Mátyás Kapa

Liability for the financial management of public assets,

or accidental meeting of branches of law on the dissection table

SUMMARY: The study examines the liability for breach of duty committed in the field of financial management of public assets. It is an increasing challenge for law enforcers to establish liability, which is attributable to two main reasons. One of them is the increasing complexity of economic processes, which appears in the various (and increasingly complicated) decision-making mechanisms, whereas the inaccuracies and collisions present in the legal system constitute the other reason. The unequivocal establishment of liabilities necessitates the rethinking of liability as a system and its harmonisation among the various branches of law. The new Constitution provides legislators with an adequate framework for this. In terms of the liability issues arising in the course of the financial management of public assets, the re-regulation of asset management rights is of fundamental importance.

KEYWORDS: public assets, asset management rights, legal liability, Constitution
JEL CODES: K11, K12, K13, K14, K31

THE ESSENCE AND STRUCTURE OF PUBLIC ASSETS

When clarifying the rudiments, our starting point is that the notion of public assets is closely related to the community and the executive power. Each *community* – including the Hungarian nation – has *common affairs*. Common affairs include public health, social provisions or education. The management of these common affairs requires funding, and it also needs some kind of organisation, institutions and persons that organise the arrangement of these matters. The *source* of common affairs may be *public assets*, which partly consist of *already existing properties*, such as natural resources (like rivers, mountains, treasures of the earth), and also consists of *supplied goods*, which are collected by the community, for example in the form of taxes or work directly performed by the members of the community. The *organisation* that organises these activities is the *state* at national level and the *local government* in smaller communities.

In my opinion, this is where the notion and essence of public assets may be deduced from. The essence of public assets is their purpose: *public assets* ensure the existence of the community; their fundamental goal is to serve lasting public interest.

The lesson drawn from what was written in connection with the terminology is that for the uniform use of the notions related to public assets a consistent and uniform conceptual apparatus and regulatory structure valid for the legal system as a whole have to be created, the basis of which is the Constitution.

Accordingly, it has to be laid down that public assets have two basic forms: state

E-mail address: kapamatyas@yahoo.com

assets and local government assets. State assets are owned by the whole community, whereas a partial community is behind local government assets.

Based on the purpose of the assets, treasury property and business property are distinguished within state assets. Treasury property basically ensures the functioning of the executive power and the discharge of state duties. Therefore, these assets are non-marketable or their marketability is limited; they have to be preserved for future generations by all means. Business property is freely marketable: it can be sold or managed. Today, clearly the latter enjoys priority; the objective is the implementation of proper management.

The situation is similar with local government assets; nominal assets and entrepreneurial assets are distinguished here on the basis of the purpose of the assets. Nominal assets serve the purpose of performing the basic tasks; they are non-marketable or their marketability is limited. On the other hand, entrepreneurial assets are marketable.

THE ESSENCE AND ELEMENTS OF PUBLIC OWNERSHIP

Public ownership is nothing else but the proprietary legal relationship related to public assets.[1] Although there are views that the notions and dogmatic elements elaborated in connection with private ownership cannot be interpreted for public ownership[2], I am of the opinion that stemming from the requirement of legal certainty and from the abstraction demand, which is the essence of law, the same conceptual apparatus has to be applied for the description of private ownership and public ownership. Accordingly, the elements of proprietary legal relationship (its subject, object and content) can be examined in connection with public ownership as well.

Accordingly, with regard to the establishment of the essence of the two types of ownership, our basic task is to clarify the subject, object and content of private and public ownership.

These questions are relatively easy to answer in connection with *private ownership*. The subject of private ownership is usually a specific person (private person, legal entity or unincorporated organisation); its object may be any object or natural force that can be utilised as an object, whereas its content is given by rights and obligations stemming from ownership. Basically, the rights providing the content of private ownership are the rights of possession, beneficial use, exploitation and the right to dispose of the object of ownership.

The situation is not so simple in connection with *public ownership*, mainly because already the clarification of the subject of public ownership may run into difficulties. In my opinion, the *subject of public ownership* is the community: the nation or a certain smaller portion of the nation, such as the local community, in view of the local governments. At the same time, the question arises how the community as the subject of the legal relationship can exercise the owner's partial rights and meet its possible obligations. Obviously, the community cannot directly wield power over the object of public ownership; this is notionally excluded.

Therefore, the community transfers the exercising of the rights and performance of the obligations constituting the content of the proprietary legal relationship to the state and to local governments. In this context, the state and the local governments represent the community and exercise the owner's powers on behalf and in favour of the community. However, the matter has not been settled in a satisfactory manner even in this way, as the state (and the local government) itself is also an artificial subject of public law, it does not have legal capacity, and is able to behave and act only through its organs. In this context,

however, the question is which body within the state may exercise the owner's rights regarding public assets. The justification of the 1989 amendment to the effective Constitution of Hungary stipulates that 'only organisations that represent the people as a whole may dispose of state property'. Although this is not qualified as a legal regulation, upon the interpretation of the Constitution the justification is of considerable importance. Inter alia, this is exactly the sentence which is the source of the – currently revived – debate in search of the reply to the question: which organisation represents the people as a whole, and – keeping this principle – in what organisational form is it possible to solve the issue of disposal of state property? Another way of formulating this question is: what is the task of the National Assembly, the Government, the minister responsible for the supervision of state assets or the Hungarian State Holding Company (hereinafter: MNV Zrt.) in the scope of exercising the rights stemming from public ownership?

With regard to the *object of public ownership*, it can be established that – similarly to private ownership – it can be any object or natural force that can be utilised as an object. What needs to be added here is that there are things that can only be the object of public ownership such as the treasures of the earth.

The *content of public ownership* is constituted by the rights and obligations stemming from the legal relationship. Here it needs to be mentioned that in the scope of public ownership special rules prevail with regard to exercising partial rights and the transfer of their exercising. It is also important that with regard to some of the objects of public ownership the right to dispose cannot be exercised or can be exercised only to a limited extent, as treasury property and local government nominal assets are non-marketable or their marketability is limited.

EXERCISING THE PARTIAL RIGHTS OF PUBLIC OWNERSHIP

According to the traditional property law approach, the partial rights of public ownership are the rights of possession, beneficial use, exploitation and disposal. Slightly different notions are used for the asset elements that are marketable with or without limitations in Act LXV of 1990 on Local Governments (hereinafter: ötv) and Act CVI of 2007 on State Property (hereinafter: vtv) as they make a distinction between the right of financial management of the property (asset management) and the right of alienation. This conflict is not irresolvable as, in terms of content, financial management and asset management roughly correspond to the right of possession, beneficial use and exploitation, whereas alienation is the most significant element of the right of disposal.

The act containing provisions regarding the two main types of national assets specifies those who may exercise the owner's rights over the objects of national assets. All the property rights and obligations of the Hungarian State regarding the objects of state property are basically exercised by the minister responsible for the supervision of state assets, who performs this task mainly through MNV Zrt. and, concerning some asset elements, through the Hungarian Development Bank and the National Land Fund Management Organisation. (Considering that regarding the greater part of state assets, it is MNV Zrt. that exercises the owner's rights, with regard to state assets this study focuses on the scope of duties and the powers of MNV Zrt.) The representative council is qualified as the organ that exercises the owner's rights over the assets of the local government. However, all this does not necessarily mean that these organs exercise all the owner's partial rights themselves.

The partial rights may be exercised as follows.

Right of alienation (right of disposal):

- with regard to state assets, the right of alienation is exercised by MNV Zrt.;
- concerning local government assets, the representative council of the given local government is entitled to exercise this right.

Other rights (possession, use, exploitation – management of the assets):

- regarding state assets, some asset elements may be managed by the MNV Zrt. itself by virtue of *law*. Or, it may transfer the exercising of these rights to a central budgetary institution, natural person or legal entity or unincorporated economic organisation on the basis of a *contract* – especially rent, lease, contract-based beneficial ownership, asset management and assignment. [See Section 23(1) of the vtv] Based on the asset management contract, the asset manager is entitled to possess, use and benefit from the object in specified state ownership [Section 27(2) of the vtv];
- concerning local government assets, they may be managed by the local government (representative council) itself by virtue of *law*. Representative councils often set up a separate entity for this purpose (for example, an asset management office). Another possibility is that the representative council transfers the asset management right to a legal entity or unincorporated organisation with a property management *contract* [see Section 80/A(2) of the ötv].[3]

Various conclusions may be drawn from the above. First, it can be seen that the management of public assets and the right of financial management of public assets may be based on law or contract. It is highly important from the aspect of liability as well, since in a civil law sense this is the basis for the separation of criminal liability and contractual liability for tort, whereas in a criminal law sense this is one of the criteria for making a distinction between the facts of misappropriation and negligence. The other important conclusion is that the regulation of asset management rights and the underlying property management contract is not uniform and complete at all, as different rules apply to state assets and local government assets.

A further problem is that the effective legal regulations do not contain detailed provisions regarding what rights the subjects in law that become asset managers through contracts exactly have. Asset management rights are most similar to the so-called utilisation rights within limited property rights, which means that its beneficiary basically has the right of possessing, using and exploiting the asset. At the same time, due to the brief regulation, economic agents cannot know exactly what rights the asset manager has, and thus it is not clear what transactions he is entitled to conclude. For example, both in theory and practice the question arose whether asset managers may pledge or encumber in any other way the assets managed by them.[4] In my opinion, for instance, hypothecation of any asset by the asset manager is hard to imagine, since the right of pledge as value right aims at the binding and possible extraction of the value incarnated by the thing. As asset managers are not entitled to alienate the asset that is the object of the asset management, they may not provide such right for anybody else either, and if the selling of the asset pledged is excluded, the extraction of the value incarnated by the object is also impossible, and therefore foreclosure cannot be interpreted either. It is also questionable whether asset managers may transfer with a contract the owner's partial rights exercised by them, and if yes, under what conditions.

LIABILITY FOR FINANCIAL MANAGEMENT

Although the term 'liability' in itself carries various meanings, in this study it means liability for breach of duty. Even in this sense many

forms of liability are distinguished; accordingly, political liability, moral liability and legal liability can be examined separately. Only legal liability is discussed here.

The traditional legal dogmatic structure of legal liability

The traditional legal dogmatic structure of legal liability contains several elements that raise practical problems under the present economic conditions.

- It intends to sanction individual acts determined on the basis of exact matters of fact.
- It can primarily be interpreted for the natural person.
- Its goal is mainly repressive, i.e. its main objective is to retaliate for a breach of duty.[5]

The types of liability for breach of duty committed in the domain of financial management

Various types of legal liability for breach of duty committed in the domain of financial management are distinguished: more specifically, in the domain of the financial management of public assets, the breach of the related duties may entail various legal consequences. Labour law, civil law and criminal liabilities are the most important types of liability.

Labour law liability

In the scope of exercising the partial rights of public ownership on public assets, decisions are ultimately taken by natural persons or bodies consisting of natural persons. The activity performed or omission committed in this domain are most often related to persons in employment relationship. As a result of culpable breach of duty by such persons, mainly labour law liability may be established and labour law consequences may be applied. The forms of labour law liability and the rules of procedure of establishing the legal consequence vary depending on whether the person who breached his/her duties related to financial management is in an employment relationship, public employee or civil servant legal relationship.

An employer may terminate an employee's employment relationship by extraordinary dismissal in the event that the latter wilfully or by gross negligence commits a grave violation of any *substantive obligations arising from the employment relationship* [see Section 96(1)*a)* of Act XXII of 1992 on the Labour Code]. A public employee or civil servant commits a disciplinary offense if he/she culpably breaches his/her *substantive obligation stemming from the public employee/public service legal relationship* [see Section 45(1) of Act XXXIII of 1992 on the Legal Status of Public Employees – hereinafter: kjt – and Section 50(1) of Act XXIII of 1992 on the Legal Status of Civil Servants – hereinafter: ktv]. In the event that the fact of a culpable breach of duty is proved within a disciplinary procedure, even the termination of the legal relationship (dismissal, deprivation of office) may be imposed as the most severe punishment. Liability for damages vis-à-vis the employer may be related to the *culpable breach of duty arising from the legal relationship* of the employee, public employee or civil servant [Section 166(1) of the Act on the Labour Code, Section 81–81/A of the kjt and Section 57(1) of the ktv].

It follows from the above that if an employee's, public employee's or civil servant's obligation stemming from his/her employment relationship is to perform careful financial management of public assets, a culpable breach of this duty may entail even the most severe labour law consequences. Therefore, the question that may arise here is what the obligations related to the financial management of public assets are,

and where the norms that give the substantive law content of liability can be found. The liabilities arising from employment, public employee legal relationship and public service legal relationship are determined by the relevant legal regulations governing the legal relationship and the individual employment contract as well as by the letter of appointment. Accordingly, the basis of liability – especially the requirements vis-à-vis the asset manager – is determined by the background norm (other legal regulation, contract) filling in the framework of the matters of fact.

Civil law liability

Civil law liability for damages may also arise within the scope of the financial management of public assets. This kind of liability for damages may burden natural persons, legal entities or other organisations as well vis-à-vis the aggrieved party (in our case vis-à-vis the state, the local government or the organisation that exercises the owner's rights).

▸ In the event that the asset management right of the public asset manager is based on law, he/she is liable for the damages caused by him/her pursuant to the rules of criminal liability (torts which are actionable per se), in conformity with Section 339 of Act IV of 1959 on the Civil Code of the Republic of Hungary (hereinafter: the Civil Code). Accordingly, the person who causes damage to somebody else *in an unlawful manner* is obliged to compensate for the damage. However, they will be exempt from the liability if they can prove that they have acted as it can usually be expected in the given situation. Consequently, unlawfulness has to be proven here for the establishment of liability. Theoretically, unlawfulness may originate from the breaching of any statutory obligation. Liability for breach of duty within the scope of financial management of public assets can be established here if there is a causal relation between the damage and the breach of the legal regulations relating to the management of the assets.

▸ In the event that the asset management right of the public asset manager is based on a contract, he/she is liable for the damages caused by him/her pursuant to the rules of contractual liability (liability for breach of contract), in conformity with Section 318 of the Civil Code. In this case the damage attributable to a causal relation with the breach of a contractual obligation has to be compensated for. (Of course, the background of the given contract is constituted by law in this case as well, and the contract itself may also indicate the legal regulation the provisions of which have to be applied in respect of issues not regulated in the contract.)

The situation in the case of civil law liability is similar to the one described with regard to labour law liability. Namely, the establishment of liability for damages may be founded on infringement of the law or breach of contract referred to in the matters of fact; accordingly, the framework of the matters of fact is filled in by a background norm (other legal regulation, contract) here as well.

Criminal liability

Criminal law also strives to provide protection against disadvantages caused by the management of assets by someone else. The two most typical criminal law matters of fact that sanction breach of duty committed in the scope of the financial management of someone else's assets are misappropriation and negligence. Obviously, public assets may also be the object of these two criminal offenses, as the manager of public assets manages someone else's assets. It is worth mentioning briefly that three theories evolved in connection with the criminal offense called misappropriation, which is discussed in more detail in the legal literature: the theory of abuse, the theory of breach of confidence and the theory of breach of legal obligation.[6]

Pursuant to Section 319(1) of Act IV of 1978 on the Criminal Code (hereinafter: Criminal Code) misappropriation is committed by the person who was entrusted with the management of someone else's assets if he/she causes pecuniary disadvantage by breaching his/her resulting duties. This assignment may be based either on a legal regulation or on a contract. Article 320(1)http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=3352.513097 – foot838http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=3352.513097 – foot839 of the Criminal Code stipulates that negligence is committed by the person who was entrusted with the management or supervision of someone else's assets whose the management or supervision is based on law, and breaching or neglecting his/her resulting obligation causes pecuniary disadvantage out of neglect. Accordingly, this crime can only be committed by a person whose mandate for the management and supervision of the assets is based on law.

The 'breach of an asset management obligation' is only one framework in criminal law matters of fact as well, the content of which is provided by other legal regulations. According to the legal literature, the main elements of the content of the asset management obligation can be determined on the basis of the provisions of the Civil Code regarding the assignment legal relationship as follows:

- safe-keeping of the assets,
- preserving the condition of the assets,
- increasing of the wealth,
- damage prevention,
- managing the subordinates and other asset managers,
- informing the owner/principal, observing his/her instructions,
- warning the owner/principal, if his/her instructions are unreasonable and/or unprofessional,
- using the services of other persons if necessary,
- taking the necessary measures in conformity with the interests of the owner/principal,
- launching court proceedings or other proceedings to enforce claims if necessary.[7]

It is clear that criminal law matters of fact are of a framework nature; it can be established here as well that the content of the criminal law matters of fact can be explored using another background norm.[8]

To sum up, the aforementioned labour law, civil law and criminal liability matters of fact are actually not independent norms; they determine a framework, which is filled in by other norms (primarily by other legal regulations and, secondly, by contracts prepared on the basis of the legal regulations). The basis of liability is in fact regulated by a background norm, the given liability facts relate to another norm and can be interpreted only together with another norm. Accordingly, this is where one may take note of the accidental meeting of branches of law referred to in the title – moreover, in various contexts. Firstly, the underlying legal regulation of the labour law or civil liability norm may even be a constitutional or administrative norm, whereas the application of civil law or administrative legal norms may also become necessary in order to fill in the framework of the criminal matters of fact. Secondly, it is obvious that identical matters of fact, a single act or omission may as well entail several kinds of legal consequences; thus it may happen that labour law, civil law and criminal legal consequences can be established at the same time for a breach of duty committed in the financial management of public assets. Thirdly, it needs to be mentioned that the historical matters of fact implementing the breach of duty in the scope of financial management of public assets overlap the branches of law, and this requires a complex knowledge from those who apply the law.

The crisis of the classical liability system

The social and economic development in recent decades brought many novelties that render the functioning of the traditional legal dogmatic structure of legal liability outlined above much more difficult. Only some of them are mentioned here:[9]

- The result of the increasingly complex economic developments is that economic decisions are difficult to evaluate; a decision may have negative and positive effects as well.
- Economic organisations, the size of which is increasing, apply decision-making mechanisms that are complicated and complex both in time and space.
- Corporate decisions are frequent in connection with financial management; moreover, the decisions of various bodies are often built on one another. This goes against the application of liability schemes tailored to the individual, and although the law has elaborated the legal solutions applicable to bodies (shared responsibility, modes of complicity, joint and several liability), one may still see that in specific cases those who apply the law have difficulties in coping with the new challenges generated by the decisions taken by bodies.

The new Constitution and cardinal laws

It can be stated that the new Constitution of Hungary has laid down the foundations of a liability system for the financial management of public assets, and prescribed various further legislative obligations with regard to this subject.

According to Article 38(1) of the chapter entitled 'The State' of the new Constitution 'The requirements for the ... responsible management of national assets shall be defined by a cardinal Act'. Paragraph (3) stipulates that 'the limitations and conditions of the alienation of national assets that are strategic in terms of the national economy, shall be defined by a cardinal Act'. Finally, Paragraph (5) adds: 'All business organisations owned by the State and local governments shall perform independent economic management in a lawful, responsible, practical and efficient manner.'

As it can be established from the quotations, the new Constitution defines several subject matters of legislation related to the financial management of public assets. The framework of liability rules will be filled in, inter alia, by the legal regulations created in this field; therefore, during their formulation this aspect will also be have to taken into account.

CONCLUSIONS

Based on the above, conclusions may be drawn for both legislation and law enforcement.

- A precise and consistent conceptual apparatus and a regulatory structure that have a uniform effect on the legal system as a whole should be created, and the collisions of legal regulations should be terminated in the field of public assets and public ownership. This is what is required first of all by the constitutional requirement of legal certainty. At the same time, any inaccuracy or inconsistency arising here may lead to wrong results in determining the liability for the financial management of public assets.
- The acts required to be created by the new Constitution should be elaborated in a way that they be suitable for filling in the liability provisions of several branches of law, and the referential rules be adequately interpretable.
- The regulation of the asset management right should be standardised so that this type of limited property right will have the same content in the Civil Code, in Act LXV of 1990 on Local Governments as well as in Act CVI of 2007 on State Property.

The content of the asset management right should also be regulated more precisely than now so that no doubts can arise with regard to the partial rights that can be exercised by the asset manager (such as the encumbrance of the public asset) and in the field of the possibility and conditions of transferring the partial rights.

It is also necessary to rethink the legal liability system both in a dogmatic and systemic sense, also taking into consideration that liability rules should be able to give an unambiguous response to newer challenges. One of these new challenges is the liability arising from the complex, badly organised decision-making mechanisms and corporate decisions. In connection with the renewal of the liability system, another important aspect may be putting emphasis on prevention and reparation in addition to repression.

The conclusion that can be formulated in terms of law enforcement is that the matters of fact related to the liability for the financial management of public assets are very complex; moreover, the same facts may trigger various kinds of legal consequences. Accordingly, determining of the legal consequences related to such matters of fact requires complex expertise that spans branches of law.

Notes

[1] During the analysis of the essence and elements of public ownership, I relied on the following publications:Izabella Bencze: A nemzeti vagyon védelmének alkotmányos és civiljogi aspektusai (Constitutional and civil law aspects of the protection of national wealth). In: Birtokpolitika – földkérdés – vidékfejlesztés (Estate policy – land issue – rural development). Summary of the presentations at a national conference (3–4 November 2010), 2010, pp. 23–26, Izabella Bencze: A kormányzati (állami és önkormányzati) vagyonnal való gazdálkodás jogi szabályozásának kérdései (Questions of the legal regulation of the financial management of government – state and local – assets). In: András Vigvári (ed.): Vissza az alapokhoz! (Back to the basics) Tanulmányok a közpénzügyi rendszer reformjáról (Essays on the reform of the public finance system). Új Mandátum Könyvkiadó, Budapest, 2006, pp.210–228, Tamás Sárközy: A korai privatizációtól a késői vagyontörvényig (Az állami tulajdon jogának fejlődése) (From the early privatisation to the late property act (The development of state property law)) HVG Orac, Budapest, 2009, pp. 184–267, János Zlinszy: Superflua lex? Non loquitur? (2007. évi CVI. törvény és az Alkotmány) (Act CVI of 2007 and the Constitution). In: Magyar Jog 2007/Issue 12, pp. 724–728

[2] See Ferenc Petrik: Tulajdonjogunk ma (Our property right today). HVG Orac, Budapest, 2007, pages 30 and 87

[3] For the asset management practices of local governments see Tamás Horváth M.: Nem boldogít – Az önkormányzati vagyon problémái (It does not make you happy – The problems of local government assets). In: Jogtudományi Közlöny, 2011/2. pp. 78–85

[4] Cf. Tímea Drinóczi – Ádám Frank: Az állami vagyon kezelésének egységesülő szabályozása (Standardising the regulation of the management of state property). In: Közjogi Szemle, 2008/Issue 4, pp. 18–20

[5] Tamás Sárközy: Jogi felelősség a gazdaságban (Legal liability in economy). In: Gazdaság és Jog, 2008/Issue 7–8, pp. 4–5

[6] Pál Angyal: A magyar büntetőjog kézikönyve (Handbook of Hungarian criminal law). Attila Nyomda, Budapest, 1936, Volume 13, pp. 96–101

[7] Cf. Tibor Ibolya: A hűtlen kezelés bizonyítása (Proving misappropriation). In: Belügyi Szemle, 2010/Issue 10, pp. 90–91, and Béla Kereszty: A vagyonkezelő büntetőjogi felelőssége (Criminal liability of the asset manager). In: Magyar jog, 2002/Issue 5, p. 277

[8] Tibor Ibolya: A hűtlen kezelés bizonyítása (Proving misappropriation). In: Belügyi szemle, 2010/Issue 10, p. 87

[9] Tamás Sárközy: Jogi felelősség a gazdaságban (Legal liability in economy). In: Gazdaság és Jog, 2008/Issue 7–8, pp. 5–6

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