"BLACK SWANS" IN ADMINISTRATIVE LAW

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Abstract: *"Black swans" represent major adverse events having tremendous consequences that are prospectively (though not retrospectively) unpredictable. Fact is that the existing law may provide for certain measures that will be able to cope with some of the consequences of a "black swan". However, due to the unpredictable nature of "black swans", their ex ante regulation by the means of law seems to be not entirely possible. This article aims to address – in the light of the COVID-19 pandemic – mutual relations between the features of "black swans" and administrative law.*

Keywords: *black swans, grey swans, uncertainty in law, administrative law, de-etatization; pandemics, tailor-made laws, compensation for damages*

1. INTRODUCTION[1]

Futuristic research in administrative law is not a brand-new discipline.[2] However, it was only during the last decade that the scholarship of administrative law focused more directly on providing an outline of the future development of this field of public law.[3] This direction of scholarly research is in line with the current trend to identify the most probable trends of future developments of law. This research, which has been known under the umbrella term "legal futurism" (or "legal futurology"),[4] aims to determine both the *forms* and *content* of the future framework in various areas of law. Fact is that, so far, "legal futurism" mainly paid attention[5] to those future developments, which seemed to be most probable given the long-term existing tendencies in respective fields, policies of the State and prospective developments of governed technologies.

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[2] TAY, A., KAMENKA, E. The future of administrative justice in the USSR. In: G. Ginsburgs (ed.). *Soviet Administrative Law: Theory and Policy*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1989, pp. 47–62.

[3] AUBY, J. (ed.). *Le futur du droit administratif. The future of administrative law.* Paris: SciencesPo/LexisNexis, 2019. Also see BALLESTEROS MOFFA, L. The Uncertain Future of European Administrative Law. *Revista general de derecho administrative.* 2018, No. 47, pp. 20–45.

[4] FUNK, D. Legal futurology – the field and its literature. *Law Library Journal.* 1980, Vol. 73, No. 3, pp. 625–633. Also see SUSSKIND, R. *The Future of Law. Facing the Challenges of Information Technology.* Oxford: Oxford University Press, 1998, pp. 20–30, and KERIKMAE, T. (ed.). *The Future of Law and eTechnologies.* New York: Springer Verlag, 2016, pp. 15–35.

[5] SMITS, J. Whither the Future of Law? Concluding remarks. In: S. Muller et al. (eds.). *The Law of the Future and the Future of Law, Vol. II.* Oslo: Torkel Opsahl Academic EPublisher, 2011, pp. 469–470.

Consequently, in administrative law, scholarship argued[6] that the future *forms* of regulation will be influenced by three major determinants. Firstly, the scholarship argued for further developments toward the internationalisation and regionalisation of administrative law. Thus, reflecting the existing long-term tendences in this field of law, one may argue that the role of instruments of international law and of the EU law as sources of administrative law will continue to increase.[7] Secondly, the scholarship argued for further trends towards decentralisation of administrative law. So, one can anticipate further strengthening of the role of measures issued by municipalities and other regional units.[8] Both these trends are in one line with the third major determinant, which has been labelled "de-etatization" in the scholarship of administrative law.[9] This determinant implies a further shift toward non-State sources of law (for example autonomous frameworks, emerging in the internet regulation).[10]

At the same time, the scholarship has also identified some of the *subjects* of the future regulation, as based on the predictions on the future developments in public administration. Thus, the authors argue for further shift towards digitalisation, smart cities and public-private partnerships.[11]

Fact is, however, that all above outlined scholarship has so far focused on identifying the most *probable* lines of the future developments in administrative law. Consequently, the scholarship has not paid any considerable attention to the feature of "black swans" – unpredictable adverse events with tremendous consequences for society, industry and the environment. Reading the book entitled *Le future du droit administratif – The future of administrative law,* published in 2019 under the editorship of Professor Jean-Bernard Auby, one can *barely* find any discussion on the role of "black swans" in the future administrative law.

Jeremy K. Kessler and Charles F. Sabel have chosen a similar approach, when writing their contribution[12] entitled *The uncertain future of administrative law* to the forthcoming book on *The modern administrative state*. Fact is, however, that it took merely a year since the book was published and administrative law had to face a global pandemic of tremendous scale, influencing nearly all the aspects so far governed by this field of law.

This article aims to react upon this gap in legal research, aiming to address the feature of "black swans" from the perspective of administrative law. In this respect, this article ar-

[6] E.g. LIGNIÉRES, P. Imaginer et construire le futur du droit administratif. In: J. Auby (ed.). *Le futur du droit administratif*. pp. 161–170.

[7] Ibid., p. 165.

[8] Ibid.

[9] See DUBOS, O. Le droit administratif contre la théorie de l État and CRAIG, P. Challenges for Administrative Law. In: J. Auby (ed.). *Le futur du droit administratif*. pp. 135–152 and pp. 77–81.

[10] See GILLETT, S, KAPOR, M. The Self-Governing Internet: Coordination by Design. In: Kahin, B., Keller, J. (eds.). *Coordinating the Internet*. Cambridge (MA): The MIT Press, 1998, pp. 3–38.

[11] See TAILLEFAIT, A. Le futur du droit administratif est-il inscrit dans le présent? À propos des *smart cities*. In: J. Auby (ed.). *Le futur du droit administratif*. pp. 439–444.

[12] KESSLER, J., SABEL, C. The uncertain future of administrative law. In: M. Tushnet (ed.). *The modern administrative state: Reconstruction or deconstruction?* Cambs: Daedalus Publishing, 2021. In: *Columbia Law School Scholarship Repository* [online]. 2021 [2021-02-23]. Available at: <https://scholarship.law.columbia.edu/faculty_scholarship/2737/>.

gues that due to the unpredictable nature of the "black swans", their *ex ante* regulation by the means of law seems to be not entirely possible. In this respect, administrative law may only partially react to the consequences of a "black swans" and – at the very same time – a "black swan" remains capable of altering the face of administrative law.

2. "BLACK SWANS" AND LAW

The feature of a "black swan" has been thematically defined by Nassim N. Taleb.[13] He classifies these features by the three following determinants. Firstly, a "black swan" is defined as an *outlier, "as it lies outside the realm of regular expectations and because nothing in the past can convincingly point to its possibility."*[14] Secondly, unlike a real swan, a "black swan" carries an extreme and adverse impact and causes tremendous damage.[15] And thirdly, in spite of its outlier status, *"human nature makes us concoct explanations for its occurrence after the fact, making it both explainable and predictable."*[16] Thus, according to Taleb, the feature of "black swans" is characterised by the following triplet: rarity, extreme impact and retrospective (through not prospective predictability).[17] In this respect, Taleb further argued that *"by symmetry, the occurrence of a highly improbable event is the equivalent to non-occurrence of a highly probable one"*[18] and consequently, a highly expected *not happening* also represents a "black swan".

The feature of a "black swan" has gained considerable attention in the scholarship of social and economic sciences. Here, academicians further elaborated[19] the distinction between "black swans" (which are fully unpredictable) and "grey swans" (or "dragon kings"), which *may* be predicted if analysing the existing tendencies carefully. Fact is, however, that an exact line between "black" and "grey swans" has never been established. Consequently, while some authors label the COVID-19 pandemics as a "black swan", others rank it in the category of "grey swans".[20]

Fact is, however, that the definition of "black swans" hasn't gained much attention within the legal scholarship so far. When searching for the key words "black swan" and "law" in databases, such as Web of Science, or Scopus, only a few results appear in legal journals.[21] When discussing the future of law, most of the authors have concentrated on

[13] TALEB, N. *The Black Swan. The Impact of the Highly Improbable.* 2nd ed. London: Penguin Books, 2010.
[14] Ibid., p. xxii.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] JANCZURA, J., WERON, R. Black swans or dragon kings? A simple test for deviations from the power law. *European Physical Journal – Special Topics.* 2012, Vol. 205, No. 1, pp. 79–93.
[20] LUESCHER, T. COVID-19: (mis)managing an announced Black Swan. *European Heart Journal.* 2020, Vol. 41, No. 19, pp. 1779–1782. See also MAZZOLENI, S., TURCHETTI, G., AMBROSINO, N. The COVID-19 outbreak: From "black swan" to global challenges and opportunities. *Pulmonology.* 2020, Vol. 26, No. 3, pp. 117–118.
[21] For example D AQUINO, P. The Black Swan Shadow Over Contracts. *Biolaw Journal – Rivista di biodiritto.* 2020, Special Issue 1, pp. 301–308. See also SAKAEVA, M. "Black Swan" and other rules of everyday legality. *Laboratorium: Russian Review of Social Research.* 2019, Vol. 11, No. 1, pp. 31–56.

identifying scenarios of the most probable future developments, rather than analysing unpredictable future events.

A decade ago, a network of scholars aimed to address the problems of legal futurism under the umbrella of the *Centre for International Law and Policy*, based in the Hague. The results of their research were subsequently published in a two-volume publication, entitled *The Law of the Future and the Future of Law* and edited by Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker.[22] While the contributing authors attempted to address foreseeable scenarios of future developments in various fields of both private and public law, any analysis of legal aspects of potential "black swans" was missing. So, the feature of "black swans" has so far successfully escaped a detailed scrutiny of the legal science.

Therefore, some general observations regarding the mutual relations between the feature of "black swans" and the law must be made on this place:

Firstly, the prospective unpredictability that constitutes the hallmark of each "black swan," represents an imminent obstacle to any comprehensive regulation of these adverse events by the means of law. This means that the law is neither able to regulate any "black swan" in their complexity, nor capable of providing any prospective measures to avoid occurrences of such an event.[23] Fact is, that law regularly addresses the prospective occurrence of large adverse events, such as pandemics, earthquakes, nuclear accidents etc. A specific and to a certain extent autonomous field emerged, which has been labelled "disaster law" and aims to deal with such harmful events.[24] However, none of these can be ranked as "black swans", as they *have* been foreseen both by scientists and policymakers. Thus, while (ordinary) pandemics have been foreseen and addressed by existing legal measures, such measures were not able to cope successfully with the current COVID-19 pandemic, due its global scale, tremendously harmful impact, and extraordinary duration.

With respect to the ongoing COVID-19 pandemics, a *second* aspect of the mutual relationship between "black swans" and the law must be mentioned. Fact is, that existing law is capable – to a certain extent – do address some of the consequences of a "black swan". Thus, emergency law has proven to be able to cope with *some* of the problems, arising from the COVID-19 pandemics, such as movement restrictions, temporary closures of shops and restaurants, as well as the introduction of online teaching and examinations at schools and universities. In the same vein, nuclear law would be capable of coping with *some* impacts of a major nuclear accident, in particular with immediate notification of such an accident, mutual assistance between concerned States and coverage of damages occurred. In a case of a major crash in financial markets, financial law will certainly be capable of addressing *some* – albeit not all – of the consequences of such an adverse event.

[22] MULLER, S., ZOURIDIS, S., FRISHMAN, M., KISTEMAKER, L. (eds.). *The Law of the Future and the Future of Law, Vol. I.* Oslo: Torkel Opsahl Academic EPublisher, 2010 and id., *The Law of the Future and the Future of Law, Vol. II.* Oslo: Torkel Opsahl Academic EPublisher, 2011.

[23] ESPEJO, R. In anticipation of black swans. In: M. Faggini – M. Gallegati – A. P. Kirman – T. Lux. *New Economic Windows.* New York: Springer Nature, 2018, pp. 121–135.

[24] GIAMPETRO-MEYER, P. Climate Change Disasters and Environmental Law. *Journal of Legal Studies Education.* 2019, Vol. 36, No. 2, pp. 213–236.

So, existing law has the capability to cope with certain *specific* aspects of "black swans", although not the capacity to totally mitigate them. *Thirdly*, a "black swan" is capable of altering the face of law.

This aspect is Janus-faced, as there are (at least) two different scenarios of such an alteration. Firstly, it is a matter of fact that a large adverse event with tremendous transboundary consequences is capable of triggering the establishment of new frameworks on international, or regional levels. So, the Torrey Canyon oil spill (1967) caused considerable changes to maritime law, in particular in the area of the liability of the owners of the oil tankers for damages caused by the oil spill.[25] The disaster, which occurred in a chemical manufacturing plant in Seveso, north of Milan (1976) and which caused the highest known exposure to dioxin (TCDD) in residential populations, triggered the establishment of robust industrial safety laws in Europe.[26] The Chernobyl accident (1986) triggered further development in nuclear law and brought about the conclusion of numerous new international agreements, governing various problems arising from the transboundary pollution caused by a major nuclear accident.[27]

While in these above-mentioned cases, "black swans" caused further developments in already existing legal frameworks, a "black swan" may also effect a total collapse of the existing system of law and its replacement by a new system. This can be – in several key aspects – in full contradiction of the previous legal order. The October Revolution in Russia (1917) may serve as a salient example of such a "black swan", which lead to replacing the former Tsarist law by a fully new framework.[28]

Finally, we must mention that all the above-mentioned circumstances concern "black swans" in both the form of an *unforeseen happening* and those which may appear in the form of the *non-occurrence* of a highly probable one. The implications of the latter, mentioned in legal frameworks have so far been fully neglected and thus certainly deserve more detailed attention of the future scholarship.

3. "BLACK SWANS" IN ADMINISTRATIVE LAW

The above-analysed aspects of mutual relations between law and the "black swans" are to be reflected upon when addressing the impacts of a "black swan" for the system of administrative law. So, we must take into consideration that the system of administrative law is – as such – not entirely capable to govern and successfully manage an unforeseen adverse event in a form of a "black swan". Of course, various provisions of public law, in

[25] The International Convention on Civil Liability for Oil Pollution Damage (1969), the International Convention for Prevention of Pollution from Ships (1973).

[26] The Seveso I Directive (1982), the Seveso II Directive (1996) and most recently the Seveso III Directive (2012).

[27] The Convention on Early Notification of a Nuclear Accident (1986), the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986), the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (1988), the Convention on Supplementary Compensation for Nuclear Damage (1997) etc.

[28] See BELOV, S. Guest Editors Note on the 100th Anniversary of the Russian 1917 Revolution and Law. *Russian Law Journal*. 2017, Vol. 5, No. 4, pp. 4–7 (see also other articles in this issue of the Russian Law Journal, dedicated to various impacts of the October Revolution for legal order).

particular in the field of emergency preparedness and health safety reflected the potential arrival of new pandemics. However, the scale, tremendous impact and longitude of the COVID-19 pandemics had not been foreseen by any policymakers and, consequently, the system of administrative law has been not capable to establish a robust framework of rules able to cope with adverse events of this scale. Secondly, the fact is that some of those measures, as existing in the provisions of administrative law, have been – to a certain extent – able to cope with some of the adverse impact of the pandemic. Consequently, this section will aim to deal with the mutual relations between a "black swan" in the form of the COVID-19 pandemic and administrative law.

3.1. Interpretation of existing laws under new circumstances

The laws of modern society are based on traditions, circumstances and culture. They do not usually arise overnight as an instrument of social change. Instead, they arise in response to events in society as it regulates newly emerging issues. Therefore, the law is always slightly behind the current circumstance. If the legislation does not reflect social changes quickly enough, there is a risk the law will cease to be effective. Unlike that, a "black swan" can promptly change the view of existing legislation and the need of its interpretation, as happened due to the global financial crisis of 2008 or the COVID-19 pandemic.

The Czech Republic's crisis legislation went through similar development, although to a far lesser degree, after devastating floods hit a third of its territory at the end of the 1990s. The legislative unpreparedness of the young republic became apparent when the state administration and the local authorities were unable to adequately respond to the situation due to a lack of appropriate instruments.[29] Even before the floods, there was an effort to adopt crisis legislation. However, there was very little political support for adopting instruments to restrict fundamental rights and freedoms so shortly after the fall of the communist regime.[30] Although the floods sped up the process of adopting crisis legislation, it was designated with regard to the crisis scenarios that legislators anticipated at the time of its adoption.

Right from the outset, the aim of the crisis legislation was to enable an effective solution to large-scale emergencies.[31] However, recent events have shown that the scope of the global pandemic was not anticipated by the legislators. The existing crisis legislation includes, among others, the Crisis Act,[32] which within its Section 36 enshrined the obligation of the state to compensate the persons for damages caused to them in a causal link to the adopted crisis measures. During its existence, this provision was used only to compensate

[29] KYSELA, J. Nad jedním z „bezpečnostních aspektů" ústavního pořádku ČR: k výkladu a aplikaci čl. 43 Ústavy [On one of the "security aspects" of the constitutional order of the Czech Republic: on the interpretation and application of Article 43 of the Constitution]. *Časopis pro právní vědu a praxi*. 2003, No. 2, p. 92.

[30] VANÍČEK, J., Činnost ústavních orgánů za krizových situací [Activities of the constitutional bodies in crisis situations]. *Správní právo*. 2001, No. 5, p. 257.

[31] Explanatory Memorandum to the Act on Crisis Management and on Amendments to Certain Acts (Crisis Act), No. 240/2000 Coll.

[32] Act No. 240/2000 Coll., on Crisis Management and on Amendments to Certain Acts (Crisis Act).

persons for individual interventions, though its wording does not indicate that it would not apply to the measures of a widespread nature. On the contrary, its literal wording can be seen as a legal basis for claiming damages caused by the state's measures. Neither the explanatory memorandum nor any other source explains the intention of the legislator in this matter. Nevertheless, it can be retrospectively concluded that their intention was to *never compensate anyone* for any damages (including lost profits).

At the time the statute was passed, the legislators failed to anticipate a situation of extensive closure of retail and sports venues, or the disruption of cultural events.[33] The purpose of the regulation was to compensate for the real damage caused by the actions of the state or other concerned persons, especially members of the integrated rescue system within their operation.[34] It is not out of the question whether it is in accordance with the law if persons could not claim the right to compensation for lost profits simply because it is not by the presumed (but unspoken) intention of the legislator. On the other hand, albeit a literal interpretation of the statute might suggest that, such a broad interpretation would be revolutionary in terms of comparative law and could also lead to state bankruptcy.

This legislative inaccuracy was largely caused by the fact that across the political spectrum, it was never expected for a state of emergency (and associated business restrictions) to be declared for several months or even years. Since the adoption of the Crisis Act, persons have been compensated mainly for material use of movable or immovable property. In general, the compensations were only paid to persons due to individual interventions. The fact that the crisis legislation was not adopted with the presumption of the widespread measures is also illustrated by the lack of the obligation to "*tolerate restrictions arising from crisis measures*" for the legal persons as the Crises Act enshrined for natural persons in section 34 of the Crises Act.

In order to ensure a high level of legal certainty, the legislator enshrined narrowly defined offenses but did not anticipate that the obligations arising from the adopted crisis measures could also affect legal persons.[35] As a result, although some legal entities are required to limit their business activities due to the legislative omission, they are not subject to administrative penalties under verbal interpretation. Nowadays, legal persons are punished according to the provisions affecting natural persons. Therefore, the penalties imposed on them may be considered low.

One year after the outbreak of the COVID-19 pandemic, the issue of damages under Section 36 of the Crisis Act have still not been resolved in a binding manner. Nevertheless, a proposal for the amendment of the Crisis Act added a provision in respect to damages, which says that *"damage means only actual damage*". At the same time, the *Act on Emergency Measures in the Event of the COVID-19 Disease* was adopted with effect from 27 Febru-

[33] See HANDRLICA, J., BALOUNOVÁ, J. SHARAPAEV, V. Náhrady a opatření přijatá v době pandemie [Compensations and the measures adopted during the pandemic)]. *Právní rozhledy*. 2020, No. 22, pp. 784–791.

[34] Also provided in Explanatory Memorandum to the Draft Act of 15 February 2021 amending Act No. 240/2000 Coll., the Act on Crisis Management and on Amendments to Certain Acts (Crisis Act), as amended, and certain other Acts.

[35] PRÁŠKOVÁ, H. Správní trestání [Administrative Punishment]. In: D. Hendrych (ed.). *Správní právo. Obecná část [Administrative Law. General Part]*. 9th revised edition. Prague: C. H. Beck, 2016, pp. 293–298.

ary 2021, which regulates the procedures and measures taken during the pandemic. The Act is also a reaction to the repealed measures of the Ministry of Health and to the fact that Section 69 paragraph 1 letter i) of the *Public Health Protection Act* (which was used as a legal basis for issuing a number of crisis measures) is of such a general nature that it has even been declared unconstitutional by several legal scholars.[36] On the other hand, in the area of business compensation, it seems the measures are taken on an *ad hoc* basis.

It is noticeable that *pre-covid* law of the Czech Republic provided a relatively effective support system for dealing with the negative economic and social factors, such as illness or unemployment. Nevertheless, it was in no way prepared for a situation where thousands of entrepreneurs would be restricted in their activities and left without income with almost no warning.[37] States all around the world had to respond to this situation, while in Czech Republic it was mainly with tailor-made laws.

Tailor-made laws

Provided that traditional legislation, i.e. laws general in their very nature, seem not to be particularly effective when encountering "black swans", one of the tools capable of targeting specific situations and circumstances are the so-called tailor-made laws. Tailor-made laws do not have a universal definition and could be collectively described as laws completely or partially lacking an element of generality. Oddly enough, it is the generality which is considered to be one of the traditional features of laws,[38] distinguishing them primarily from legal acts of the executive branch.[39] Contrary to the laws in their traditional perception, tailor-made laws are therefore "tailored" to suit a certain situation, person, object, place etc.[40]

When it comes to the classification of tailor-made laws, the first method which logically comes to mind is selection based on the element of generality these laws happen to lack. These elements of generality, referred to by Professor Timothy Endicott as "modes of gen-

[36] See WINTR, J. K ústavnosti a zákonnosti protiepidemických opatření na jaře 2020 [On the constitutionality and legality of anti-epidemic measures in spring 2020]. *Správní právo*, 2020, No. 5–6, p. 293.

[37] According to a press release by the Ministry of Agriculture of 2nd November 2020, 10,000 entities operating in the agricultural and food sectors are affected.

[38] The generality of laws can be said to be one of the fundamental building pillars of Roman legal theory, see e.g. *Digest of Justinian*, Liber Primus, 1.3.8 Ulpianus III ad Sabinum. Marcus Tullius Cicero even suggests that the very word "law" implies universal bindingness upon all („*[…] legis haec vis sit, scitum et iussum in omnis*", see CICERO M. T. *De Legibus. Cicero Volume XVI, Loeb Classical Library 213*. Cambridge (MA): Harvard University Press, 1928, p. 512.

[39] These, on the contrary, fundamentally regulate rights and obligations of specific persons in specific situations through administrative acts as part of the process of application of general legal norms. See STAŠA, J. Správní akty [Administrative acts]. In: D. Hendrych (ed.). *Správní právo. Obecná část [Administrative Law. General Part]*. 2016, pp. 133-136. See also SINGH, M. P. Administrative Powers: Administrative Act. In: *German Administrative Law*. Berlin, Heidelberg: Springer, 1985, pp. 32–34.

[40] Although after a brief introduction the definition of tailor-made laws may appear quite self-explanatory even to an unacquainted reader, this term is sometimes incorrectly associated with lobbying and laws being suited to serve the needs of third parties indirectly involved in the process of policymaking. The term of tailor-made laws as used by the authors refers to the properties of the law per se rather than the process of its adoption (nota bene that laws tailored according to needs of lobbyists are likely to be general in their nature, even despite indirectly prioritizing the needs of particular addressees).

erality",[41] mirror different types of tailor-made laws and thus can also be used to divide them. The modes of generality of laws as described by Endicott are attributed to the four following factors: (i) persons to whom they apply (generality in *addressee*), (ii) conduct which they regulate (generality in *subject*), (iii) time at which they are in effect (generality in *temporal scope*), and (iv) place in which they apply (generality in *territorial scope*).[42] Hence accordingly, tailor-made laws may be lacking the generality in addressee (i.e. only be binding for a specific person),[43] generality in subject (concern a specific situation or person), generality in temporal scope (only be effective for a limited period of time)[44] or generality in territorial scope (only apply to a certain place).

German legal theory provides a more distinct division of tailor-made laws. According to German doctrine, tailor-made laws may bear the form of a so-called *Einzelfallgesetz* (which can be translated verbatim as "law for a specific case or event") or *Individualgesetz* ("individual law") governing an individual, explicitly defined case or concerning a specific person, or a form of a *Maßnahmegesetz* ("law adopted as a measure") or *Anlassgesetz* ("law adopted due to an occasion"), addressing specific situations whilst referring to them in general terms.[45] Regardless of their classification, which may vary based on different factors, a commonality of all types of tailor-made laws is that these laws are adopted as a response to a unique occasion, the irregularity or individuality of which makes it inconvenient for tailor-made laws to become a general rule of conduct.

Although tailor-made laws were not primarily intended as a tool of crisis management, due to their inherent properties, they happen to come in handy in solving crisis situations.[46] These laws turned out to be useful *inter alia* during the COVID-19 crisis in the Czech Republic, which gave rise to the need to respond flexibly to rapidly changing conditions and to specifically regulate areas of life vital for the management of the epidemic. In this case, tailor-made laws avoided taking the form of laws *stricto sensu* adopted by the parliament, but rather in the form of so-called crisis measures of the government issued pursuant to the Crisis Act.[47]

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[41] See ENDICOTT, T. *The Generality of Law. Forthcoming*. In: D'Almeida, L. D., Edwards, J., Dolcetti, A. (eds.). *Reading HLA Hart's 'The Concept of Law' (Hart Publishing 2013)*. Oxford: Oxford Legal Studies Research Paper No. 41/2012, University of Oxford, 2013, pp. 3–4.

[42] Ibid., pp. 3–6.

[43] This type of tailor-made law is not to be confused with laws merely concerning an individual person, i.e. applicable to all persons yet regulating a particular person. As a matter of example, Act No. 22/1930 Coll., on the merits of Tomáš Garrigue Masaryk ("Lex Masaryk") can be mentioned. The law mentioned concerned a specific, unambiguously identified statesman, yet the said person could hardly be its addressee.

[44] The irregularities in temporal scope of a law can either be „formalized" in a form of a so-called sunset clause or sunset provision, or be caused by a factual obsolescence of the law. See e.g. KOUROUTAKIS, A. E. *The Constitutional Value of Sunset Clauses*. New York: Routledge, 2018, pp. 3–10, or RANCHORDÁS, S. Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty? *Statute Law Review*. 2015, No. 1, pp. 28–45.

[45] See SCHNEIDER, H. *Gesetzgebung. Ein Lehr- und Handbuch. 3rd edition*. Heidelberg: C. F. Müller Verlag, 2002, pp. 22–30.

[46] See PERFETTI, L. Massnahmeforschriften and emergency powers in contemporary public law. *The Lawyer Quarterly*. 2020, Vol. 10, No. 1, pp. 30–33.

[47] See Sec. 2 Paragraph b) of Act No. 240/2000 Coll. on Crisis Management and on Amendments to Certain Acts (Crisis Act). In this case, the term "law" is rather used for legal regulations in general and does not refer only to laws adopted by legislative bodies.

Through these measures, adopted in the form of a government resolution, the government (acting in a capacity of a crisis-management body), restricted the type-defined activities and operations of type-defined enterprises or provided for exceptions to restrictions. On the one hand, the regulation itself described in detail the activities to which it did or didn't apply, while on the other hand setting out the limited duration of these restrictions.[48]

Therefore, crisis measures the Government of the Czech Republic adopted in connection with COVID-19 (as an unforeseen situation) lacked (or at least weakened) two elements of generality: these measures were limited in their temporal scope and applied to activities type-specified in these measures or provided for an exception. On the contrary, the measures applied to all persons in the territory of the Czech Republic and applied throughout its territory. This legal concept has been subject to extensive debate among many lawyers and legal scholars concerning the legal nature of the crisis measures issued by the government, as it was the absence of generality that evoked the idea that these measures are not legal regulations.[49] Therefore, part of the professional community tended to incline to the opinion that these measures should be classified as so-called measures of a general nature, i.e. abstract-specific acts, which are provided with a generally defined circle of addressees and a specifically defined subject and therefore neither administrative acts nor legal regulations.[50]

Considerable confusion was also introduced by the fact that some of the exact same measures that had been previously adopted by the Ministry of Health in the form of so-called extraordinary measures,[51] were judicially affirmed to be general measures.[52] However, in the case of governmental crisis measures, the court stated that these do not materially qualify as general measures since the subject of the regulation is not sufficiently

[48] By a recent crisis measure of the Government of the Czech Republic adopted by Resolution No. 298 of 18 March, 2021, the Government, effective from 22 March, 2021 from 00:00 to 28 March, 2021 to 23:59, prohibited the retail sale and sale of services in establishments, with the exception of explicitly listed establishments, such as grocery stores, stores with animal needs, glasses and contact lenses stores, flower shops etc.

[49] See e.g. HEJČ, D. Nezákonnost mimořádných opatření Ministerstva zdravotnictví k onemocnění COVID-19 podle MS v Praze: Když obsah překračuje formu [Illegality of extraordinary measures of the Ministry of Health concerning COVID-19 according to the Municipal Court in Prague: When the content exceeds the form]. *Soudní rozhledy*. 2020, No. 6, pp. 185–190; KEISLER, I. Náhrada újmy vzniklé v důsledku mimořádných a krizových opatření [Compensation for damage caused by extraordinary and crisis measures]; MELZER, F. Poskytování náhrad za újmy vyvolané opatřeními MZd po jejich zrušení [Provision of compensation for damages caused by measures of the Ministry of Health after their derogation]; VESELÝ, J. Diskuse: Jak je to s náhradou škody způsobené opatřeními MZd [Discussion: Once again on the compensation for damage caused by the measures of the Ministry of Health]. All published in *Advokátní deník*. 2020.

[50] See HENDRYCH, D. Opatření obecné povahy [General measures]. In: D. Hendrych (ed.). *Správní právo. Obecná část [Administrative Law. General Part]*. 2016, pp. 133-136. See also HENDRYCH, D. K institutu opatření obecné povahy v novém správním řádu [On general measures in the new Administrative Procedure Code]. *Právní rozhledy*. 2005, No. 3, p. 2.

[51] *Inter alia* Extraordinary Measures of the Ministry of Health of 23 March 2020, File No. MZDR 12745/2020-1/MIN/KAN; of 30 March 2020, File No. MZDR 12745/2020-4/ /MIN/KAN, and of 6 April 2020, File No. MZDR 15190/2020-4/MIN/KAN.

[52] This legal conclusion was expressed in the resolution of the Constitutional Court of the Czech Republic of 22 April, 2020, File No. Pl. ÚS 8/20, paragraphs 51 to 54. The same opinion was expressed in the judgment of the Municipal Court in Prague of 23 April, 2020, File No. 14 A 41/2020.

specific.[53] The court rationalised the different approach to the two types of measures by an explicit definition of extraordinary measures of the Ministry of Health as general measures provided by law. Thus, following these judicial conclusions, the government's crisis measures can be described as legal regulations *sui generis* adopted by the crisis management body (government), which have a limited temporal scope and a relatively specific subject, which allows an agile and selective regulation compared to relatively rigid restrictions which can be achieved by general laws.

It is not without interest that while historically legal theory and practice have approached tailor-made laws with scepticism and caution, treating this type of law as an undesirable and potentially dangerous phenomenon,[54] during the COVID-19 epidemic, tailor-made laws became a completely ordinary part of the crisis legislator's arsenal. Such leniency towards tailor-made laws does not appear to originate from the doctrinal acceptance of this phenomenon, but rather from sheer despair, as general legislation appears to have failed in response to such a widespread and unforeseen crisis. Thus, at the time of the COVID-19 crisis, tailor-made laws seemed to be one of the few (if not the only) functional tools capable of equipping crisis management bodies with a means of agile response to the daily development of an epidemiological circumstance.

3.2. Attempts for reconciliation between the State and the public

According to the rule of law, the public authority is bound by applicable law. Although the Czech legal system did not directly envisage restrictions of a widespread nature, the crisis legislation provided a sufficient legal basis for restrictions on fundamental rights and freedoms from the beginning of the pandemic. Measures to limit the spread of the disease were adopted in the Czech Republic based on the crisis legislation in the form of so-called *crisis measures*, a new form of administrative action developed during the pandemic. Crisis measures are adopted by the Czech Republic government and have the nature of *sui generis* legislation. In accordance with Czech law, the crisis measures are not reviewable within the ordinary judicial system but are subject to control by the Chamber of Deputies.[55] Even though the Czech Republic had instruments to legally restrict social contacts on the basis of crisis legislation, it did not have any immediately applicable instruments to support entrepreneurs who found themselves without income with almost no warning.

The pandemic has been shown to have a negative impact on the economic situation in the Czech Republic within the first wave of COVID-19, although the presence of the disease was minimal. In this respect, the *pre-covid* law failed to provide sufficient support to

[53] Ibid.

[54] Tailor-made laws were previously declared unconstitutional by the Constitutional Court of the Czech Republic, see e.g. Judgment of the Constitutional Court of the Czech Republic of 28 June, 2005, file no. Pl.ÚS 24/04 or Judgment of the Constitutional Court of the Czech Republic of 10 September 2009, file no. Pl.ÚS 27/09. Tailor-made laws restricting the basic rights and freedoms are explicitly forbidden by the German *Grundgesetz*, providing in its Article 19 (1) that "a basic right may be restricted by or pursuant to a law, whereas such law must apply generally and not merely to a single case."

[55] Resolution of the Constitutional Court of the Czech Republic of 22 April, 2020, File No. Pl. ÚS 8/20.

the persons affected by the adopted measures. It was necessary to swiftly create new compensatory rules for these purposes. Compensations in the Czech Republic are regulated uniformly at the national level. The first compensation statute was adopted on 9 April 2020 (nine days after its approval by the Czech government),[56] which may be considered sufficient given the circumstances. The flexible creation of the new rules took place within individual states as well as at the EU level. In order to prevent a severe economic downturn, the European Union adopted a *Temporary Framework for State Aid Measures* aimed at ensuring liquidity for vulnerable companies.[57] The purpose of the measure was to set guidelines for the Member States on how to provide liquidity through direct subsidies and tax advantages, state guarantees on bank loans, subsidised interest rates for loans, guarantees and loans channelled through credit or other financial institutions, or short-term export credit insurances.[58] This framework defines the form of state aid currently provided across the European Union.

The Czech Republic continuously improved the compensation system for those entrepreneurs affected by the crisis and mainly provided support through tax advantages, direct subsidies, and loan programs. Within the support of maintaining employment, the Czech state compensated entrepreneurs for staff costs of up to 100%, further partly compensated entrepreneurs for payment of rents, provided a fixed compensation bonus for self-employed persons and partners of small limited liability companies, as well as compensation for those on nursing leave due to closed school and preschool facilities. Sectoral support was also provided on an ongoing basis to mitigate the crisis's impact in the most affected business areas (e.g., culture, tourism, or irregular bus transport).

Despite the existence of extensive measures, some enterprises remain without cover from the state support scheme — for instance small shops, swimming pools, or fitness centres. Although these entrepreneurs were entitled to some support (rent allowance, owner's compensation bonus, employee allowance), the resulting amounts often did not even cover business costs, much less the owner's personnel costs. Suppliers of closed establishments found themselves in a similar situation. For example, the field of brewing is not banned by the state in any way. However, according to a study published by the *Centre for Economic and Market Analysis* carried out for the *Czech Association of Breweries and Malthouses*, brewery sales fell by more than 1,104 million Czech crowns from March to May of 2020.[59]

The program to support these entrepreneurs was eventually adopted, but not until almost nine months after the beginning of all restrictions.[60] All entrepreneurs who have been

[56] Act No. 159/2020 Coll., on the compensation bonus in connection with crisis measures related to the incidence of coronavirus SARS CoV-2.

[57] *Temporary Framework for State Aid Measures* to support the economy in the current COVID-19 outbreak (2020/C 91 I/01).

[58] Ibid.

[59] ROD, A., FANTA, M. Ekonomické ztráty českého pivovarnictví v souvislosti s vyhlášením nouzového stavu [Economic losses of the Czech brewing industry in connection with the declaration of a state of emergency]. In: *Ceta – Centrum ekonomických a tržních analýz* [online]. 2020 [2021-03-23]. Available at: <http://eceta.cz/wp-content/uploads/2020/07/Pivovary_COVID_FINAL.pdf>.

[60] The compensation program approved by the Resolution of the Government of the Czech Republic of 4 January, 2021, No. 10 on the program of support for entrepreneurs affected by the worldwide spread of COVID-19 caused by the SARS-CoV-19 virus "COVID – Gastro – Closed establishments", No. 10/2021 UsnV.

forced to close their establishments due to government measures and have seen a drop in sales of more than 30% may apply for support. However, that support is set as a fixed amount per employee, and many entrepreneurs announced redundancies within the nine months of restrictions. Therefore the size of their employee base may not necessarily correspond to the size of their costs. At the same time, a support program for entrepreneurs in the agriculture and food industries was introduced, aiming at entities supplying products to catering service operators. The condition for obtaining this support is a decrease in total revenue by at least 25%.

Although many of the concerned companies are in a compromised financial situation, their total revenues have not decreased to this level. Also, disadvantaging entrepreneurs operating from their own premises is debatable as they are not eligible for the rent compensation, despite the fact that they may be repaying the loan for the premises. Similarly, self-employed persons, who have been declared insolvent, were not eligible for the compensation bonus for several months. The compensation bonus is in the form of so-called public support, and according to the general European Union rules, the aid may not be granted to undertakings that were in difficulty as of 31 December, 2019.[61] Following negotiations with the European Commission, this rule was repealed in February of 2021.

Compensation in the Czech Republic has the character of compensation for objective costs. However, if some entrepreneurs have not been able to adapt to the new circumstances, for example, small shops have not been able to build an e-shop or fitness centres have not been able to provide online lessons in a short time, then even after a partial cost contribution, entrepreneurs can find themselves at a significant loss. Rent and employees are not the entrepreneurs' sole expense as they must also pay energy bills, leasing, or loans. In this respect, Germany's support system was more generous as the aid for the most critical months was based on immediate payments calculated as a revenue percentage from the previous year. The entrepreneurs concerned could receive direct aid of up to 75% of the revenue received in the same month of the previous year due to the damages caused by a lockdown declared by the German government for the period from November to December. Entrepreneurs operating in the area of trade fairs and congresses could claim damages of up to 100% of their lost profits compared to the previous year.

On the other hand, compensation based on lowered revenue may *de facto* subsidize some entrepreneurs significantly more than others (given their expenses). This is one of the arguments used by the Czech authorities for not applying this form of support.[62] Similarly, the German government relinquished this form of support in further months and provided support to entrepreneurs based on fixed costs. Therefore, the current aid is based on a similar principle. Within the Czech Republic, a large proportion of aid is provided through retroactive compensation for incurred costs. Subsequently, many compensations are provided belatedly as, for example, entrepreneurs receiving rent allowance a few months after they have had to pay the rent.

[61] Temporary Framework for State Aid Measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01). Section 2.2 Paragraph c).

[62] HAVLÍČEK, K. (Minister of Industry, Trade and Transport), Press conference after the government meeting of 14 December, 2020.

4. CONCLUSIONS

This article aims to analyse the mutual relations between administrative law and a "black swan". For the purpose of this study, the ongoing COVID-19 pandemic is considered to represent a salient example of such a "swan", as it perfectly matches the triplet outlined by Nassim N. Taleb. Firstly, the pandemic represents a real *outlier,* as it lies outside the realm of regular expectations. Secondly, the pandemic has implied adverse impacts and caused tremendous damage. Thirdly, in spite of its outlier status, from a retrospective viewpoint, the pandemics can be considered as predictable.

This article argues that the existing framework of administrative law was unprepared to address the COVID-19 pandemic in its entirety. This is not surprising, given its *outlier* status. In this respect, this article demonstrates that the written provisions of acts adopted in the pre-COVID-19 period, may cause both unexpected and fully unintended consequences, if applied to extraordinary situations arising from the COVID-19 pandemic. Consequently, application of the existing legal framework towards the realities of the COVID-19 era causes a number of problems and fully unexpected uncertainties.

On the other hand, this article also demonstrates that the system of administrative law also possesses measures which may efficiently react to newly arising circumstances. Tailor-made laws and various schemes of public-private reconciliations between the States and private entities represent good examples of such measures. While one may argue that these measures represent just a temporary reaction of public administration to the newly emerged situation, others may posit that these measures will remain to represent integral parts of administrative law in the future.

Despite the fact that administrative law wasn't entirely prepared for the challenges and problems arising from the COVID-19 pandemic, one may argue that it was able to cope with these new realities. We don't face a collapse of administrative law after one year of the ongoing pandemic. Consequently, one may argue for viability of the basic structures and one may presume the durability of the existing institutes for the forthcoming future as well.