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MIGRATION AS PART OF HYBRID THREATS

Migrácia ako súčasť hybridných hrozieb

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Bratislava, Slovak Republic

ABSTRACT: This article examines migration as part of hybrid threats. Migration is one of those complex and multifaceted phenomena that have been an integral part of the history of human civilization. Since ancient times, mankind has been on the move, and this movement continues today. However, migration patterns have evolved significantly over time. The people, the regions, the extent, the direction, and the routes of migration, as well as the reasons for moving from one place to another in certain historical periods, have changed. In many cases, migrants have sought better living conditions, improved job opportunities or a more peaceful and safer new home. However, migration has also been exploited in various ways, including its use as a tool as a hybrid threat. For this reason, the author, using relevant scientific methods and approaches within security scientific research carried out, explores the role of migration in hybrid threats spread by both state and non-state actors with the aim to achieve set political, ideological, security and other goals.

Key words: Security – migration – hybrid threat – mankind – society.

ABSTRAKT: Tento článok skúma migráciu ako súčasťou hybridných hrozieb. Migrácia patrí k tým zložitým široko spektrálnym javom, ktoré sú neoddeliteľnou súčasťou histórie ľudskej civilizácie. Ľudstvo bolo v pohybe už od najstarších čias a je v pohybe dodnes. V priebehu postupujúceho času však dochádzalo v migrácii k významným zmenám. Menili sa ľudia, regióny, rozsah, toky a trasy, ktorými ľudia migrovali, ako aj dôvody, kvôli ktorým sa v určitých historických obdobiach sťahovali z jedného miesta na iné. V mnohých prípadoch našli migranti lepšie životné podmienky, získali lepšie pracovné príležitosti alebo pokojnejší a bezpečnejší nový domov. V mnohých prípadoch ale boli aj viacerými spôsobmi zneužití a jednou z možností zneužitia migrácie je jej využitie ako hybridnej hrozby. Z uvedeného dôvodu sa autor, s využitím relevantných vedeckých metód a prístupov v rámci realizovaného bezpečnostného vedeckého výskumu, v článku zaoberá problematikou migrácie ako súčasťou hybridných hrozieb šírených štátnymi i neštátnymi aktérmi s cieľom dosiahnutia stanovených politických, ideologických, bezpečnostných a ďalších cieľov.

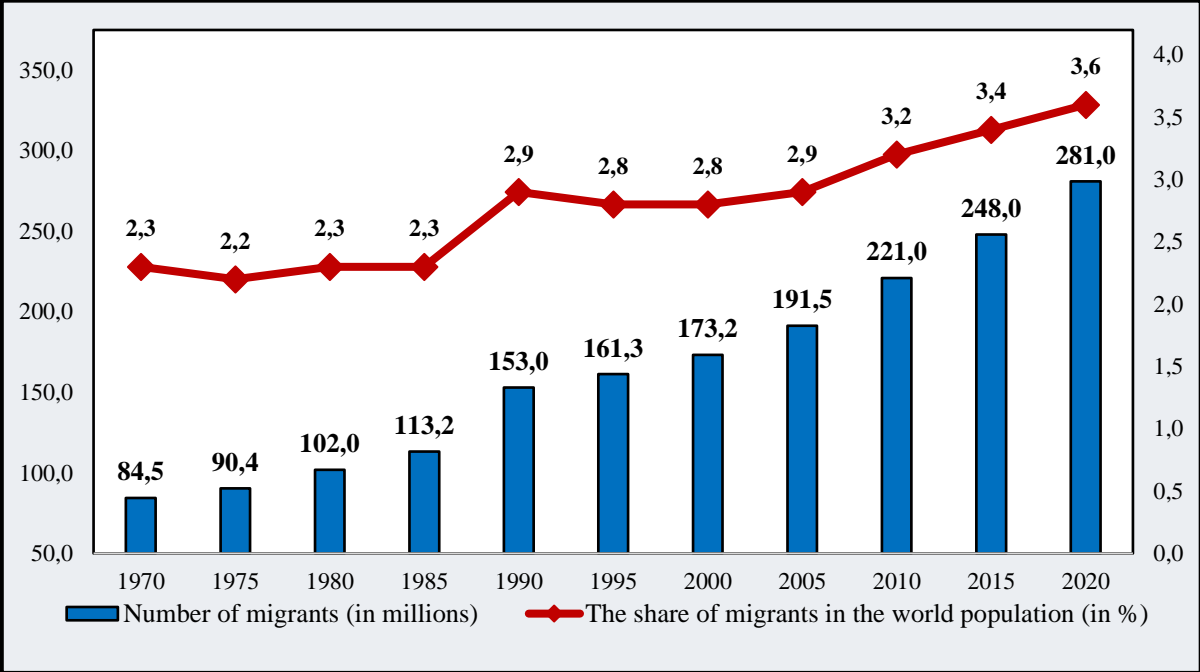
Kľúčové slová: Bezpečnosť – migrácia – hybridná hrozba – ľudstvo – spoločnosť.

INTRODUCTION

In today's world, we are witnessing a high level of human mobility. More people than ever before in history live in a country other than the one in which they were born. Migrants are present in all countries of the world. However, migration does not only occur at the international level; there are also substantial movements within countries (internal migration), which mostly involves people relocating to larger and wealthier urban centres or cities with more attractive infrastructure and better job opportunities than in those found in rural areas (Erdelen - Richardson, 2020). However, the majority of people still live in the countries where they were born. Only one in thirty people is a migrant (IOM, 2024).

For a clearer illustration of the investigated issue, the starting point is data that helps us better understand the scope, changes and trends related to global political, social, economic, or security transformations related to the phenomenon of migration. The most recent global data, published in 2020, indicates that there were approximately 281 million international migrants in the world, which represents 3.6 percent of the global population. Overall, the estimated number of international migrants, that is, people living in a country other than their country of birth, has increased over the past five decades. In 2020, the total estimated number of migrants was approximately 1.8 times higher than in 1990, and more than three times higher compared to 1970. The total share of international migrants in the world population has also increased, but only gradually, rising from roughly 2.2% in 1970 to 3.6% in 2020 (see Graph 1).

Graph 1: The number of migrants (in millions) and their share in the world population (in %) from 1970 to 2020



Source: Author based on IOM (2024) data.

Migration is undoubtedly a significant and complex phenomenon that occurs within various temporal, political, social, economic, geographical, environmental, demographic and many other contexts, significantly affecting almost all societies around the world. Both historical and recent experiences with migration demonstrate that it is neither a short-term phenomenon nor an isolated incident, but a long-term, complex and widespread process with deep and serious impacts on social, economic, political, cultural, security and other structures (Manning, 2005; Khory, 2012).

At the same time, migration is a process significantly influenced by several different factors and trends. Political persecution, discrimination based on colour, race, nationality, or religion, along with human rights violations, are key drivers that compel people to leave their home countries and move to others. Also, socio-economic inequalities between countries and regions lead many individuals and entire families to migrate in the hope for a better quality of life and better economic opportunities in other countries. Similarly, deteriorating living conditions due to climate change push people to leave areas affected by drought, floods, hurricanes, or other natural disasters (Pécoud – Geiger, 2017; Hollifield – Foley, 2022).

Factors that significantly influence large-scale migration, forcing millions of people to leave their homes and seek refuge and safety in other countries include inter-state conflicts and internal civil wars, political instability, social, ethnic, and religious unrest in various parts of

the world, as well as security threats such as terrorism, gang wars, organized crime, and high crime rates. Moreover, unfavourable demographic trends, such as excessive population growth in some regions and aging populations in others, also drive migration, especially in the context of labour shortages or the need for elderly care (Fisher, 2014; Brettell - Hollifield, 2014; Margheritis, 2015).

METHODOLOGY AND OBJECTIVE

Migration has become an integral part of today's world, driven by the aforementioned and other factors. Millions of individuals cross borders in search of better living conditions, job opportunities, security, family ties, or other personal reasons. This migratory movement has a significant impact on the social, economic, political and security landscape not only of the countries involved in migration but also of the nations experiencing it. The complexity and multidimensionality of migration are evident across various sectors, from individual decisions to the formulation of national and international policies.

For these reasons, research on migration requires a holistic approach that takes into account the various interrelated aspects and contexts of this complex, multidimensional phenomenon. The aim of the author is to use relevant methods of scientific research, with an emphasis on appropriate analytical-synthetic and comparative approaches, to offer both professional and general audiences a perspective on migration as part of the hybrid threats deployed by state and non-state actors with the aim of achieving set political, ideological, security and other objectives. Additionally, this work addresses other key aspects that are essential for a better understanding of migration and migration flows in today's turbulent and ever-changing world.

RESULTS AND DISCUSSION

Migration can generally be defined as "the movement of people from one region or country to another region or country" (IOM, 2019, p. 137), or as "the movement of persons, social groups or larger groups of people within the territory of a state or between states, which is associated with a temporary or permanent change of residence" (DCSL, 2021). It is also described as "the movement of people to a new area or country in order to find work or better living conditions" (OLD, 2024).

It follows from these definitions that migration can involve movement of persons within one state or between two or more states. The concept of mobility is often mentioned in this context, and since these two concepts are often confused, it is necessary to differentiate them.

While mobility represents a broader term that refers to any movement of persons, regardless of frequency, distance, purpose, or direction, migration is narrower and directly linked to a change of the place of permanent residence. Another related term is re-emigration, which refers to the "the movement of a person who, after returning to their country of origin, emigrates again" (IOM, 2019, p. 170).

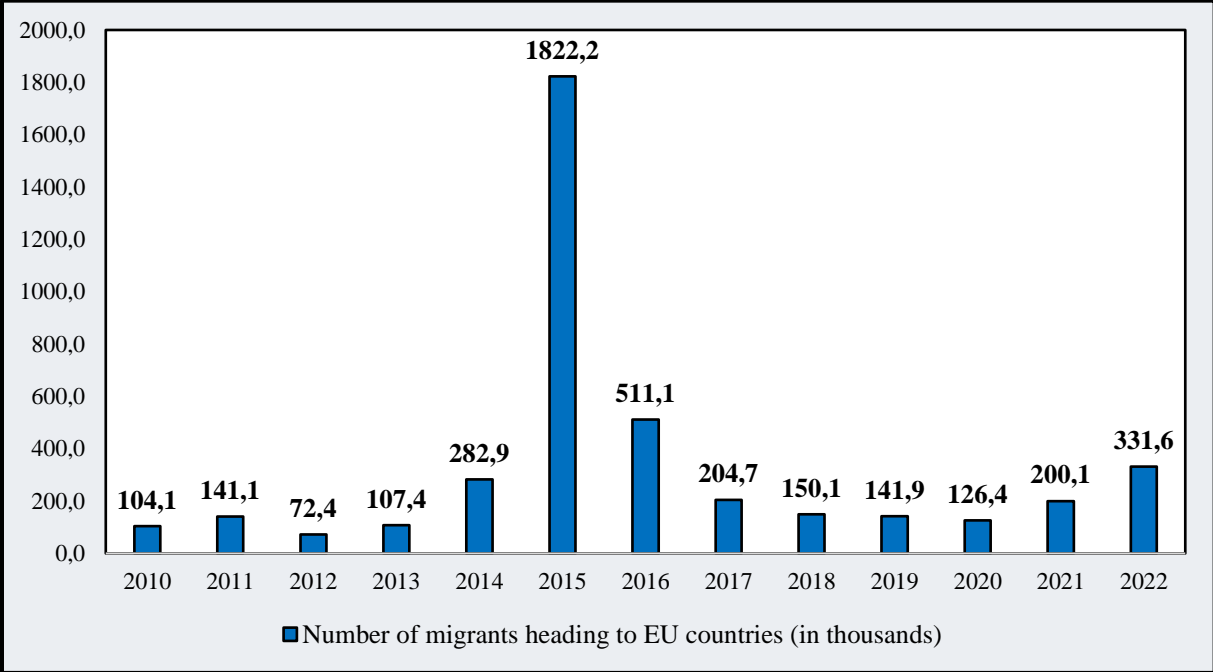
Migrant is an umbrella term that reflects the common lay understanding of a person who moves from their place of habitual residence to another location, either within their own country or across an international border, temporarily or permanently, for various reasons (IOM, 2019, p. 132). Alternatively, it is "a person who migrates, changing their place of residence in order to settle in another state; typically, someone who has left their country, usually for political, economic, or religious reasons, such as a refugee" (DCSL, 2021).

The terms immigrant, emigrant, and international migrant are closely related to the term migrant. An immigrant is "a person who moves to a country other than their country of nationality or habitual residence, so that the destination country effectively becomes their new country of habitual residence" (IOM, 2019, p. 103). An emigrant is "a person who moves from their country of nationality or habitual residence to another country, making the destination country their new habitual residence" (UN, 1998, p. 18). An international migrant is a person defined as "any person who changes their country of habitual residence" (UN, 1998, p. 9), whereby this definition excludes movements of persons that are carried out, for example, for reasons such as recreation, vacation, visits to friends, acquaintances and relatives, trade, medical treatment, religious pilgrimages, etc.

MIGRATION AS PART OF HYBRID THREATS

The main drivers of migration in the second and third decades of the third millennium include interstate and domestic armed conflicts, which, alongside ongoing political or other persecution and the adverse effects of deepening globalization and climate change, have significantly contributed to the rising numbers of global migrants. Millions of people, displaced by war, conflict, or persecution, have sought peace and security in other countries in recent years. Increasingly, many of them are heading to the member countries of the European Union (EU), (Graph 2).

Graph 2: Overview of the number of migrants heading to EU countries (in thousands) from 2010 to 2022



Source: Authors based on Statista (2024) data.

As early as 2010, the North Atlantic Treaty Organization (NATO) identified emerging security challenges, labelling them as hybrid threats. In the following two years, NATO developed a detailed catalogue of these threats as part of its Bi-Strategic Command Capstone Concept, which highlighted mass migration and human trafficking as specific security risks that surpass the traditional scope of conventional war threats (Bachmann, 2011, p. 24).

Mass migration, in the context of hybrid warfare, acts as a strategic tool used by a state posing a hybrid threat. The goal is to exert pressure on the target state's government to either take, or refrain from taking, certain actions that benefit the threatening state, while disadvantaging the target state. In the target country, a hybrid threat in the form of mass migration flows across its borders can cause tensions, particularly within its political, social, and security structures. This unrest may lead to widespread dissatisfaction with the government, provoke public protests, and, in extreme cases, result in the collapse of the government and a significant weakening of the state (Kelo – Wächter, 2004).

Mass migration as part of hybrid threats is a deliberate strategy used for strategic purposes. It may serve military objectives (for example, shifting the focus of a state's armed forces from defending against an external enemy to addressing problems related to the internal security), or non-military objectives by facilitation the gradual infiltration of a particular group that settles in the target state and it makes itself available to external influence from the state

with which it is identified. This group, once established, may remain susceptible to external influence from a state with which it identifies. Furthermore, this diaspora group can be manipulated through propaganda to feel threatened, making them more inclined to align with the foreign state that targets them, potentially acting against the interests of the host state in which they reside.

Greenhill identifies mass migration as a tool of state foreign and security policy, highlighting its adversarial power in the context of hybrid threats through forced displacement and coercion. It shows how the exploitation of mass migration can be achieved through direct threats that overwhelm the destination country's ability to manage the influx of refugees or migrants, or through politically motivated blackmail that leverages the existence of legal and normative obligations to those fleeing violence, persecution, or deprivation. In other words, by flooding the target country with refugees, neighbouring states can gain dominance through hybrid coercion (Greenhill, 2010, p. 26).

Actors could also use mass migration to pursue political objectives that would be completely unattainable by traditional military means, or in some cases for powerful actors to achieve goals where the use of military force would be too costly or potentially escalatory and thus dangerous (Greenhill, 2010, p. 27).

The Charter of the United Nations outlines its core objectives in Article 1, including the maintenance of international peace, the development of friendly relations, and the promotion of human rights. The issue of sovereignty and peaceful coexistence is highlighted in Article 2, which prohibits any threat or use of force against the territorial integrity or political independence of a member state or any action contrary to the goals of the United Nations (UN Charter, Art. 2 (4)). Customary international law also prohibits interference by one country in the internal affairs of another.

The use of mass migration to advance one country's foreign and security policy at the expense of another poses a significant challenge to peace. This raises the question of what constitutes the use of force and an armed attack, and what response, if any, is permissible. Article 51 of the UN Charter asserts that states may resort to self-defence if they experience an armed attack. Typically, we think of armed force as involving conventional weapons and military action against a nation or its armed force. However, hybrid threats operate below the threshold of traditional force or armed attack, and this is their advantage. They are a tool primarily used to influence behaviour (Hagelstam, 2018).

When mass migration is used to deliberately destabilize a country, it constitutes interference in the internal affairs of the state and has a negative impact on its national security.

While this could potential be classified as the use of force, it would need to meet a very high threshold, with a particularly serious impact on the target country, in order to be regarded as an armed attack. The criteria for this threshold remain unclear but may depend on factors such as the intent of the originating country to reduce migrant flows, the adverse impact on the economy and social security systems, increased civil unrest and demonstrations, the undermining of stability, etc. Clearly, the perception of the target state will be very important when considering an appropriate response to such a hybrid threat.

Mass migration that aims to (a) deliberately overwhelm or disrupt the ability of the target state to cope with the threat by having to engage its armed forces to support civilian police and border agencies, or (b) undermine the economy by imposing additional financial and social burdens, can be considered part of hybrid threats, because it would obviously weaken the target state and hamper its functionality.

CONCLUSION

In conclusion, migration is a complex, multidimensional phenomenon that can be misused by some state and non-state actors in certain cases as part of hybrid threats directed against target states. Migration can be considered a hybrid threat for several reasons. Primarily, it poses significant security risks for host countries. These risks include, for example, destabilization of economic and social structures of the state due to the mass influx of illegal migrants and the related dissatisfaction of domestic population and even civil unrest. Migration can lead to social and cultural tensions in host countries, as migrants with differing values, traditions, and customs, may clash with local populations, resulting in conflict. Economically, migration can have a variety of negative economic consequences, including strain on the labour market, resources, public finances, social services, and infrastructure in destination countries. If not effectively managed, these adverse economic consequences can create additional hybrid threats.

Additionally, the infiltration of terrorist or organized criminal groups through migration flows can disrupt the target state's security, posing serious risks. State and/or non-state actors may abuse migration flows to achieve their political, ideological, economic, or other goals, leading to additional hybrid security threats, disruption of public order, violation of laws, rules, increased crime, chaos, instability, uncertainty, inability of the government to solve the problems, undermining of the functioning of the state, etc. Furthermore, mass migration may increase the risk of spreading infectious diseases and health problems among migrants and in host communities, creating additional security and public health concerns in the target state.

The root causes of migration are very complex and hybrid in nature. In addition to the above-mentioned traditional factors such as economic inequality, poverty, conflicts, or political, religious, or racial persecution, new factors such as climate change and its negative consequences and demographic shifts also contribute to migration. This combination of multiple factors makes migration a hybrid threat, affecting not only security, but also the economy, social and cultural spheres of host countries. As such, coordinated national and international efforts are essential to effectively manage migration and mitigate its negative consequences.

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**ON SELECTED ASPECTS OF THE RESEARCH OF HUMAN
RESOURCES MANAGEMENT ISSUES**

O vybraných aspektoch skúmania problematiky manažmentu ľudských zdrojov

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ABSTRACT: This article examines human resources management as one of the most important parts of the complex management of organizations, focusing on activities such as recruiting, selecting, onboarding, and integrating individuals into the organizational structure. It also covers management, leadership, remuneration, organization of the training and development of employees in line with the needs of the organization and work process. Additionally, HRM involves coordinating work, social, and other activities arising from the employee-organization relationship. For this reason, the author, drawing on management theory and employing relevant research methods, explores key aspects of HRM, including its definition, purpose, goals, forms, and other selected topics.

Key words: Management – human resource management – organizations – people.

ABSTRAKT: Tento článok skúma manažment ľudských zdrojov ako jednu z najdôležitejších súčastí komplexného manažmentu organizácií, ktorá zameriava svoje aktivity na získavanie, výber, prijímanie a doplňovanie ľudí do organizačnej štruktúry organizácie, ich riadenie, vedenie, odmeňovanie, organizáciu ich prípravy a vzdelávania v súlade s potrebami organizácie, pracovným procesom a tiež koordináciu pracovných, sociálnych a ďalších činností vyplývajúcich zo vzťahu k organizácii. Z uvedeného dôvodu sa autor, s využitím teórie manažmentu a relevantných metód v rámci realizovaného vedeckého výskumu, v článku zaoberá významom, definovaním, podstatou, cieľmi, formami a ďalšími vybranými aspektmi manažmentu ľudských zdrojov.

Kľúčové slová: Manažment – manažment ľudských zdrojov – organizácie – ľudia.

INTRODUCTION

Contemporary human society is highly organized, with the vast majority of all processes and activities conducted on a daily basis through various organizations. These range from top state institutions and various specialized offices to public administration bodies, local government entities, civil associations, and private companies such as corporations, enterprises and firms (Ivančík, 2019). Within all these organizations, management processes are integral to all activities carried out. For this reason, it can be concluded that management undoubtedly

represents one of the most significant and important human activities aimed at achieving common or collective goals that would be unattainable by individual efforts. According to Ivančik (2022, p. 15), *"management is thus inseparably connected with organized work performed in human collectives, the goal of which is the achievement of set collective goals (desired outcomes)"*.

Due to the fact that there is currently no single, comprehensive, universally accepted definition of management, a variety of definitions, characteristics, or explanations for this term can be found in professional literature. For example, Drucker (2007, p. 25) defines management as *"the process of coordinating the activities of groups of people, which is carried out by an individual or a group of people in order to achieve goals that cannot be achieved individually"*. Similarly, Robbins and Coulter (2004, p. 23) characterize management as *"the process of coordinating people's work activities so that these activities are carried out effectively and efficiently"*. Additionally, Nanda (2008, p. 18) offers a more specific definition, stating that *"management is a specific process consisting of planning, organizing, leading people and controlling, which is carried out in order to determine and achieve set goals using human and other resources"* (Nanda, 2008, p. 18).

It follows from the above definitions that the key element of the functioning of any organization is represented by people, i.e., human resources. Human resources are widely recognized as the most important of all the basic resources (human, material, financial, and information) available to organizations. Without them, the development or functioning of no organization is possible. Their central role lies in their ability to mobilize other resources and influence their utilization. Human resources encompass a set of qualities, experience, knowledge, and skills, including physical and mental abilities and characteristics that contribute to the success of the organization as a whole. An integral part of human resources is human potential, representing a structured set of abilities (e.g., qualifications, fitness, resilience, creativity, etc.), which are prerequisites for the performance of various activities in organizations (Armstrong – Taylor, 2007).

Investments in human resources leads to the creation of human capital, which acts as a driving force in the development of human resources. This encompasses ongoing investments aimed at enhancing both practical and theoretical knowledge, skills, abilities, psychological, physical, and moral attributes of individuals and groups, all of which contribute to higher productivity and performance. An integral part of these processes are investments in appropriate evaluation of the performed activities, which has a profound impact on meeting individuals' material and mental needs (Naylor, 2004). Human resources represent strategic capital for every

organization because they create added value and provide a competitive advantage. Furthermore, they can be capitalized, because their value and contribution can be increased through continuous education, training, and retraining in order to fulfil the organization's objectives. The higher the quality, qualifications, and motivation of the human resources available to an organization, the greater the probability of successfully accomplishing its goals and priorities (Gilbreth, 2018).

METHODOLOGY AND OBJECTIVE

The main goal of the article, which deals with the issue of human resource management, is to explore selected aspects associated with the quality of human staff, their potential, knowledge, professional expertise, skills, and abilities. These factors, along with the level of staff motivation set by the organization, directly contribute to either its success or failures of organization, whether the organization is small, large, production, non-production, business, non-business, state, public or private. In this context, the author points to the fact that without sufficiently skilled, qualified, and motivated personnel, no organization can effectively, economically and purposefully use its other resources and means (financial, material or informational). The findings presented in the article are based on research into human resource management within public administration organizations. The author draws on management theory and employs a range of scientific methods and procedures suitable for addressing the investigated issue. Several types of analysis were used, including theoretical, content, semantic, comparative and qualitative analysis, as well as scientific methods such as document study and theoretical generalization of the knowledge. The author references scientific monographs, articles, and contributions from international scientific conferences by experts engaged in research on this subject.

RESULTS AND DISCUSSION

Human resources management represents a crucial role in the overall management of an organization, which focuses on activities related to recruiting, selecting, accepting, and onboarding people into the organizational structure. This includes overseeing their participation in the work process, providing leadership, organizing training and development programs to meet the organization's needs, and coordinating work, social, and other activities that arise from the relationship with the organization (Carrell et al., 2012).

Organizations are created by people, their functioning is ensured by people, and the results of the organization's activities serve to meet or satisfy people's needs. Organization

typically refers to a formal, structured group of people with common goals and motivation and is defined in relation to its surrounding environment. It represents the arrangement of partial components of a certain whole into a system according to established principles. Examples of such organized systems include companies, enterprises, and offices in the civilian sector, military units such as platoons or brigades, or law enforcement organizations like districts and directorates. (Ivančík, 2019, p. 72).

Every organization represents a differentiated whole that consists of individual parts or elements. These elements and their interrelationships form an organizational structure. The dynamics between these elements are variable, creating a flexible and adaptive system. Additionally, each organization possesses its own unique culture, which plays a crucial role in its performance and success, and distinguishes it from other organizations (Pajpachová, Baričičová, 2016, p. 40). Organizations that want to be successful set goals and objectives that they want to achieve. Regardless of whether they are long-term, medium-term or short-term goals and objectives, they should reflect their vision and ambitions of the organization, its philosophy, values, mission, and tasks. The basic ambition of every organization is to be successful, efficient and effective in achieving set goals (Fisher et al., 2009).

In private organizations operating on the market, success is often measured by market presence, profitability, company value, and competitive advantage, etc. On the other hand, public or non-profit organizations focus on providing public welfare and public services to citizens, or providing generally beneficial services to any or selected groups of citizens. The key and decisive element across all types of organizations is people, with the help of which the organization fulfils the set goals. Therefore, the area of human resources management cannot be seen only as a certain limited or partial functional area, but as an area that has strategic importance for the organization and that fundamentally affects the success or failure of achieving the goals and fulfilling the organization's ambitions (Armstrong – Taylor, 2007).

DEFINITION, MEANING, ESSENCE, OBJECTIVE AND FORMS OF HUMAN RESOURCE MANAGEMENT

Human labour represents one of the basic aspects of being a member of society. Education, theoretical and practical preparation for work, as well as the actual performance of a certain work form an integral part of a person's lifelong activity. Through work, people satisfy their needs, whether primary or secondary, individual, collective or social, or economic, human-legal, ethical or cultural, etc. The results of their work bring recognition, boost self-confidence, and often serve as a means of self-realization. Work with human resources, that is, with people,

thus forms an integral part of all significant and important activities taking place in the organization's management system (Gilbreth, 2018).

An organization can only fulfil its ambitions and achieve set goals if it effectively connects and utilizes its human, material, financial, information and other available resources necessary for its functioning. Human resources, as mentioned above, play a crucial role, serving as the driving force that mobilizes other resources in motion and decisively determines their use. Human resources form the basis of the management of every organization (firm, enterprise, society), and directly impact its activity, prosperity, and competitiveness.

Based on this, human resource management can be defined as *"a strategically and logically considered approach to the most valuable asset of the organization - to the people who work in the organization and individually and collectively contribute to the achievement of its goals"* (Armstrong - Taylor, 2007, p. 27).

Human resource management is the part of an organization's management that deals with employees (workers, members) and their intra-organizational (intra-company) relations. It primarily involves the formulation, design, and adoption of the organization's personnel strategy and policy; consulting and managing strategy and policy management; providing personnel services and consultation to executives (managers). Human resource management is part of the work of every senior employee. It can be considered a responsibility of each individual accountable for the work of others in the organization (Adetule, 2011).

The main tasks of human resource management in any organization include:

- Ensuring compliance with the number and structure of jobs and workers,
- Enforcing a suitable management style for personnel,
- Optimizing the use of working time,
- Maximizing the utilization of employees' work skills,
- Fostering positive interpersonal relationships at work,
- Managing employee career development (Mihalčová, 2007, p. 16).

It follows from the above that human resources management is a management-oriented activity directed by the management of the organization (enterprise, company) leadership, which requires compliance between the strategy in the field of human resources and the strategy of the organization (enterprise, company strategy). All line managers in the organization are responsible for human resource management, emphasizing the importance of teamwork. The primary goal of human resources management is to ensure that the organization (enterprise, company) is able to achieve its set goals of the organization with the help of its employees (workers, members) (Armstrong, 2007, p. 30).

The organization achieves these goals by addressing two fundamental tasks of human resources management:

- ensure, in accordance with the organization's strategic goals, the necessary number of employees with the required professional quality and qualification structure,
- promoting employee behaviour that aligns with the strategic goals of the organization (Kachaňáková, 2007, p. 12-13).

In this context, it shall be noted that the set goals of the organization can be viewed as articulated values, which express the values of the organization. Organizational failure often occurs due to failure in goals, roles, and communication. A lack of clarity in setting organizational goals can lead to disorganization, inefficiency, or poor performance. Additionally, situations where individual goals take precedence over collective organizational goals can exacerbate these issues. Therefore, it is necessary for senior employees to promote alignment between individual and organizational goals (Antalová, 2011, p. 25).

In addition to the above-mentioned definitions and ideas, many other similar or largely identical definitions can be found in the professional literature. There is no single, unified and generally accepted definition of the term. Each author provides their own interpretation, and these definitions vary based on the countries, areas of interest or expertise of the authors, as well as the primary focus of the work, study, or research. Overall, it can be concluded that the core element of every organization is its people, and thus the management of human resources is generally considered one of the crucial aspects of the organization's management.

Human resource management, as an integral part and one of the most important processes within the overall management of the organization, can take various forms. The most basic distinction is between "hard" and "soft" approaches, while the key difference between these two approaches mainly lies in how the employee's role or position within the organization is viewed.

The "hard" form of human resource management is based on the view or opinion that all resources, including people, are equally valuable for the organization. In this perspective, employees are treated similarly to material, financial, or informational resources. The primary focus is on the organization's needs and goals, with people regarded as capital that must be invested in to generate profit.

Conversely, the "soft" form of human resource management is based on the view or belief that people represent the organization's most valuable resource. Rooted in the human relations school of thought, this approach emphasizes communication, motivation, and leadership of people in the organization. Employees are treated as a key asset of the

organization, a source of competitive advantage, through their adaptability and quality. Emphasis is also placed on communication with workers, gathering their opinions and attitudes, which gives them space to build trust in the organization (Armstrong – Taylor, 2007, p. 34).

In practice, many organizations implement a mixed form of human resource management within one organization.

STRATEGIC MANAGEMENT OF HUMAN RESOURCES

Armstrong's definition of human resource management is grounded in the idea that every organization carries out its activities based on a certain strategy. It represents the long-term direction and functioning of the organization, during which it adapts the use of its available resources to a changing environment, but mainly to citizens, customers, clients, in order to meet the expectations of all stakeholders. Strategy thus represents the process of defining objectives and allocating or aligning resources with the opportunities and needs of the organization. In an organizational context, strategy is about gaining competitive advantages. At the same time, it encompasses change management, planning, and is reflected in the strategic goals of the organization (Armstrong – Taylor, 2007, p. 115).

In the current era of deepening globalization, which is described as "*a multidimensional phenomenon involving not only economic but also political, social, security, military-strategic, technical, technological, environmental, cultural and other dimensions*" (Ivančík, 2011, p. 41), organizations that strive to be successful, achieve set goals and fulfil set tasks cannot function effectively without the use of strategic management. A successful organization must adapt to constant changes and leverage the opportunities that arise from uncertainty. At the same time, in the period of globalization and dynamic changes, there is an increase in the demands placed on the knowledge, abilities, skills and capabilities of all people in the organization. The ability to respond to these changes and their use to achieve set goals is made possible through strategic management (Vetráková, 2011, p. 63).

Strategic human resource management can also be understood as a particular approach to addressing long-term issues in the field of human resources management, which is an integral part of the organization's management. It can be characterized as a process that involves formulating a vision, mission, and goals, analysing the external and internal environment of the organization, selecting an appropriate strategy, proposing organizational changes, administrative measures and a control system to implement the adopted strategy of the organization (Kachaňáková, 2007, p. 27).

Strategic management of human resources is a practical outcome of an organization's personnel strategy. Managers who adopt a strategic approach to managing an organization must be aware that their decisions made now will affect their success in the future. Therefore, a strategic approach to management is one of the most important elements in the field of human resource management and is considered one of the three key elements of a successful organization: mission and strategy, organizational structure, and human resources management (Vetráková, 2011, p. 63).

The strategic management of an organization primarily involves top-level managers who shape the strategic behaviour of the entire organization, thus bearing a significant responsibility for the adopted strategy. These managers focus on maintaining long-term alignment between the organization's mission, its long-term goals, available resources, and the environment in which the organization operates (Koubek, 2009, p. 24).

CONCLUSION

Human resource management is one of the most dynamically evolving fields within the broader scope of organizational management. Human resources represent the most important asset for organizations (companies, enterprises) with an extremely high potential for further development. They are the most important, constantly developing factors of production, the driving force behind development, prosperity, and economic growth. People are the most valuable thing and it is essential to nurture their development, leverage their unique talents, and consider their social relationships both within and outside the organization. One of the basic tools for the implementation of these activities is the management of human resources.

Although the beginnings of contemporary managerial thinking and the first theoretical works in the field of management emerged as early as at the turn of the 19th and 20th centuries (although the issue of managing people's activities was of interest to many important thinkers and leaders long before that), the term human resource management began to be used to describe the latest concepts in the field of personnel management only in the 1950s and 1960s in developed countries. This emphasized the need, but especially the importance of people and human labour in the organization as the most valuable asset. The development of human resources management has become a knowledge base for advancing management practices and nurturing human resources. In today's market conditions, where globalization processes are accelerating, organizations (companies, enterprises) can no longer compete effectively in the market without adopting the principles of strategic human resources management in order to successfully meet their goals and objectives.

The above applies not only to private (business) organizations but also to public (non-business) organizations ensuring the provision of public services, and handling essential state functions, such as guaranteeing national security. All organizations must adapt their human resources management strategies to constantly changing conditions resulting from changes in the political, economic, security, legislative, organizational, informational, technical, technological or environmental environment. In response, they must modify their strategy, tactics, goals, work methods, processes, and activities to align with these evolving circumstances, particularly in the field of human resources management.

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**TARGET MARKETING COMMUNICATION TOOLS SUPPORTING
THE COMPETITIVENESS OF CZECH MINIBREWERS**

Důležitost nástrojů cílené marketingové komunikace minipivovarů v souvislosti s jejich konkurenceschopností.

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ABSTRACT: The Czech Republic ranks first in the world for beer consumption, with an average of 143 liters per person in 2023, highlighting the country's deeply rooted beer culture and tradition. Since 2010, there has been a significant increase in the number of microbreweries in the Czech Republic, along with a growing interest in home brewing. Microbreweries now account for approximately two and half percent of the country's total beer production. As the number of microbreweries grows, so does the competitive pressure within this segment. This paper examines which target marketing communication tools are the most important for microbrewery owners in relation to competitiveness. The research was conducted in 2023, using data gathered through a questionnaire survey. The survey was distributed electronically to a research sample that included all 551 microbreweries in operation as of 31 December 2022. The response rate was 37%, resulting in a sample of 208 microbreweries. According to the research results, the most important tools of target marketing communication for maintaining competitiveness of microbreweries are customer recommendations and the reputation of the brewery, followed by company websites and social media platforms. The least important tool in this context are contests.

Key words: mini-breweries – marketing communication – competitiveness.

ABSTRAKT: Česká republika je na prvním místě ve spotřebě piva na světě, v roce 2023 činila tato spotřeba 143 l na osobu, pivní kultura a tradice je zde velmi hluboce zakořeněna. Od roku 2010 došlo v České republice k výraznému nárůstu počtu minipivovarů a k rozšíření domácího vaření piva. Produkce minipivovarů se na celkové produkci České republiky podílí zhruba dvěma a půl procenty. S rostoucím počtem minipivovarů roste i konkurenční tlak v tomto segmentu. Jaké nástroje cílové marketingové komunikace jsou pro majitele minipivovarů v souvislosti s konkurenceschopností nejdůležitější, je oblast, kterou se zabývá tento příspěvek. Výzkum proběhl v roce 2023, data byla získána metodou dotazníkového šetření s využitím elektronického dotazování v rámci celého výzkumného vzorku, tedy 551 minipivovarů k 31. 12. 2022. Návratnost dotazníku byla 37 %, zkoumaný vzorek tvoří 208 minipivovarů. Z výsledků výzkumu vyplývá, že jako nejdůležitější nástroje cílové marketingové komunikace v souvislosti s konkurenceschopností minipivovarů ze zkoumaného souboru jsou vnímána

doporučení zákazníků a dobré jméno pivovaru. Další v pořadí důležitosti jsou vlastní webové stránky a sociální sítě. Nejméně důležitým nástrojem v této skupině jsou soutěže.

Klíčová slova: minipivovary – marketingová komunikace – konkurenceschopnost.

ÚVOD

Konkurence mezi pivovary byla věc v České republice neznámá do roku 1989. Do té doby byly všechny tehdy existující pivovary rajonizovány, každý měl svoji oblast, do které nedodával žádný jiný pivovar. Toto pravidlo neplatilo pouze pro několik vybraných pivovarů, ty mohly dodávat na celé území Československé republiky, patřili mezi ně například Plzeňský Prazdroj, Budějovický Budvar a další tři průmyslové pivovary. Po zrušení tohoto principu se trh otevřel a začalo se vytvářet standardní konkurenční prostředí (KOZÁK, 2013; HASMAN 2016).

Celkový výstav (tedy objem výroby pivovarského odvětví) v České republice byl v roce 2022 20,50 mil. hl piva, minipivovary (tedy pivovary, jejichž výstav je do 10 000 hl za rok) se na této produkci podílely zhruba třemi procenty (LIDOVÉ NOVINY, 2023; EURACTIV, 2023). Je pravděpodobné, že podíl minipivovarů na celkovém výstavu se v souvislosti s růstem jejich počtu bude i nadále zvyšovat, tak jak je tomu i v dalších evropských zemích, který tento boom zažívají, pravděpodobně však nikdy nepřekročí řády desítek procent (POKRIVČÁK, 2018). Jak je uvedeno výše, počet minipivovarů v České republice neustále roste. V roce 2015 zde bylo celkem 300 minipivovarů, v roce 2020 504 minipivovarů, v roce 2022 byl celkový počet aktivních minipivovarů 551 (PIVOVARSKÝ KALENDÁŘ, 2023).

Zvláštností české pivovarské scény je její rozdělení, z 599 českých pivovarů jich jen 48 vyprodukuje víc než 10 tisíc hektolitrů piva za rok. Sem patří všechny známé pivovary jako Staropramen nebo Pilsner, tak i ty menší jako Zubr, Černá Hora nebo Polička. Zbytek, tedy 92 % českých pivovarů, má výstav menší než 10 tisíc hektolitrů piva ročně, a řadí se mezi minipivovary (EURACTIV, 2023). Nicméně 8 % českých pivovarů vyprodukuje 97 % celkové produkce odvětví.

Konkurence v tomto specifickém segmentu je v současné době aktuální otázkou. Některé zdroje (EKONOMIKA DNES, 2024) uvádějí, že zde neexistuje, jiné naopak hovoří o začínající konkurenci v souvislosti s počtem a trendem zakládání minipivovarů (MATHIAS, 2018). Jedním z faktorů konkurenceschopnosti je i marketingová komunikace, ta zahrnuje veškeré aspekty vizuální, psané, hovorové a smyslové interakce mezi firmou a cílovým trhem (COOPER, 1999). Většinou jde o komunikaci komerčního charakteru, jejímž cílem je na

základě předávaných informací ovlivňovat poznávací, motivační a rozhodovací procesy těch, na které chceme působit ve shodě s našimi záměry. (VYSEKALOVÁ, KOMÁRKOVÁ, 2002).

Pro systematické dělení velmi široké škály marketingových komunikačních technik a nástrojů, lze použít několik teoretických opor jako je část Kottlerem převzatých 4P, komunikační mix, kam autor zařazuje: reklamu, přímý prodej, osobní prodej PR a podporu prodeje, nebo Peslmackerův komunikační mix, kam patří: reklama, podpora prodeje, sponzorování, public relations, komunikace v prodejním či nákupním místě, výstavy a veletrhy, přímá marketingová komunikace, osobní prodej a interaktivní marketing.

V rámci pivovarského odvětví jsou používány všechny výše uvedené techniky a nástroje. Jeden z nejvýraznějších faktorů, který ovlivňuje složení komunikačního mixu je velikost pivovaru, respektive jeho finanční síla a dále specifika zákaznického segmentu, který pivovar obhospodaruje (CASTILIONE, 2011). Z tohoto pohledu lze marketingovou komunikaci rozdělit na masovou, která používá masové komunikační prostředky a cílí na co největší počet potenciálních zákazníků, tuto používají převážně průmyslové a regionální pivovary. A cílenou, která využívá osobní komunikační kanály a cílí na konkrétní skupinu zákazníků, kterou využívají minipivovary.

Minipivovary na českém pivním trhu komunikují se zákazníky především svým produktem – pivem (BŘEZINOVÁ, 20219). Jejich hlavním aktivem je jedinečnost a lokálnost (TORO, 2014). Jejich propagace je tak zajišťována především technikou word of mouth, tedy ústním podáním, které realizují spokojení návštěvníci a fanoušci netradičních piv (STOKLÁSEK, 2013). Tento fenomén má u minipivovarů ještě další přesah, a to je stejně jako vinná turistika i turistika pivní (DUDA, 2013; KRAFTCHICK, 2014; CORTESE, 2017; WONG, 2019).

I přes výše uvedené jsou do předkládané studie zahrnuty obě skupiny nástrojů marketingové komunikace, tak aby tento předpoklad byl potvrzen či vyvrácen. Jaké nástroje cílené marketingové komunikace, jsou pro majitele minipivovarů v rámci jejich konkurenceschopnosti nejdůležitější a zda je vůbec využívají, je otázka, na kterou odpovídá předkládaný příspěvek.

METODIKA A CÍL

Data byla získána v roce 2023 kvantitativním výzkumem, metodou elektronického dotazníkového šetření, provedeném na celém výzkumném vzorku (551 minipivovarů). Návratnost dotazníků byla 37 % a zkoumaný vzorek tedy představuje 208 minipivovarů.

Dle teorie (KOTLER, 1998; PELSMECKER, 2003) bylo stanoveno 26 nástrojů marketingové komunikace, které byly zahrnuty do výzkumu. V rámci dotazníkového šetření, respondenti (majitelé minipivovarů) stanovili důležitost jednotlivých nástrojů marketingové komunikace na čtyř stupňové škále následovně: velmi důležité (4), důležité (3), méně důležité (2), nedůležité (1). Při zpracování získaných dat z dotazníkového šetření byly jednotlivé nástroje marketingové komunikace rozděleny do tří skupin, pro větší přehlednost výsledků. V tomto příspěvku autor předkládá výsledky třetí skupiny, kterou tvořily nástroje cílené marketingové komunikace: sociální sítě, dobré jméno pivovaru, pořádání kulturních akcí, sponzorování místních spolků, vlastní webové stránky, doporučení stávajících zákazníků a soutěže.

V souvislosti s výzkumnou otázkou: “Jsou nástroje marketingové komunikace zařazené ve stejné skupině, pro minipivovary stejně důležité v souvislosti s jejich konkurenceschopností?” Byly stanoveny dvě alternativní hypotézy.

H₀ – Všechny marketingové nástroje ve skupině jsou stejně důležité.

H₁ – Alespoň jeden marketingový nástroj ve skupině má vyšší či nižší míru důležitosti než ostatní.

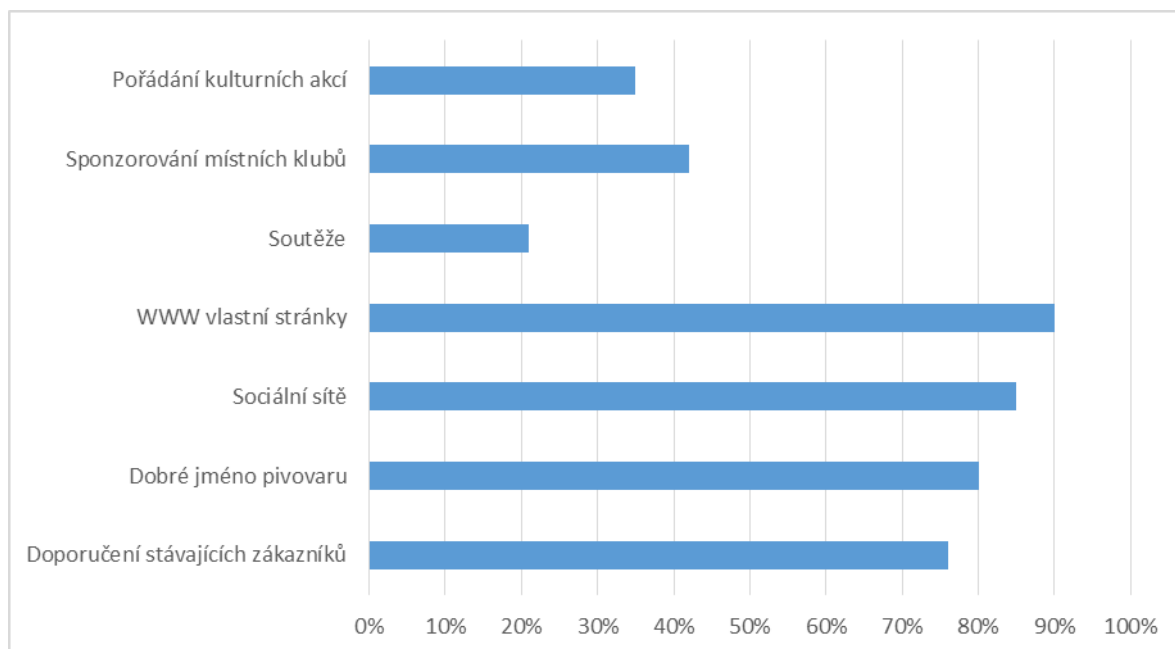
Rozdíly mezi četnostmi odpovědí byly testovány pomocí testu dobré shody za použití kritéria χ^2 (chí-square), za předpokladu, že všechny nástroje marketingové komunikace v jedné skupině jsou pro minipivovary stejně důležité v souvislosti s jejich konkurenceschopností, dále byly použity histogramy.

VÝSLEDKY A DISKUSE

Abychom zjistili, jak jsou vybrané nástroje marketingové komunikace pro majitele minipivovarů důležité v souvislosti s jejich konkurenceschopností, je třeba nejprve zjistit, jaké nástroje z této skupiny minipivovary vůbec používají. Výsledky prezentuje graf číslo 1. Skupina vybraných nástrojů cílené marketingové komunikace. I když je tato skupina marketingových nástrojů v teorii pro takto malé podniky (90 % minipivovarů v ČR spadá do skupiny mikro-podniků s počtem zaměstnanců do 9 osob) označována jako nejvýhodnější (ČEVELOVÁ, 2010; HORÁKOVÁ, 2003; KOZÁK, 2014), a to hned z několika důvodů, kdy se jako hlavní udává přesné zacílení a u některých nižší ekonomická náročnost. I přes to

z výsledků výzkumu vyplynulo, že některé vybrané nástroje či kanály cílené marketingové komunikace, nejsou i přes tato pozitiva minipivovary výrazněji využívány. Překvapivý je tento výsledek především u pořádání kulturních akcí a sponzorování místních klubů, a to především z toho důvodu, že spotřebitelé těchto specifických MSP (minipivovarů) se z velké části rekrutují z jejich nejbližšího okolí a pro minipivovary je tedy velmi vhodné budovat dobré vztahy s místní komunitou. I přes to výše uvedené nástroje využívá necelých 35 % respektive 42 % minipivovarů ze zkoumaného vzorku. Nástroje, které jsou dle předpokladu využívané většinou minipivovarů jsou vlastní webové stránky (90 %), další platformy sociálních sítí (85 %), dobré jméno pivovaru (80 %) a doporučení stávajících zákazníků (75 %).

Graf č. 1: Vybrané nástroje cílené marketingové komunikace, využívané minipivovary



Zdroj: Vlastní výzkum.

Dalším výsledkem, je důležitost využívaných nástrojů cílené marketingové komunikace v souvislosti s konkurenceschopností minipivovarů v ČR. Pro tyto účely byla data podrobena statistickému šetření tak abychom buď potvrdili jednu ze stanovených hypotéz, nebo ji vyvrátili. Důležitost nástrojů cílené marketingové komunikace pro majitele minipivovarů s ohledem na jejich konkurenceschopnost prezentují následující výsledky. Jak je uvedeno v metodice, jedná se o tyto nástroje cílené marketingové komunikace: sociální sítě, dobré jméno pivovaru, pořádání kulturních akcí, sponzorování místních spolků, vlastní webové stránky, doporučení stávajících zákazníků a soutěže.

Výsledky Friedmanova a Kendallova koeficientu shody prezentované v tabulce číslo 1 prokazují zamítnutí H_0 – všechny nástroje v této skupině jsou stejně důležité. Na hladině významnosti $p = 0,5$ k čemuž dochází, pokud je p menší než $0,5$ v našem případě, je $p = 0,00000$ zamítnutí H_0 je tedy prokázáno. Potvrzuje se tedy, že některé nástroje marketingové komunikace z vybrané skupiny jsou pro minipivovary důležitější než jiné. Jako vůbec nejdůležitější jsou z této skupiny dle výsledků koeficientu shody, vnímány doporučení zákazníků a dobré jméno pivovaru. Vlastní webové stránky a sociální sítě jsou s průměrným hodnocením na dalším místě důležitosti. Nejméně významný nástroj v této skupině jsou soutěže.

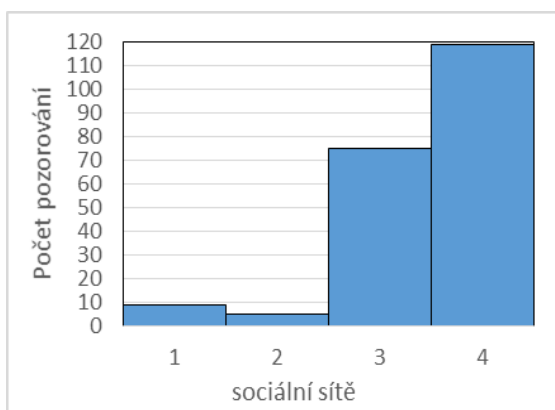
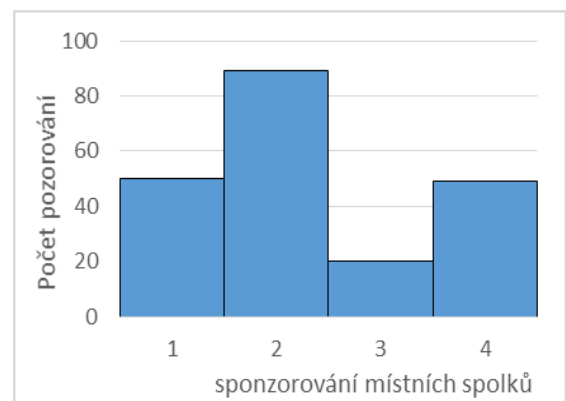
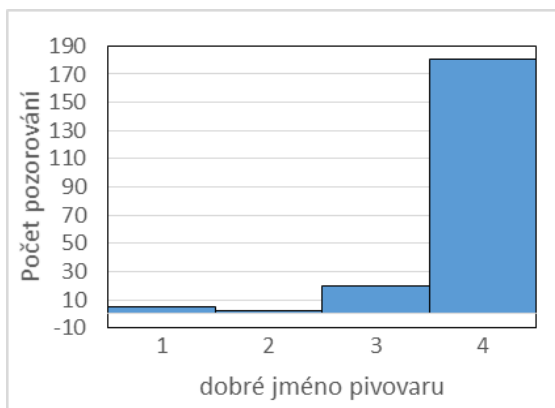
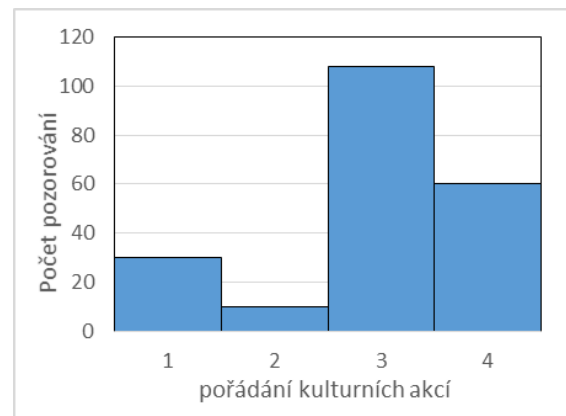
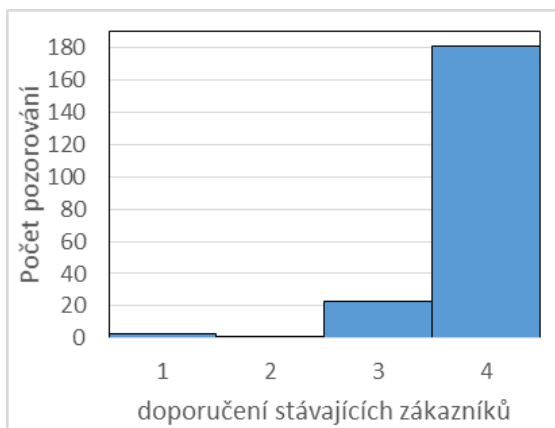
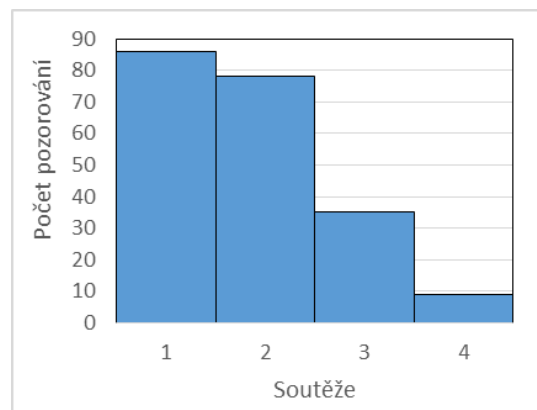
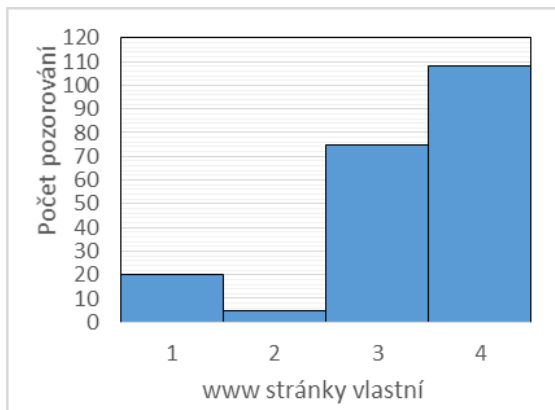
Tabulka 1: Friedmanův a Kendallův koeficient shody, pro cílené nástroje marketingové komunikace minipivovarů

Proměnná	Friedmanova ANOVA a Kendallův koeficient shody (M_{nastroje} 3) ANOVA chí-kv. ($N=208, sv=7$) =501,3463 $p=0,00000$ Koeficient shody=,57626 Prům.hods. $r=,57332$			
	Průměrné pořadí	Součet pořadí	Průměr	Sm. Odch.
soutěže	1,779310	258,0000	1,800000	0,813087
doporučení zákazníků	5,396552	782,5000	3,862069	0,450627
www stránky vlastní	4,579310	664,0000	3,468966	0,799784
sponzoring místních spolků	2,727586	395,5000	2,358621	1,128395
pořádání kulturních akcí	3,496552	507,0000	2,993103	0,989504
sociální sítě	4,624138	670,5000	3,448276	0,857411
dobré jméno pivovaru	5,396552	782,5000	3,862069	0,494704

Zdroj: Vlastní zpracování.

Výsledky Friedmanova a Kendallova koeficientu potvrzují i následné histogramy, graf číslo 2, kde jsou pro každý zkoumaný nástroj uvedeny všechny čtyři varianty odpovědí: velmi důležité (4), důležité (3), méně důležité (2), nedůležité (1).

Graf 2 – Histogramy sledovaných nástrojů cílené marketingové komunikace



Zdroj: Vlastní zpracování.

Z výše uvedených výsledků vyplývá, že nejdůležitější nástroje/kanály cílené marketingové komunikace pro majitele minipivovarů v souvislosti s jejich konkurenceschopností jsou: doporučení zákazníků a dobré jméno pivovaru, které jsou velmi důležitá či důležitá pro 98 % respektive 97 % respondentů, vlastní webové stránky (93 %) a sociální sítě (88 %) jsou na dalším místě důležitosti. Nejméně významný nástroj v této skupině jsou soutěže, ty jsou důležité či velmi důležité pouze pro 21 % respondentů. Pořádání kulturních akcí je velmi důležité a důležité pro 81 % respondentů, tento závěr koresponduje s myšlenkou, že minipivovary přejímají funkci kulturních center v menších obcích a ve venkovském prostoru obecně. Další sledovaný nástroj byl sponzorování místních spolků, které je důležité pouze pro 33 % minipivovarů, v souvislosti se zákaznickou skupinou, která se ve velké míře rekrutuje právě z nejbližšího okolí minipivovarů, lze minipivovarům doporučit, aby se ve větší míře zaměřili na sponzoring komunit a spolků realizující svoji činnost v okolí minipivovarů. Výsledky výzkumu korespondují s teorií, která pro MSP doporučuje cílené nástroje marketingové komunikace (SCHMID, 2014; STOKLÁSEK, 2013; VYSEKALOVÁ, 2002).

ZÁVĚR

Předkládané výsledky dokazují, že ze skupiny nástrojů/kanálů cílené marketingové komunikace, jsou pro majitele minipivovarů nejdůležitější v souvislosti s jejich konkurenceschopností doporučení zákazníků a dobré jméno pivovaru, které jsou velmi důležitá či důležitá pro 98 % respektive 97 % respondentů, Vlastní webové stránky a sociální sítě jsou na dalším místě důležitosti. Nejméně významný nástroj v této skupině jsou soutěže.

Byly použity dvě metody (test dobré shody a histogramy), které byly aplikovány na získaná data, výsledky použitých metod se navzájem potvrzují. Mezi důležitostmi jednotlivých nástrojů cílené marketingové komunikace ze stejné skupiny, v tomto případě, ze skupiny cílených nástrojů/kanálů, hodných pro malé a střední podniky kam minipivovary patří, jsou výrazné rozdíly.

V souvislosti s konkurenceschopností minipivovarů jsou mimo marketingovou komunikaci důležité i inovace, jak uvádí Limberger (2018). V této oblasti mají minipivovary výhodu oproti průmyslovým pivovarům. Mohou experimentovat s různými produktovými inovacemi, a jelikož jsou jejich várky malé, při neúspěchu nové receptury nehrozí tak velké riziko ztráty jako u průmyslových pivovarů. V současné době je aktuální trend, kdy průmyslové pivovary zahrnují do svého portfolia produktů i piva z minipivovarů a tím nahrazují inovace vlastních produktů.

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ON SOME PROBLEMS OF RAWLS' SOLUTION OF OBJECTIVE
CONTRACTUALISM

(Critical analysis of the selected aspects of “A Theory of Justice”)

K některým problémům Rawlsova řešení objektivního kontraktualismu
(Kritická analýza vybraných aspektů knihy „Teorie spravedlnosti“)

Jakub ŠVEC

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ABSTRACT: “A Theory of Justice” is one of the most influential works of political and practical philosophy of the 20th century. In the context of the escalating Cold War, John Rawls aimed to offer an alternative to the utilitarian approach to resolving ethical questions in the civil-political discourse. In his work, Rawls proposes to model the theory of a fair social contract in such a way that it is based on the neutral positions of individuals, while their decisions should be based on rationalism and the deontological principle of equal and inviolable human rights. This study analyses selected problematic aspects of Rawls's theory, which show certain inconsistencies with the author's claims. To achieve this, the primary source of information will be the original work “A Theory of Justice” or its translated versions. Furthermore, the method of critical analysis and synthesis will be employed. The study concludes that despite some pitfalls in Rawls's concept, the author's theory remains one of the most relevant theories of political and practical philosophy.

Key words: liberalism – contractualism – freedom – John Rawls.

ABSTRAKT: „Teória spravodlivosti“ je jedným z najvplyvnejších diel politickej a praktickej filozofie 20. storočia. V kontexte eskalujúcej studenej vojny sa John Rawls rozhodol ponúknuť alternatívu k utilitaristickému pohľadu na riešenie etických otázok v občiansko-politickom diskurze. Vo svojej práci navrhuje modelovať teóriu spravodlivej spoločenskej zmluvy tak, aby vychádzala z neutrálnych pozícií jednotlivcov, pričom ich rozhodovanie by malo byť založené na racionalizme a deontologickom princípe rovnakých a nespochybniteľných ľudských práv. Táto štúdia analyzuje vybrané problematické časti Rawlsovej teórie, ktoré vykazujú určité nezrovnalosti s tvrdeniami autora. Na dosiahnutie tohto cieľa bude primárnym zdrojom informácií pôvodné dielo „Teória spravodlivosti“ alebo jeho preložené verzie. Ďalej budeme využívať metódu kritickej analýzy a syntézy. Štúdia preukazuje, že napriek úskaliam Rawlsovoho konceptu patrí autorova teória k najrelevantnejším teóriám politickej a praktickej filozofie.

Kľúčové slová: liberalizmus – kontraktualizmus – sloboda – John Rawls.

INTRODUCTION

The work "A Theory of Justice" by John Rawls draws on the long-forgotten philosophical approach of contractualism. However, Rawls's theory emerged in a contemporary context that questioned its validity. This context was characterized by a world divided into two competing ideologies, each presenting a distinct conception of the "good life". It shall be noted that the definition of this conflict merely as a struggle between socialism and liberalism is in many ways a blanket and simplified statement. In this regard, it is paradoxical that these two competing ideologies share certain common historical and philosophical roots, or, in certain areas are based on related principles.¹ Classical liberalism, having overcome absolutism, which was its central motivation, found itself in a situation where it was exhausted in terms of its goal. The emancipation of the individual and their unique role in the newly emerging civil and political society was achieved in the sense of individual rights (often referred to as first-generation human rights). An individual - a citizen - had a wide range of so-called of "negative" freedoms,² but at the moment of liberating themselves from monarchic power, they were immediately confronted with a new problem that classical liberalism had not anticipated. In other words, while individual escaped the shackles of feudalism, they found themselves subjected to a different kind of servitude - the absence of the so-called of "positive freedom", which primarily materialized through the concept of social rights.³ This materialization became a driving force for classical liberal reflections on the social nature of justice, gradually leading some philosophers from this tradition to embrace the principles of social liberalism.

Perhaps the most relevant examples are Jean Jacques Rousseau and, later, John Stuart Mill, who embraced elitism, utilitarianism, and classical liberalism during the first half of his life, dedicating the second half to the defense of social rights and equality. The works of these authors were later followed by John Dewey, and in the next fifty years, John Rawls wrote his most famous work "A Theory of Justice", which he positions alongside "Political Liberalism" as a cornerstone of political and practical philosophy in the second half of the 20th century. In any case, despite the differing views of the two largest groups within liberalism (classical and social), its central theme remains unchanged: individual freedom. We conclude this

¹ We address this issue in the article "On the historical sources of liberalism - Between political ideology and philosophical concepts." A relevant statement from the study reads: "While the ideas of Locke's classical liberalism are followed in modern philosophy by neoliberal or libertarian currents of philosophical thought, the later ideas of Mill or Rousseau are favored by social liberalism, which attributes a much more relevant role to the state within the social system" (Švec, 2020, p. 354).

² Although we recognize the pitfalls of dividing freedom into positive and negative categories, this general distinction is sufficient for our study. At this point, we also acknowledge the criticism of this division, as articulated by Adam Swift in his work "Political Philosophy".

³ To a large extent, we are talking about the second generation of human rights.

introduction with Lucia Husenicová's statement: "Regardless of the interpretation or definition of the individual values on which liberalism is built, they remain unchanged, whether we perceive liberalism as a political theory, paradigm, or ideology. It is a central category is the freedom of the individual, which is connected to the emphasis on natural rights" (Husenicová, 2017, p. 71). Wollner and Ušiak completes the philosophical dimension of understanding the relationship between liberalism and freedom: "However, the concept of freedom is cardinal for liberalism, which proclaims the axiom that the individual must be given as much space as possible to act freely and only then, and only to the most necessary extent, can he be limited by the state. According to political liberals, there must be clearly defined spheres of individual life that are not regulated by state intervention, so that individuals are left with a real possibility of choice (Wollner; Ušiak, 2020, p. 11).

Historical and philosophical context of John Rawls' Theory of Justice

It should be noted that social liberals do not always proceed from identical assumptions about the origin and reason for the organization of society. For example, Rousseau is a contractualist who believes in a natural order of things, while Mill advocates for solutions based on the rational tenets of the utilitarian tradition. As for Rawls' theory, his motivation for writing his most famous work "A Theory of Justice" is described in an interesting way by Richard Rorty in the book "Objectivity, Relativism, and Truth", specifically in the chapter "Part III: The priority of democracy to philosophy", where he paraphrases, quotes and supplements Rawls's ideas from "Justice as Fairness", stating: "Rawls thinks that 'philosophy as the search for truth about an independent metaphysical and moral order cannot ... provide a workable and shared base for a political conception of justice in a democratic society'. He suggests that we limit ourselves to gathering dry settled convictions, such as the belief in religious tolerance and the rejection of slavery 'and then' attempt to organize the basic intuitive ideas and principles implicit in these convictions into a coherent conception of justice'. This attitude is thoroughly historicist and anti-universalist. Rawls can readily align himself with Hegel and Dewey against Kant, asserting that the Enlightenment's endeavor to free itself from tradition and history, appealing to 'Nature' or 'Reason', was self-deceptive. He views such appeals as misguided attempts to achieve what theology failed to do" (Rorty, 1991, p. 180-181).

In "A Theory of Justice", Rawls effectively addresses several issues at once within a single theoretical framework. In the situation of the already mentioned bipolar world order, democratic countries sought to build a welfare state, particularly in Western Europe and

Canada, where various levels and models of such policies emerged⁴. After World War II, Europe had two major motivations for implementing such a policy. The first was the reconstruction of economically strong Europe; the second, perhaps less emphasized in contemporary discourse, was the so-called "prevention of communism", which was in a way legitimized by the Kennedy doctrine. In other words, democratic states pursued welfare policies through various political avenues, not limited to left-wing political parties. However, the policy of the welfare state required certain philosophical and value-based legitimization. Until 1971, these policies primarily emerged from pragmatic considerations rather than ideological commitments, especially when promoted by parties other than those on the left.

The second, in this case philosophical, motivation was the definitive abandonment of consequentialism, particularly utilitarianism, in ethical dilemmas. In his theory, Rawls tries to bypass the principle of accepting lesser evil to achieve the greater good for the majority. However, an important aspect is the attainment of a fair position in the formation of the social contract. Proponents of contractualism, such as Locke, Hobbes, and Rousseau, emphasize the necessity of collective agreement on the social contract. However, their texts often reveal signs of disagreement among individuals regarding who should receive advantages in the envisioned civil and political society. However, their texts often reveal signs of disagreement among individuals regarding who should receive advantages in the envisioned civil and political society. To circumvent this dilemma, Rawls creates his own fictional construct, which he terms "Veil of Ignorance". Rawls understands this space as: "The original situation of equality from the point of view of justice as fairness (which corresponds to the state of nature according to the traditional theory of the social contract). By the original situation, of course, we do not mean any real historical state of affairs, (...) we understand it as a purely hypothetical situation, through which we could arrive at a certain conception of justice" (Rawls, 1993, p. 75).

Veil of ignorance and Sandel's insight into the issue of fair social cooperation

The Veil of Ignorance addresses a fundamental problem in the formation of a social contract: the limitation of the preference of individuals' personal inclinations, talents, gifts and abilities of individuals who conclude a social contract. As Rawls states, "The veil of ignorance removes, together with other conditions of the original position, differences in bargaining advantages, so that in this and other respects the parties are symmetrically situated. Citizens are represented only as free and equal persons" (Rawls, 2007, p. 140). Rawls rightly

⁴ The British model, the German model, the Scandinavian model, which is perhaps the most extensive.

assumed that as long as individuals engage in agreements while being aware of their predispositions, reaching a consensus becomes impossible. The reason is the knowledge of individuals of their talents, social roles, and status in society. People cannot agree on a general rule regarding societal benefits and the framework for redistribution.⁵ Therefore, the author comes up with a revolutionary idea, which consists in thinking about how individuals would think about designing a social contract in a space in which they would not have this information about themselves. According to Rawls's theory, individuals would know the conceptions of the good of a democratic civil and political society, which he refers to as "primary goods".

They would know if it is good to be healthy, free, materially secure, educated, but they would not know what part of these primary goods belong to them in the real world because they are behind the Veil of Ignorance. The author assumes that in such a situation of uncertainty, individuals will think pessimistically about their position in the real world. In other words, they will consider the possibility that they may become the least favored individuals or disadvantaged after the Veil of Ignorance is removed because no one can be sure of their social position, wealth, or level of health behind the veil. Rawls considers such conditions of uncertainty about the disposal of primary goods to be just and fair. Michael Joseph Sandel offers a useful and current expansion of the discussion on social justice from the perspective of his 2020 publication, "The Tyranny of Merit: What's Become of the Common Good?" Sandel deepens the discussion on fair social cooperation in a democratic society by introducing a fresh perspective on merit. He begins with a premise that aligns closely with Rawls's viewpoint: a social order based on merit does not inherently guarantee fairness within a competition framework. This is largely due to the inherent differences in individuals' talents and abilities. However, Sandel's notable contribution lies in his consideration of what form of social arrangement individuals would choose if they were aware of their future social status, contrasting the notions of aristocracy and meritocracy. According to Sandel, decision-making in this context would not be based only on the maximin theory, as proposed by Rawls under the Veil of Ignorance.

⁵ Throughout the work, Rawls discusses the concept of timeless fair cooperation, aiming to achieve a state where, through the preference of the individual will, the individual will at the same time contribute to the general welfare, a condition he refers to as a "well-ordered society". However, John Dewey addressed similar issues by building upon previously developed ideas of social liberalism concerning the role and position of the individual in society. In "Democracy and Education", in the section "The Individual and the World", he writes: "True individualism was created by allowing the authority of custom and tradition (...) But for various reasons, the new individualism was not interpreted philosophically in the sense that it proclaimed the development arrangements for the revision and transformation of previously held beliefs, but stood as a claim that the mind of each individual is completely isolated from every other thing. (...) This created the problem of how it is possible to achieve a purely individual consciousness that would act in favor of the general or social interest" (Dewey, 2001, p. 314).

The maximin principle and the appearance of free choice in an apparently neutral position

In the broadest sense, the maximin principle in the context of contractualist theory posits that when designing an agreement, contracting parties envision various theories of justice while considering the position of the most disadvantaged individuals in each scenario. According to Rawls, since individuals are rational beings, they will choose option in which the position of the most disadvantaged individuals is the most favorable among all other theories. In other words, the actors in the social contract aim to maximize their happiness. The maximin principle is Rawls's counter to the utilitarian approach of maximizing utility, ensuring that human rights remain intact, because individuals behind the Veil of Ignorance are aware of the conceptions of the good within a pluralistic democratic society, which discards any calculations that compromise human rights. This ignorance and uncertainty regarding their position behind the veil prompt individuals to think in terms of ensuring a relatively decent standard of living, even under the assumption that they may end up being the most disadvantaged one the Veil of Ignorance is removed. In the context of Rawls's model, it should be (again) noted that at this moment, it is appropriate to consider whether the actors of the contract in Rawls's theory can genuinely be regarded as free since as they detach from the primary goods modeled by Rawls—goods he describes as ideologically neutral and universally desired by rational individuals—there is a question of whether they remain rational actors in the social contract from the philosopher's perspective⁶.

In the chapter "Success Ethics" from his aforementioned, Sandel states that "People care not only about how much money they have but also about what their wealth or poverty signifies for their social standing and self-esteem. If you were born into the upper reaches of an aristocracy, you would be aware that your privilege was your good fortune, not your own doing. Whereas if you ascended, through effort and talent, to the apex of a meritocracy, you could take pride in the fact that your success was earned rather than inherited. Unlike aristocratic privilege, meritocratic success brings a sense of achievement for having earned one's place" (Sandel, 2020, p. 114). Sandel's reasoning does not contradict Rawls's concept of primary goods, as

⁶ Rawls defines these primary goods, which he considers rational to follow when creating a social contract behind the Veil of Ignorance: "1. basic rights and liberties: freedom of thought and liberty of conscience; 2. freedom of movement and free choice of occupation amidst diverse opportunities are required for the pursuit of final ends and revise their choices as needed; 3. powers and prerogatives of offices of responsibility; 4. income and wealth, understood broadly as versatile resources with exchange value, enabling individuals to achieve a wide array of goals, directly or indirectly; 5. Social basis of self-respect, normally regarded as aspects of basic essential institutions, if citizens are to have a lively sense of their own worth as moral persons and the ability to advance one's aims with self-confidence" (Rawls, 2007, p. 99-100).

Rawls acknowledges that financial resources and the pursuit of material wealth do not fully satisfy individuals in society. Intangible factors such as societal interest and recognition, the political environment⁷ and representation, social recognition within the community, internal satisfaction etc. also play crucial roles.

In any case, Rawls's work is among the most cited, but also the most criticized or commented upon in the field of political philosophy. It is argued that Rawls's concept, despite its original ambition, has not completely avoided utilitarian connotations. It can even be claimed that the utilitarian *modus operandi* has already infiltrated the cornerstone of his theory, particularly in the sense that rational actors of contracts must accept primary goods that appear, or which the author presents as neutral, while their acceptance enables individuals to fulfill their individual goals. This results in a certain form of coercion, which Rawls, however, believes to be a free choice that a rational actor cannot reject to ensure a higher level of well-being in the future civil-political society.

Despite the many pitfalls of Rawls's theory, this issue is also discussed because it has been addressed by prominent thinkers such as Ronald Dworkin or the previously mentioned Michael Sandel. In his famous book "Liberalism and The Limits of Justice", Sandel devotes several subchapters to Rawls's theory, clarifying its difficulties. As part of our critique regarding the issue of free will within the Veil of Ignorance, Sandel states: "Of any contractual agreement, however free, it is always intelligible and often reasonable to ask the further question, 'But is it fair what they have agreed to?', a question that cannot be reduced to the merely vacuous questions, 'But is it what they have agreed to, what they have agreed to?' What makes it fair is not just that it was agreed to" (Sandel, 1998, p. 106). In line with our observation about the degree of freedom of contractual actors behind the veil, the author further argues for the need to distinguish two aspects of the contract that Rawls might not have taken into account when developing his theory, or might have temporarily overlooked: "The distinction between these two sorts of questions suggests that we may think of the morality of contract as consisting of two related yet indistinguishable ideals. One is the ideal of autonomy, which views a contract as an act of will, whose morality consists in the voluntary character of the transaction. The other

⁷ According to the findings of Slavka Pitoňáková in the article "Public Relations and Journalism", political topics in the media and public space (within democratic arrangements of society) are at the center of attention, followed by news about the economy and health care: "We found out that the press releases from the area of politics are the most attractive (five out of seven press releases are from the area of politics). The second place is occupied by the press releases focused on the edifying activities and health campaigns (three out of five press releases)" (Pitoňáková, 2012, p. 51).

is the ideal of reciprocity, which sees a contract as an instrument of mutual benefit, whose morality depends on the underlying fairness of the exchange" (Sandel, 1998, p. 106).

Dworkin's criticism of Rawls's theory stems from doubts about the relevance of the discussion on the contract, which is hypothetical in nature and does not reflect a state that has occurred or could occur. As Dworkin writes in "Taking Rights Seriously", "A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all" (Dworkin, 2013, p. 186). The main purpose of these quotations is to point out, from our point of view, one of the main weaknesses of Rawls's theory, which consists in the implicit coercion in leaving the actors of the contract in a situation where they are forced to accept primary goods with the risk that if they fail to do so, they risk being labeled as irrational participants in the social contract. Moreover, there is a strong suspicion, which needs to be explored, that the primary goods modeled by Rawls do not represent value-neutral variables, but rather sophisticatedly formulated virtues rooted in liberal norms of a good life. Despite these criticisms, it is widely argued that Rawls's theory remains one of the most viable theories of contemporary political and practical philosophy, and its application to political practice is verifiable in issues such as affirmative action and redistributive policies.

CONCLUSION

As has been suggested, despite the numerous criticisms, problems, and pitfalls of this theory, it can still be concluded that Rawls's concept remains applicable and unsurpassed. This is not because his mistakes have not been proven, but rather because no more comprehensive and viable practical-philosophical concept has yet to be proposed – one that approaches a universal, and ideally as neutral as possible, agreement. The publication that attempts to address this ambition and resolve the shortcomings of "A Theory of Justice", many of which Rawls himself later acknowledged, is, paradoxically, another book by John Rawls entitled "Political Liberalism". This work is discussed in greater detail in several sections of this article. Unlike "A Theory of Justice", "Political Liberalism" is devoted primarily to civic-political practice or addressing the problem of how different ideological doctrines can coexist and function within the framework of a democratic pluralistic system.

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**THE ISSUE OF PUBLIC LAW AND POLICIES WITHIN TOURISM
AND MARKETING STRATEGY**

Otázka veřejného práva a politik v rámci cestovního ruchu a marketingové strategie

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ABSTRACT: The paper aims to analyse tourism management and marketing strategies and propose a dynamic system for tourism policy. We will apply this concept within the framework of destination management and marketing in the Czech Republic. The proposed dynamic tourism policy framework represents one of the possible approaches to the implementation of management and marketing strategies in the Czech Republic and other European countries. The framework of the dynamic tourism policy concept is aimed at improving the planning and effectiveness of tourism policy, including controlling the efficient use of resources. As a complementary part of the research, we will analyse potential responses of tourism policy to pandemic crises. We recommend leveraging the lessons learned during the Covid-19 pandemic to revive tourism and introduce innovative planning through strategies focused on resilience, communication, sustainability, and partnerships.

Key words: tourism – public policies – marketing strategies.

ABSTRAKT: Cílem článku je analyzovat strategii řízení a marketingu cestovního ruchu a navrhnout dynamický systém politiky cestovního ruchu. Tento koncept aplikujeme v rámci destinačního managementu a marketingu České republiky. Navržený rámec koncepce dynamické politiky cestovního ruchu představuje jeden z možných přístupů k realizaci managementu a marketingu v České republice a dalších evropských zemích. Rámec koncepce dynamické politiky cestovního ruchu je zaměřen na zlepšení plánování a zefektivnění politiky cestovního ruchu, včetně kontroly efektivního využívání zdrojů. Jako doplňující část výzkumu bude analyzována možná reakce politiky cestovního ruchu na pandemické krize. Doporučujeme využít zkušenosti získané během pandemie Covid-19 k restartu cestovního ruchu a nastavit inovativní plánování prostřednictvím strategií zaměřených na odolnost, komunikaci, udržitelnost a partnerství.

Klíčová slova: cestovní ruch – veřejné politiky – marketingové strategie.

INTRODUCTION

The key shortcomings of the Czech Republic's tourism policy include the absence of a well-functioning organisational structure, both legislatively and institutionally, within the framework of a combined model of public administration. At present, there is no stable organisational structure for the coordination of activities and the management of tourism at either the national or regional levels, which is essential for implementing strategic objectives of strategic documents and ensuring the effective use of financial resources.

A potential solution to the problems associated with increasing the functionality of the organisational structure of managing tourism as a sector at the national level is to define a system of dynamic tourism policy. The policy clarifies the roles and limits of individual sectors and entities involved in destination management. In this framework, public policies act as a driving force, stimulating the business environment while mitigating the negative impacts of a market failure. Due to the broad scope of destination marketing and management, this paper focuses specifically on the current challenges faced by tourism policy in the Czech Republic at the national level.

The aim of this paper is to propose a dynamic system of tourism policy that integrates destination management and marketing strategies. This system will be analysed at the level of the national tourism headquarters. As a complementary part of the research, possible responses of tourism policy to crisis situations will be analysed, drawing on lessons learned from the Covid-19 pandemic, which hit the tourism sector very hard. This paper addresses a gap in research, as such a comprehensive examination of tourism policy has not yet been conducted in the Czech Republic.

LITERATURE REVIEW

Freyer (2006) defines tourism policy as the intentional shaping of both current tourism conditions and future prospects through various instruments and governance structures (public, private and international ones). Tourism management is an integral part of this policy process, where, based on the formulation of priorities and objectives, a system is created to achieve the desired outcomes. Public tourism policy seeks a consensus between the interests of all tourism policy actors from the public, private and non-profit sectors. It establishes a framework of measures, such as the tax system, statistical monitoring, support programs, and investment incentives, to secure the socio-economic benefits expected from the tourism industry.

According to Keller and Smeral (1997), tourism policy largely depends on the overall state of development of a country, and in countries with the same level of the development, the

tourism policy is very similar. Rather than focusing solely on profit factors, such tourism policy aims to meet the broader needs of society. In practice, it can be particularly challenging to reconcile ways of achieving objectives at different levels of civil society (regional, national, and transnational ones). Tourism takes place within a geographical, and the development of tourist regions or destinations is central to this process. Local government units do not always coincide with tourism destinations.

The systems of tourism policy differ from country to country and are shaped by political frameworks of the country. It is evident that, without the guarantee of free movement of people as a fundamental right of citizens of liberal states and without an adequate economic level, tourism would be virtually impossible. According to Bieger and Keller (2005), the development of tourism is also strongly influenced by factors such as a stable business environment, the level of public infrastructure, and a functioning social security system. When formulating tourism policy, a socio-economic perspective typically dominates, aligning with the prevailing economic view that places tourism in the economic policy with a strong overlap into social policy (Kaspar, 1996). At present, however, tourism is often neglected in national economic policies, and there is limited public awareness of tourism policy issues. Hall and Jenkins (1995) point out that while the public is quite regularly informed about domestic, social, health or agricultural policy issues, tourism policy is seen as something specific, only for professionals or interest groups. This perception stems from a limited understanding of the true economic and social importance of tourism. Tourism should be seen both as a tool for regional development (especially in economically disadvantaged regions) as well as a driver of broader economic development.

According to Mundt (2004), the formulation of tourism policy differs fundamentally from other economic sectors that have to be considered. In most cases, tourism policy makers are public organizations or organizations with their significant influence/share. The quality and marketability of tourism products are heavily reliant on the complexity of services offered by various, often non-cooperating entities (from both the business and public sectors) and on the overall goodwill of the destination (i.e., also the behaviour of residents). The literature also addresses tourism policy from the perspective of marketing and management (Freyer, 2006), cultural tourism management, and partnerships and networking at the local level. Additionally, the use of statistical data for tourism evaluation, strategic planning, and the role of stakeholders in sustainable tourism development are examined in the literature (Merinero-Rodríguez and Pulido-Fernández, 2016).

METHODOLOGICAL AND THEORETICAL BACKGROUND

Qualitative research methods are employed to achieve the objectives of the paper. To design the concept of a dynamic tourism policy, the authors used the Balanced Scorecard (BSC) method (Mio et al., 2022). as a framework for evaluating the current strategy of the Czech Republic. In assessing the objectives of the strategy, five key perspectives were examined: the partners' perspective, the financial perspective, the perspective of visitors and residents of the destination, the perspective of internal processes, and the perspective of learning and growth of national tourist centres (such as the CzechTourism agency). Special emphasis was placed on their measurability and evaluability. To evaluate the applicability of the proposed concept in practice, the authors drew on their experience in the development and implementation of programmatic and strategic documents in the field of tourism. They also gained knowledge from consultations with managers of the national tourist centre and destination management companies.

The conceptual framework of this research is based on defining the problem and exploring the application of findings in tourism planning and organisation within the tourism policy of the Czech Republic. The framework for the research of the tourism policy creates the so-called direct conceptual policy and the set of instruments created and implemented by the central state administration body for tourism (the Ministry of Regional Development). The Government of the Czech Republic, through the Ministry of Regional Development, outlines and guarantees the fulfilment of strategic objectives in the development of tourism in relation to both regional areas and the EU. Tourism policy as a system is a part (a subsystem) of economic policy. It is closely linked to other subsystems such as regional development policy, cultural policy, employment policy, and others. Tourism policy cannot operate separated from other systems (policies) and their organisations or functions within the national economy (Bieger, 2005).

When examining the elements and their interrelations, the technique known as the interaction scenario was employed, which should serve as a basis for addressing the challenges of tourism management and organisation while creating a concept for dynamic tourism policy at the national level. Essentially, this approach is systems and is designed in a modular way into blocks and modules that cover information, organisational, and methodological areas. The design of the dynamic tourism policy system draws upon studies focused on public administration, as well as the development and evaluation of public policies (Vesely and Nekola, 2007). The basic approach to developing the concept of dynamic tourism policy is based on viewing tourism as an open dynamic system (Keller and Smeral, 1997), with public

administration at its centre. This administration is defined by four basic functions: coordination, planning, co-production, and initiation. The coordinating function is aimed at improving the position of tourism within the context of other policies (transportation, education, culture, environmental protection, security policies, etc.). The planning function is focused on spatial planning and ensuring the basic spatial and temporal conditions necessary for the development of tourism within the region. The co-production function involves the provision of goods and services necessary for the development of tourism (security, transport services, health, and cultural services). The core of the initiation function is the stimulation of development programmes and ensuring balanced support for tourism stakeholders from the business, public, and non-profit sectors. Additionally, the linkages with the external environment have also been explored (Vila et al. 2010).

The implications and recommendations for developing tourism policies in times of crisis (particularly in the context of recurring pandemics) are based on the guidelines provided by international organizations. To inform these recommendations, several case studies from selected countries and cities worldwide have been utilized. The findings from these case studies have been published directly by destination management organizations and have been thoroughly analyzed in various articles and studies.

RESULTS

Tourism is strongly linked to both natural and cultural-historical conditions and the business environment, particularly small and medium-sized enterprises. The primary purpose of tourism policy is to establish conditions that foster a supportive market environment and business activities while respecting the sustainable capacity of natural and cultural areas. A successful tourism policy must be oriented towards the creation of competitive products and added value in the sector. At the national level, where the competencies of the Ministry of Regional Development and its subsidiary organisation, CzechTourism, are defined by legislation, a foundational framework is established to address the issues outlined in the introduction. In order to develop a comprehensive approach to formulating tourism policy that respond effectively to relevant societal aspects and trends, we propose applying a systemic approach (using the interaction scenario technique) to introduce the concept of dynamic tourism policy. In assessing the applicability of the chosen method, the authors primarily consider whether the specificities of tourism and the limitations for evaluating the implementation of strategies, including the measurement of the performance/activity of the guarantors (public organizations) can be applied and respected in relation to established objectives and expected

outcomes. Feedback mechanisms (or control "feed-forward" relations), where feedback is integrated at the system's input, are vital for evaluating system behaviour and ensuring ongoing adjustments.

The application of theoretical knowledge and the results of conducted analyses confirm that it is possible to implement a functional tourism management system (dynamic tourism policy) and to apply methods and techniques of the strategic management in the Czech Republic. Utilizing the Balanced Scorecard method (Nasuka and Hasbullah, 2020), we recommend the development and evaluation of annual action plans for the marketing strategy of the Czech Republic as a destination. To effectively measure the outcomes of the objectives and measures of the strategy, it is necessary to establish a system of regular supplementary surveys and prepare annual reports on the development of tourism, complemented by quarterly updates. Furthermore, there is a need to ensure the coherence and complementarity of the portfolio of activities and their successful execution. It is essential to create a contractual framework that allows for the participation of key stakeholders, both within and outside the tourism sector, in joint marketing activities and to create a functional management information system (Fatima and Elbanna, 2020). Managing authorities should ensure the coordination of plans and activities of regional managements with the activities of the CzechTourism. Regarding budget efficiency, it is advisable to prepare and implement grant projects with an emphasis on measurable efficiency and effectiveness in the use of public funds.

Strategic management in the Czech tourism sector based on the Balanced Scorecard method, should be supported by a comprehensive evaluation of tourism policy concepts concerning both the effectiveness and efficiency of individual instruments (Ahn, 2001). To evaluate management strategies and standards, it is crucial first to develop a clear methodology. Following this, an inter-ministerial committee should be set up to focus on policy priorities, common procedures, and control processes. The newly defined processes will then be used in the preparation and implementation of regular tourism development concepts. These methods and procedures will be applied simultaneously at regional, local, and national level (Bílý, 2007).

A useful entry into the intersection of law and organizations in the sociology of law is through the rationalist perspective of law and economics. Rationalist economic theories explain the organizational behaviour as efficient adaptations to external market conditions. The principles of efficiency and rationality are adopted within organizations because they are rewarded in the tourist market. Law, understood as the entirety of formally enacted rules, represents one of the many coercive exogenous forces that influence organizational behaviour. Contrary to rationalist market approaches, institutionalist perspectives in the sociology of law

argue that rationality is socially constituted rather than an objectively given reality. Organizations rely on rational myths that may not be inherently accurate but are effective because they align with widely shared public policies and marketing practices.

For the implementation of both the inbound and especially domestic tourism strategies, we used findings from the marketing method called 7S. This concept emphasizes the integration of regional and national levels in either the planning or profiling of key products. The method is also aimed at applying forms of partnership marketing forms within an integrated communication strategy. The execution of the strategy goes beyond the competence of CzechTourism and encompasses broader tourism policy. The current system of marketing management at the level of the Czech Republic as a destination and at the level of the CzechTourism agency requires changes essential for the implementation of effective strategy. Key elements at the destination level include product development, coordination of marketing activities, and the integration of national, regional, and local levels. At the level of the CzechTourism agency, a fundamental shift in perspective regarding the role of foreign representations and their financial and material support. The common and critical denominator of the implementation at both levels are soft factors, including people's skills, shared values, and a common vision. Regular monitoring of strategic results and practices is essential for establishing a coherent national framework for the strategic evaluation of development interventions and for formulating the concept of a dynamic tourism policy.

The dynamic tourism policy concept serves as a basis for the final reports on the implementation of the State Tourism Policy Concept. The aim is to structure factual knowledge from national tourism policy routines, provide a comprehensive explanation of challenges, and facilitate the identification of effective solution. In the longer term, a methodology for evaluating tourism strategies and introducing standards for management, decision-making, and control in the public sector, will be developed based on the practical verification of the proposed approach.

The severe impacts of the COVID pandemic necessitate a review and innovation of approaches to tourism management and marketing. Public administration bears the responsibility for public finances and their responsible and efficient use. In tourism, public administration approaches affect the business sector and the overall outcomes of the tourism sector. When examining crises in tourism, it is important to recognize that many influences causing crises at the destination level cannot be influenced (or are very difficult to manage). While such crises may be geographically and temporally limited, they can still harm a destination's image of the destination – an aspect that can be influenced. Sensitivity to tourism

crises varies across different markets and segments (Navrátilová et al., 2020). This variation does not imply a total loss of visitors; understanding market dynamics is crucial. Generally, domestic and regional source markets prove to be the most resilient to crises (Ritchie and Jiang, 2019). The most resilient segments tend to be adventurers, seasoned travellers, and cultural tourism participants (as opposed to those engaged in beer consumption, gastro-tourism, or commercial entertainment).

Crisis management tools vary based on the stages of a given pandemic, beginning with preventive measures, planning, and crisis management settings. At the onset of the crisis, activities are initiated according to a tentative plan. In transitional stages, a clear marketing and communication strategy is established. The recovery phase is characterized by the restoration of original activities and infrastructure, accompanied by a coordinated marketing response (Tittelbachová et al., 2022). The evaluation and updating of strategic plans are essential. Cities, destinations, and national tourism hubs experienced a sharp decline in tourism demand during the pandemic. They focused on rebuilding confidence and mitigating psychological barriers associated with fear of travelling and dining out, providing financial support and incentives for businesses. The unexpected drop in demand posed bankruptcy risks for various sectors, including hotels, restaurants, travel agencies, tour guides, the MICE sector, etc. (Lai et al., 2020). Destinations struggled to reestablish their image as healthy and safe options. Coordinated activities at regional, national, and international levels were aimed at adaptation and survival of businesses, promotion of domestic tourism, international travel corridors, provision of clear information and enhancing cooperation between stakeholders (Khan et al., 2021).

Marketing and communication became central to the efforts of tourist centres and destination management companies. Effective marketing communication should lead to the creation of unique products, destination narratives, and cultural stories. The aim is to achieve positioning both destinations and products in the market to attract more customers. During the pandemic and its aftermath, changes in demand necessitated adjustments in tourism offerings. Compared to international tourism, domestic tourism was relatively less affected by the Covid-19 pandemic and dominated the tourism economy in the short term. The question is how this segment will evolve in the coming years. Marketing strategies have shifted towards local tourists and nearby markets, considering geographical, cultural, and social factors. However, strategic destination marketing should not be neglected, even in times of crisis. Successful cities and countries have planned their activities in the short, medium, and long term (Okafor et al., 2022). While short-term postponement of selected marketing activities and the reallocation of

media investments are necessary. It is crucial to maintain space for strategic planning within crisis management. Sustaining brand importance and destination relevance for customers remains possible. In times of crisis, marketing tools combine a focus on current customers and the deferred demand. The tourism recovery observed in the past year has facilitated partial economic recovery for destinations ready to restart their economies and employment (Collins-Kreiner and Ram, 2021).

The pandemic underscored the need for intensive communication through destination websites and social networks, reinforcing their importance in the marketing toolkit. Crisis communication and customer engagement were facilitated through these channels. Businesses and destinations increasingly adopted digital tools, disseminating online applications, sales and payment instruments. Digital marketing became a key tool. An important part of a destination management is the coordination and strengthening of the interests of relevant stakeholders. Online tools enhance cooperation among national tourism centres, public institutions, destination organisations, cities, associations, chambers of commerce, and universities. Communication strengthens the flexibility of destinations and businesses. Digital environment became an opportunity to share information and data, enabling a transfer of ideas, thoughts, and best practices. Platforms like MS Teams software have enabled the development of professional seminars, conferences, workshops, and training events in a short period of time. Significant differences in the quality of measures between destinations and countries can be attributed to variations in financial resources. During the Covid-19 pandemic, increased flexible funding was essential to support the operation and retention of businesses (Holesinska, 2022).

For a more detailed look at the changes in tourism caused by the pandemic, we present the following case studies. In 2021, the City of Berlin approved a new plan for the development of cycling tourism. The aim of the strategy was to create a connected network of almost 900 cycle paths totalling almost 500 km by 2030 (Buehler and Pucher, 2022). The city will complement and extend existing cycle path networks, increasing the flexibility of bicycle travel by upgrading streets for two-way cycling. The development of cycling is not new in Berlin and aligns with the city's long-term master plan and sustainable transport development plan. The pandemic offered new opportunities for the development and promotion of cycling as a viable alternative to public transport. Cycling can serve as a solution during future pandemic and other crises, contributing to addressing climate problems, air pollution, reducing environmental damage, conservation of non-renewable resources, population health problems, etc. The Portuguese association MARCA created a specific product called Creautr, which aims to provide unique, authentic experiences in destinations while strengthening their intangible

cultural heritage. MARCA seeks to unite citizens and institutions in order to find solutions that can promote sustainability and improve the quality of life for local residents, focusing on environmental protection, the valorisation of cultural and natural heritage, and promotion of social and cultural initiatives (Marujo et al., 2021).

The city of Kraków introduced marketing tools aimed at attracting tourism from targeted groups. A joint marketing campaign with DMO - Kraków Undiscovered focused on domestic tourists. It included a strong advertising campaign in the media and via the websites of the country's largest cities (Gdańsk, Wrocław, Poznań, Łódź, Szczecin, and Warsaw). The city also formed a partnership cooperation with the seaside resort of Sopot and launched a specific campaign targeting the residents of Kraków. In foreign markets, campaigns emphasized safety (Kowalczyk-Anioł et al., 2021), encouraging visits to museums, galleries, and restaurants during less crowded times. Free and discounted tours led by local guides attracted interest, while many museums (e.g., the Italian State Museums in Venice, Rome, and Naples) leveraged social media to reach a wider online audience through free virtual tours, descriptions of artworks, quizzes, and treasure hunts. Buenos Aires, in collaboration with UNESCO, launched a project called „Cultura en Casa“, offering a rich cultural content for both adults and children. The materials are free for everyone and free access to opera, ballet, virtual visits to museums and galleries, audiobooks, and TV series.

CONCLUSIONS

The proposed framework for a dynamic tourism policy concept represents one of the possible approaches to the implementation of management and marketing strategies in the Czech Republic and other European countries. The aim was to identify recurring problems and explore potential solutions. Successful implementation of the strategy must be supported by appropriate objectives, key priorities, and activities integrated into operational plans and interventions. An evaluation framework that reflects the dynamic nature of the implementation process needs to be developed and enacted, utilizing feedback mechanisms to identify interim results and facilitate necessary adjustments.

The framework of the dynamic tourism policy concept seeks to enhance the planning and effectiveness of tourism policy while ensuring efficient resource utilization. Emphasis should be placed on increasing accountability among the guarantors and implementers of chosen measures. Individual projects and interventions must align with strategic objectives to be executed efficiently, effectively, and cost-effectively. The feedback system facilitates a continuous process of exploring solution options and scenarios for future development, playing

a crucial role in knowledge acquisition and rational assessment and the impacts of the implementation of the chosen scenario. The contribution of the proposed concept of a dynamic tourism policy aims to improve coordination and foster partnerships among sponsors, implementers, and target groups involved in tourism development concepts. This concept serves as a platform for coordination, communication, and information sharing, structured around the existing institutional framework for tourism management in the Czech Republic.

We recommend using the experience gained during the Covid-19 pandemic to rejuvenate tourism and establish innovative planning through strategies focused on resilience, communication, sustainability, and partnership. The concept of resilience enables tourism actors to respond to and recover from external shocks. Understanding, anticipating, and preparing for various external risks should be integral to both destination management and marketing strategies. Being aware of potential changes understanding what responses are needed when those changes materialise will help organisations to better navigate changes, shocks, and crises such as pandemics.

The pandemic crisis has highlighted deficiencies in government and business preparedness and their ability to respond. The crisis presents an opportunity to rethink tourism support. Tourism organisations must prioritize the qualitative aspects of tourism while promoting social and environmental sustainability principles. Both tourism demand and supply will increasingly focus on minimising environmental impacts and advancing the benefits of a low-carbon economy. In the social sphere, aligning the values of residents with those of domestic and international visitors will be essential (Bílý, 2023).

Additionally, the pandemic has accelerated new directions of development in technology, online market, and digitalization. National tourism hubs should consider the long-term implications of the crisis while leveraging digitalisation, supporting the transition to a low-carbon economy and the structural transformation needed for more sustainable tourism industry. From the perspective of national tourism hubs and destination management, it is important to establish integrated marketing platforms, enhance customer influence, and restructure the offer of tourist destinations. With the restart after the pandemic, the importance of monitoring developments to address over-tourism becomes increasingly important. Projects that were previously unfeasible may now gain attraction (Araújo, 2022).

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**THE STATUS OF THE STATE-OWNED ENTERPRISES IN
INVESTMENT ARBITRATION: NAVIGATING LEGAL CHALLENGES
AND POLICY IMPLICATIONS**

Postavení a význam státních podniků v investiční arbitráži: Řešení právních výzev
a politických důsledků

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ABSTRACT: State-owned enterprises (SOEs) play an increasingly prominent role in the context of global trade and investments. Their potential role as both commercial and public entities presenting a significant jurisdictional challenge to the ISDS framework is predominantly built upon disputes between private investors and states. The article employs doctrinal analysis to examine jurisdictional objections raised against or by SOEs based on their ownership status or relation with the home state's government. The centerpiece of the article is an analysis of several landmark cases, highlighting tribunals' approach to these challenges. The article aims to elucidate the jurisdictional reasoning in cases involving prominent SOEs and shed light on potential future developments around SOE investment arbitration, particularly in relation to the emerging new generation of investment agreements.

Key words: Investor-State Dispute Settlement (ISDS) – Broches Test – Tribunal Jurisdiction – Jurisdictional Challenge – State-Owned Enterprises (SOE).

ABSTRAKT: Státní podniky (State-owned enterprises, SOE) hrají v kontextu globálního obchodu a investic stále důležitější roli. Jejich potenciální role jako obchodních i veřejných subjektů, která představuje významný jurisdikční problém v rámci řešení sporů mezi investorem a státem (Investor-State Dispute Settlement), vychází převážně ze sporů mezi soukromými investory a státem. Článek za použití doktrinní analýzy zkoumá jurisdikční námitky vznesené státními podniky nebo vůči nim na základě jejich vlastnického statusu nebo vztahu k vládě jejich domovského státu. Článek se soustředí na analýzu několika klíčových případů, která poukazuje na přístup tribunálů k těmto námitkám. Cílem článku je objasnit jurisdikční argumentaci v případech zahrnujících významné státní podniky a nastítnit možný budoucí vývoj v oblasti investičních arbitráží, které se těchto podniků týkají, zejména ve vztahu k nově vznikajícím formám investičních dohod.

Klíčová slova: Řešení sporů mezi investorem a státem (ISDS) – Broches Test – Jurisdikce tribunálu – Jurisdikční námitka – Státní podniky (SOE).

INTRODUCTION

State-owned enterprises (SOEs) play an increasingly prominent role in international trade and investments. For example, the European Union experienced a 77% increase in foreign investments between 2015 and 2016, with major contributions from Chinese SOEs (Svetlicinii, 2021, p. 2057). Their presence poses challenges to existing mechanisms for dispute settlement via the investor-state dispute settlement system (ISDS) due to their dual role as both commercial entities and sovereign actors. The Chinese SOEs framework, for instance, renders them more akin to instruments of the state than to commercial entities (Xun and Weng, 2024, sec. 2.1). This dual role grants the state the power to pursue national objectives both domestically and internationally through their stake in these enterprises, which function as market participants. The state inevitably has an interest in management of the economy, and SOEs might serve as tools to achieve this goal (Pernazza, 2023, p. 170). The ambiguity of their function potentially challenges the jurisdiction of investor-state arbitration, as this mechanism is predominantly designed to resolve disputes between private investors and states. Active interference within an SOE to advance governmental objectives could necessitate a transition toward state-to-state arbitration (SSDS), as the SOE under such conditions might be considered organs of the state.

Illustrative is the case of *Beijing Urban Construction Group Co. Ltd (BUCG) v. Republic of Yemen*, where the claimant is a Chinese SOE. The case concerns a contract for the improvement of Sana's International Airport. BUCG was unable to complete the contract and the contract was terminated by the respondent due to alleged harassment by the respondent's armed forces. In the dispute, the claimant argued that BUCG, as a state-owned entity, should not be allowed to participate in an ISDS dispute. The respondent claimed that BUCG is both an agent and an organ of the Chinese state. Conversely, the respondent argued that it acted in accordance with commercial considerations (*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, 2017a, paras 22–30).

The question thus arises regarding the nature of SOEs under ISDS and the ability of tribunals to establish jurisdiction over state-controlled entities. More specifically: Are SOEs considered private investors under ISDS? How do tribunals establish jurisdiction over SOEs? When are SOEs considered commercial and non-commercial in nature for the purposes of ISDS jurisdiction?

The issue has attracted significant scholarly attention. Nodir Malikov extensively examines the topic from the perspectives of both national courts and international arbitrations. The core of the paper lies in an analysis of key cases, concluding that while national courts and international tribunals are generally reluctant to pierce the corporate veil, they consistently

emphasize that SOEs are not entitled to sovereign immunity, as demonstrated in the case of *Crystallex International Corp. v. Bolivarian Republic of Venezuela* (Malikov, 2023). Paul Blyschak offers a broader focus on the international aspects of disputes involving SOEs. The paper is centered on a comprehensive analysis and survey of major cases, particularly in the context of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) and the Broches test, aiming to provide an in-depth analysis of how tribunals establish jurisdiction under Article 25 of the ICSID Convention. In addition, Blyschak analyzes the wording of the ILC Articles, the ICSID Convention, and selected International Investment Agreements (IIA) (Blyschak, 2011). Wang Qing et al. adopt a similar approach to previous scholars by analyzing both the ILC articles and the Broches test. However, their work uniquely argues for the integration of these two frameworks. They propose that the ILC Article 8 could complement the agent test by assisting tribunals in determining effective control over SOEs, especially when structural control alone is not insufficient to establish state interference. Furthermore, the article provides a distinctive examination of the contemporary legal framework and recent reforms targeting SOEs in China, highlighting the Chinese government's steps toward commercialization of these SOEs. Nonetheless they emphasize that explicit references to SOEs appear in only eight out of out of the 106 bilateral investment treaties (BITs) signed by China, often necessitating tribunals to rely on the Broches test (Qing *et al.*, 2023). Anran Zhang focuses specifically on case analysis. The centerpiece of Zhang's work involves examining disputes concerning Chinese SOEs in the cases of *BUCG v. Yemen*, and *CBQ v. Mongolia*. Zhang concludes that claims brought by SOEs are likely to remain contentious and recommends measures to differentiate between the commercial and non-commercial nature of their business operating abroad. (Zhang, 2018)

The presented article builds upon the research conducted by contemporary scholars by examining the various approaches adopted by investment tribunals in order to establish jurisdiction and their underlying reasoning. The key aspect of the analysis are several cases involving SOEs, either as a claimant or as entities dragging their home state into disputes with prospective foreign investors due to their close relation with the state. The aim of the article is to establish a balanced analysis of tribunals' ability to address jurisdictional questions and assess the purpose of these undertakings. Additionally, the article seeks to shed light on both doctrinal and practical challenges that shape the approaches of investment tribunals to such issues. It also includes an analysis of selected IIAs that incorporate provisions for disciplining SOEs.

The paper is structured into five distinct sections. The first section, the introduction, provides an overview of the topic of investment arbitration and SOEs. The second section, titled

“Background”, examines the historical development of the international investment protection framework and the evolving participation of SOEs, highlighting also international standards for SOE management. The section concludes with a discussion on contemporary approaches to state participation in the economic management of SOEs. The third section, “The Standing of State-Enterprises in International Tribunals” examines how tribunals approach the establishment of jurisdiction in cases involving SOEs. The fourth section, “The Analysis and Future Developments”, addresses gaps identified in the previous section and proposes potential solutions to the issues discussed in the paper. The final section, “Conclusion”, summarizes the key findings and points in the paper.

1 Background

1.1 The Conceptual Framework of the International Investment

The contemporary international investment landscape relies heavily on the framework of international investment agreements for its proper functioning, establishing a set of rules to protect investments and guide international investment arbitration tribunals. However, this system is a relatively recent development, with its origins dating back to the Treaties of Friendship, Commerce, and Navigation (FCN). The first such treaty, the Treaty of Amity and Commerce, was signed on 6 February, 1778, between the United States and France. This was followed by a slew of additional treaties under the same framework, such as the Treaty of Friendship, Limits, and Navigation Between Spain and The United States (1795) and The Treaty of Amity and Commerce Between His Majesty the King of Prussia and the United States of America (1785) (Prussia and the United States of America, 1785; Spain and The United States, 1795). The treaties were generally based on the principles of reciprocity and promotion of mutual interests, such as the protection of individual citizens and property, including goods and investments.

Over time and distance, however, the effectiveness and reciprocity of the treaties have gradually diminished. The individual interpretations of these treaties often tended to lean in favor of investors, leading to the inclusion of specific provisions that eventually formed the foundation of the modern principle of fair and equitable treatment (Marisi, 2023, p. 18). Further expansion of trade and investment networks and enforcement of investment protections were facilitated by “gunboat diplomacy”, which was notably employed in the continents of Asia and South America. A prominent example of this approach is the 1853 expedition of American Commodore Matthew Perry, which aimed to open isolationist Japan to foreign trade. At the time, Japan’s international contact was limited to a few key locations, including Yokohama, Kobe, Nagasaki, Niigata, Hakodate, Tokyo, and Osaka. The Americans utilized “gunboat

diplomacy” to pursue their international policy objectives by coercing Japan to open its borders (Okamoto, Kawashima and Iokibe, 2024, p. 56). During this period, mechanisms for dispute settlement lacked impartial and neutral parties in form of the investment tribunal, and investors relied on their home states to protect their investments through diplomatic channels (Kim, 2018, p. 308).

The system remained in place until the 1950s, which saw the introduction of the very first modern international investment agreement: the bilateral investment treatment between Germany and Pakistan in 1959 (The Federal Republic of Germany and Pakistan, 1959). This BIT introduced several improvements over its predecessors, most notably the establishment of an independent ad-hoc tribunal consisting of three members. Each party appointed one member, while the appointed members jointly selected the third tribunal member. In cases where the tribunal members were unable to agree on the final appointment within a month, the President of the International Court of Justice was authorized to make the appointment (The Federal Republic of Germany and Pakistan, 1959, art. 11).

The introduction of bilateral investment treaties ushered in a new era of international trade and investments relations between countries. These agreements played a significant role in the rapid post-World War II reconstruction, attracting countries from around the world. Particularly toward the end of the Cold War, countries historically hesitant to engage with the West, due to extensive Western exploitation during earlier periods, as exemplified by South American nations under the Calvo Doctrine, began opening their borders and enhancing their investment protection standards to attract further investments, which were perceived as essential for national development (Egli, 2007, pp. 1050–1053).

Up to this point, all disputes were predominantly resolved through state-to-state dispute settlement mechanisms, requiring investors to rely on their home states for the protection of their investments. Investor-state disputes during this period were relatively rare (Yackee, 1864). Slow gradual changes were introduced with the signing of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on March 18, 1965 (The World Bank, 1965). This convention established the International Centre for Settlement of Investment Disputes, and, for the first time in multilateral agreements, granted individuals the right to independently protect their investment rights by initiating arbitration against a state, institutionalizing the concept of investor-state dispute settlement and shifting the balance of power towards individual investors. For instance, Chapter IV, Section 1, Article 36(1) stipulates that “...any national of a Contracting State wishing to institute arbitration proceedings...” may do so.

The enforceability of arbitration awards was further strengthened by the New York Convention, adopted in 1958, which provided guarantees to disputing parties that arbitration awards would be recognized and enforced, even in cases where the location of the tribunal differed from that of the disputing states. This provision allowed ISDS proceedings to be held in third countries (United Nations, 1958).

The enforcement of arbitration awards and the resulting shift in power towards investors over states is only one of several significant factors contributing to the attractiveness of international arbitration. Investors often perceive national courts as biased, favoring either their home states or domestic investors, thereby casting doubt on the impartiality of such proceedings. Investment tribunals, by contrast, are viewed by investors as sidestepping such issues by being independent of national judicial systems while providing impartial, flexible and relatively swift resolutions to disputes. This independence enhances their appeal to investors while reducing the workload of national courts (Snyder, 1964, p. 391).

One of the earliest cases discusses following the establishment of ICSID formation was *Holiday Inns S.A. and Others v. Morocco* in 1972, which was ultimately settled between the parties (Lalive, 1981). One of the first cases formally administered by ICSID was *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, brought under the Sri Lanka-United Kingdom BIT. This dispute arose from counter-insurgency operations. The tribunal ruled in favor of the investor, awarding 460,000 dollars plus a 10% interest rate from the date of arbitration until full payment. Additionally, the fees for the use of ICSID facilities were allocated 60% to Sri Lanka and 40% to the investor, with Sri Lanka also required to bear one-third of the claimant's preparation and presentation costs, amounting to 54,972.40 dollars (*Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, 1990). These disputes were primarily based on international investment agreements between states, underscoring their significance and prominence as guarantors of investment protection and access to guaranteed recourse to state actions potentially infringing upon investors' rights. The investors' ability to independently initiate arbitration under these agreements led to a generation of IIAs that accommodate both investor-state dispute settlement (ISDS) and state-to-state dispute settlement mechanisms. The dual approach allowed states to address disputes via traditional diplomatic channels while also providing investors direct access to arbitration. Such frameworks are exemplified by several international treaties, such as the Agreement Between the Government of The People's Republic of China and the Government of the Republic of Latvia on the Promotion and Protection of Investments 2004, Agreement Between the People's Republic of China and The Federal Republic of Germany on the Encouragement and Reciprocal Protection

of Investments 200, Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of The People's Republic of China and The Government of The Kingdom of The Netherlands 2001 (The Government of The People's Republic of China and The Government of The Kingdom of The Netherland, 2001; The People's Republic of China and The Federal Republic of Germany, 2003; The Government of The People's Republic of China and the Government of the Republic of Latvia, 2004).

However, the shifts in power had unintended consequences, most notably the limited ability of states to regulate without the risk of triggering arbitration proceedings, thereby undermining the state's autonomy and potential sovereignty. The new generation of IIAs aims to rebalance investor-state relations, offering greater leniency for states to regulate in the public interest. BITs, such as the EU-Canada Comprehensive Trade and Economic Agreement (CETA) include various provisions that safeguard the right of states and governments to exercise their mandates (The European Union and its Member States of the one part, and Canada, 2017).

The rise and evolution of investment protection for individual investors also raises questions regarding the role of SOEs and their role in the international investment landscape, which will be addressed in the following part.

1.2 Competitive Neutrality

The economic landscape of SOEs has undergone a significant shift, evolving from underperforming, domestically contained enterprises towards global competitors and investors, particularly since the turn of the millennium. Reforms such as China's "grasping the large and letting go of the small" strategy have led to the creation of larger and more profitable SOEs (Fan Xi, 2008; Zhang, 2015, p. 20). These enterprises are now major players in domestic markets with significant contributions to economic growth and development (Zhang, 2019). Furthermore, SOEs have become increasingly active in global markets, posing potential threats to established privately owned and free-market-oriented enterprises, particularly when states prioritize policy objectives over commercial interests in managing their corporate stakes. The close relation between the government and SOEs may foster a culture of mutual dependence, with SOEs relying on government for their continued existence, while governments rely on SOEs to fulfill policy goals, such as employment generation (National Academy of Development and Strategy, n. d.).

Given this context, the Organisation for Economic Co-operation and Development (OECD) stipulates that competitive neutrality is achieved when no entity is granted preferential treatment in any given market (OECD, 2012). The form of advantages that may be granted can

vary widely in form and function. These advantages can include subsidies, tax cuts, or other financial benefits, but can also involve looser regulatory oversight, such as reduced thresholds for access to bank loans, all of which serve to distort market competition (Xu, 2023, p. 164).

Neutrality can ideally be achieved when the state actively participates in the management of an SOE within any given market as a responsible and well-informed stakeholder (Liyang and Dongmei, 2020, p. 29). The state should focus on commercial objectives and the continued economic growth of the company, given its role as a stakeholder. A lack of engagement or disinterest from the state in corporate management may result in insufficient oversight of the enterprise (Zhang, 2021, p. 125). The increasing importance of adhering to these principles is underlined by the OECD in their 2013 policy paper, which highlights that between the years 2010 and 2011, 204 out of the 2,000 largest companies were SOEs (Willemyns, 2016, p. 660). This contemporary trend reflects the growing overlap between private and public ownership, characterized by the challenges of balancing political and commercial objectives (Blyschak, 2016, p. 10). Major economies, such as China, which have significant SOE proliferation, stress the necessity of adhering to market principles and policies with emphasis on market competition while maintaining a balanced relationship between the government and the market (Xinhua News Agency, 2019, para. 2). The policy underlines market liberalization for private enterprises and market-oriented mechanisms. SOEs are expected to conform to these market principles and allow private enterprises to participate in the reforms process (Xinhua News Agency, 2019, paras 11; 16).

Chinese SOEs are also being reclassified into various categories based on their purpose. SOEs operating within the public sector receive more substantial subsidies compared to those focused on commercial activities, which are required to compete on a more equal footing with private enterprises (Duan and Song, 2022, p. 18). The principle follows the contemporary mixed ownership reforms introduced in 2015, underlying a reduced role of the state in corporate management by merging public ownership with private management. These reforms underscore the importance of adhering market economy principles and ensuring fair competition (*The State Council on State-Owned Enterprises Advice on the Development of a Mixed-Ownership Economy*, 2015).

2 The Standing of State-Enterprises at International Tribunals

2.1 The State's Role in the Economy

The state has a natural inherent interest in fostering its economic development and growth, which may conflict with free market principles. SOEs can be viewed as tools in the

broader strategy to stimulate economic growth. Thus, the state functions as a regulator, responsible for drafting and enforcing legislation, setting regulatory standards, and as a competitor through its stake in SOEs. In state-directed economic models, the state further assumes the role of a planner, aiming to reduce and overcome market deficiencies, analyze economic conditions, and set growth targets (Luyao Che, 2022).

The dual (or triple) role of the state necessitates a degree of separation between the state and the enterprise to manage potential conflicts of interests. This can be achieved by establishing a supervisory body that acts as an intermediary between the state and SOEs, ensuring that the state does not directly intervene in SOE management. This body would be responsible for making key appointments within the enterprise, ensuring that appointees are not affiliated with the state (*Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, 2018, paras 825–830).

The principle of effective control has been established in both investment and trade law to describe the state's ability to direct the actions of an undertaking, which differs from simple controlling interest. The World Trade Organization Panel considers whenever the state's controlling stake in an enterprise translates into effective control. The tribunal has ruled that, under the financial definition of "controlling interest", control rests with the majority owner. The majority does not necessarily need to be 50% or more, but rather is determined by the overall number of shareholders, where the state holds the largest share (The World Trade Organization, 2010, para. 8.134; 8.135). However, the subsequent Appellate ruling established that controlling interest and effective control are substantively different, as majority ownership does not automatically translate into state's ability to direct the actions of an undertaking (The World Trade Organization, 2011, para. 346).

The investment tribunals' approach reflects the relative difficulty in determining the role of the state in the management of SOEs. The general approach consists of (1) Structural Test, and (2) Functional Test:

1. Structural Test focuses primarily on the degree of ownership to determine whether an undertaking is a public entity.
2. Function Test establishes whether an undertaking functions as a state organ or is vested with the authority to act on behalf of the state, *i.e.*, having a public mandate (Meardi, 2021).

The case of *Emilio Agustín Maffezini v. The Kingdom of Spain* provides a clear illustration of the application of both principles. It should firstly be understood that the arbitration was not triggered by actions of the Spanish government but rather by actions of the state-owned entity *Sociedad para el Desarrollo Industrial de Galicia Sociedad Anonima*

(SODIGA), which underestimated the cost of a project and provided inaccurate estimates to the Claimant. Additionally, SODIGA pressured Emilio A. Maffezini S. A., the company established by Maffezini in Spain, to make investment before the completion of the environmental impact assessment. The tribunal established jurisdiction on the grounds that the dispute arose after the entry into force of the Argentine-Spain and is based on the fact that SODIGA was a state entity (*Maffezini v. Spain Emilio Agustín Maffezini v. The Kingdom of Spain*, 2000a, paras 24; 44; 46).

The tribunal applied the structural test, which held that SODIGA fell within the scope of the tribunal's jurisdiction, and by extension, the Spanish government, on the basis that even if it was considered a private entity, the enterprise could still be influenced by the government. Such indirect actions are subject to the Articles on the Responsibility of States for Internationally Wrongful Acts, specifically Article 7. However, the tribunal also acknowledged that the various forms SOEs can take may render the structural test's effectiveness in determining whenever an entity or its actions are attributable to the state (*Maffezini v. Spain Emilio Agustín Maffezini v. The Kingdom of Spain*, 2000b, paras 77–79).

To further address the issue, the tribunal employed the functional test, which underlines that simple state ownership alone is not sufficient to establish the tribunal's jurisdiction. Instead, the intent of the government for SODIGA to perform governmental function, such as conducting studies to introduce new industries into the region and providing various forms of financial advice and assistance was key. The activities performed by SODIGA could theoretically have been carried out by a privately owned enterprise but the Spanish government had opted to establish it under a government-owned entity. It should be noted, however, that the distinction between private and public status of an undertaking is of less relevance under the functional test, as private enterprises can also serve governmental functions. The tribunal concluded that both the structural and functional tests are applicable to the SODIGA, thereby establishing a connection to the Spanish government and the actions of the undertaking, which led to establishing the jurisdiction of the tribunal (*Maffezini v. Spain Emilio Agustín Maffezini v. The Kingdom of Spain*, 2000b, paras 84; 86; 87; 89).

The role of the state in the domestic market and its actions could be considered actionable, but the issue lies in the specificity of interpretations. The dispute addressed actions of a SOE, a public undertaking under the control of the state. It was established that under the functional test, the undertaking had been tasked to perform a very narrow and specific task of attracting investment into the region and providing assistance. The clearly defined purpose of the SOE helped the tribunal in determining jurisdiction. In cases where such information is not

available, or where state interference might be present, the determination becomes more challenging. Entities such as the Chinese SASAC may interfere with the functional test, courtesy of their dual role as a principal stakeholder and a supervisory entity (The People's Republic of China, 2023).

2.2 The Private-Public Separation

The inability of the tribunal to attribute the acts of an undertaking to the state could hinder the ISDS tribunal in establishing jurisdiction, given that the proceedings are focused on disputes between private investors and states. The distinction is significant because, under Article 25 of the ICSID Convention, states are disqualified from being considered investors. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State... (The World Bank, 1965, art. 25).

The tribunal may instead examine the economic interests of the company in the performance of any contentious acts, as well as the interest of the undertaking in the case, as was done in *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*. Focusing on the substantive jurisdictional issues in relation to SOEs, the case predominantly addresses the privatization of CSOB during the transformation of the Czech and Slovak Republics toward free-market economies. In this case, the tribunal established that actions taken by a governmentally owned undertaking to benefit from governmental policy do not constitute acts of a state organ. This is due to the fact that such actions are inherently self-motivated and akin to those taken by private undertakings to strengthen their market position. Additionally, the existence of a state-owned middleman, which received two non-performing loans in order to facilitate privatization of CSOB, had no impact on the standing of the claimant under ICSID, despite the transfer of risks (*Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, 1999, paras 23; 25; 32).

The core message of the ruling is thus that as long as an undertaking takes part in commercial activities, it is essentially regarded as a commercial entity with the right to access ICSID. The tribunal best summarized both the case and the issue by stating that:

It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these

functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature (*Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, 1999, para. 20).

This differentiation is fundamental as it establishes access to investment tribunals under any relevant IIA. The reasoning of the tribunal clarifies that ownership alone and actions taken in pursuit of governmental policy by an SOE do not necessarily translate into acts of a state organ if such actions would be carried out by a privately owned undertaking in similar situation. Even collusion between the state and the enterprise can be viewed as an exercise of governmental function, as seen in the *Helnan International Hotels A/S v. Arab Republic of Egypt*, where EGOTH played an active role in the privatization process at the behest of the Egyptian government. This applies even if the undertaking is not directly empowered by the state at the time of the breach, as per ILC Article 5 (*Helnan International Hotels A/S v. Arab Republic of Egypt*, 2006, para. 93).

2.3 The Treaty Based Attribution

The new generation of IIAs signed predominantly by the EU provides various mechanisms for regulating the behavior of SOEs. Chapter 18 of the CETA provides for a comprehensive coverage of state monopolies and SOEs. These entities are expected to engage in commercial activities and act in accordance with commercial considerations, ensuring non-discriminatory treatment of investors from the other party in terms of the supply and procurement of goods and services. The clauses within the chapter underline that SOEs should not act in a manner inconsistent with CETA (The European Union and its Member States of the one part, and Canada, 2017, art. 18.3; 18.4; 18.5). The fundamental question therefore is: “How do tribunals interpret SOE related clauses?”

A prominent example of the issue can be found under *Beijing Shougang and Others v. Mongolia*. The case falls under the auspices of UNCITRAL, although there is no direct analogy with previous cases under ICSID for consistency purposes. However, relevant principles of international law still apply. The Vienna Convention clearly establishes that treaties should be interpreted in good faith, with words given their ordinary meaning (United Nations, 1969, art. 31). This case thus offers useful insight into tribunal approaches, including those under ICSID, regarding treaty content and interpretation. The case concerns the revocation of licenses by the

Mongolian government for the purposes of resource exploitation. Among the claimants, China Heilongjiang and Beijing Shougang are Chinese SOEs. In the dispute, the respondent argued that the claimants were acting at the behest of the state, referencing academic analyses of the state's involvement in SOEs, as well as the alignment between Chinese government policy on resource exploitation abroad and the decision of China Heilongjiang to invest in Mongolia. The respondent further underlined that Beijing Shougang operates under the direct supervision of the State Council, and argued that the extracted resources were sold below market price (*Beijing Shougang and others v. Mongolia*, 2017, para. 271).

The tribunal assessed the meaning of “economic entity” under the China-Mongolia BIT. The agreement itself stipulates that in order to be qualified as an investor under the BIT, the undertaking has to be constituted under the relevant laws of PRC and Mongolia, without making any distinction on the basis of ownership (The People's Republic of China and The Government of The Mongolian People's Republic, 1993, art. 1(2)).

The tribunal cast a broad interpretation of the BIT by stipulating that the Vienna Convention on the Law of the Treaties allows the assignment of special meaning to terms only if the parties have explicitly intended it. The panel underlined that the concepts of “independence” and “separateness”, as envisioned by the respondent, have no significance under the BIT. Furthermore, the tribunal attributed the meaning of “economic entity” to any legal entity engaged in business activities (*Beijing Shougang and others v. Mongolia*, 2017, paras 412; 413; 415).

It should be firstly established that under the structural test, the designation of commercial and non-commercial primarily serves to determine whether an undertaking is owned by the state. Moving beyond the CETA, which would eventually evolve its SOE clauses in future agreements signed by the EU, the focus is now moved on the EU-Vietnam Free Trade Agreement (EVFTA). Beyond simply stipulating that SOEs and state monopolies must act with commercial considerations in mind, with the exception of the state-designated monopolies for the purposes of fulfilling a public mandate, the EVFTA contains an explicit provision that delineates ownership thresholds. If state ownership exceeds fifty percent, the provisions of Chapter 11 apply. This includes both direct ownership and indirect ownership, including via subsidiaries. Under the structural test, the tribunal is able to reach similar conclusion as stipulated in the applicable clauses, *i.e.* the state is the primary controlling entity. The provisions underlying the state's ability to appoint (directly or indirectly) more than half of the board of directors' members or to exercise control over strategic decisions reflects these principles as well (The European Union and its Member States of the one part, and The Socialist Republic

of Vietnam, 2020, chap. 11). Therefore, the key lies not in the meaning of the clause but in their existence. As underlined in *Beijing Shougang and Others v. Mongolia*, the existence of such clauses to regulate SOEs can effectively distinguish investments made by SOEs from those made by private investors.

The EVFTA is not unique in establishing provisions for disciplining SOEs. Similar provisions can be found across various other EU treaties. The emergence of these provisions within treaties can be viewed as a response to the increasing proliferation of SOEs internationally, accompanied by growing suspicion towards their actions. In this context, ISDS serves as a neutral platform for arbitration (Trakman and Musayelyan, 2016, p. 208). The Comprehensive Agreement on Investment (CAI), as an example of a major treaty, contains provisions that closely resemble EVFTA. Both agreements underline that SOEs conducting commercial activities must act with commercial consideration in mind. A key difference, however, is the inclusion of mechanisms for reporting control structures, balance sheets, and special privileges. (The European Union and its Member States of the one part, and The People's Republic of China, 2020, sec. II, Article 3bis, 4). The CAI, however, is a heavily SDDS-focused agreement and does not fall under ICSID jurisdiction (Qian, 2022). A more suitable example outside the EU is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which contains extensive provisions similar to those in EU agreements. These provisions apply to SOEs where the government directly owns more than fifty per cent of the capital, controls more than half of the voting rights, or has the power to appoint the majority of board members. The provisions are designed to tackle SOEs directly engaged in commercial activities. Nevertheless, the CPTPP does not delve deeply into control via subsidiaries. The agreement mandates the disclosure of key information related to control, special privileges and financial records (*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, chaps 17, Article 17.1; 17.10). While the sharing of ownership percentages may not capture the attention of tribunals, structural control through the ability to appoint personnel into key positions or other means of directing the enterprise remains more substantive. A key issue raised in the *Beijing Shougang* case, then, is the intent of the parties when signing these agreements.

The CPTPP provides a general definition of SOEs under the General Definition section, but this definition is not substantial enough to establish to categorize SOEs as a unique entity whose investments should be treated differently from those of other businesses. If this were the case, it could also imply that, for instance, small and medium-sized enterprises would also be afforded different treatment by their mere mention in the agreement (*Comprehensive and*

Progressive Agreement for Trans-Pacific Partnership, 2018, chap. 1). The agreement additionally includes provisions designed to discipline the behavior of SOEs. Broadly speaking, the main objective of these provisions is to ensure compliance with commercial considerations, improve transparency, avoid discriminatory treatment of foreign investors, enhance corporate governance, provide for independent and impartial courts with availability for foreign investors and lastly, ensure that the supervising entity is impartial to both state- and privately-owned enterprises (*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, chap. 17). Thus, the provisions underline a basic concept; SOEs must comply with commercial consideration in their operations. While their investments are not automatically scrutinized and viewed differently from those of private investors, SOEs are subject to monitoring through mandates to disclose relevant information upon request, with punitive measures available to investors. Additionally, Article 17.7 introduces various forms of injury that SOEs acting inconsistently with commercial considerations may cause. As an example, 17.7.1(a) states that non-commercial assistance can arise if it impedes market imports or sales via the sale of goods by an SOE that received the assistance. Article 17.8 outlines the process for determining injury, but the burden of proof lies with the injured investor. This could theoretically be viewed as separating the investments made by SOEs from those made by private investors (*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, chaps 17, 17.7; 17.8). While the clauses are primarily focused on ensuring fair competition and preventing discrimination. It ensures that home states cannot evade their treaty obligations by delegating powers and responsibilities to state-owned undertakings (*Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, 2012, paras 179–181).

3 The Analysis and Future Developments

3.1 Broches Test

The present cases are generally considered within academic discussion to fall under the purview of the Broches test, with the exception of *Beijing Shougang and Others v. Mongolia*. For an in-depth examination of the Broches test, see Gu (2024). Broches, the first secretary of ICSID, stated that: ...There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government owned corporation should not be disqualified as a ‘national of another Contracting State’ unless it is acting as an agent for the

government or is discharging an essentially governmental function (*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, 2017b, para. 33).

It is further established that under the ICSID Convention, one of the parties must qualify as a contracting state, while the other sits as a national of another contracting party (Broches, n. d., p. 11). State-to-State arbitration falls within the jurisdiction of the International Court of Justice, making ISDS arbitration apolitical, with sovereign immunity expressly excluded under Article 27 of the ICSID Convention (Feldman, 2016, p. 33).

The Broches test closely aligns with principles established in the ILC Articles, particularly regarding the ability of the tribunal to attribute the acts of SOEs to their home states. Article 5 underlines that the conduct of an entity empowered by the state shall be regarded as an act of the state. Article 8 stipulates that actions at the behest of the state are likewise attributable to the state (United Nations, 2001, arts. 5; 8).

3.2 Draft Articles on Responsibility of States for Internationally Wrongful Acts

Building on the previous section, the next logical step is to examine the ILC Articles and their similarity with the Broches test. The Articles themselves, while not being binding, are regarded as reflecting customary international law (*Noble Ventures, Inc. v. Romania*, 2005, para. 69; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, 2014, para. 281). ILC Article 4 stipulates that the conduct of a state organ is attributable to the state, regardless of its position within the state's structure or the specific function it performs. Organ is defined as "any person or entity which has that status in accordance with the internal law of the State." (United Nations, 2001, art. 4). The limitation of ILC Article 4 is that the entity must be established and tied to the government, vested with governmental authority and, more importantly, at least partially integrated into the government. The principle can be understood as de jure organ (*Noble Ventures, Inc. v. Romania*, 2005, para. 69). This includes state-designated monopolies and/or enterprises with special rights of privileges. For instance, the tribunal in the *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)* addressed the status of National Highway Authority (NHA) in this context.

The fact that there may be links between NHA and some sections of the Government of Pakistan does not mean that the two are not distinct. State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with the government (*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, 2009, paras 9; 119).

The ability of ILC Article 4 is thus exceptionally challenging both within its context of itself and in relation to SOEs, including state monopolies, as well as its applicability to the Broches test. However, it shall be noted that companies of a distinct legal and financial nature constituted under applicable national laws and not established through contracts with such entities, are not covered by an applicable treaty. This distinction renders them separate entities from their home state, and their acts are not attributable to the state, even if they are state-owned and/or created for a specific purpose, as states cannot be held responsible for contract with provincial authorities (*Impregilo S.p.A. v. Islamic Republic of Pakistan*, 2005, paras 198–216; 262). Essentially, a state may only breach its obligation under a treaty if it exercises its sovereign authority, rather than acting as a contractual party in investment disputes (Magnarelli and Ziegler, 2020, p. 517).

The tribunal may consider the application of the article in cases where there is significant governmental control, legal immunity, the ability to appoint and dismiss individuals in key positions, and control over finances and decision-making (*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, 2012, para. 405). This indicates a manifest and distinct lack of separateness between the entity and the controlling state.

Article 5 provides that the conduct of a person or an entity empowered by the state, while not being a state organ, shall be considered an act of the state if carried out in a particular instance. This makes Article 5 better applicable than Article 4 in such cases (United Nations, 2001, art. 5). Although the ILC article is not explicitly referenced within the jurisdictional objection section of the proceedings, the Maffezini case directly underlines that SODIGA was established with the express purpose of carrying out governmental functions (*Maffezini v. Spain Emilio Agustín Maffezini v. The Kingdom of Spain*, 2000a, para. 85). The ILC-based attribution aligns with the functional test, as SODIGA was empowered to act as a governmental agency. For Article 5 to apply, entities must be empowered by the state, even to a limited extent (*Jan de Nul NV and Dredging International NV v Egypt*, 2008, para. 163). The fact that such entities do not fall under the definition of a *de jure* organ of the state is irrelevant under Article 5, which does not differentiate between entities that are formally part of the state and those acting on its behalf. The critical question is whether the entities act at key moments according to their prescribed competences under applicable laws defining their functions (*Noble Ventures, Inc. v. Romania*, 2005, para. 70).

Article 8 specifies that the conduct of a person or a group of persons shall be considered acts of the state if they act under the instructions, control, or direction of the state while performing specific acts (United Nations, 2001, art. 8). The Article could be effectively seen as

extending the applicability of Article 5 to actions beyond its immediate scope. In the case of CSOB, considerations related to pursuing commercial objectives could potentially fall under the purview of Article 8.

In summary, the ILC Articles, particularly Articles 5 and 8, essentially mirror the Broches principles in their ability to attribute the actions of non-governmental entities, i.e. SOEs, to the state for the purposes of determining the jurisdiction of a tribunal (*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, 2017b, para. 33; Du, 2021, p. 293).

3.3 A Way Forward

Contemporary ISDS-based tribunals have demonstrated the ability to establish jurisdiction over disputes involving SOEs. Sejko's research showcases that, between 1977 and 2022, tribunals reviewed eighteen cases involving SOEs with available data. Of these, nine included jurisdictional discussions, and in each case, the tribunal ruled that it retained jurisdiction (Sejko, 2023, pp. 866–868). The primary challenge, however, is the rapidly evolving landscape of SOE-based investments and operations. Mixed economy models are becoming increasingly prominent, a trend that is likely to impact the global stage significantly. The growing influence of SOEs will place greater pressure on tribunals, which will inevitably see a rise in the application of the Broches test.

Reforms should begin with the standardization of the Broches test, incorporating a clear interplay with the ILC articles. This approach should integrate both structural and effective control analyses, alongside an examination of the applicable IIAs. Additionally, tribunals should assess whether the SOE acted as an organ of the state at the time of the alleged breach or injury, particularly in the absence of specific provisions addressing SOEs (*Adel A Hamadi Al Tamimi v. Sultanate of Oman*, 2024, para. 323). The next logical step is the incorporation of IIAs into the discourse, replacing the structural test in cases where the agreement in question explicitly addresses SOEs based on ownership stakes. Here, it is important to note the pivotal role of the principle of *lex specialis*, which can override the existing attribution framework. Treaties may supersede both the ILC Articles under the provisions of Article 55 and state obligations derived from customary international law (General Assembly, 2001, pp. 356–359; de Stefano, 2017, p. 273).

When working in tandem, it is necessary to establish structural control in scenarios where the agreement in question explicitly stipulates that a clause applies to entities with at least a 50% ownership stake and the threshold is met. Should the applicable treaty stipulate applicability of the provisions to an entity where the state holds the power of appointments, the

tribunal should assess the extent to which the state holds such power and the interest in the appointments and management of the entity. For instance, in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, the tribunal underlined that the ability of make appointments, the composition of the board, and the interest of the Moroccan state in the management of the entity were indicative of structural control (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, 2001, pp. 617–618).

The examination of treaties should be conducted regardless of whether the treaty explicitly distinguishes between SOEs and private investments, delineates the applicability of SOE-disciplining provisions, or omits such provisions completely. The presence of these provisions should be interpreted as an indication of the parties' intent to provide general guidelines for tribunals. Accordingly, tests should be applied to determine whether the undertaking meets the prescribed thresholds. If the treaty's SOE-disciplining clauses stipulate applicability only to treaty Parties without mention of investors, and the relevant thresholds are met, jurisdiction should be denied and the matter referred to SSDS instead. Certain treaties, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), explicitly address Party-to-Party communications within its chapter on state-owned enterprises and designated monopolies (*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018, chap. 17). The application of such measures could enhance the predictability of proceedings, allowing investors to more accurately assess whether an ISDS tribunal will establish jurisdiction.

From the perspective of IIAs, it is necessary to implement clauses that explicitly apply to SOEs. These clauses should clearly define the scope of application, such as the percentage of ownership, but, more importantly, address the various alternative forms of control that the state might exert to influence the behaviour of SOEs, such as the golden share. The agreements should also incorporate monitoring mechanisms that are specifically tailored to SOEs. Where applicable, these clauses should clearly emphasize the distinction between SOEs and private investors to facilitate the tribunal's analysis of an IIA, as exemplified in the Beijing Shougang case. For instance, clauses stipulating that companies or SOEs are entities incorporated under the national laws do not adequately support this distinction. Such provisions merely establish that the entities qualify as nationals of a contracting state and are thus afforded protection under frameworks like ICSID (*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, 2008, para. 313). Treaties should further establish that actions of designated or established state monopolies are, by default, considered acts of state organs, and establish specific characteristics of state monopolies within respective treaty provisions,

enabling tribunals to attribute all actions taken by a monopoly to the state. For instance, in *Limited v. Romania*, the tribunal stipulated that once an entity is recognized as a state organ, all its actions are attributable to the state under ILC Article 4 (*EDF (Services) Limited v. Romania*, 2009, para. 188).

Lastly, the IIA should clearly establish the connection and relationship to any associated treaty or clause. The EU as a major bloc has been separating its investment protection and free trade agreements following the advisory ruling in the 2/15 opinion of the European Court of Justice. This is due to concerns regarding the ability of the European Commission to conclude investment protection agreements, particularly in areas such as indirect investments and investor-state dispute settlement, which fall under mixed competence shared within the EU and its member states (The Court of Justice of the European Union, 2017). Agreements such as the EVFTA and the EU-Singapore Free Trade Agreement (ESFTA), which segregate investment protection into separate agreements requiring ratification by all member states before their entry into force. These agreements are the EU-Vietnam Investment Protection Agreement (EVIPA) and the EU-Singapore Investment Protection Agreement (ESIPA). Notably, the EVFTA and ESFTA include, to varying degrees, provisions aimed at disciplining the behavior of SOEs. However, such provisions are absent from the EVIPA and ESIPA. Furthermore, free trade agreements primarily focus on state-to-state dispute settlement mechanisms, whereas investment protection agreements incorporate ISDS. The SOE clause should also clarify the relation between investors and SOEs, especially in cases where SOEs infringe upon investors' legitimate interests. Without explicitly linking these provisions to the evaluation of SOE roles, tribunals are unlikely to consider provisions within free trade agreements in ISDS cases. This omission could deprive investors of a significant tool for addressing state interference in the economy through SOEs (The European Union and Singapore, 2018; The European Union and its Member States of the one part, and the Republic of Singapore, 2019; The European Union and its Member States of the one part, and The Socialist Republic of Vietnam, 2020; The European Union and Vietnam, 2020).

CONCLUSION

The growing participation and evolving role of SOEs in the global investment and trade landscape presents a unique challenge to the existing ISDS arbitration system. The SOEs' potential dual role as both commercial entities and instruments of public policy necessitates a tailored approach, as the ISDS framework, particularly under ICSID, was primarily designed to address disputes arising from private investors. Due to their ownership, SOEs could be

perceived as extensions of the state and thus subject to SSDS.

Through doctrinal analysis of key cases, such as *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, *Emilio Agustín Maffezini v. The Kingdom of Spain*, and *Beijing Shougang and Others v. Mongolia*, this paper has explored various approaches adopted by tribunals when addressing the roles and ownership of SOEs. A central focus of the paper was the distinctions between structural and functional control. exerted by the state. The paper underlined that the tribunals under ICSID commonly employ what is called the Broches test, distinguishing between structural control, which exists as a natural phenomenon of the state's ownership stake within an enterprise, and functional control, which is determined by the state's active influence over the operational decisions of an undertaking. While the application of the Broches test varies depending on the specific circumstances of each case, its methodology parallels the principles outlined in the ILC Articles.

The paper also examines the impact of various treaties, with particular attention to the FTAs and IIAs signed by the EU. These agreements often include provisions under which require SOEs to operate with commercial considerations. A key finding highlights that, in determining jurisdiction, distinctions based on ownership scope or the state's ability to appoint key personnel are less significant than the explicit intent of treaty signatories to differentiate SOEs from private investors.

The paper concludes that tribunals have consistently established jurisdiction over SOEs to date, the increasing global proliferation of SOEs and the inherent difficulty in distinguishing between commercial and non-commercial activities pose substantial challenge. To address these issues, this paper proposes greater reliance on applicable treaties, which can enhance consistency. States should clearly stipulate their intent for SOEs to be treated differently, where relevant, and incorporate specific provisions into treaties that reflect this intent. Such reforms could facilitate a smoother transition to SSDS for disputes involving SOEs, thereby improving the predictability of rulings. At the same time, these measures would enable the dispute settlement system to keep up with the rapidly changing landscape of investments made by entities with state ownership or backing.

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RECENZNÍ ŘÍZENÍ PRO Č. 2/2024

Jednotliví oponenti (9) recenzovali 1–2 články. Redakce od nich obdržela na každý příspěvek 1–2 posudky, celkem 13 posudků.

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Auspicia is an independent, peer-reviewed scientific journal on the social sciences and humanities. The journal presents original scientific contributions on core areas of its field of focus, as well as currently significant and solved problems. In the form of overview studies, many of them constitute proposals for a real solution to specific problems, polemics in the sense of academic plurality of opinions.

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