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**CHALLENGES IN FREEDOM OF
INFORMATION. BEST PRACTICES
AND WORST PRACTICES: HUNGARY**

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ABSTRACT

This essay provides an overview of the Hungarian freedom of information practice during Covid-19 pandemics. The essay aims to summarise all major cases related to freedom of information and data of public interest in Hungary during pandemics, with particular reference to the delayed disclosure of regional and territorial data.

INTRODUCTION

Covid-19 pandemic challenged the universal system of human rights around the world.

The situation of freedom of information is specific: data (information) such as the spread of the virus, the number of infected, the number of deaths, the hotspots of the outbreak, or the most important vaccine information as well as credible information on Government measures to combat the epidemic, are not simply *data of public interest*, but are in fact data that are prerequisites for public confidence in the fight against the pandemic.

In Hungary, by and large, the Government failed to recognize how the power of information serves its own interests, and regarded the extended exercise of freedom of information as an obstacle to its own effectiveness in the fight against Covid-19. In sum, the Hungarian Government chose to restrict data of public interest via statutory measures from the very early stage of the pandemic.

REGULATORY BACKGROUND

The Hungarian government declared a state of emergency for the first time on 11 March 2020 [Government Decree 40/2020 (11.III.) on the declaration of a state of emergency], thus a special legal regime for the whole country came into force. The decree was extended continuously and currently is in force due to the war in Ukraine. So, the state of emergency was originally introduced

(and justified) in the fight against the Covid-19 pandemic, and the special legal order was continuously extended for reasons related to the war in Ukraine.

Restrictions on freedom of information were first regulated by Government Decree 179/2020 (4 May 2020) on the derogation from certain provisions on data protection and data requests in times of emergency^[2] and then by Government Decree 521/2020 (25 November 2020) (with the same title and the same content but different numbering). Government Decree No 521/2020 (25.XI.) expired on 8.II.2021. It was then re-enacted by Government Decree 27/2021 (29 I).^[3] After a new expiry, the validity of Decree No 521/2020 (XI.25) was extended until 23 May 2021 by Government Decree No 80/2021 (II.22).^[4] Finally, under the next amendment, the scope of Government Decree 521/2020 (XI.25) was again extended by Government Decree 271/2021 (21 May) until the expiry of Act I of 2021 on the protection against the coronavirus pandemic.^[5]

In May 2020, the Civil Liberties Union for Europe, Access Now and the Hungarian Civil Liberties Union (TASZ) appealed to the European Data Protection Board (EDPB) against the provisions of Government Decree 179/2020 (4 May 2020) that derogate from freedom of information principles and certain data protection provisions. In its reply of 3 June 2020, the EDPB stresses that it has no jurisdiction in the matter. Suspected violations of the GDPR can be investigated by the national data protection authority.^[6] (In this study we argue that the credibility of European and Hungarian NGOs are

^[2] The legislator has always adapted the order of the data request to the scope of the law imposing the imposition (and reimposition) of the emergency measure. Government Decree 179/2020 (V.4) provided for its application until the end of the state of emergency declared by Government Decree 40/2020 (11.III.).

^[3] 27/2021 (I. 29.) Government Decree on the declaration of a state of emergency and the entry into force of emergency measures, § 4, point 17, reapplies Government Decree 521/2020 (XI. 25.).

^[4] Government Decree 80/2021 (22.II.) on the extension of the period of validity of the emergency measures related to the state of emergency declared on 8 February 2021. Pursuant to Article I, point 17: the Government extends the validity of Government Decree No 521/2020 (25.11.20) on derogations from certain provisions on data requests during the emergency until the expiry of Act I of 2021 on the control of the coronavirus pandemic.

^[5] 271/2021 (21.V.) Government Decree on the renewal of the extension of the emergency measures related to the state of emergency declared on 8 February 2021 § 1.

^[6] https://edpb.europa.eu/sites/default/files/files/file1/edpb_letter_out2020-0046_ngoshudecrees.pdf

higher if they manage to apply to competent authorities with their claim. Even though their claim was rightful, they were unable to articulate it).

The government's justification for the restrictions on the right to freedom of information in Hungary in the fight against Covid-19 is the authorities' administrative workload. According to the Government's reasoning, the delay in fulfilling data requests is justified because the data controller (public authority in charge) is burdened with other pandemic-related tasks. The nature of the restrictions in Hungary are as follows:

1. The request for access to data of public interest may not be submitted orally, and the request for access to data does not have to be fulfilled in the form and manner requested by the applicant pursuant to Paragraph (2) of Section 30 of the Information Act, if it involves a personal appearance before the public authority performing public tasks.
2. The public authority challenged shall comply with the request within 45 days of receipt of the request for data, if it is likely that compliance with the request within the time limit (15 days) would jeopardise the performance of the public tasks of the body. The applicant shall be informed of this (new) deadline within 15 days. This time limit (45 days) may be extended once by 45 days.
3. If the fulfilment of the data request involves a disproportionate use of the staff resources necessary for the performance of the core activities of the body performing public tasks, or the requested document is of significant volume, then a cost compensation may be determined pursuant to Section 29 (2) of the Information Act, and the data request should be fulfilled within 45 days of the payment of the cost compensation instead of the original 15 days of deadline. This period of 45 days may be extended once by another 45 days
4. The data requester under FOI must be notified of the refusal of the request, the reasons for the refusal and the legal remedies available (Section 30 (3) of the Information Act) within 45 days of receipt of the claim instead of 15 days. This period may be extended by a further 45 days.
5. The restrictive measures shall also apply retroactively to pending requests for access to data of public interest.

We have summarised above the most important features of the legal context of freedom of information during the Covid-19 pandemic. This study will further focus on a significant problem: separation of personal and public data in the context of the Covid-19 contagion.

CONFLICT BETWEEN FREEDOM OF INFORMATION AND DATA PROTECTION IN THE ERA OF COVID

It is a well-known truism among information rights researchers that, in the course of their research, it is inevitable that — in the given context — they will sooner or later be faced with the conflict of the rights of privacy versus freedom of information.

In the fight against Covid-19 pandemic, the most visible conflict in Hungary relates to the improper disclosure of data of Covid – infected citizens. In the early stages of the outbreak in Hungary, we witnessed that local communities protected themselves against the outbreak by publicly identifying the infected population. In her study, Christina Etteldorf rightly notes that the publicity of a specific person's infection is an issue that puzzles many authorities across Europe.^[7] The disclosure of such personal data can affect the socio-economic situation of the person concerned and can be counterproductive in that it discourages cooperation with the authorities, mainly due to fear of stigmatisation.^[8] Various European solutions are known, for example the Latvian DPA states that the designation of infected areas should be sufficiently broad to prevent a person from being personally identified. Such a broad definition would be to refer to a large town instead of a municipality of a handful inhabitants.^[9]

In the case of the National Data Protection Authority (NAIH) NAIH/2020/3378/4, the mayor of the city of a small town in Hungary, Szarvas,

^[7] Christina Etteldorf, *EU Member State Data Protection Authorities Deal with Covid-19: An Overview*, 6 EUR. DATA PROT. L. REV (2020). p. 265.

^[8] Christina Etteldorf, *EU Member State Data Protection Authorities Deal with Covid-19: An Overview*, 6 EUR. DATA PROT. L. REV (2020). pp. 276-77.

^[9] Christina Etteldorf, *EU Member State Data Protection Authorities Deal with Covid-19:*

^{An} Overview, 6 EUR. DATA PROT. L. REV (2020). p. 277.

published on his personal Facebook page the public areas of the city where he had ordered an official quarantine, and at one point he also gave the exact address of the property concerned, which he later corrected and called the release of the address an *administrative error*. NAIH points out that there are precise and strict legal-epidemiological rules for the designation of an official quarantine. *In a small municipality, it is inevitable that news of an outbreak might spread from the affected location and affected residents. This does not mean, however, that either the head of the municipality or the general practitioner should make this information public in a targeted way (...)*^[10] In Resolution NAIH-3418-4/2021, the Mayor of the Municipality of Mikófalva was censured for having provided information on the Covid – positive status of a parent in a closed Facebook group of the local kindergarten, disclosing the full name of the parent. Data protection supervisory body (NAIH) stresses that in a small town, it is almost inevitable that news of someone's illness will spread in a closed community known to all. However, this does not mean that either the head of the municipality or anyone else should purposefully make such information public. There are strict rules of procedure for the disclosure of such information. Information on the number of persons infected or under official quarantine in the municipality, or information on who may have unfortunately died, is lawful, but any other unintended use of the data should be avoided. This could apply to the naming of one or more *infected streets* in a small municipality (in a small municipality citizens know who resides on the designated street) or the naming of an infected person on a social media or community site.

It is typical that in the early case law of the Hungarian data protection authority (NAIH) the principles of data protection in human epidemic were fuzzy and not yet clear. To show the ambiguity, we highlight that NAIH did not oppose the disclosure of personal data in circumstances similar to those in the previous cases. The local media and the official Facebook page of the city of Cigánd published the Covid-19 infection of a nurse from the city; the information was made public by the Mayor himself. In an article published on 22 March 2020, the local news site, Frissmédia, wrote: „The head of the town

^[10] NAIH/2020/3378/4

had vain hopes that a nurse working in Budapest, who is a native of Cigánd, was unaffected by the virus, but she finally tested positive.^[11] According to the mayor, *T here is no reason to panic, we have taken the precautions that are customary at such times. The family (Gönczi family, Iskola School street) will be C ovid – tested soon according to the procedure. They have thus been moved from voluntary quarantine to strict official quarantine. So they will not be allowed out of their home until they are found not to be carriers „. The Mayor continues, „as there are small children in the family, I ask you to deal with the situation appropriately. Please do not make their already difficult days more difficult with negative comments.*

NAIH argued in the case that the data subject did not subsequently request the deletion of her data, and therefore she consented to the disclosure of it, so, her privacy rights under the Information Act were not violated. However, both GDPR and the Hungarian Information Act requires prior consent for the disclosure of personal data. (Not to ask for deletion later on is an opt – out solution, and prior consent is needed instead). Our research moreover did not discover any document that the data subject’s family, also named in the communication, had given their prior (informed, voluntary and explicit) consent to the disclosure of their data. Thus, this case is in contradiction with similar facts in previous cases elaborated on earlier in this study .

Data protection authorities in Germany, Austria, Sweden, Belgium, Spain and the Czech Republic also stress that specific names and other personally identifiable information in the context of the pandemic can only be disclosed in exceptional cases. The Slovak data protection agency vests the competent authority to decide case by case the need to protect the data subject or to protect the public health interest of the competent authority.^[12] The Lithuanian data protection authority prohibits the disclosure of such data by individuals on social media, arguing that only the competent body can take such

^[11] <https://frissmedia.hu/hir/egy-cigandi-apolono-is-covid-19-beteg/13913>

^[12] Christina Etteldorf, EU Member State Data Protection Authorities Deal with Covid-19:

^{An} Overview, 6 EUR. DATA PROT. L. REV (2020). p. 277.

a decision.^[13] The Italian DPA even calls for a journalist's code of ethics (despite the fact that the DPA has no control over such codes).^[14]

The case of President János Áder in the context of Covid-19 is part of the *balancing conflict* between data protection and freedom of information. The petitioner referred to the certificate testifying that the President of the Republic has been vaccinated against SARS-COV-2. The fact that the President was vaccinated with the Chinese Sinopharm had been released by his Office. In the case NAIH-3356-2/2021, the complainant requested the Office of the President to release a copy of the certificate as data of public interest, claiming that the President of the Republic had previously announced the news, as an advertisement against the virus. The claim points out that the President himself had therefore made the information public. The petitioner's position could have been further strengthened, but he did not refer to case NAIH/2020/3378/4, in which the person concerned had himself contributed to the disclosure of his data. In the abovementioned case, the data protection supervisory authority finds the *previously published personal data* such data that is already made public: „I note that in NAIH's case law and practice, there have been cases where a GP concerned has personally agreed to the publication of his health data and the fact of his infection in the local online newspaper in order to control the coronavirus at the municipal level.^[15]

In the case of János Áder, NAIH argues that personal data of public interest covered by Article 26(2) of Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information explicitly refers to personal data related to the performance of public duties of the President of the Republic, i.e. data closely related to the performance of his constitutional duties as the Head of State. Unless János Áder, the President of the Republic, *voluntarily and freely decides otherwise*, the request for his vaccination certificate *may be lawfully refused in the current context*^[16].

^[13] <https://www.dvi.gov.lv/lv/zinas/dvi-vers-uzmanibu-uz-personu-tiesibam-un-pienakumiem-datu-aizsardzibas-joma-veselibas-informacijas-konteksta>

^[14] Christina Etteldorf, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6 EUR. DATA PROT. L. REV (2020). p. 278.

^[15] NAIH/2020/3378/4

^[16] NAIH-3356-2/2021

SUMMARY

The aim of this paper was to bring insight into the freedom of information practices in Hungary during the C ovid-19 epidemic. In the first part of the paper, we described the legal environment that governed access to and dissemination of information of public interest from the beginning of the epidemic until the end.

In the second part of the paper we focused on the conflict of freedom of information and privacy rights during Coronavirus pandemics.

REFERENCES

- Act CXII of 2011 on the Right to Informational Self-determination and Freedom of Information (Hereinafter: Information Act).
- Christina ETTELDORF, EU Member State Data Protection Authorities Deal with Covid-19: An Overview, 6 EUR. DATA PROT. L. REV (2020).
- Government Decision 1108/2020 (18.III.)
- Government Decision 1101/2020 (14.III.), point 3 a) and b).
- <http://www.ekint.org/az-allam-atlathatosaga-informacioszabadsag/2020-05-12/uvegemberkent-elni-a-nagy-testver-orzagaban-avagy-a-lemeszarolt-informacioszabadsagok>
- <https://444.hu/2020/03/17/az-osszes-europai-orzag-kozol-teruleti-adatokat-a-koronavirusos-betegekrol-kiveve-magyarorszagot>
- <https://444.hu/2021/08/04/szel-bernadett-kivancsi-lett-volna-a-reszletes-adatokra-a-kormany-elhiresult-vakcinahatekonysagi-tablazatarol-de-nem-kapta-meg-azokat>
- <https://444.hu/2021/08/04/szel-bernadett-kivancsi-lett-volna-a-reszletes-adatokra-a-kormany-elhiresult-vakcinahatekonysagi-tablazatarol-de-nem-kapta-meg-azokat>
- <https://frissmedia.hu/hir/egy-cigandi-apolono-is-covid-19-beteg/13913>
- <https://github.com/tamas-ferenci/ExcessMortEUR>
- <https://hang.hu/belfold/koronavirus-csak-akkor-serulnek-adatvedelmi-jogok-ha-a-z-erintett-szemely-beazonosithato-115063>
- https://index.hu/belfold/2020/03/25/a_brit_nagykovethelyettes_a_koronavirus_egyik_aldozata_magyarorszagon/
- <https://index.hu/gazdasag/2021/04/27/kormanyzati-tajekoztatasi-kozpont-vakcina-tablázat/>
- <https://infostart.hu/belfold/2020/03/19/kormanyinfo-tiz-tizenotszoros-a-lappangaszazezres-lehet-a-megbetegedes>

- <https://infostart.hu/belfold/2020/04/01/a-veszelyhelyzet-vegeig-fenntartja-a-jarvany-miatt-elrendelt-rendkivuli-intezkedeseket-az-operativ-torzsa-a-nap-hirei>
- <https://infostart.hu/belfold/2021/09/30/ujhelyi-istvan-pert-indit-a-covid-betegek-oltottsagi-adatai-miatt>
- https://kimittud.atlatszo.hu/request/korhazi_agykapacitas_felszabadit
- https://kimittud.atlatszo.hu/request/korhazi_agykapacitas_felszabadit
- <https://koronavirus.gov.hu/cikkek/korhazak-orszagszerte-felkeszulnek-tomeges-meg-betegedesekre>
- https://nepszava.hu/3132813_miert-titkolja-a-covid-betegek-oltasi-adatait-a-kormany
- <https://tasz.hu/cikkek/jogserto-listat-kozolt-az-allam-a-koronavirus-aldozatairol> <https://who.maps.arcgis.com/apps/opdashboard/index.html#/ead3c6475654481ca51c248d52ab9c61> <https://coronavirus.jhu.edu/map.html>
- https://www.uoou.cz/dp/id_ktg=5141
- Interview with Attila Péterfalvi. Hungary live extra: with Attila Péterfalvi (2020-03-19) – HÍR TV. https://www.youtube.com/watch?v=YAQ_-hPxjGQ
- NAIH 2010-6/2021.
- NAIH 2010-6/2021.
- NAIH 2020/2904-2
- NAIH 2020/3404/2.
- NAIH/2020/3378/4
- NAIH/2020/3378/4
- NAIH/2020/3506-2.
- NAIH/685-1/2021
- NAIH-157-2/2021
- NAIH-157-2/2021
- NAIH2020/5138/2.
- NAIH-2940-8/2021
- NAIH-3092-4/2021
- NAIH-3356-2/2021
- NAIH-4751-5/2021
- NAIH-831-11/2021.
- NAIH-831-11/2021.
- Opinion of the Hungarian Medical Chamber: <https://index.hu/belfold/2021/04/27/a-mok-szerint-a-kormany-vakcinatablazata-nem-alkalmas-melyebb-kovetkeztetesek-levonasara/>
- Virág ERDEI – Roland HORVÁTH, Az adatfeldelés elleni védelem statisztikai eszközei. Statisztikai Szemle, August 2004. https://www.ksh.hu/statszemle_archive/2004/2004_08/2004_08_705.pdf