

SETTING UP THE LEGISLATIVE FRAMEWORK FOR THE INTRODUCTION OF A REGULATORY SANDBOX: THE CZECH PERSPECTIVE¹

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Abstract: This paper delves into the intricate intersection of the phenomenon of regulatory sandboxes and public law and focuses on the issue of legislative empowerment for the establishment of a regulatory sandbox. Based on the example of the Czech Republic, which lacks a fully operational regulatory sandbox, the study investigates the legislative prerequisites for initiating such a framework. Using the qualitative doctrinal research, the authors examine diverse conceptual frameworks, aiming to identify the optimal legislative approach for implementing and sustaining a regulatory sandbox. Notably, the study scrutinizes the viability of constructing a regulatory sandbox under general administrative empowerment clauses within the Czech legal context, considering the principles of legality and *intra vires* doctrine inherent in continental administrative law. The research contributes insights to the ongoing discourse on regulatory sandboxes, providing a nuanced understanding of the legislative prerequisites for their operation, with a focus on the specific challenges and opportunities within the Czech regulatory landscape.

Keywords: regulatory sandboxes; experimental lawmaking; legislative requirements; empowerment provisions; enabling clauses; statutory mandate; financial law; energy law; fintech; Innovation

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INTRODUCTION

There is, most certainly, more than just one way to define a regulatory sandbox. As a matter of example, the Council of the European Union defines regulatory sandboxes as concrete frameworks which, by providing a structured context for

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experimentation, enable where appropriate in a real-world environment the testing of innovative technologies, products, services or approaches for a limited time and in a limited part of a sector or area under regulatory supervision ensuring that appropriate safeguards are in place.⁴ In other words, regulatory sandboxes serve the purpose of helping both the regulators and the participants to learn about the opportunities and risks that a particular innovation carries, and to subsequently develop the right regulatory environment to accommodate it.⁵ When pondering about the status of regulatory sandboxing in public law (or any other area of law, for that matter), it is rather hard to overlook the fact that sandboxes lie as much outside the realm of jurisprudence and law in its formal sense as they do inside those disciplines.

Having said that, it is safe to state that regulatory sandboxes are in many aspects inclined to become more of a technical solution than a legal (or legislative) one,⁶ with the core of their nature hiding in administrative practices rather than laws. On the other hand, however, it is clear that the establishment and proper functioning of a regulatory sandbox requires legislation allowing the purpose of a sandbox to be fulfilled. When it comes to technical implementation of a regulatory sandbox, several noteworthy manual-like publications have been written,⁷ meanwhile the preparatory phase of such implementation devoted to the creation of an opt legislative environment still remains somewhat concealed behind the veil of mystery.⁸

While the Czech Republic does not have a fully operating regulatory sandbox, making it *prima facie* seem as though it has little to contribute to the debate concerning sandboxing, this state of affairs provides us with solid ground for raising a highly relevant question regarding the legislative prerequisites for the introduction of a regulatory sandbox. Would it be possible to establish a regulatory sandbox under the current legislative conditions, should some Czech regulator decide to do so? And in case of a negative answer to the prior question, what legislative solutions could be exploited to compensate for the shortcomings of the present legal framework? Following those questions, this article pursues the objective of (i) ascertaining whether the current legislation

⁴ Regulatory sandboxes and experimentation clauses as tools for better regulation: Council adopts conclusions. In: *European Council: Council of the European Union: Press release* [online]. 16. 11. 2020 [cit. 2024-02-24]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2020/11/16/regulatory-sandboxes-and-experimentation-clauses-as-tools-for-better-regulation-council-adopts-conclusions/>.

⁵ See Federal Ministry for Economic Affairs and Climate Action of the Federative Republic of Germany. Regulatory Sandboxes: Testing Environments for Innovation and Regulation. In: *Bundesministerium für Wirtschaft und Klimaschutz* [online]. September 2022 [cit. 2024-02-24]. Available at: <https://www.bmwk.de/Redaktion/EN/Dossier/regulatory-sandboxes.html>.

⁶ To gain a more high-level understanding of the referred to principles under which regulatory sandboxes operate, see e.g., ALLEN, H. J. Regulatory sandboxes. *George Washington Law Review*. 2019, Vol. 87, No. 3, pp. 579–645; or LIM, B. – LOW, CH. Regulatory sandboxes. In: MADIR, J. (ed.). *FinTech. Law and Regulation*. 2nd ed. Cheltenham: Edward Elgar, 2021, pp. 340–364.

⁷ See e.g., JENÍK, I. – DUFF, S. *How to build a regulatory sandbox: a Practical Guide for Policy Makers*. Washington DC: CGAP, 2020.

⁸ Prior to exploring this specific topic in greater detail, the authors undertook a scientometrical assessment of the four core databases in the field of legal science, namely Scopus, Web of Science, JSTOR, and Hein Online. Based on the search and analysis of relevant sources covering the topic of regulatory sandboxes, the authors identified a research gap in the existing literature with regard to the question of legislative framework for the establishment of a regulatory sandbox. For the reasons specified afore, the authors then decided to base their research on the example of the Czech public law regulation.

in the Czech Republic provides a sufficient basis for the establishment of a regulatory sandbox, and (ii) indicating, from a high-level perspective, possible approaches to framework regulation of sandboxing.

For the sake of meeting the objective outlined afore, the authors exploited the following methodology. Firstly, the authors establish the general conditions that must be met in order for the action of the administrative authority to be considered *intra vires*. With those conditions kept firmly in mind, the authors then explore the relevant legislation, identify the applicable empowerment clauses contained in that legislation, and subject those clauses to analysis in order to establish their material scope. The analysis *per se* is undertaken predominantly via systematic research and through the available literature and case law. Hence, using the Czech legislation as an example, the authors determine whether a regulatory sandbox can be legally built upon general administrative empowerment clauses (also referred to as delegation clauses, enabling clauses or statutory mandates), especially in light of the principle of legality and the *intra vires* doctrine traditionally abided and adhered to in the continental administrative law. Secondly, the authors identify possible models of creating a legislative basis for regulatory sandboxes by analysing the specifics of this phenomenon. The authors explore various conceptual setups, ascertaining the optimal legislative solution for the introduction and operation of a regulatory sandbox. Provided that this topic has not been sufficiently explored in the existing literature and due to the fact that this article does not, by any means, aim to provide comprehensive and detailed overview of all legislative approaches, the authors take the liberty of making their suggestion using partial comparative research and doctrinal analysis.

INTRA VIRES AND ULTRA VIRES ACTIONS OF ADMINISTRATIVE AUTHORITIES

Prior to dwelling upon the issue of regulatory sandboxes *per se*, it is necessary to first expose the context associated with the so-called empowerment clauses, and to elucidate their connection to the establishment of a sandbox. In general terms, the administrative law doctrine operates with the principle of legality implying that administrative authorities ought to only exercise the powers bestowed upon them for the purposes foreseen by the law and only to the extent absolutely necessary to achieve the desired outcome.⁹ In Czech legal theory, this principle is even sometimes referred to as the enumerability of public law titles, meaning that the authority of a state body to act in a certain way needs to be explicitly stipulated by law.¹⁰ In the context of regulatory

⁹ VOPÁLKA, V. – PRÁŠKOVÁ, H. Základní zásady činnosti správních orgánů [Basic principles of the administrative authorities]. In: HENDRYCH, D. et al. *Správní právo: obecná část* [Administrative Law: General Part]. 9th ed. Prague: C. H. Beck, 2016, p. 253.

¹⁰ See also the Resolution of the Constitutional Court of the Czech Republic of 7 September 2010, File No. Pl. ÚS 4/10. The enumerability of public law titles represents the exact opposite of the principle of individual freedom which implies that an individual may act in any way that is not explicitly forbidden by law. Whilst the principle of freedom can be simplified to “what is not forbidden is permitted”, the principle of legality would be “what is not permitted is forbidden”.

sandboxes this principle manifests itself in the need of a provision allowing the regulator (be it any administrative authority regardless of its specific status) to create and operate such sandbox. This, of course, is said without any prejudice to the fact that the proper operation of a sandbox will in many cases require an exception from the normal regime for the participants in such sandbox.¹¹

The aforementioned principle can be extended to the question of regulatory sand-boxing by raising a question whether the creation of a sandbox is an action that can be considered *intra vires* with regard to a specific regulator (i.e., the scope of the authority entrusted to the regulator is wide enough to cover the creation and operation of a regulatory sandbox), or whether such action would overstep the delegated authority, thus making the establishment of a regulatory sandbox *ultra vires*. It must be mentioned, however, that the scope of powers entrusted to a certain administrative authority is usually not obvious from the wording of the law since the empowerment clauses tend to be rather general and vague. Contrary to the ideas described in the legal theory, in practice such provisions are typically not enumerative and do not contain an exhaustive list of narrowly defined powers, thus creating room for (extensive) interpretation. It is commonly known that regulators in many cases engage in activities that are not explicitly stipulated, which nonetheless evokes questions regarding the legality of such conduct.¹²

Provided that empowerment clauses are in many cases vague, it is necessary to make them subject to legal interpretation in order to establish their applicational scope. The approach towards the interpretation depends upon the nature of the individual clause, meaning that different tests can be applied in relation to different clauses (e.g., clauses enabling a certain authority to issue an implementing subordinate legal act, as opposed to clauses enabling to exercise the delegated authority in individual cases by means of administrative activity).¹³ For instance, when it comes to empowerment to issue a legislative act (i.e., a legal regulation, for these purposes regardless of its specific hierarchical status), the general principle promoted *inter alia* by the Czech Constitutional Court demands that the empowerment be “*so precise and specific as to their scope, content and purpose that a ministry or other administrative body is not able to deviate from the legal limits and thus exercise its own (political) will*”.¹⁴

While the cited decision is *stricto sensu* (obviously) linked to lawmaking, a more general interpretational principle that can be derived from this theory. Firstly, as is quite aptly pointed out by the authors of the handbook “Legislative Procedure”, the scope of an empowerment clause cannot be ascertained from its text alone, but should instead be

¹¹ See e.g., KNIGHT, B. – MITCHELL, T. *The Sandbox Paradox*. CSAS Working Paper 19–36. George Mason University, Antonin Scalia Law School, 2019, pp. 9–10.

¹² See also VOJTĚCH, J. Několik poznámek k doporučením ČNB úvěrovým institucím v oblasti hypotečního trhu a jejich právní povaze [Some comments on the CNB’s recommendations to lending institutions in the mortgage market and their legal nature]. *Obchodněprávní revue* [Business Law Review]. 2017, Vol. 9, No. 4, pp. 104–107.

¹³ Clauses empowering to issue legislation have repeatedly been subject to constitutional review, see e.g., the Decision of the Constitutional Court of the Czech Republic of 21 June 2000, case No. Pl. ÚS 3/2000; or decisions case No. Pl. ÚS 7/03 or Pl. ÚS 43/13.

¹⁴ See the Decision of the Constitutional Court of the Czech Republic of 9 February 2010, case No. Pl. ÚS 6/07.

derived from its context and the content of the law as a whole.¹⁵ Hence, while it is necessary to first carefully examine the language used in the clause and look for statements that explicitly grant authority or powers to the designated entity, it is then appropriate to go beyond the grammatical interpretation and explore the broader statutory or legal framework in which the empowerment clause is situated, i.e., analyse how the clause aligns with other relevant provisions and whether there are any conflicts or inconsistencies.¹⁶ Further, the legislative intent and purpose behind the delegation can provide valuable context. Secondly, it is also vital to examine the overall purpose and objectives of the law containing the empowerment clause, since understanding the goals intended to be achieved by the delegation can shed light on the intended interpretation of the clause. In other words, the power delegated to the authority should directly contribute to the fulfilment of its purpose.

In many cases, the wording of the law is quite straightforward and is thus more than sufficient to determine the scope of the empowerment. That is mostly the case with the laws where the legislative technique used by the lawmaker operates with a number of micro-delegations placed in different parts of the law and connected with other relevant provisions. From the viewpoint of the *intra vires* doctrine, this legislative approach is more restrained and provides little to no room for extensive interpretation. However, the scope of powers delegated to a certain authority can also be expressed very broadly, following the high-level objectives of such authority.¹⁷ In these cases, blindly following the principles outlined above could lead to some sort of a “the end justifies the means” approach (for the lack of a better idiom), as it would be possible to justify a very wide variety of actions as long as such actions contribute, in one way or another, to achieving of the goals outlined by the law. It comes as no surprise that the current approach to the interpretation of vague provisions is quite the opposite, with the Czech Constitutional Court repeatedly calling for restrictive interpretation of empowerment clauses.¹⁸ In the context of regulatory sandboxing this reserved approach could be applied in a manner implying that unless the establishment and operation of a regulatory sandbox is absolutely necessary to achieve the objectives set for the regulator.

In order to determine the possibility of the introduction of a sandbox in the Czech Republic, it is hence necessary to explore the scope of the empowerment clauses contained in the currently applicable laws. For the purposes of this analysis, two laws

¹⁵ See VOPÁLKA, V. – MLSNA, P. *Zákonné zmocnění* [Statutory mandate]. In: BOHÁČ, R. et al. *Legislativní proces: teorie a praxe* [Legislative process: theory and practice]. Prague: Ministry of Interior of the Czech Republic, 2011, p. 120.

¹⁶ The authors of Legislative Procedure most probably refer to systematic interpretation in its traditional sense, see e.g., PADJEN, I. L. Systematic Interpretation and the Re-systematization of Law: the Problem, Co-requisites, a Solution, Use. *International Journal for the Semiotics of Law*. 2020, Vol. 33, pp. 192–194.

¹⁷ In some cases, the lawmakers also use the combination of both approaches, with a relatively broad general clause outlining the core competence of the authority, and a series of partial empowerment clauses delegating concrete powers. In such case, it is not also entirely clear how the relationship between those two types of clauses should be interpreted and whether the general empowerment clause can extend the scope of partial clauses, i.e., go beyond micro-delegations and allow the regulator to also act in cases not explicitly foreseen by law.

¹⁸ Beyond the already mentioned, see also the Decision of the Constitutional Court of the Czech Republic of 9 February 2016, case No. Pl. ÚS 17/15.

(applicable to two corresponding regulators) were selected based upon their relevance to the issue of regulatory sandboxing. Since the first formalised attempt to create a regulatory sandbox was undertaken in the area of energy law, this sector was chosen as the first subject of scrutiny. The second selected area is, quite unsurprisingly, the area of banking and financial law, where the authority of the Czech National Bank will be ascertained.

LEGAL FRAMEWORK IN THE CZECH ENERGY LAW

The energy law regulation in the Czech Republic generally focuses on maintaining a stable and secure energy infrastructure, whereas its main objectives are ensuring the reliability of energy sources, protecting consumers, and preventing disruptions to the supply chain. It is one of the sectors in which the pursuit of stability and safety often takes precedence over fostering an environment conducive to experimentation. Also, within the Czech energy market, the participants operate within a highly regulated framework, primarily governed by the Act No. 458/2000 Sb., on business conditions and the exercise of state administration in the energy sectors and on amendments to certain acts (*Energy Act*) and related subordinate legislation.

The elemental provisions of the Energy Act define the energy sectors regulated by the Energy Act, which are the electricity, gas, and heating industries. Further, the Energy Act regulates the exercise of state administration in energy sectors, the rights and obligations of persons related thereto, and it lists the activities that constitute entrepreneurship in these sectors.¹⁹ The key aspects of the energy sector's legal regulation are permitting, licensing and price regulation.²⁰

To legally commence business in the latter activities, the participants must go through a comprehensive licensing process to obtain a relevant license. The licensing process serves as a regulatory mechanism to ensure that participants adhere to predetermined standards, safety protocols, and compliance measures. Price regulation, on the other hand, is directed at entities operating in part of the energy sector where, for various reasons, no effective competition exists. It prevents these entities from charging excessive and socially inappropriate prices, but at the same time, it shall ensure the effective operation of these participants. When carrying out business activities in the energy sector, the entrepreneur must always comply with all the obligations stipulated by the Energy Act. This does not only establish a legal framework for accountability, but it also aims to uphold the reliability and security of the energy infrastructure. Non-compliance with the obligation to obtain the prescribed license or failure to comply with the obligations set out in the Energy Act for the license holder carry significant legal consequences. As a result of such a breach, the entrepreneur faces the risk of penalties and possibly revocation of the license that it holds under the Energy Act. In this way, the regulation of

¹⁹ These are the production of electricity, the transmission of electricity, the distribution of electricity and trade in electricity, market operator activities, the production of gas, transportation of gas, distribution of gas, storage of gas and trade in gas, production of thermal energy, and distribution of thermal energy and intermediary activities.

²⁰ Energy Act, Section 17.

permitting and licensing serves as a barrier to market entry, and price regulation serves as an instrument to regulate the consequences of these barriers.

Within the Czech technological market, innovation within the energy sector is supported by different programs, for example, the Programme to Support Applied Research, Experimental Development and Innovation THĚTA.²¹ It is also acknowledged that legal frameworks that enable testing and demonstration projects are a vital way for innovators to demonstrate the viability and safety of their technologies before widespread deployment. For this purpose, the regulatory sandboxes can emphasize areas where regulation needs to change and recognize gaps where new regulation is required.²²

As for the empowerment provisions, the Energy Act contains both the general establishment and delegation clause (stipulating that the Energy Regulatory Authority is a regulatory authority in the field of energy),²³ as well as a number of partial imperative and empowerment clauses providing relatively concrete and detailed actions that ought to be undertaken by the regulator. While the presence of micro-delegations *per se* does not necessarily imply that such an empowerment clause would be required for each minor activity that ought to be undertaken by the Energy Regulatory Authority, in this particular case it is rather clear that establishment of a regulatory sandbox falls outside of the scope of authority foreseen by the legislature. Given the manner in which the Energy Act enlists various powers and duties of the Energy Regulatory Authority, the empowerment to launch a regulatory sandbox could hardly be derived from the general clauses via interpretation. The systematics of the law suggests that the lawmaker would most probably specify such power, had they decided to allow such action, while the opposite interpretation (i.e., derivation of such power from the general clauses whilst at the same time the specification of other powers is substantially more detailed) would go against the spirit of the law. The fact that the legislature would go with explicit empowerment, should they decide to allow for a sandbox to be launched, also follows from the fact that such proposal was in fact on the table (see further).

Since the Energy Act does not contain any provision allowing exemption from the imposed obligation, nor does it allow the government or the Energy Regulatory Authority to grant the exemption, the authors argue that the current wording of the law does not allow for a regulatory sandbox to be launched, not even by means of extensive interpretation. There are, however, countries such as Great Britain or the Netherlands in which granting a new mandate to the national regulator is not required in order for them to create a sandbox, and thus, new legislation does not have to be adopted for this purpose.²⁴ However,

²¹ See Inovace – výzva I. OPTAK [Innovation – Call I. OPTAK]. In: *Ministry of Industry and Trade* [online]. 15. 8. 2022 [cit. 2023-12-27]. Available at: https://www.mpo.cz/podnikani/dotace-a-podpora-podnikani/inovace_-_vyzva-i--op-tak--269229/.

²² Energy Transition Expertise Centre. Study on Regulatory Sandboxes in the Energy Sector: Final Report [online]. Publications Office of the European Union, 2023 [cit. 2023-12-25]. Available at: https://op.europa.eu/en/publication-detail/-/publication/86c18e4c-1ecb-11ee-806b-01aa75ed71a1/language-en?WT_mc_id=Searchresult&WT_ria_c=37085&WT_ria_f=3608&WT_ria_ev=search&WT_URL=https%3A//energy.ec.europa.eu/.

²³ See Sec. 17 para 1 of the Energy Act.

²⁴ Council of European Energy Regulators. CEER Paper on Regulatory Sandboxes in Incentive Regulation: Distribution Systems Group [online]. 25. 5. 2022 [cit. 2023-12-23]. Available at: <https://www.ceer.eu/documents/104400/-/-/72eab87d-9220-e227-1d26-557a63409c6b>.

this is not the case in the Czech Republic where, without the creation of a new mandate to derogate from specific provisions, the regulator or other authorities in the Czech Republic are not allowed to do that, and consequently also, the participants in the energy market cannot deviate from the established legal rules.

It is to be noted that the Energy Act also defines activities that fulfil the definition of business in the energy sector, but for some reason, a license for them is not required (in particular with regard to the range of activities carried out). These cannot be viewed as exemptions from the current legal framework in the sense of regulatory sandboxes or encouragement to innovate. The exclusion of these activities from the requirement to hold a license under the Energy Act is resulting, for example, from the fact that these activities do not affect the existing network on a larger scale or it was made as a political decision, as in the case of the use of electricity in the operation of a charging station pursuant to Act No. 311/2006 Sb., on fuels and fuel filling stations and amendments to certain related acts (the Fuels Act).²⁵ As exemptions are not allowed, all new technologies requiring the change of existing rules can be used in daily operations only after the relevant legal regulations are changed to allow them.

As regard to the exemption from the current regulatory requirements, the first attempt to include such a provision in the Energy Act was made by the Ministry of Industry and Trade in February of 2023.²⁶ This amendment proposal included provisions regulating so-called “*pilot projects*”. According to the amendment proposal, the approval to run the pilot project was supposed to be granted by the Energy Regulatory Authority upon the evaluation of the application, whereas the applicant was supposed to provide, among others, information on the conditions for the operation of the pilot project, including the scope of exemptions from statutory obligations.²⁷ As the provision did not set limits for the subject or scope of the pilot projects, the final decision was supposed to be left to the Energy Regulatory Authority as the national regulator. The possibility of carrying out a pilot project would be open only to holders of the license granted under the Energy Act upon prior approval of the Energy Regulatory Office granted on a case-to-case basis.

Despite the global trend of embracing regulatory sandboxes as catalysts for innovation, in June of 2023, the government decided to remove the provision on the regulatory sandboxes from the draft amendment to the Energy Act without any sound explanation.²⁸ Thus, for now, it is unclear whether the wording of the provision will be followed in the future and whether the adoption of this provision can be expected or if it was judged by the government to be unacceptable.

²⁵ MED, J. Podnikání v energetických odvětvích [Business in the energy sectors]. In: ZDVIHAL, Z. – SVĚŘÁKOVÁ, J. – MED, J. – OSADSKÁ, J. et al. *Energetický zákon* [Energy Act]. Prague: C. H. Beck, 2020, p. 130.

²⁶ See Sec. 21 et seq. of the Draft Act amending the Act No. 458/2000 Sb., on business conditions and the exercise of state administration in the energy sectors and on amendments to certain acts (Energy Act), as amended, and Act No. 406/2000 Sb., on energy management, as amended, file No. MPO 98819/22/41100/01000, version as of 27 February 2023.

²⁷ Ibid.

²⁸ See Reviewed Draft Act amending the Act No. 458/2000 Sb., on business conditions and the exercise of state administration in the energy sectors and on amendments to certain acts (Energy Act), as amended, and Act No. 406/2000 Sb., on energy management, as amended, file No. MPO 98819/22/41100/01000, version as of 14 June 2023 et seq. versions.

The advantage of the proposed provision was the fact that it was not limited to concrete technology, and thus, its application would be widespread regardless of future development, which could cause concrete provisions focusing on a specific technology to become redundant. The actual impact of the regulatory sandboxes would be for the innovators to examine the new technologies faster and do more proper examination before their widespread use. Secondly, it could speed up the legislative process as the public authorities would be familiar with the new technology and at the time the legislative process is running, the technology would be already tested.

When it comes to the necessity of a special empowerment clause allowing the Energy Regulatory Authority (or the Czech government) to deviate from the standard legal regime, the fact that such a solution was on the table probably speaks for itself. Would it not be imperative to adopt an amendment to the Energy Act, the only explanation for such step would be that the amendment is of a purely legislatively-technical nature,²⁹ which however would have been stated in the explanatory memorandum. At the same time, the current wording of the empowering provisions does not leave any room for an interpretation allowing the establishment of a regulatory sandbox.

LEGAL FRAMEWORK IN THE CZECH FINANCIAL LAW

The authority to carry out regulatory supervision *vis-à-vis* the financial sector in the Czech Republic is granted to the Czech National Bank.³⁰ In comparison with the Energy Regulatory Authority, the Czech National Bank has a special law governing its operation, which describes the main responsibility of the regulator as ensuring the price stability.³¹ This constitutes a kind of a first layer of delegation contained in the law. The second layer specifies the individual instruments that the Czech National Bank ought to use to fulfil its duties, such as determination and implementation of monetary policy, regulation of the circulation of money, the payment system and the settlement of bank accounts, or the issuance of banknotes and coins.³² This clause also contains the provision empowering the Czech National Bank to “*supervise the actors on the financial market*” (within the meaning of Section 44 (1) of the Czech National Bank Act).³³ Finally, the third lawyer consists of a number of micro-delegation clauses, similar in their nature to those contained in the Energy Act.

While in case of the Energy Act the need for explicit delegation via a special clause was rather straightforward (especially considering the fact that there was a legislative attempt to adopt such a clause), the system of empowerment clauses contained in the Czech National Bank Act appears to provide more flexibility. It must be noted that in case of the Czech National Bank Act, the relationship between different layers of

²⁹ For example, such amendment is imaginable in cases when the previous wording of the law was not clear enough and gave ground for uncertainty about its meaning. A new wording could be thus adopted for the sake of clarification of an already existing regulation.

³⁰ See Sec. 1(1) of the Act No. 6/1993 Sb., on the Czech National Bank (Czech National Bank Act).

³¹ Sec. 2(1) of the Czech National Bank Act.

³² See Sec. 2(2) *ibid.*

³³ See Sec. 2(2)(d) *ibid.*

clauses is clearer, as the first layer is directly expanded and specified by the second layer, while the second layer provides for a residual category of empowerment clauses.³⁴ This assumption is also supported by the fact that the Czech National Bank is demonstrably engaging in activities that are not explicitly foreseen by the law, such as issuing of supervisory benchmarks and providing official legal opinions on various matters.³⁵ Despite the fact that presented activities are indeed carried out outside the scope of the legislative regime, this example might not be helpful in relation to regulatory sandboxes, since one of the main characteristics of the said activities is that none of those documents are legally binding. At the same time, those documents must comply with the law and abide its boundaries, since there is no legislative exception granted.

Following the aforementioned, it is necessary to distinguish two situations. When no exception from the legislative regime is needed and all activities are exercised within the boundaries of the existing law, it is imaginable that such setup could be implemented based on the existing empowerment clauses. However, when it is necessary to grant an exception from legal regulations, such exception cannot be granted without explicit delegation of such authority. In this regard, the authors of the Legislative Procedure point out that, *“in very exceptional cases, it is permissible for legislation at the statutory level to empower an authority to grant exemptions from the law. Any exemptions from the law for specific recipients are undesirable, so such provisions should be kept to an absolute minimum in legislation and their existence should be duly justified”*.³⁶ Hence, while it could be technically possible for the Czech National Bank to establish a regulatory sandbox via the extensive interpretation of the empowerment provisions of the Czech National Bank Act, such sandbox would fail to provide its participants with any sort of regulatory reliefs since the regulator is not empowered to grant any exceptions from the law.

Since the Czech legal system does not provide the explicit legal basis for the existence of a regulatory sandbox in the financial market, although the establishment of a regulatory sandbox could be beneficial for the Czech FinTech environment as it could, for example, allow new market players access the existing market, it is currently impossible to establish a fully functioning FinTech sandbox, even if the Czech National Bank decided to do so. This, after all, could also be one of the reasons why the actors currently operating in the Czech financial market are mainly banks and other traditional institutions. The main reason these are the main providers of financial services in the Czech Republic is the licensing procedure, which, due to its length and complexity, becomes impassable for multiple applicants which could have an adverse effect on competition.

³⁴ See Sec. 2(2)(f) of the Czech National Bank Act stipulates that the regulator shall *“carry out further activities under this Act and under other legislation”*.

³⁵ See Dohledová úřední sdělení a benchmarky [Supervisory Statements and Benchmarks]. In: *Czech National Bank* [online]. [cit. 2024-01-28]. Available at: <https://www.cnb.cz/cs/dohled-financni-trh/vykon-dohledu/dohledova-uredni-sdeleni-a-benchmarky/>.

³⁶ See BOHÁČ, R. – KOHAJDA, M. Zmocnění k povolování výjimek ze zákona [Empowerment to grant exemptions from the law]. In: BOHÁČ, R. et al. *Legislativní proces: teorie a praxe* [Legislative process: theory and practice]. Prague: Ministry of Interior of the Czech Republic, 2011, p. 369.

In general, the process of obtaining a license from the Czech National Bank begins with the preparatory stage, during which the applicant must prepare documents and an application for submission to the Czech National Bank. The preparation phase is followed by the administrative licensing phase, during which the Czech National Bank assesses the application.³⁷ Therefore, the applicant has to prove their preparedness with respect to financial, technical, IT, and personnel matters. The applicant's preparation for the administrative process must be thorough, as the fulfilment of all stipulated requirements has to be proven to the Czech National Bank via the documentation provided in the administrative procedure. The requirements for obtaining individual licenses and procedural details can slightly differ for individual services as individual types of financial services (e.g., banking services, securities dealers, insurance companies, investment companies, payment institutions, Investment companies, or investment funds) are regulated separately by individual sectoral acts and require different licenses.³⁸

In the application process, there is no space for exemption from current legal regulations. On the contrary, obtaining a license is a very rigorous process in which all legal conditions must be met. To some extent, the Czech National Bank may exercise administrative discretion³⁹ or attach restrictions or conditions to the license granted. For example, the Banking Act specifies that a banking license, “*shall contain a nominal definition of the authorized activity and may contain a definition of the scope of the authorized activity, but not in the sense of limiting the number of individual business cases, and may also contain a statement of the conditions which a bank or a branch of a non-Member State bank must comply with before commencing any authorized activity or comply with in carrying on any authorized activity*”,⁴⁰ whereas including conditions or restrictions to the license is according to the Court of Justice of the EU in line with European law.⁴¹ These instruments allow the Czech National Bank a certain degree of administrative discretion, but they do not constitute regulatory sandboxes.

Further, as the financial environment constantly evolves, the requirements for participation in the financial market are constantly changing, creating some uncertainty for license applicants. The Czech National Bank frequently returns applications for revision due to insufficient documentation, which lengthens the process considerably. The licensing process is thus never-ending, requiring refinement of requirements and active communication directly with the regulator. For this reason, the process of obtaining a license in the Czech Republic can be considered by the applicants rigorously and

³⁷ Under the application of the Act No. 500/2004 Sb., Administrative Code and other Acts that apply to the particular activity carried out.

³⁸ For example, Act No. 21/1992 Sb., on Banks, Act No. 277/2009 Sb., on Insurance, Act No. 240/2013 Sb., on Investment Companies and Investment Funds, Act No. 256/2004 Sb., on Capital Market Undertakings.

³⁹ European Banking Authority. *Obecné pokyny k vnitřnímu systému správy a řízení* [General guidelines on the internal governance system] [online]. 21. 3. 2018 [cit. 2023-12-26]. Available at: [https://extranet.eba.europa.eu/sites/default/documents/files/documents/10180/2164689/e1d8f4b9-71e5-408f-86bb-ef94da11938a/Guidelines%20on%20Internal%20Governance%20%28EBA-GL-2017-11%29_CS.pdf?retry=1#:~:text=Obecn%C3%A9%20pokyny%20formuluj%C3%AD%20n%C3%A1zor%20org%C3%A1nu,2%20na%C5%99%C3%ADzen%C3%AD%20\(EU\)%20%C4%8D](https://extranet.eba.europa.eu/sites/default/documents/files/documents/10180/2164689/e1d8f4b9-71e5-408f-86bb-ef94da11938a/Guidelines%20on%20Internal%20Governance%20%28EBA-GL-2017-11%29_CS.pdf?retry=1#:~:text=Obecn%C3%A9%20pokyny%20formuluj%C3%AD%20n%C3%A1zor%20org%C3%A1nu,2%20na%C5%99%C3%ADzen%C3%AD%20(EU)%20%C4%8D).

⁴⁰ Banking Act, Section 1(8).

⁴¹ Decision of the Court of Justice of the EU dated 25 June 2015. *CO Sociedad de Gestión y Participación SA and Others v. De Nederlandsche Bank NV and Others*, C-18/14, ECLI:EU:C:2015:419.

unclearly concerning its conditions. This lack of rigidity in the regulator's licensing requirements could be viewed as a complication, which was confirmed by the public consultation held by the Czech National Bank in 2019.

Through this public consultation, the Czech National Bank gained information regarding financial market innovation and consumer protection. The majority of respondents to the public consultation believe that over-regulation of financial services is an obstacle to development and that the current regulation is unnecessarily strict. In this respect, according to the evaluation of the public consultation published by the Ministry of Finance concerning financial market innovation and consumer protection, several respondents repeatedly answered that, in their view, the supervisory authority's reticence to establish a regulatory sandbox or incubator is an obstacle to the development of financial innovation.⁴² However, in their view, these could help speed up licensing procedures for financial innovators. Given the fragmented legal framework, if the Czech National Bank would support the idea of introducing regulatory sandboxes into the Czech financial sector, the process of its adoption could be very comprehensive. The Czech legislature would have to decide whether the regulatory sandbox would be open to all financial services and sectors or only some, and in this respect, it would have to adopt a general act that would allow the application of regulatory sandboxes in various application procedures or implement the legal basis of a regulatory sandbox in the invidious sectoral Acts. There would be, of course, other legal ways, for example, a Decree of the Czech National Bank.

However, within the published evaluation of the public consultation, the Czech National Bank explains its disagreement with this statement and emphasizes that the aim of the legislative development should not be to support a certain segment or a certain type of technology but to create an efficient market that will create room directly or indirectly for competition and equal access to market players.⁴³ In this respect, the Czech National Bank considers support for selected entities in the form of a regulatory sandbox or similar instrument to be contrary to the principles of technological neutrality. Moreover, the Czech National Bank explicitly stated on its website dedicated to innovation that it is not currently planning to establish a regulatory sandbox nor an innovation hub, and without the activity on the side of the Czech National Bank, it is not very probable that the regulatory sandboxes in the FinTech Sector would be assessed by the legislature.⁴⁴

On the other hand, despite the absence of regulatory sandbox regulation, the Czech National Bank took some steps to provide assistance to financial market participants. The Czech National Bank established a FinTech Contact Point, which has been in operation since November 2019. FinTech Contact Point is an innovation facilitator at the Czech National Bank. According to the Czech National Bank statement, *“the FinTech Contact Point aims to promote the introduction of innovative technologies on the Czech financial market through more active communication with incumbent institutions and*

⁴² Ministry of Finance. *Vyhodnocení veřejné konzultace: inovace na finančním trhu a ochrana spotřebitele* [Evaluation of the public consultation: financial market innovation and consumer protection] [online]. 19. 5. 2020, p. 3 [cit. 2023-12-25]. Available at: https://www.mfcr.cz/assets/cs/media/Vyhodnoceni_2020-05_Vyhodnoceni-verejne-konzultace-inovace_v02.pdf.

⁴³ *Ibid.*, p. 3

⁴⁴ Financial Innovation. In: *Czech National Bank* [online]. [cit. 2023-12-26]. Available at: <https://www.cnb.cz/en/supervision-financial-market/financial-innovation/>.

potential new entrants”.⁴⁵ According to this statement of the Czech National Bank, the aim of the FinTech Contact Point is to respond more flexibly to relevant FinTech-related inquiries. By this means the Czech National Bank shall try to help resolve unclear regulatory issues (for example, regarding licenses or supervision) so as to facilitate compliance with the duties imposed on enquirers by financial market regulations. Another way in which the Czech National Bank is trying to support FinTech is through so-called roundtables. In this form, the Czech National Bank organizes regular meetings with the FinTech community, as well as the wider public, on various topics related to financial innovation. These instruments could help the innovators to overcome the issue connected with the lack of rigidity in the regulator’s licensing requirements.

APPROACHES TOWARDS THE LEGISLATIVE SOLUTION

Having established that it would be necessary to introduce a special empowerment provision enabling the Czech regulators to introduce a regulatory sandbox, we can further ponder over the concrete legislative solutions. Should the lawmaker decide to introduce provisions enabling the said regulators (i.e., the Energy Regulatory Authority and the Czech National Bank) to launch a regulatory sandbox, from the purely technical perspective this could be done in several ways. Probably the most convenient solution would be to amend the existing laws by adding an explicit delegation to establish a regulatory sandbox. Such provision could be fairly brief (similarly to the other empowerment provisions), which could nonetheless lead to several applicational problems, since the properties of the sandbox would most likely remain uncovered by the letter of law. Hence, while such provision would formally allow for a regulatory sandbox to be created, it would still be unclear what powers regulator holds within the operation of such sandbox, and whether it can e.g., grant exceptions from various legal obligations.

The second approach to the delegation of power necessary to establish a regulatory sandbox could lie in enumerative selection of provisions which can be granted reliefs from. In this case, it would be substantially clearer what legal provisions could be subject to a relief, however other general principles of sandbox operation will remain unwritten. Moreover, if the sandbox is perceived only as a tool for granting reliefs from legal obligation, there would even be no need for a general empowerment provision to launch a sandbox, as this power would be implied in partial micro-delegations. That is the case with the German Carriage of Passengers Act, which contains a so-called experimentation clause providing that, “*in order to allow for the practical testing of new modes or means of transport, the licensing authority may, upon request on a case-by-case basis, authorise exemptions from the provisions of this Act or from provisions adopted on the basis of this Act for a maximum period of four years, insofar as they do not conflict with public transport interests*”.⁴⁶

⁴⁵ Ibid.

⁴⁶ See Sec. 2(7) of Personenbeförderungsgesetz (PBefG) in der Fassung der Bekanntmachung vom 8. August 1990 (BGBl. I S. 1690), das zuletzt durch Artikel 23 des Gesetzes vom 2. März 2023 (BGBl. 2023

The third possible approach could operate with the existence of a special law comprehensively governing regulatory sandboxes regardless of their area of operation. While such law (e.g., Regulatory Sandboxes Act) could provide a solid framework and principles for the operation of various types of sandboxes, it could be seen as rigid and inconvenient to include the empowerment clauses in such law. Thus, a combination of different types of approaches appears to provide the most flexibility, where the empowerment to grant an exception from particular legal obligations could be stipulated in laws governing those obligation, with a more general framework law governing further miscellaneous aspects of sandbox operation.

CONCLUSIONS

Provided the findings described above, the authors regard the objectives of the article as achieved with the following conclusions. While there is currently no regulatory sandbox operating in the Czech Republic, which could be blamed upon the regulators operating in the relevant fields, the authors argue that there is little the regulators can do on their own to change that. Following the principle of legality of public actions and the *intra vires* doctrine demanding that any action undertaken by a public authority must have a basis in the law, the authors reached the conclusion that the current legislative setup does not allow for the establishment and operation of a regulatory sandbox (at least not one allowing the regulator to grant reliefs from legal obligation). Hence, in order for a regulatory sandbox to be created, it would be necessary to first introduce empowerment clauses delegating relevant power onto regulators. Such delegation could be done either by means of a vaguer empowerment clause explicitly enabling the regulator to launch a sandbox, or via various partial empowerment clauses allowing to grant exceptions from the normal regulatory regime, or even by means of a special law comprehensively governing the entire area of regulatory sandboxing.

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I Nr. 56) geändert worden ist: “Zur praktischen Erprobung neuer Verkehrsarten oder Verkehrsmittel kann die Genehmigungsbehörde auf Antrag im Einzelfall Abweichungen von Vorschriften dieses Gesetzes oder von auf Grund dieses Gesetzes erlassenen Vorschriften für die Dauer von höchstens fünf Jahren genehmigen, soweit öffentliche Verkehrsinteressen nicht entgegenstehen.” The cited translation is provided by the German Federal Ministry of Economic Affairs and Climate Action (See Regulatory Sandboxes: Testing Environments for Innovation and Regulation).