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Peculiarities of Service in Slovakian Administrative Court Proceedings with a Large Number of Participants

Abstract

The success of serving documents has an impact on the smoothness of the proceedings before the administrative court, their speed and on the substantive decision itself.
This article focuses on research results on the specifics of service in administrative court proceedings with a large number of participants.
The Slovak Code of Administrative Procedure[1] has established a number of legal mechanisms aimed at speeding up court proceedings and preventing entities from avoiding documents being served
The authors set out to assess whether the mechanisms introduced are sufficient and whether there are any major obstacles within the process of serving documents in the practice of administrative courts that would cause delays in the proceedings.

Keywords: service of documents, administrative court proceedings, large number of participants, Slovak Code of Administrative Procedure, Slovak Law

I Introduction

The topic, the service of court documents in court proceedings, may appear unoriginal and exhausted for further legal research, as it has been present in jurisprudence and legal/judicial

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[1] Act. No. 162/2015 Coll., Administrative Procedure Code.

practice from their beginning. Life and socialisation in the legal community, however, brings a lot of surprising stimuli, experiences and observations that will open new discussions and initiatives, even on questions considered already answered. The idea of reviewing service in administrative court proceedings, with a focus on proceedings with a large number of participants,[2] arose precisely from such an initiative.

The authors already set the aims that determined the focus of the research at the stage of choosing the topic. These served to guide us throughout the research, influencing the choice of appropriate methods, as well as the division of the research into several phases. These aims can thus be described as primary. However, in the course of the research itself, various issues and problems that may be found in application practice arose, which could not be ignored in this paper and we deemed it necessary to raise awareness of these issues. Therefore, in the course of the research that was already underway, the authors formulated additional aims, focused on drawing attention to the shortcomings identified in our primary aims. These were hence labelled as secondary.

II Methodology of the Research

The results of quality legal scientific research must be verifiable. To enable the research results to be properly verified, it is necessary to begin this article by describing the steps taken by the authors prior to and during their scholarly work on the topic. The first step comprised specifying the research objectives, followed by selecting the appropriate methods for achieving these objectives and implementing them according to good scientific research practice. The last step was to evaluate whether the set objectives had been fulfilled and to process results into concrete and practical calls to action. The objectives and sequential steps of the research are elaborated in this part of the article.

1 Primary Aims of the Research

The primary objectives were to elicit the answers to the scientific questions posed and present *de lege ferenda* proposals regarding the legal regulation of the service of documents in the administrative justice system, with an emphasis on proceedings with a larger number of participants. These are the main lines of scientific activity, to which the research process is vested across all phases of the authors' scientific research. The primary objectives of the research are to reach the findings on the state of service of documents within the scope of the research subject, to identify potential problems and to find solutions to eliminate these.

[2] For the purposes of this article, the authors defined the term 'large number of participants' as the number of participants in the proceedings being greater than ten.

In order to achieve the stated findings, it was necessary to prepare questions to which the authors sought answers. The authors therefore formulated five interrelated research questions, namely:

Question No. 1:

Is there a problem with serving documents in administrative court proceedings with a large number of participants regarding the speed and economy of the proceedings?

Question No. 2:

If there is a problem with service in administrative court proceedings, where exactly do you see the problem?

Question No. 3:

What is the current court procedure in this respect?

Question No. 4:

Is the current court procedure as stated in question no. 3 regarding the speed and economy of the proceedings sufficient?

Question No. 5:

Are there any suggestions from your side on how to improve the service in administrative court proceedings?

As for the *de lege ferenda* proposals, these represent the findings identified after the answers to the posed questions were obtained. In order to formulate the *de lege ferenda* proposals, it was first necessary to evaluate all the responses, and then to compare these answers with each other and also with the requirements of the rule of law. This was necessary as some of the proposals for improvements might constitute a disproportionate interference with certain fundamental rights and freedoms, which cannot be tolerated. Their evaluation was followed by a focus group discussion.

2 Secondary Aims of the Research

The research is primarily aimed at answering the questions raised and at developing the *de lege ferenda* proposals for the normative regulation of document service of in administrative court proceedings with a large number of participants. However, the significance of the research does not lie solely in fulfilling the abovementioned primary objectives. The authors also aimed to unify the practice of judicial clerks in solving problems associated with serving documents in administrative court proceedings with a high number of participants. However, the broader goal was to increase judges' awareness about problems encountered by judicial clerks, as they are often not perceived by the judges at all, or they do not receive the attention they deserve.

3 Phases and Scientific Methods of the Scientific Process

The authors proceeded in five successive, logically and methodically connected phases, (i.e. data collection, data processing, data analysis, correlation and processing of conclusions). With reference to the theory of Slovak (and historically Czechoslovak) science of administrative law,[3] it is possible to subsume the phases of data collection, processing and analysis under the phase of scientific research defined in theory as the phase of abstraction. The purpose of the abstraction phase is to achieve a comprehensive picture of the general elements, context, features and relationships of individual problems within the subject of research, which in certain conditions keep recurring. The correlation, as a phase of scientific research, represents a form of gradual concretization. The gradual concretization represents a thought-logical process in which particular elements, contexts, aspects and individual problems in the subject of scientific research, recurring only under certain conditions, are considered.

Data collection, as the first phase of the research includes so-called desk research, as well as collecting of the necessary information and data from interviewing the administrative judiciary. Study materials were gathered from the available professional literature, as well as the available and relevant court decisions, which were analysed and compared in the subsequent stages. The main data source were with professionals) working in administrative courts in the Slovak Republic. Personal interviews were conducted with two judges of the Supreme Administrative Court of the Slovak Republic, one judge from a municipal court, four court clerks working at municipal courts and one assistant to the judge of the Supreme Court of the Slovak Republic from the former administrative college. The interviews were subsequently followed by a focus group, in which the addressed court clerks together with the authors discussed the possible *de lege ferenda* proposals on the research topic.

The data processing, (i.e. the second phase of scientific research), was carried out after the completion of data collection on the specific questions posed. In the of data analysis phase analysis and comparison were used as integral methods, whereby the outputs from the expert interviews were compared. In addition, we subjected them to legal interpretation. It is the basic step by which the authors have tried to recognise the idea contained within the legal norm.

Correlation, as the fourth phase was important in order to assess the mutual relations of dependence and conditionality between the individual legal norms of the court service system, especially with regard to the interconnectedness of the Code of Administrative Procedure and the Code of Civil Procedure.[4] At this stage, it was also necessary to assess whether the *de lege ferenda* proposals, as they emerged from the interviews and discussions in the focus group, would be in line with the legislation of the Slovak Republic and the

[3] For more information see: M. Gašpar et al., *Czechoslovak Administrative Law* (Obzor 1973) 30.

[4] Act No. 160/2015 Coll., Civil Procedure Code and on amendments and supplements to other acts (Civil Procedure Code).

European Union as a whole. In this part of the research, general scientific methods, such as abstraction, induction and deduction, and, similar to the previous phase, methods of analysis and synthesis were used. Last but not least, the authors used a historical-logical method in this part of the research, subsequently followed by historical comparison, primarily in relation to the reform of the judicial codes in the Slovak Republic from 2015.

Formulation of research conclusions represents the last part of the research process. In conclusions, the scientific activity of the authors culminates in the fulfilment of the primary research goals, which the authors presented above. In addition to the answers to the posed scientific questions, the conclusions also include a clear formulation of *de lege ferenda* proposals for further normative development in the field of court service of documents. The primary aim of these proposals is to help ensure effective court service of documents while respecting basic human rights and freedoms and also preserving the right to a fair trial.

Thus, the method of analysis and synthesis prevails in the formation of *de lege ferenda* proposal

III Current State of Legislation and Applicational Issues

A reform of the administrative justice system is currently underway in the Slovak Republic, which encompasses the establishment of administrative courts that shall, together with the Supreme Administrative Court of the Slovak Republic, form the courts of the administrative justice system. The system of courts under Article 143(1) of the Constitution of the Slovak Republic will thus be dichotomous and consist of courts of the general judiciary (district courts, including municipal courts, regional courts, the Specialised Criminal Court, the Supreme Court of the Slovak Republic) and courts of the administrative judiciary, which will comprise the three administrative courts and the Supreme Administrative Court. According to the legislator, the administrative judiciary shall thus be institutionally separated from the system of general courts and become a fully autonomous part of the court system. This amendment will complete the process of the independence of the administrative judiciary at the institutional level, which was preceded by the procedural separation of the administrative judiciary from the general judiciary through the adoption of the Code of Administrative Procedure.[5] It may however be stated that this independence will not be absolute, which, for example is also reflected in the legislation on the service of documents, which largely refers to the rules applicable to civil proceedings.

Service of documents is a typical procedural act of the court. Its significance is considerable, both in terms of the consequences that are attached to such an act and the

[5] Explanatory memorandum online: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=508019> accessed 30 December 2022.

commencement of the time-limits that are linked to the moment of serving the document.[6] The success of service of documents has an impact on the smoothness of the proceedings before the administrative court, their speed and, last but not least, also on the substantive decision itself.[7]

The Slovak Code of Administrative Procedure (hereinafter CAP) establishes a number of legal mechanisms aimed at speeding up court proceedings and preventing entities from avoiding being served with court documents.

The authors set out to assess whether the aforementioned mechanisms are sufficient and whether there are any major obstacles within the process of serving documents in the practice of administrative courts that would cause delays in the proceedings. It is particularly important to note that the authors' research focused primarily on the service of the action - the first act of the court in proceedings with a large number of parties. In order to be able to draw conclusions based on the research carried out, it is necessary to know the manner of serving documents by the administrative courts in Slovakia.

In the regulating the service of documents in the CAP, the legislator limited itself to a relatively austere set of rules, included in the provisions of sections 72 to 75 of the CAP on the grounds that the institution of serving documents in the practice of administrative courts has not caused serious problems thus far, and therefore, in section 72(3), refers to the service of documents under the Code of Civil Procedure (hereinafter CCP).[8] Moreover, the provision of section 25, which provides for the subsidiarity of the CCP in matters of the service of documents, also applies, and ,if the issue is not even regulated in the CCP, the court shall proceed pursuant to the basic procedural principles, so that the purpose of administrative justice is fulfilled.[9]

The CAP, in conjunction with the legislation in the CCP, thus provides for the service of documents in the following order:

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[6] Supreme Court of the Slovak Republic, Case No 5Cdo 179/2010: 'The legislation on service of documents in civil proceedings has a very important function. The court may act and decide only if it is duly proven that the parties have received all documents, the receipt and knowledge of which is a prerequisite for further proceedings, the use of remedies, means of procedural defence and protection and other acts which may only be performed within the time limit prescribed by law or by the court. In particular, the service of court decisions on the merits is a prerequisite for the valid closing of the case and, where applicable, for the enforceability of the court decision (if the decision is enforceable irrespective of its validity). Service of documents affects the examination of the procedural conditions of the main proceedings, the appeal proceedings and the proceedings on extraordinary appeals. The legislation on service of documents therefore fully respects the interests of the parties and the need for them to be fully and effectively informed by means of that procedural act. Failure to serve a document correctly, in accordance with the rules governing such act, directly results in a defect, the illegality of service of documents, which has serious procedural effects; if the decision is defective or if the court omits to serve it at all, the decision cannot become valid.'

[7] J. Baricová, M. Fečík, M. Števček, A. Filová et al. in J. Baricová, A. Kotrecová, K. Gešková et al. (eds), *Správny súdny poriadok. Komentár* (1st edn, C.H. Beck 2017, Bratislava) 439–459.

[8] Ibid.

[9] Ibid, 202–205.

1. by the administrative court at a hearing or during a different act,

2. to an electronic mailbox pursuant to special regulation,[10]

3. service to an electronic address at the request of a party to the proceedings, unless these are documents to be served to an own hand,

4. service of documents via a service authority at an address pursuant to section 106 of the CCP in conjunction with section 72(3) of CAP, or service by a special service authority where the statutory conditions pursuant to section 107(2) of the CCP in conjunction with section 72(3) of the CAP are fulfilled cumulatively.[11]

In view of the fact that the first three delivery options assume active participation by the subject, or a participant with an activated data box for the delivery of public administration documents, no delays are foreseen for these options. However, serving documents to a party who is a natural person by means of a service authority appears to be problematic.[12]

1 Service of the Statement of Claim to a Natural Person

The statement of claim shall be served to the own hand of all the parties to the proceedings. Section 116 of the CCP provides for a special procedure of service of a document to a natural person when it concerns serving of a statement of claim action brought against that natural person, on the grounds that this is the most important procedural act of the court with the most significant consequences for the individual.

This procedure was introduced into the legislation to reflect the constant case law of the Court of Justice of the European Union (CJEU),[13] which in principle permits service by notice, subject to the due diligence required by the principles of diligence and good faith to ascertain the defendant's whereabouts.[14] This represents a major change from the previous legislation.

The action shall be served to the defendant who is a natural person, either to the address given by the plaintiff in the action or to the address registered in the Register of Residents of the Slovak Republic (or to the address of the foreigner's place of residence in the territory of the Slovak Republic). If the plaintiff states the defendant's address directly in the action, it is recommended that the address indicated by the plaintiff id be respected, as it may be assumed that the plaintiff is aware of the defendant's place of residence. If the service of the action fails pursuant to the aforementioned principle, the court is obliged to serve the action to the address registered in the Register of Residents of the Slovak Republic

[10] Act no. 305/2013 Coll. on Electronic Form of Governance Conducted by Public Authorities and on amendments and supplements to other acts (e-Government Act).

[11] Baricová, Fečik, Števček, Filová et al. (n 7) 439–459.

[12] Service of documents to legal entities is conducted by depositing of the document to an electronic data box, activation of which is obligatory for the legal entities.

[13] Explanatory memorandum online: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=508019> accessed 30 December 2022.

[14] Case C-292/10 *G v Cornelius de Visser,* EU:C:2012:142.

(or to the address of the foreigner's place of residence in the territory of the Slovak Republic). If this procedure also fails in serving the action, the court shall be obliged to carry out investigative actions in order to establish the defendant's actual residence, in which case the fiction of service does not apply. Such investigative actions involve enquiries to the Social Insurance Agency, the tax office, the municipality, the institution for the enforcement of a prison sentence, etc. The legislator has not laid down an exhaustive list of acts that the court is obliged to carry out in the proceedings; however, according to court case-law, neglecting this obligation leads to a violation of the right to a fair trial.[15]

The further course of action will depend on the outcome of the investigations as mentioned above. In the event that the court succeeds in establishing the defendant's actual residence, any further documents shall be served to the defendant at the address corresponding to the actual residence thus established. Only subsequently, if the court does not establish the defendant's actual residence, may the statement of claim be served to the given person by publishing a notice on the action on the official notice board of the court and on its website. The fiction of service of the statement of claim[16] shall become effective after the expiry of a 15-day period from the publication of such notice.

All further documents are subsequently served by the court to the address listed in the Register of Residents of the Slovak Republic or to the address of the foreigner's place of residence in the territory of the Slovak Republic, depending on the type of the foreigner's residence, with the consequence of the fiction of service.[17] This rule applies due to the fact that the service of documents under the CCP was designed in a light of the fact that everyone is obliged to guard their residence. However, it also applies that incorporating a stricter regime of service of documents into the CCP should apply first and foremost if the defendant already has knowledge of the dispute.

> If a party is aware of the ongoing court proceedings, it can arrange its matters concerning service of documents in a way so as to avoid possible complications (notifying the court of the email

[15] Resolution of the Supreme Court of the Slovak Republic from 17. July 2019 case no. 7Cdo 51/2019.

[16] Constitutional Court of the Slovak Republic case no I. ÚS 190/07: 'In the case of substituted service of documents, the abovementioned provision constructs a legal fiction that the effects of service of documents occur *ex lege* after the expiry of a specified period of time, even against the person who did not actually receive the document. A legal fiction is a legal-technical procedure by which a situation is deemed to exist which is manifestly contrary to reality and which permits different legal consequences to be drawn from it than those that would flow from a mere statement of fact. The purpose of fiction in law is to enhance legal certainty. Legal fiction, as an instrument of the rejection of reality by law, is an exceptional instrument, strictly intended for the fulfilment of one of the main constitutional postulates of the legal order under the rule of law. In order for a legal fiction to fulfil its purpose (to achieve legal certainty), it must respect all the requirements that the law associates with it. If all the legal requirements are not met, the court is not entitled to find that the fiction has been fulfilled (see Article 2(2) of the Constitution, according to which State power may be exercised only in the cases and within the limits laid down by law).'

[17] R. Smyčková, M. Števček, M. Tomašovič, A. Kotrecová et al., *Civilný mimosporový poriadok. Komentár* (1st edn, C. H. Beck 2017, Bratislava) 419–421.

> address, appointing an attorney, etc.); whereas the plaintiff is always aware of the ongoing court proceedings, the defendant only becomes aware of them after the service of the statement of claim to him or her. Therefore, it must apply that the defendant shall be served the documents properly once, namely the statement of claim, and thereafter the responsibility for receiving documents rests on the side of the parties to the dispute.[18]

The above procedure may present itself as quite clear and unambiguous. It may seem that the service of documents in administrative court proceedings do not pose any serious problems, since the CAP refers to the rather elaborate legislation on service of documents laid down for civil proceedings by the CCP. However, some administrative proceedings and subsequent administrative court proceedings involve a large number of participants, in some cases numbering in the hundreds. Did the legislator also have the abovementioned specific of administrative proceedings in mind? Is the above procedure for service to a natural person also sufficient in those cases with a large number of participants, whose addresses are often unknown or insufficiently or incorrectly marked? To what extent should the administrative courts carry out investigative measures to establish the actual address of a party in order to preserve the principle of the economy of proceedings at the same time?

Pursuant to section 31 of the CAP, the statement of claim must be served to each party's own hand. The participants to administrative court proceedings are also participants in the administrative proceedings.[19]

The theory stipulates that there is an exception to the obligation of the administrative court to serve the administrative statement of claim to those participants that are viewed as additional participants under section 32(3)(a) if these parties are not readily ascertainable from the filed statement of claim, decision or measure contested in the action or from the administrative file. This will be the case, in particular, where, in the administrative procedure, the decision or measure challenged in the action was served to the participants by means of a public notice (section 26 of the Act on Administrative Proceedings[20]). In such a case, the administrative court should, by analogy, apply section 32(3) a) and section 75 to the service to such additional participants to the proceedings, in accordance with the second sentence of section 25, and conduct the service by publication on the official notice board of the administrative court or on the website of the administrative court concerned.

However, this exception does not directly derive from the current legislation and thus causes a divergence of practice as to which participants the court should carry out the investigative acts and in relation to which participants it should not. Moreover, the aforementioned seems to be in contradiction with section 116 of the CCP, which does not

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[18] Regional Court of the Slovak Republic no 7Cdo 51/2019.

[19] Section 32 (3) (a) of the Administrative Procedure Code.

[20] Act No. 71/1967 Coll., Act on Administrative Proceedings and on amendments and supplements to other acts (Act on Administrative Proceedings).

provide for an exception to the group of natural persons for whom the investigation of the actual address for service of the action does not have to be carried out.

In terms of the impact on subjective rights and obligations, the defendant in civil court proceedings may be identified with the additional party to the administrative court proceedings under section 32(3)(a), who is a natural person and to whom the decision challenged by the action or measure of the public authority would establish or declare rights and obligations.[21]

The authors agree with this view, as the obligation to carry out an investigation of the actual address was derived from the case law of the CJEU in civil and commercial matters, where the decision generally establishes rights and obligations for all participants in the proceedings. In administrative proceedings, the range of participants is often wider and the decision often establishes or declares rights and obligations for only a portion of them.

In this case, service to an own hand pursuant to section 116 of the Civil Procedure Code shall not be controversial with regard to the natural person who is the addressee of the decision challenged by the action or measure of the public authority, (i.e. whose rights or obligations have been directly established or declared by the decision or measure) e.g. a builder in a general administrative action brought by a participant in construction proceedings against a building permit.[22] Thus, the unknown other participants to the proceedings in relation to whom the decision does not establish or declare rights and obligations, but the law requires service of the statement of claim into their own hands, e.g. owners of neighbouring land to the building in construction proceedings, become problematic.

IV Conclusions for Primary Aims

From the answers to Question No. 1, the authors conclude that there is a problem with the service of statements of claim at the courts of first instance regarding the speed and economy of the proceedings. It is caused by the adoption of a new legal regulation in the CAP. The aforementioned problem was not identified in the courts of second instance precisely because it is a relatively new legal arrangement, as well as because, in a large number of cases, the problem with the service of documents is already solved by the court of the first instance. Courts of second instance subsequently serve documents in the same manner as the court of first instance.

Regarding Question No. 2, the authors identified a problem with the service of the statement of claim to participants who were not properly identified in the administrative proceedings, or to whom it was served by public decree.

[21] Baricová, Fečik, Števček, Filová et al. (n 7) 224–232.
[22] Baricová, Fečik, Števček, Filová et al. (n 7) 224–232.

Based on the responses to Question No. 3, it may be stated, that when choosing the service procedure, the respondents' approaches of are very individual. In this respect, the workload of court clerks is often considered. In principle, they use the investigative actions so that the documents can be served correctly. Such a process already causes delays at the beginning of the court proceedings. Application of the procedure recommended by the theory (i.e. delivery by notice of the court on the official notice board, if delivery was made by public decree within the administrative procedure without further investigative actions) is only applied by the court clerks as a last option. In order to achieve more reliable research results, the authors conducted further research through an in-depth search of the database of court decisions and identified the use of the given recommended procedure in one case only. It was resolved by the Regional Court of Banská Bystrica Case No. 23S/107/2017 dated 12/07/2018. Even in this case, it is not clear whether the public decree was used to deliver the lawsuit or only to announce the date of the hearing. In no other case, after analysing the relevant results from the available sources, was this procedure used.[23]

When answering Question No. 4 and Question No. 5, respondents do not consider the current legislation to be sufficient, with which the authors, after completing their research, agree. Hence, the authors also propose several improvements to the legislation. Some proposals of court clerks, even *de lege ferenda* proposals, could not be adopted by the authors. This is because, based on their own analysis of the given problem and a discussion in a focus group, the authors and the respondents concluded that the problem leads to a violation of the right to a fair trial.

In our opinion, the procedure, partially proposed by the theory, seems to be the most probable and correct procedure. According to this, the courts shall serve the statement of claim only to the participants in relation to whom the rights or obligations in the administrative proceedings were directly constituted or declared. In the case of these participants, the administrative court shall also be obliged to perform investigative actions to establish the real address for serving a statement of claim. On the other hand, participants whose rights or obligations were not directly constituted or declared in the administrative proceedings shall be served by the notification without further examination in the event that they were served by public decree in the administrative proceedings. However, this proposal requires an amendment to the Slovak legislation, since the legislator, when adopting the CAP, took over the legal regulation of service in civil proceedings without considering the specifics of administrative proceedings and administrative court proceedings. In the opinion of the authors, the given solution is balanced from the point of view of the speed and economy of the proceedings as well as from the point of view of diligence and good faith when ascertaining the actual address of the participant required by the CJEU.

[23] The state database of general court decisions available online at <www.slov-lex.sk> was used.

V Conclusions for Secondary Aims

Regarding the secondary aims, we believe that society should first debate the application issues. This should shall take place within the professional public, who deal with this problem in everyday practice. After the hearing their experience, having discussions and adopting conclusions based on them, a qualitative amendment to the legislation can be proposed, which will be stable and will be based on the opinions and experience of the experts.

It is essential that the approach of administrative courts is uniform when solving the given application problems, in order to ensure the continuity of decision-making practice and to prevent surprising decisions and legal uncertainty. At the same time, it is necessary for the Supreme Administrative Court to supervise this uniformity.

> In the context of supervising the continuity of court proceedings, administrative supervision must be aimed primarily at ensuring the unification of decision-making practice, so as to avoid unjustified differences and discrepancies. Judicial case-law must be stable and must treat similar cases in the same way and dissimilar cases differently.[24]

Also considering that, on the basis of our research, a contradiction was found between the opinions of judges and court clerks, we conclude that judges in the Supreme Administrative Court do not have any knowledge of the given problem. We consider it necessary that the discussions on this topic shall take place and be lively.

[24] M. Horvat, M. Radosa, 'Considerations on the supervision exercised over courts and judges' in Wojciech Piątek (ed), Supervision over Courts and Judges. Insights into Selected Legal Systems. Dia-Logos, Vol 30. (P. Lang 2021, Berlin) 95.