disclose the requested data or information, since the defendant is unable to prove that it legally and reasonably declined the disclosure of information. It shall also be pointed out, that courts always ordered that personal data shall be deleted or made unrecognisable from the documents in question. The enterprises often claimed that the disclosure of information would cause them harm in the competition and also it would hurt the protection of their business secrets. In these cases, the courts always required the companies to explicitly and accurately prove how the disclosure would infringe their business secrecy and would cause them disadvantages in competition. Another important statement from the decisions is that in spite of the state or the local government transferred its assets to the company, so the owner of the assets changed permanently, the assets of the company are still considered national assets, since they have been transferred from the state of from a local government. From the point of view of theory, this statement is contrary to the basic principles of legal persons, since one of their main features is that the assets of the legal person are not the assets of its founders or its members (Papp, 2014, pp. 150-159; Papp, 2019, p. 285). However, indirectly, but usually the "final" owner of these assets are still the state or a local government, since most publicly owned enterprises are solely owned by the state or a local municipality.

2.3. Summary of the emergence of the requirement of transparency

As we established above, publicly owned enterprises shall operate and manage their assets transparently, in order to make sure that the taxpayers and citizens are able to keep tabs on the utilisation and consumption of their contributions. However, companies are often unwilling to comply with the special rules of disclosing information, therefore more and more legal actions are brought against them. The decisions and reasonings of the proceeding courts are usually identical to each other. Companies are ordered to disclose the requested information, since it shall be considered public information or information of public interest based on the relevant legal regulation. Even though they often refer to the protection of their business secrets, business interests or to the fact that the requested information does not concern their activities connected to providing public services or fulfilling public tasks, their arguments are often brushed away. Fulfilling the inevitable demand to become aware of the asset management of publicly

[41] See among others Metropolitan Regional Court Pf. 21.039/2017/5.
[42] See among others Metropolitan Regional Court Pf. 20.055/2018/4.
[43] See among others Metropolitan Regional Court Pf. 20.329/2018/5.

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owned enterprises is more important than the previously mentioned arguments. Despite the unified practice of the courts, companies still deny the disclosure of information frequently, therefore more and more actions are brought before courts related to the disclosure of public information or data of public interest. In our opinion and based on the applicable provisions of the relevant laws, disclosure of data related to the asset management of publicly owned companies is an inevitable and necessary requirement and demand from the citizens and other entities, since these enterprises use public funds and provide public services, thus they usually operate for the benefit of those very citizens, who wish to know more about the asset management of these enterprises. The assets of these companies are often complied of the taxes paid by the citizens, therefore the previously described process might be viewed as a circle: citizens pay taxes, a part of which taxes are used during the operation of publicly owned enterprises, which often provide public services for or for the benefit of the same citizens, who wish to know how their money is used and utilised. To summarize the above, in our opinion if the requested data falls within the scope of data which shall be disclosed pursuant to the provisions of the State Property Act and the Info Act, its disclosure may not be denied by the company. However, we would like to emphasize the importance of business secrets and the protection of privacy as well, hence the disclosure shall take place in a manner that these non-public information and data remain private and not be disclosed along with the information of public interest.

3. Closing remarks

In our essay we introduced the general requirements applicable to the operation and asset management of publicly owned enterprises. We laid a special emphasis on the fundamental principles named in the Fundamental Law, in the National Assets Act and in the State Property Act. After the introduction and examination of these requirements, we drew the conclusion that it is hard to define their substance, therefore these principles shall be considered as general guidelines. In our view, the individual rules of the mentioned acts and certain rules of other acts – such as Act C of 2000 on Accounting – shall provide the content of these general requirements. The principles of the Civil Code shall also be taken into consideration, however, in our opinion, only as secondary principles.

We highlighted one special principle, the requirement of transparency in our paper. One of the reasons of underlining this principle is that it has the most significant practice, the most court decisions are connected to this requirement and courts often reflect to other principles as general ones, without establishing their exact content. After introducing the relevant legal regulation connected to transparency, we briefly summarized the main tendencies of court decisions from the last couple of years. Based on the examination of several decisions of the Curia and Regional Courts, we drew the conclusion that the practice of the court shall be considered unified related to this question, however some dogmatical or theoretical aspects might require a more extensive reasoning in the future in order to make practice and theory coherent with each other.

Bibliography

Auer, Ádám – Bakos, Kitti – Buzási, Barnabás – Farkas, Csaba – Nótári, Tamás – Papp, Tekla [ed. Papp, Tekla]: *Társasági jog*. Lectum Kiadó, Szeged, 2011., pp. 25-39

Auer, Ádám: Helyi önkormányzati részvétellel működő gazdasági társaságok – szervezetfejlesztés társasági jogi eszközökkel. In.: Auer, Ádám – Boros, Anita – Szólik, Eszter (eds.): *Az önkormányzati vagyongazdálkodás aktuális kérdései*. Dialóg Campus, Budapest, 2018., pp. 9-28

Bende-Szabó, Gábor: A helyi önkormányzati vagyon törvényi szabályozásában új rendszere. In.: Patyi, András – Lapsánszky, András (eds.): *Rendszerváltás, demokrácia és államreform az elmúlt 25 évben – Ünnepi kötet Verebélyi Imre 70. születésnapja tiszteletére*. Wolters Kluwer, Budapest, 2014., p. 49

Bende-Szabó, Gábor: *A vagyongazdálkodás jogi keretei*. Nemzeti Közszolgálati Egyetem, Budapest, 2014., p. 4

Hajdu, Edit: A joggal való visszaélés tilalmának ítélkezési gyakorlata. In.: *Advocat*, 2018/3-4., pp. 54-60

Horváth M., Tamás: Tulajdonosi szerepek változása közszolgáltatási feladatot ellátó vállalatokban. In.: Bartha, Ildikó – Horváth M., Tamás (eds.): *Vállalatok és integráció*. Dialóg Campus, Budapest, 2020., p. 129.

Kovács, Árpád: *Közpénzügyek*. ELTE Eötvös Kiadó, Budapest, 2010. p. 302.

Menyhárt, Szabolcs: A nemzeti vagyonjog fejlődése a rendszerváltástól napjainkig. In.: *Miskolci Jogi Szemle*, 2017/2. special edition, pp. 357-366.

Miczán, Péter: Az Alaptörvény által támasztott átláthatósági követelmény bevezetésével felmerülő jogalkotási kérdések, különös tekintettel a társasági jogra. In.: Varga, Norbert (ed.): *Az új Alaptörvény és a jogélet reformja*. Szegedi Tudományegyetem, Szeged, 2013., pp. 165-186

Noctha, Tibor: A jóhiszeműség és tisztesség elvének érvényesüléséről a társasági jogviszonyokban. In.: *Gazdaság és Jog*, 2017/2., pp. 3-8

Papp, Tekla: Cégnyilvánosság alapelve. In.: Dúl, János – Lehoczki, Zóra Zsófia – Papp, Tekla – Veress, Emőd (eds.): *Társasági jogi lexikon*. Dialóg Campus, Budapest, 2019., pp. 78-80

Papp, Tekla: Tulajdoni elkülönülés elve. In.: Dúl, János – Lehoczki, Zóra Zsófia – Papp, Tekla – Veress, Emőd (eds.): *Társasági jogi lexikon*. Dialóg Campus, Budapest, 2019. p. 285

Papp, Tekla: Vázlatos áttekintés a jogi személyről az új Ptk. apropóján. In.: *Pro Publico Bono*; 2014/2., pp. 150-159

Sárközy, Tamás: *A korai privatizációtól a késői vagyontörvényig*. HVG-ORAC, Budapest, 2009., pp. 35-67

Vékás, Lajos: Bevezető rendelkezések. In.: Vékás, Lajos – Gárdos, Péter (eds.): *Kommentár a Polgári Törvénykönyvhöz*. Vol. 1., Wolters Kluwer, Budapest, 2014., p. 53

Zlinszky, János: Elvárhatóság a magánjogban. In.: Kozma, György (ed.): *Ünnepi tanulmánykötet Petrik Ferenc 70. születésnapjára*. PPKE JÁK, Budapest, 2003., pp. 281-290.