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## **CHARACTERISTICS OF THE CONTRACTS CONCLUDED BY POLICE BODIES SECURING PUBLIC ORDER AND PUBLIC SAFETY**

### Police tasks related to public order and public safety

Establishment and maintenance of public order and safety are fundamental rights and obligations of the state as they are governmental tasks and main issues of law enforcement.

Both practicing professionals and legal experts have aimed to implement the precise definitions of public order and public safety for quite a long time.

Specification of the content and components of the two definitions and their relation to each other and to internal order have been subject to professional debates [1].

The frame definition of public safety represents the measures of society and public state whereas the operations of governmental bodies and safety of both private entities and their communities and the undisturbed conduct of their activities and operations are guaranteed, whilst public order mirrors the presence of normative order in activities of social coexistence, essentially picturing the efficiency of law and order. [2, p. 1024]

Some consider public order as the sum of certain unwritten rules, nevertheless public order may only be relevant for the field of law if unwritten

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rules of coexistence are excluded (for example ethics). [3] The safety guaranteed by the state as a system of instruments of legal nature includes the internal order of the state, steadiness and safety of the public together with personal security of the citizens. [4, p. 134] Researchers favoring this approach identify public order with law enforcement activities. [5]

The measures and means of public safety are being represented as multilevel categories in Hungarian jurisdiction, whereas multiple interests, values and several alternative tasks complete the definition. Our jurisdiction implies that in some cases public safety is one of the many components of public order (for example, in cases of criminal responsibilities or administrative offenses), on the other hand public order is interpreted as an element of public safety, nevertheless, sometimes they appear as equivalent categories (for example in the act on armed force and in the act on police forces). [6]

Public safety is an essential condition to the operation of the institutions of the legal state and democratic society. Undoubtedly, protection and security of public safety are obligations of the governmental institutions, directly originating in fundamental constitutional doctrines.

There is no doubt that local governments undertake certain tasks in the maintenance of public safety [6], notwithstanding to the participation of other institutions and bodies directly or indirectly involved in the maintenance of public safety as well.

Article 46 of the Hungarian Constitution unambiguously defines the obstruction, investigation of criminal actions alongside with frontier protection, the protection of public safety and public order as fundamental tasks of police forces. [7] According to the statutory provisions of the separate Act on police forces, cross-border patrol, combat against terrorist actions, criminal prevention and investigation and the re-acquisition of illicit assets deriving from criminal activities are tasks of police besides the above-mentioned duties defined in the

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Constitution. Upon its regulatory authorization, police pursues crime prevention and investigation activities alongside its administrative and law enforcement duties. The Police Act expressly specifies the tasks of police forces in detail. However, the most enhanced activities of the statutory specification emphasize the general criminal investigative authorities of the police, including prevention, obstruction and investigation of criminal offences, re-acquisition of illicit assets, also its duties as the misdemeanor authority including its co-operative tasks in the prevention and investigation of administrative offences. The police also pursues regulatory authorities related to the production, trade and usage of certain measures and substances that represent danger to public safety. Notwithstanding to the above, police forces pursue traffic and law enforcement duties and other law enforcement activities related to the maintenance of the order of public areas, furthermore, they take care of the personal security of the participants of criminal procedures and other members of the authorities involved in these procedures, finally, they are responsible for the execution of the Security Program on the participants of criminal procedures and assistant members of jurisdiction.

In accordance with its further statutory authorizations, police forces are obliged to protect the personal security, life and physical integrity of certain high priority personnel in Hungary – expressly specified in separate statutory provisions of law (furthermore referred to as protected persons) -, also, they secure and protect specific institutions, take care of the permissions and control over personal and asset security and private investigative activities, pursue execution activities and certain law enforcement duties related to state of emergency, preventive momentary threat and unexpected attack, furthermore, in case of state of emergency and unexpected threat they co-operate in the extrusion, capturing and disarming persons crossing the border bearing weapons or with armed force. [8]

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Notwithstanding to the above, the police is obliged to provide protection against any actions directly threatening or endangering the life, physical integrity of anyone or endangering the security of assets and it is further obliged to provide information to those in need. [8]

Of course, police does not pursue these tasks and duties in ‘empty space’ or in isolation by any means, on the contrary, it is the regulatory obligation of the police to co-operate with other governmental and local municipal bodies, with social and economic institutions, furthermore with the citizens and their communities during the course of fulfillment of its duties.

Consequently, upon its statutory obligations police is obliged to support the voluntary attempts and activities of the local governments and civil communities aiming to improve public safety. [8]

However, regulatory provisions do not implement any specific measures or instrumental system; they only establish normative authorization for the co-operation between certain (governmental, municipal and social) bodies and institutions. These stipulations do not specify – or even mention – the forms or conditions of such co-operation. We must find that the legal narrative of this co-operation is of a frame nature, eventually, specification of the rights and obligations under the co-operation is always condition to the given situation. By these means, tasks and obligations of the police are always determined by the characteristics, demands and social images of the given era.

As many authors and researchers dedicated to the subject have pointed out police may only conduct its duties effectively in the course of social co-operation and only upon a modern criminal prevention and public safety concept, in accordance with the demands of the given era. Accordingly, coordinated and adequate regulation on the activities of the organizations involved in public safety duties, yet governed by separate sectorial laws is an ultimate necessity. [9]

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Specification of the means and measures of the police used or required to fulfill its statutory obligations is not only a fundamental issue but also the guarantee of the successful accomplishment of the tasks.

#### Contracts as the measures of governmental duties

Ultimately, the coordination of the actions of separate organizations is necessary to secure more efficient to conduct of public order and safety. Therefore, during the course of pursuing its governmental duties police is allowed to implement the civil law measures of contracts besides the classically criminal law measures and law enforcement means provided to maintain public order and public safety, whereas it is authorized to engage in agreements with other bodies and institutions.

Upon common understanding and terminology, these agreements are usually referred to as co-operation agreements.

This issue automatically raises the question, how these co-operation agreements concluded by the police provided to accomplish its statutory tasks should be specified.

Are these administrative or civil law institutions? Should we consider such agreements as contracts, despite of the fact that from many aspects they show significant alterations from the classical contractual forms?

The answer is far from being obvious, since there is still not any unified or itemized dogmatic system in the Hungarian jurisdiction on the specification of the contracts concluded by governmental institutions, public agreements and administrative contracts.

The legal institutions related to pursuing public duties have been specified and implemented to the Hungarian judicial system in the form of statutory provisions long ago. For example, certain rules on waste management public utility agreements, public education agreements, agreements between the local governments and the police on public security, etc. do have a judicial history;

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however, there is no unified frame of regulations over such agreements until now.

Nevertheless, a bill has been completed and presented to implement unified statutory rules of public contracts in 2006. If this bill had made it to implementation, there would have been a chance for a unified legal dogmatic specification of the agreements concluded by the police related to their tasks.

Part of the definition of public agreements included in the draft specified as 'performing governmental tasks without the act of the public authority' would have been applicable to the agreements concluded by the police as well. [10] However, the bill did not pass, so administrative judicial theory specifies and uses several alternative and different terms on the definition, objective and subject of administrative contracts, public contracts and public law contracts.

The regulatory concept of 2006 has revealed that specification of the relation between public agreements concluded in order to provide governmental tasks and the Hungarian Civil Code is inevitably necessary. [11] Regrettably, the new civil codex (Act V of 2013 on the Civil Code) that came into effect in 2014 has still missed to dissolve controversies, as it failed to define both public agreements and administrative contracts, therefore there is still no itemized definition of the institution that would expressly specify and classify the contracts and co-operation agreements of the police in accordance with their substantial means.

In the system of civil law contracts contracting parties are co-ordinate entities, involved in the agreement upon their free contractual intent (except for statutory limitations).

Relative nature of contracts according to which the entity of the contracting parties is revealed, whereas their rights and obligations are expressly specified shall also apply to the agreements concluded by the police.

Notwithstanding to the fact that the police participates in these agreements as a governmental institution, the police still acts as a co-ordinate contracting

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party. This matter adds some sort of unique specialty of the agreements conclude by the police. There are no hierarchical relations between the contracting parties and there are no any right of instruction despite of the fact that the police is involved in these agreements as a governmental institution with public special authorities. The police participates in these agreements not upon its public authorizations but upon statutory permissions, seemingly acting as equal to its contracting parties, yet without any classic civil law means. We may state, that the contracts of the police objected to maintain public order and public safety stay borderline between civil law and administrative law.

Both the conclusion of such agreements and participation in the performance are based upon statutory obligations. Police bodies have no autonomous right or choice like other – civil law - legal entities to decide whether they wish to get involved in the agreement or stay aside. On the contrary, they are obliged to co-operate or eventually obliged to conclude the agreement provided to fulfill their obligations.

Contractual relations of the police implemented with regards to public order and public safety are classified as administrative contracts in the broad scale, on the other hand, they can not be considered as clearly civil law agreements either, despite of their contractual characteristics.

Analyzing formal and substantial measures of these contracts we may find that both the contractual elements classified as administrative law measures and the elements of civil law means are present in these instruments.

Substantial characteristics of the administrative agreements are represented in the co-operation agreements concluded by the police. Primarily, they are concluded with regards to some public interests related to the fulfillment of a governmental task [12] (in this case in order to secure public order and public safety), second of all, one of the contracting parties is the police

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as an administrative body with public authorities. Nevertheless, the police does not pursue its (governmental) public authorities in such agreements.

Any other entity or institution may be participating as a contracting party. The only condition of the participation as a contracting party is that the given entity must be capable to co-operate in the fulfillment of the given governmental task (when the governmental task falls into police authority and competence). By these means only those legal entities may position themselves as contracting parties who (that) are able to participate in the fulfillment of the state task of securing public order and public safety, or in otherwise are capable to support or assist to the governmental duty to maintain public order and public safety. Otherwise, governmental, municipal or civil nature of such organization is irrelevant.

Whether the given body is part of any institutional hierarchy or is subordinated to any other institution or controlled by further organizations is likely to be insignificant. Capability to participate in the performance of the governmental duty is the only principal of organization. However different these contracts may be by subject their common characteristic is that they are strictly related to the essential task of the police, namely to secure and maintain public order and public safety.

Consequently, the agreements to be concluded or actually finalized by the police may show significant alterations. No itemized specification of such agreements is possible. Nevertheless, co-operation agreements concluded with home guard units must be emphasized amongst the contracts signed in protection of public order and public safety, due to the special role of home guard associations in the maintenance of public order and public safety on the local level.

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The characteristics of the contracts concluded between the police bodies and the home guard associations reveal the specialties and legal nature of other agreements of the police made and done during the course of pursuing its tasks.

As a form of a voluntary civil organization, home guard associations host and allow willing and pro-active citizens feeling responsibility for the safety of their environment to participate in the state duties, being part of the protection and maintenance of public order and public safety. [13]

As a form of civil organizations, home guard associations operate in close co-operation with police forces, local governments, law enforcement bodies, and with civilian citizens. Unless otherwise provided by the provisions of law [13], home guard associations fall under the provisions of Act on Right of associations and operations and subvention of civil associations and the provisions of the Hungarian Civil Code.

Home guard associations complement state duties pursued by the police on local levels. Fundamental statutory obligation of the home guard organizations is the protection of the local public order and public safety.

Despite of its civil nature home guard associations pursue some 'law enforcement-like' conducts as well, such as public patrol services, monitoring services, traffic control and management at the accident scenes, surroundings of nurseries, day care, elementary school or high school facilities as part of its co-operational efforts provided to participate in crime prevention. Upon statutory provisions of law home guard associations may be authorized to complete supplementary activities such as voluntary co-operation in the prevention of the consequences of eventual natural disasters, duties related to restoration, supporting the prevention of accidents, monitoring visual images recorded at public areas related to public security, crime prevention and law enforcement purposes, securing the perimeter or venues of organized programs, etc. These additional undertakings also serve to secure public order and public safety.

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The home guard organization may only start to pursue and carry on its main activities upon the conclusion of a written co-operation agreement with the county (metropolitan) police headquarter competent in accordance with its residence (seat), after its has been enlisted as the member of the National Home Guard Associations and the territorial home guard association.

Even though the co-operation agreement concluded with the police is actually and formally a contract by nature it must be defined as an administrative act. Starting and initiating home guard activities is condition to the preliminary conclusion of the written co-operation agreement. In fact, this agreement complements the authority's permission to start the activity and seems to implement the supervision and control of the state.

Further characteristic of these agreements is that in case the home guard association initiates the conclusion of the co-operation agreement at the local police body the local police must forward the request to the competent county (metropolitan) police headquarter. The local police body has not right of discrepancy, in other words, there is no freedom of contractual will whatsoever. Furthermore, if preliminary requirements are fulfilled the police can not deny the conclusion of the co-operation agreement, thus police bodies must face a contractual obligation established and based on the statutory provisions of law.

Applicable statutory regulations specify obligatory provisions on the contents of the co-operation agreement. Parties are especially obliged to define the fields of co-operation, specification of assets allocated to the home guard association with or without charge, the provisions on the rules of usage and re-distribution of the premises granted, the order of conducting commonly pursued activities, furthermore, the means and contents of sharing information on the completion and circumstances of the activities of the home guard association.

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Regulations on the correspondence of the parties and authorization of the local police unit appointed to proceed in accordance with the provisions of the co-operation agreement are also obligatory provisions of the contract.

Moreover, statutory provisions of law oblige the parties to regulate further actions supporting the cooperation; however, they do not expressly specify the forms of such means.

The fact that the parties are allowed to define methods, conditions and measures of their co-operation images the principle of contractual freedom essential in civil law. When specifying such means parties may reflect local characteristics, conditions and capabilities of the given organizations with special regards to financial and personal limitations of the participating bodies.

Notwithstanding to the above, the declaration on subordination and undertakings generally used for so-called 'outsourced activities' in the Hungarian judicial practice must be part of the agreement. The declaration issued by the home guard association on the undertakings to comply with the applicable law and the conditions set forth in the co-operation agreement is an obligatory part of the contract thereto, in accordance with statutory provisions of law. Such statutory obligation not only implies but even verifies that police tasks may only be re-allocated on a rather small scale, whereas it also secures the body responsible for the governmental task with the chance of control over the performance under the co-operation, together with the right of termination in case of misconduct. In this case, termination of the agreement is an instrument governed by the provisions of civil law; nevertheless, its consequences are not without any nature related to authority powers. Elements of the agreement are determined in accordance with the principles on dispositive regulations, but with significant limitations. The same characteristics apply to the measures of termination as well. Forms of terminating the agreement are regulated in accordance with the terms commonly used in civil law contracts, for example,

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termination, termination upon mutual agreement, etc. On the other hand, the fact that the home guard association is not allowed to pursue home guard activities in case of termination of the agreement – regardless of the initiation of any procedures for legal remedy – implies that the co-operation agreement is the act of administration. Actually, this legal instrument defines the prohibition of the authority ('revoking the permission of activity'). By terminating the agreement the authority eventually revokes the right of participation in the state duties upon the constitutional provisions essentially rendering such governmental tasks to the police forces, therefore these contractual provisions eventually reveal the governmental authorities of the police in the agreement.

Besides the above-stipulated details, the civil law nature of the termination prevails, whereas the participants must settle accounts with each other in accordance with the provisions set forth in the co-operation agreements. Principally (unless otherwise provided by the statutory provisions of law) the provision of the Hungarian Civil Code shall prevail for the co-operation agreement, whereas any disputes arising in relation with the agreement before court provisions of the act on civil law procedures shall be applied. The fact that any financial disputes of the parties shall be settled before civil law bodies and not by administrative actions show the dominance civil law over the legal institution accordingly.

### Summary

Completion of governmental tasks of securing public order and public safety necessarily requires co-operation between the institutions of the state and the member of civil society, whereas co-operation agreement is one of the forms of pursuing the tasks. Nevertheless, further progress and innovation of the legal environment regulating the relations of the police and civil society is ultimately necessary to increase and enhance the willingness and capability of the civil society participating in the completion of governmental tasks.

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The tasks of the state for securing the public order and the public security, requires the cooperation of public entities and the civil society as well.

A possible instrument of the social cooperation to fulfill effectively the public order and the public security is the concluding of contracts. In this study the author analyses the contracts, and presents the legal background, most important characteristics of the contracts and the special position of the contracting parties.

**Key words:** administrative contracts, cooperative agreements, burgher guard, public order, public security, social participation.

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