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Ivana Pařízková, Eva Tomášková (eds.)

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INTRODUCTION

This technical publication entitled "Interaction Law and Economics" has been elaborated by a collective of authors comprised of financial lawyers and economists from the Czech Republic, Poland and Hungary. It mainly involves academicians, several of whom however also maintain a practice.

The topic presented is very current and offers a series of possibilities of how to view it. The area of the interaction of law and economics is constantly a lively topic of various discussions, but in this unfortunately, various opinions come forth whose polarity did not originate only in differing standpoints, which would be a common cause of disputes.

This collective publication primarily intends to open room for a multidisciplinary discussion that describes, analyzes and compares law and economics, as well as their mutual effect in society. As clearly indicated by the journal's name, the topic of research of the collective of authors is support of the activity of scientists and scientific practice in an area not yet satisfactorily resolved in the Czech Republic.

Of course, this does not merely concern an answer to the question understood by the term "interaction of law and economics". One may also consider important the institutional anchoring of the researched topic in the Czech Republic, and a comparison with other countries.

The area of law, but also economics, have seen recognizable development in recent years nationally, but they also hold an international dimension especially as a part of the European Union.

The main motivation for presenting this publication was given by the fact that the intertwining of law and economics is a topic with which the department of financial law and national economy constantly encounters, and it is the subject of extensive discussions at conferences, meetings of departments and at workshops.

In the journal, the authors have primarily focused on the fields in which economics and law strongly intertwine, and which, in scientific, educational or practical areas, they encounter as they find new solutions to these

questions. Results of this publication may inspire all who deal with law and economics and who may point out that though each author presented a different view of the interaction of law and economics, the conclusions will be applicable in all three mentioned areas.

The publication leans on the current state of knowledge in theory and practice. The authors believe that the best way to elaborate them is by applying the method of analysis, synthesis, deduction, induction and comparison, but also with the help of a historical or descriptive method for certain passages - in particular where facts are presented.

It is necessary to state that this publication does not contain an exhaustive list of partial topics, and many further ideas certainly exist that would deserve further attention and elaboration. The collective of authors will deal with these questions in the framework of their further scientific work, whereas the meaningfulness thereof will lie mainly in carrying over theoretical findings into practice.

Ivana Pařízková and Eva Tomášková

CRIMINAL LAW AS LAST RESORT IN INFLUENCING ECONOMIC ACTIVITIES IN HUNGARY

Erzsébet Amberg[1]

Abstract

The main question of the study is the following: what is the role of Hungarian criminal law regulation in the field of influencing economic activities. Is criminal law an appropriate tool to control economic processes?

To approach this theme the study starts with the structural overview of the Hungarian economic criminal law in force, and introduces shortly its judicial practice with particular regard to the legal consequences of economic crimes, and the criminal liability of legal entities. To understand the actual intention of the Hungarian legislator, the study drafts the main directions of the changes within this structure since the change of regime in Hungary. After this the paper aims to examine the concept of punishing economic wrongdoings in the light of a principle of criminal law, namely the last resort (ultima ratio) role of the criminal liability, which declares that criminal law should only be applied if another fields of law are not effective to fight against social undesirable types of human behaviour.

Keywords

Law Making; Legal Institutions; Hungarian Economic Criminal Law; Criminal Law as Last Resort (ultima ratio).

JEL Classification

K400; K40; K140.

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1 Introduction

By differentiating social conditions, economic processes become more complex. Their control requires more and more rules. (Jakab, 2014) The dynamically changing environment offers an increasing number of opportunities for abusive participation in economic processes. The discourse about suppressing of these abusive conducts shall be the common issue for economics and law practitioners.

The central theme of the study, the examination of the relationship between the economy and the criminal law makes it essential to have a general overview of the social system as a whole and the relationship between its economic and legal subsystems.

The examination of the relationship between the economy and the criminal law makes it necessary to briefly review the relationship between the social system as a whole and the economic and legal subsystems, and to define such basic categories as economic law, economic crime and economic criminal law.

One of the cornerstones of the discussion on the role of criminal justice in the economy is the self-definition of criminal law about it self's function and role in the society. The Hungarian Constitutional Court dealt intensively with this issue in the years following the change of the regime in 1989, and to this day a relatively coherent perception has emerged. The paper outlines the concept of the Constitutional Court about criminal law as last resort in the rule of law and then presents the system of economic criminal law and the criminal policy outcomes related to it.

The limitation of the study is that the writing neglects the complex historical approach and the examination of the subject in the light of international and European integration processes, in the light of the global economics and the international legal environment. In the focus of the study stands only the Hungarian economic criminal law which is a little part of the almost opaque complex phenomena of the national economic regulation.

2 Conceptual and theoretical basics

2.1 Views of the relationship between economics and law

In state organized communities, their social order of cohabitation, including the economic form of the state, is defined by legal frameworks based on various utility and ideological considerations.

As well as, the approach to the relationship of law and economy as two sub-systems of the society can be different. The context of the sub-systems was, according to a vulgar-marxist approach known in post-socialist countries, that the economy determines the law.

In a reversed, extreme approach, law directly, almost immediately, can affect the economy, and by creating the right rules – by over-regulation – the economic processes evolve along with the legislator's vision. (Vékás, 2014)

The actual economic policy can be approached from the second concept, of which formal expressions are on the one hand, the increase in the volume of legislation,[2] and on the other hand the qualitative extension of the rule of law to cases that are not necessarily necessary for the natural functioning of the economy. Because of these there is a frequent change in the legal environment, which can lead to legal uncertainty and the lack of predictability of management processes from the point of view of economic operators. Ideally, the relationship between law and economics can be seen as an interaction in which law has an impact on the economy, but indirectly, in a shaded, differentiated form. (Vékás, 2014)

Capitalist management is fundamentally linked to an operative legal framework that actually defines capitalism itself. Capitalism presupposes that the state creates in a self-restricted way a legally stable environment and it rules freedom of business and competition, which process premises the relationship of law and economics. Another question is the level of this relationship, whether the use of economic legal instruments fits to the country's actual economic situation, or not. (Chikán, 2014)

In this process the considerations to be taken into account must include the establishment of good social policy goals and their correct legal and embedded legal engineering, because without these the law is not able to trigger the expected impact on the economy.

2 There are 250 legislative acts drafted in the Hungarian legislation annually.

It should be emphasized that economic activity is a common good, even if some people use better economic freedoms than others and achieve greater profits. Government needs to plan its legislation, policy, and financial operations in such a way as to encourage an individual: to be an activist in his own interest, as the whole society gains. Devices in this regard (such as extended educational opportunities, job opportunities, access to credit, etc.) are a general concern and contribute to overall well-being by increasing social capital (social intelligence) and thus creating a much more energetic economy. (Drinóczi, 2012: 5) This process can also greatly reduce livelihood crime, so the state needs to have less resources to run its criminal power from both, legal and material considerations.

2.2 Economic law- economic sinning – economic criminal law

Economic law is not a disciplinary, generally accepted category of law, but rather a summary term or conceptual level of the extensive legal regulating of economy. The economic law can be classified first of all along the internal structure of law. There are some branches of public law, e. g. financial law, administrative law, criminal law, besides there is civil law and finally as hybrid branches the competition law, or the bankruptcy law. (Vékás, 2014) The study deals only with the criminal law instruments of economic regulation.

A vital basic definition of the study is the term of economic crime, we can speak about them in common sense, in criminological sense and in sense of criminal law. (Tóth, 2015: 2)

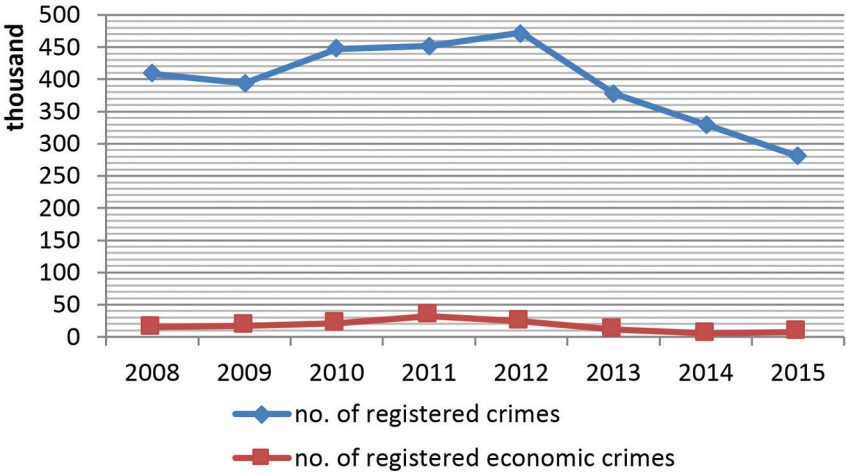
Public opinion lists here those behaviours that ensure unlawful economic gain, irrespective of whether they qualify as criminal offenses, minor offenses, other any another break of law, or they are merely unethical. (Tóth, 2015: 2–3)

In Criminological terms, the majority of authors believe that the crimes committed in connection with economic activity are economic crime, irrespective of whether which chapter of the Criminal Code defines the crime.[3] (Tóth, 2015: 4; Gál, 2011: 124–125) The definition of economic crime has a strong criminal law binding in the criminological sense.

3 Well known, it is possible that a crime protects more legal interest, e. g. economic corruption protects first of all the purity of public life, and is takes place in the C.C. among these crimes, in addition it protects economic interest.

According to the statistics of the Chief Prosecutor's yearly report, economic crime in this sense has represented 2–7 % of total criminality over the last few years, and this tendency is equally relevant for proportionality and variability of economic crime.

Graph 2.2: Illustration on the economic sinning



In the terms of criminal law, practically, the economic criminal law gives a frame to economic crime. The concept of economic criminal law has been restored to the structure of the third written Criminal Code of Hungary, so it is necessary to look back on this law.

The Act IV of 1978 on the Criminal Code was in force for 34 years, including initially c.a. 200 types of criminal offences, which grew to c.a. 280 up to the time of repealing the code. Among these there were 43 economic crimes in Chapter XVIII Crimes against the order of economy. It contained four types of economic criminal acts according to the protected interest: the offenses against economic obligations, the offenses against the order of economy, the counterfeiting of money and stamps, and the financial crimes. These were called economic crimes in narrow sense.

We could found another circa 23 crimes in further chapters[4] of the Criminal

4 Crimes against public order, justice and the purity of public life; crimes against public order; and crimes against property.

Code. Summarized, 66 crimes – 23 percent of the total number of criminal acts in the Criminal Code – was called economic crimes in broad sense.

The recodification of the Hungarian criminal law was completed after a decade long preparation in 2012. The Act C of 2012 on the Criminal Code contains 290 criminal offenses, among these circa 60 crimes (c.a. 20 percent of the criminal offenses punished in the code) can be categorized as an economic crime. Taking into account the differentiation of economic conditions, in line with international requirements and tendencies, the legislator ordered the crimes into smaller chapters, to protect more special phenomena of society. So, we can find now the economic crimes in eleven different chapters of the new Criminal Code.[5]

5 Chapter XVII Criminal Offenses Against Health: Criminal Offenses with Harmful Consumer Goods Section 189;
Chapter XXIII Criminal Offenses Against The Environment And Nature: Environmental Offenses Section 241, Damaging the Natural Environment Section 242, Violation of Waste Management Regulations Section 248;
Chapter XXVII Crimes Of Corruption: Active Corruption Section 290, Passive Corruption Section 291, Active Corruption of Public Officials Section 293, Passive Corruption of Public Officials Section 294, Active Corruption in Court or Regulatory Proceedings Section 295, Passive Corruption in Court or Regulatory Proceedings Section 296, Misprision of Bribery Section 297, Indirect Corruption Section 298, Abuse of a Function Section 299;
Chapter XXXI Criminal Offenses Against Economic Sanctions Imposed Under International Commitment For Reasons Of Public Security: Violation of International Economic Restrictions Section 327, Failure to Report Violation of International Economic Restrictions Section 328
Chapter XXXVI Offenses Against Property: Embezzlement Section 372, Fraud Section 373, Economic Fraud Section 374, Information System Fraud Section 375, Misappropriation of Funds Section 376, Defalcation Section 377
Chapter XXXVII Crimes Against Intellectual Property Rights: Plagiarism Section 384, Infringement of Copyright and Certain Rights Related to Copyright Section 385, Compromising the Integrity of Technical Protection Section 386, Falsifying Data Related to Copyright Management Section 387, Infringement of Industrial Property Rights Section 388
Chapter XXXVIII Criminal Offenses Relating To Counterfeiting Currencies And Philatelic Forgeries: Counterfeiting Currency Section 389, Aiding in Counterfeiting Operations Section 390, Forgery of Stamps Section 391, Counterfeiting of Cash-Substitute Payment Instruments Section 392, Cash-Substitute Payment Instrument Fraud Section 393, Aiding in Counterfeiting Cash-Substitute Payment Instruments Section 394
Chapter XXXIX Criminal Offenses Against Public Finances: Fraud Relating to Social Security, Social and Other Welfare Benefits Section 395, Budget Fraud Section 396, Omission of Oversight or Supervisory Responsibilities in Connection with Budget Fraud Section 397, Conspiracy to Commit Excise Violation Section 398
Chapter XL Money Laundering: Money Laundering Section 399, Failure to Comply with the Reporting Obligation Related to Money Laundering Section 401
Chapter XLI Economic And Business Related Offenses: Breach of Accounting Regulations Section 403, Fraudulent Bankruptcy Section 404, Misprision in Liquidation Proceedings Section 404/A, Concealment of Assets for Avoiding a Liability Section 405, Unauthorized Foreign Trade Activities Section 406, Impairment of Own Capital Section 407, Unauthorized Financial Activities Section 408, Failure to Comply with the Obligation to Supply Economic Data Section 409, Insider Dealing Section 410, Capital Investment Fraud Section 411, Organization of Pyramid Schemes Section 412, Breach of Trade Secrecy Section 413, Interpretative Provisions Section 414
Chapter XLII Crime Against Consumer Rights And Any Violation Of Competition Laws: Marketing of Substandard Products Section 415, Fraudulent Attestation of Conformity Section 416, Misleading Consumers Section 417, Breach of Business Secrecy Section 418, Imitation of Competitors Section 419, Agreement in Restraint of Competition in Public Procurement and Concession Procedures Section 420
Chapter XLIII Illicit Access To Data And Crimes Against Information Systems: Breach of Information System or Data Section 423, Compromising or Defrauding the Integrity of the Computer Protection System or Device Section 424.

Because of the more differentiated chapters of the new Code, the factual situation of economic criminal law was prevalent in the code, I have a definite view that it has gone beyond economic criminal law to be narrow or broadly spoken, and instead, it is suggested to base a broader group of economic crimes.[6]

In connection with economic sinning, more than 23 300 economic crimes have been registered in Hungary in the first half of this year. As it is visible on the snapshot of economic sinning, the composition of it is over represented by four crimes: Abuse of cash substitute means of payment (17000 cases!), Budget Fraud, Money Counterfeiting and Infringement of the accounting system.

Economic sinning in 2017 I.–VII. months	no. of registered cases
Abuse of cash substitute means of payment	17 595
Budget Fraud	1 523
Money Counterfeiting	1 356
Infringement of the accounting system	994
Infringement of Credit	383
Bankruptcy Crime	333
Counterfeiting of cash substitute means of payment	246
Competitor imitation	200
Failure to Supply Economic Data	162
Stamp Counterfiting	155
Aiding in Counterfeiting Operations	73
Withdrawal of debt cover	62
Acquisition of an unjustified economic advantage	45
Unauthorized financial activity	44
Abuse excise duties	36

6 This view is also reinforced by the fact that in controlling the economic protection activity of the Police, a National Police Headquarters internal level instruction also defines economic criminal offenses in the broad sense. (Act on the Economy Protection Activity of Police, Annex 1) It should be noted that the instruction enforced in 2007 does not take into account the recodification of the Criminal Code, so, its upgrading is urgent to eliminate many problematic issues.

Economic sinning in 2017 I.–VII. months	no. of registered cases
Infringement of the European Communities' financial interests	24
Violation of Payment Obligation to the Labor Market Fund	20
Credit fraud	20
Abuse of social security, social or other welfare benefits	20
Money laundering	16
Promoting excise duties abuse	13
Placing bad quality products	7
Consumer Fraud	5
To promote the counterfeiting of a cash substitute payment instrument	3
Illegal Conduct by Senior Employees of Business Associations and Cooperatives	1
Damaging Customers	1
Illegal Market Manipulation	1

2.3 What kind of place and role should have criminal law in the Hungarian legal system?

A country's economic development potential can be influenced by a number of legal institutions, the recognition of law's influence, as discussed above, can be controversial. The fact is, however, that the legislator gives a criminal law response to the inappropriate functioning of economic processes or the inappropriate functioning of economic law in some cases. The self-perception of criminal law, its law-protection function and its constitution-protection function orients the legislator on the question whether an abusive economic activity blameworthy is or not.

Of the above considerations, the constitution is a basic document defining both economic regulation and the criminal power framework. Since in the democratic rule of law all activities of the state must be directly or indirectly traceable to the constitution, the degree and form of criminal interference in market and fundamental rights must be fundamentally bound

by the constitution. (Drinóczi, 2012: 6) In establishing the scope of the economic criminal law, the starting point is to respect the freedoms guaranteed by the economic (and financial) constitution and to support the fulfilment of obligations.[7]

The Hungarian Constitutional Court has expressed its position in several decisions regarding the place and role of the criminal law in the Hungarian legal system, considering the requirements of rule of law: "…the task of criminal law is to protect the essential social life conditions governed by other branches of law, and thereby to protect the state structure on which the power structure and the legal system are built." The Constitutional Court highlights in the referenced decision: "Criminal law is the ultima ratio in the legal liability system. Its social purpose is to have the sanctionary seal of the entire legal system. The role and purpose of Criminal sanctions, and the punishment is to maintain the integrity of legal and moral norms when the sanctions of other jurisdictions do not help. The substantive requirement stemming from constitutional criminal law is that the legislator cannot act arbitrarily in defining the scope of punishable behaviour. The need to declare a punishable act is to be judged by a strict standard: only in order to protect different living conditions, moral and legal standards, only if the necessity of restricting the human rights and freedoms is strictly necessary and proportionate, and only when protection of constitutional or from constitution deduced goals, social, economic goals or values are not otherwise possible." (Constitutional Court: 30/1992, Justifying Part IV/4)

The Constitutional Court therefore clearly takes the view that the need for a proportionality test is a constant argument against criminal law making and enforcement, and this branch of law cannot be used as a primary tool.

The authors of domestic criminal law textbooks interpret the above ideas almost without exception in the definition of criminal law or in the presentation of the ultima ratio (Last resort) principle of criminal law. (For example: Blaskó, 2010: 67, or Bárd, 2009: 55) But the actual and precise meaning

7 Economic fundamental rights include the right to property and inheritance, the right to free choice of work and occupation, the right to entertain, the right of organization, the prohibition of child labour and servitude, the public obligation to protect parents and young people at work, and the rights of consumers. The underlying obligation includes the obligation to pay public debt. (Drinóczi, 2012: 8–9).

and content of ultima ratio is little developed in Hungarian legal literature. The statements and comments of the textbooks on criminal law are contradictory and are not clear on whether ultima ratio ought to be treated a) as a characteristic within the dogmatic system of criminal law defining its role or; b) as a basic principle.

If should it be considered as a basic principle, several questions arise.: Some authors thinking that ultima ratio is the synonym and/or the explanation of subsidiarity (Balogh, 2010: 35; Földvári, 1997: 36–37; Görgényi, 2007: 69–70; Nagy, 2010: 43–44, 59–60) Some authors thinking, that it is a completely independent principle, or it does appear as a umbrella term for necessity and proportionality. (Bárd, 2002: 29; Sántha: 2004: 12) And some authors thinking that ultima ratio have to be regarded as a criminal judicial cornerstone and does it play a role in the legitimation of criminal law. (Belovics, 2009: 55)

In my opinion – considering the above-mentioned decisions of the Constitutional Court and the remarks of the relevant legal literature – ultima ratio in criminal law is an institution ensuring the constitutional constraints of criminal justice, which carries independent meaning and content. The application of criminal law as last resort, the necessity of punishment and the proportionality of restriction of fundamental rights are three separate categories of the significance of basic prinicipality in criminal justice. I regard it as necessary to list ultima ratio as an independent basic principle, as within the context of our legal system, it explicitly expresses criminal judicial responsibility. The application of the sanction system of criminal justice may arise only after various, primary and secondary attempts and considered principles. The significance of ultima ratio is that it serves as the theoretical foundation for the management of antisocial and offensive behaviour by the tools of criminal law. It is a self-limiting institution of criminal law that protects fundamental rights by establishing boundaries of intervention for all branches of the judiciary. It plays a major role in the decision-making process whether to apply criminal judicial tools in handling undesired conducts violating or endangering social order. As far as the application of criminal law as last resort can be justified in the criminalisation process, it intensifies the legitimacy of the fact, indirectly, the legitimacy of criminal law itself.

From a criminal political point-of-view, ultima ratio may seem to be a counter-criminalization argument prior to the decision on penalisation as well as a decriminalisation argument with regards to the current law. The demand for limiting the criminal power is also formulated in studies on criminal policy: one of the basic terms of this requirement is the ultima ratio principle. It is a requirement for the criminal policy of the state: criminal law and criminalization can only be the last and last resort in defence of social and individual interests. (Pallagi, 2014: 43)

In connection with the scope of economic criminal law intervention, the literature also reflects on the need to use the criminal law as a final instrument. In economic law, the instrumental system of criminal law is merely an ultima ratio, a final instrument, and even it can be stated that in economic law criminal sanctions are largely ineffective- says Visegrády. (Visegrády, 2015)

Economic criminal law is not a decisive factor for influencing the economy, it can only be used as a final tool. Even then, it cannot become a decisive part of economic law if it can indirectly affect economic processes – says Tóth. (Tóth, 2015) Criminal law is the ultimate, but also the strongest tool in influencing economic crimes, since it makes it possible for the most dramatic, imprisonment-type interference of citizen's life – says Gál. (Gál, 2011: 124)

The Constitutional Court used the principle in more, than twenty cases, to justify its criminal substantive law decisions between 1992 and 2017. The Court referred to the principle during e. g. the examination of dangerousness some behaviour types, or the examination of lapse time, or during the examination the limits of criminal law in the aspect of different fundamental rights – freedom of expression, right of association, right of self-determination, etc. This overall suggests that the principle of the ultima ratio has a place and a well-developed role in the legal argument. (Amberg, 2016: 9–10)

2.4 The current economic criminal law

This part of the research aims to examine the emergence of the ultima ratio requirement in economic criminal law in force. Nonetheless the practice of the Constitutional Court there is no comprehensive analysis in the domestic literature that will reveal the specific legal aspects of the ultima

ratio principle and all its practical manifestations. Still, the author in the following section attempts to assess the conceptual economic criminal law and criminal policy concept in the light of the ultima ratio principle.

Therefore the author uses a German test model for the examination, elaborated in Yoon's 2001 doctoral dissertation. Yoon tries to reveal what kind of legal rules or legal political conceptions can be categorized as criminal law as a last resort. Yoon, 2001: 2–4) The reason of his research is, that the German criminal law enacted the liability of legal person. These are elements, arguments and techniques of criminal policy and criminal law that show the saving power of criminal power.

Looking at trends in the current economic policy, the ministerial statement to the C. C. shows that the document refers in several places to the ultima ratio role of criminal law:

1. In the case of infringements of intellectual property rights two crimes – infringement of copyright and certain rights related to copyright, and violation of industrial design rights – have been decriminalized with the addition of the previously applicable general HUF 50 000 offense threshold to HUF 100 000.
2. The legislator decriminalised one behaviour type and the negligent form of the crime breach of the order of accounting. The ultima ratio proviso was used in the ministerial reasoning to justify the decriminalization.
3. Insider Trading and Fraud Regarding Capital Investment, have been renamed under EU law-making obligations, and the content of the latter changed in 2016.

It can therefore be seen that the cutback of the scope of criminal law, by either modifying some elements of fact (committing behavior, guilt) or narrowing the criminal threshold, makes the legislature keen on referring to the last resort use of criminal law. From a normative point of view, many aspects of criminal justice intervention can be assessed:

1. The general part of Hungarian criminal law applies to the application of active repentance (mediation), as a reason of cessation of criminal punishment, for nominated criminal offense types and to the imposition of maximum 5 yearlong penalty lot tops. Mediation is available within

economic crimes in the case of crimes against intellectual property and in case of crimes against property. (Act on the Criminal Code Art. 29) In addition, mediation is possible on the basis of the special part of the code in defined crime cases, like abuse of public goods, crime against the environment, budget fraud, social insurance fraud. Its impact is similar when it is possible to alleviate the criminal liability on the basis of co-operation in the exploration in defined crime cases, like corruption offenses, money laundering, withdrawal of the debt cover, placing a low quality product on the market, restricting competition in public procurement and concession proceedings, or circumventing a technical measure to protect the information system. In my opinion, the termination or limitation of the criminal law threatens by reparation or cooperation is a projection of the ultima ratio criminal law, which is allowed in roughly half of the economic crimes.

2. We need to see in parallel that a number of criminal offenses and types of crime also provide increased, early criminal protection for legitimate interests. This is done by formulating a pertinent fact, by declaring the preparation punishable and by criminalizing the types of behavior of preparatory, the abettor or the accessory as a sui generis completed crime. This early criminal protection is characterized by one third of economic offenses. It is noteworthy that this rate is largely significant due to EU legal harmonization by corruption crimes, money laundering, and by the protection of cash-substitute currencies.
3. The extension of criminal law protection by sanctioning negligent forms appears roughly to 10 percent within economic crimes, which reflects the fact that the handling of neglected types of behavior is basically addressed by other branches of the legal system.
4. The Criminal Code's punishment system type is relative defined, it operates with eleven abstract punishment lines in order to punish different harmful crimes in a different measure. The scale of the abstract punishments spreads from 5 day long imprisonment to 20 years. The codex also recognizes the actual life imprisonment. The most commonly used for the foundations of economic criminal cases are the 2 years, 3 years and 1 to 5 years term of imprisonment.

On the basis of the above mentioned information, it can be said in general, as regards economic crimes, that they are finely treated, and the internal proportionality of criminal law can therefore be said to be provided.

2.5 Some criminal political aspects

It is well-known in the literature that in Hungary the legislator tried to support economic policy steps by means of tightening criminal law during or after economic recessions. (Gál, 2011: 126)

In addition to the criminalization of certain types of behavior, the main argument, primarily and in general, can be the deterrent power of criminal law, and this can be said about economic crime. If a company is threatened not only by its financial position or reputation, but also by its own property and personal freedom of its managers, owners, it can be assessed as a much greater deterrence as a simple financial fine.

As a secondary argument, the so-called leniency policy of criminal law can be applied. So the cases in which the offender comes under cessation of punishment or the punishment may be mitigated without limitation for the reason of cooperation with the authorities in the detection, and/or the reparation. (Gerencsér, 12–13) It can be taken into account as a counter criminalization argument in my view, if the European tendencies are not favorable to the criminalization of a type of crime. It is advisable to deal with automated model taking carefully because of the differences between countries economic law institutions and administrative and criminal law regulation systems.

The criminal policy concept of the new Criminal Code is based on at least three gauge tracks, by Great. In the case of serious criminal offenses and of highly dangerous offending perpetrators, it imposes strict penalties, while for easier offenses and, for the first time, for offenders, it focuses on alternative sanctions without deprivation of liberty, the educational and preventive punishment. In addition, it focuses on reparation, with the aim of widespread enforcement of the toolbox of restorative justice. (Nagy, 2014: 1)

The possibility of a measure against a legal person as an alternative sanction is known by the Hungarian criminal law, but the legal institution is applied

in the case law in dozens of cases every year, it is not really enforced. Taking into account the penalty lots of the basic behavior types of economic criminal law, the legislator seems to treat these infringements as easy criminal offenses in the criminal justice system. The punishment practice clearly shows the same, that instead of imprisonment to be released, punishments are imposed on fines and less suspended imprisonment.[8]

This case law is, in my view, correct. The effectiveness of the fight against economic crime cannot be achieved by increasing the number of prisoners, by enacting demonstrative and rigorous rules which however are not possible to work effectively. Economic crime can be fight off by reducing and terminating the profitability of this profit-making form of crime. (Tóth, 2015: 20)

Further considerative aspects may be, that economic criminality judgments also have a kind of market value, and the spread of cost-benefit analysis is certainly a factor that can help to enforce economic law. In addition, administrative sanctions other than criminal law could also be suitable for protecting the economy under consolidated conditions, in a high moral level of business culture, provided that administrative penalties are triggered by multiple illegal gains in economic crime. However, in Hungary these conditions are lacking, so the need for economic criminal law cannot be denied. (Gál, 2011: 128)

3 Summary

As easy is destroying an economy with law, it is so difficult to build and to develop it, because t is not a direct relationship between the two social systems, but the law is actually an infrastructure of economic development. (Jakab, 2014)

The study endeavored to provide a comprehensive picture of the criminal law of his own field of expertise within the highly complex phenomena of economic regulation.

8 One of the reasons for this is that Hungarian criminal law automatically provides for alternative punishment for non-custodial offenses for three years of imprisonment. Taking into account the punishment of the basic cases for economic offenses, this option is given to a large part of the facts.

the basic question about the influence by criminal law on the management of economic processes was answered within the scope of criminal law science, criminal policy and criminal law inside.

But it should be emphasized, that the development of influencing economic processes through criminal law, measuring the effectiveness of this influence and any modification is a question that requires the close cooperation between economic and legal professionals.

Consequently, the ideas referred in this paper – such as the constitutional criteria of the criminal law law; criminal law as a last resort; aspiration to restorative justice; enforcing double-track penal policy – can only be additives and components of the concept of criminal law as a proper economic governance tool.

Besides these, it is essential to take into account the added values, principles and goals of economic sciences and of economic policy, which summarized can ground a multidisciplinary unified economic management concept.

Apart from professional considerations, it is appropriate to pay attention to the social judgment of economic crime, to the social embedding, acceptance or non-acceptance of a given type of economic crime, because a sufficiently sensitive legal environment, the introduction of financial regulators, safeguards, or the power of the public, the strengthening of the economic morality can be a more effective tool than criminal action. (Tóth, 2015: 4)

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DEFINITION OF PUBLIC EXPENDITURE

Richard Bartes[1]

Abstract

In his paper, the author focuses on the definition of public expenditure because there is no uniform definition of this concept to be found due to the complexity of the public finance discipline. Therefore, the objective of the paper is to define the public expenditure concept. To that end, the author employs analysis, synthesis, description and comparison. The author determined the hypothesis that "the public expenditure concept is not defined in the legal framework of Czech budgetary law." For that reason legal regulations of general application which govern Czech budgetary law (whether on the national level or the level of self-governing regions), or scholarly literature which can be helpful in the definition of the public expenditure concept, can be used as a source of current knowledge. That equally applies to foreign scholarly literature because it contains an outlook on these issues which frequently differs significantly from that provided by domestic scholarly literature.

Keywords

Public Expenditure; Public Finance; Public Goods; Public Sector.

JEL Classification

K0; K490; H41; H50.

1 Introduction

Public expenditure is an integral part of public finance of every state, as well as all self-governing territories (i.e., regions in the Czech Republic, or abroad, for instance, in France, departments or regions). Numerous publications and papers have been written on public finance and its individual components,

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and naturally also on public expenditure. However, these works mostly examined public finance in terms of its classification, or structure, purpose, efficiency and theories explaining the growth of public expenditure (in particular Wagner's law or Baumol's law).

Although much has indeed been written on the topic, it is still impossible to find a comprehensive definition of public expenditure as it is not contained in the Czech legal framework, and frequently not even in scholarly publications on public finance (or rather, such definitions tend to be rather scant). This is due to a variety of factors, including the comprehensive nature, or rather complexity, of the public finance discipline, as well as the different concepts of [2] and approaches to this otherwise royal discipline.

Paul-Marie Gaudemet[3] pointed to the specificity of public finances by saying that it is a "*discipline of crossroads*." (Gaudemet, Molinier, 1996: 22) It reflected the idea that public finance discipline has multiple links with other disciplines, including economics, sociology, history etc. The idea of the transdisciplinarity of public finances appears in the work of many contemporary French authors. (e. g. Trotabas, Cotteret, 1995: 7 or Orsoni, 2005: 5–6) Public finance discipline from a comprehensive point of view integrates notions of law, economics, sociology, history etc. That is why the public finance discipline is studying in these individual disciplines from a legal (e. g. Pellet, 2014), economic (e. g. Quattara, 2002), sociological (e. g. Leroy, 2007), historical (e. g. Isaïa, Spindler, 1988) perspective.

For example, foreign fiscal policies (including the French public finance school) distinguish two terms which could seem similar at the first sight, but in fact they are fully different. In this context it could be mentioned French terms "dépenses publiques" (in English "public expenditure") and "dépenses fiscales" (in English "tax expenditure"). While the sense of a term public expenditure is in any case the same, the term of tax expenditure could have more meanings. The Czech both non-professional and scientific

2 An addition to the Anglo-Saxon (Anglo-American) and the German public finance schools, frequently discussed in this country, one also needs to take the French public finance school into account.

3 French law professor, one of the leading figures of French public finance discipline.

society associates the term tax expenditure with private accounting.[4] On the other hand (for example again) the French society understands this term from a different point of view.[5]

On the grounds of this fact the aim of the article is to define the public expenditure concept. The author determined the hypothesis that:

"**The public expenditure concept is not defined in the legal framework of Czech budgetary law**."

To that end, the author employs analysis, synthesis, description and comparison as science methods. Methods of analysis and synthesis are important for examining definitions of public expenditures (both current and earlier ones)

4 In case of a keeping the tax records, it is possible to employ the actual expenses incurred. These expenses are tax deductible if:
a) they were expended on achieving, securing and maintaining of taxable income,
b) the entrepreneur archives their invoices,
c) the entrepreneur employs invoices in the year when he pays them,
d) the entrepreneur registers invoices in the tax records.

5 The main function of the tax system is to generate a sufficient level of income to finance government expenditures such as health, education etc. Taxes are the main source of government funding. Tax expenditures are one of the mechanisms of the government for offer benefits to individuals and companies to achieve economic or social objectives. Tax expenditures generally refer to measures that the effect of reducing or deferring taxes by tax payers. Tax expenditures are exceptions to that what can be considered the basic tax system. Tax expenditures are intended to influence certain behaviour or activities, as well as to help certain groups of tax payers who find themselves in a particular situation. The government uses tax expenditures to support economic development or to encourage savings for retirement. The concept of tax expenditure therefore refers to the government´s fiscal policy choice whereby the government agrees to deprive itself of its tax revenues in order to achieve its objectives. For this reason, tax expenditures should not be confused with means used by certain tax payers to avoid tax, for example by using the tax avoidance or the tax evasion.
Tax expenditures are an integral part of the various tax laws (e. g. income tax act or consumer taxes acts). Tax expenditures are involved either in the tax rate structure (for example by granting preferential rates for certain types of activities) or at the level of the basic tax base (for example by granting certain deductions). Specifically in case of the French income tax it could be:
a) tax exclusions (e. g. the guaranteed income supplement) or exemptions (e. g. non-profit organizations).
b) tax deduction (deductions for registered retirement saving plan contributions)
c) Reduced tax rates (in certain cases, the tax system provides tax rates lower than the generally applicable rate; the value of this form of tax expenditure does not depend on the marginal tax rate, but simply on whether or not the tax payer can benefit from reduced tax rates)
d) Tax deferrals (tax deferrals are amounts that are not included in the calculation of income for the year but in a future year; e. g. the taxation of capital gains or accelerated tax depreciation)

and their evaluation. The method of description can be helpful in explaining and understanding of principal terms and conceptions of public finance. And finally the comparison is the best method how to present a difference at first between the terms public expenditure and tax expenditure; after that how to present a difference between various interpretation of definitions of public expenditure.

Among books which deal with the definition of public expenditure could be mentioned most of writings concerning of public finance, as for example writings by B. Hamerníková – e. g. Hamerníková, 2017; by J. Peková – e. g. Peková, 2011; by M. Bouvier – e. g. Bouvier, Esclassan Lassale, 2012; or D. D. Saguna – e. g. Saguna, 2017.

These mentioned writings are included in this paper and they are only examples of books which deal with this issue. In fact, we can find many more writings dealing with public finance, or rather public expenditure.

2 On the concept of public expenditure

In this context, the concept of *expenditure,* as well as *revenues* and *finance*, must first be classified as private expenditure (revenues, finance) and public expenditure (revenues, finance). That is a cardinal prerequisite for the inclusion of these key terms into the public, or private, sector category. The difference between private expenditure and public expenditure will thus be not only in their different definitions, but also their different roles, structure or comprehensive concepts.

Until 19th century, the public expenditure was overshadowed because the originally French slogan "laissez-faire" of the classical liberalism believed that funds left in private sector could bring more efficient revenues. But on the other hand John Maynard Keynes started to discuss[6] the role and the importance of public expenditure.[7] That was the crucial milestone of the economic history because since then the public expenditure has started increase. With this increase of public expenditure, it was necessary to study, examine and define public expenditure.

6 During the 20s of the 20th century.

7 J. M. Keynes has written a book "The End of Laissez-Faire", claiming that "*there are areas where the state acts better than private entrepreneurs*."

When we do talk about public expenditure as part of public finance, categorically associated with the public sector, we can undertake a more thorough definition of same.

2.1 Analysis of legal framework of Czech budgetary law in terms of public expenditure concept

In order to define this concept, one needs to draw primarily on legal regulations of general application which govern this area.

However, as already noted above, there is no legal definition of public expenditure although Act No. 218/2000 Coll., on Budgetary Rules and Amendments to Certain Related Acts, defines the target areas financed through public expenditure from the state budget (one could thus refer to the legal framework of the allocation and re-distribution function of public expenditure instead). However, the term public expenditure is not defined even in the definitions provided at the beginning of said act (Section 3 of Act No. 218/2000 Coll., on Budgetary Rules and Amendments to Certain Related Acts). The act merely defines *government loan expenditure* and *expenditure on operating requirements*.

As regards Act No. 250/2000 Coll., on Budgetary Rules Applicable to Regional Budgets, once again, it only provides (analogously to the above-cited act) for the target areas financed out of public funds of municipalities or regions (Cf. Act No. 250/2000 Coll., on Budgetary Rules Applicable to Regional Budgets, sections 9 and 10).

Other acts regulating national budgetary law include Act No. 219/2000 Coll., on Assets of the Czech Republic and Its Role in Certain Legal Relations; Act No. 128/2000 Coll., on Municipalities; Act No. 129/2000 Coll., on Regions, and Act No. 243/2000 Coll., on Budgetary Classification of Certain Tax Revenues, all of the above as amended. However, none of the above laws provides a more detailed specification of the notion of public expenditure.

Decree No. 323/2002 Coll., on Budget Structure, which provides for the classification of revenues and expenditure, or rather the aspects of such public budget classification, is not helpful, either.

For the sake of completeness, when analyzing laws, one must not omit the medium-term budgetary outlook (which is in the form of an act of law), or a medium-term expenditure framework in the form of a resolution. However, the former document is more of a comprehensive statistical, as well as commented, expression of public revenues and public expenditure for the upcoming budgetary period (both at the state level and the level of self-governing regions). The latter document represents the total limit of government expenditure (state budget and state funds). These otherwise practical and helpful tools designed to support the fiscal discipline of the state thus naturally cannot be used to define public expenditure.

Therefore, this sub-chapter brings us to the conclusion that legal regulations of general application which lay down budgetary law in the Czech Republic do not provide a legal definition of public expenditure, and at the same time, they cannot be deemed adequate as a basis for the definition thereof.

This sub-chapter also confirms the determined hypothesis that: "The public expenditure concept is not defined in the legal framework of Czech budgetary law."

2.2 Analysis of scholarly literature with a view to the public expenditure concept

As the individual Czech laws are not sufficiently helpful in the definition of the public expenditure concept (because they only address the allocation or re-distribution functions of public expenditure, or the classification of public expenditure, but not its definition), it is necessary to rely on scholarly literature, both Czech and foreign, in order to define this term. Scholarly legal and economic literature will be analyzed. This approach (using comparison, analysis and synthesis) will make it possible to adopt the requisite attitude to the definition of the term. For the time being, it can thus be noted that the definition of the public expenditure concept is a task for public finance theory.

I would now like to focus on Czech, or Czechoslovak, scholarly literature, in chronological order, from the time of emergence of independent Czechoslovak financial science, through the Communist era, to the present day.

One of the most important financial law theoreticians, Karel Engliš, referred to public expenditure at the time of the First Republic as "*the outlay of funds in public interest, for public benefit, for the public purpose of a forced union.*" (Engliš, 1929: 33) Prof. Engliš further expanded the role of public expenditure to include providing for the minimum national and human ideal not covered by private initiative (Engliš, 1929: 45). Another important representative of Czechoslovak financial science, Prof. Vilém Funk, saw public expenditure as "*the sum of expenses which public authorities must spend in order to fulfill their tasks.*" (Funk, 1929: 14)

During the Communist era, Prof. Bedřich Spáčil defined public expenditure, or government expenditure, as follows: "*Expenditure of the socialist state budget in support of the economy, on cultural, edifying, educational, health care and social measures for the benefit of the population, and further, on the administration and defense of the country. Where the state has concluded loans with its citizens, then also towards loan repayment.*" (Spáčil, 1970: 101)

Assistant professor Jitka Peková currently states as follows on the topic of public expenditure in her publication: "*Public expenditure is used to finance public needs. Public expenditure represents relations of distribution and application of public budgets and other monetary non-budgetary funds and uses in the budget system. Non-market activities of the state and local self-administration in connection with the decentralization of certain functions of the state, i.e., including public expenditure, are financed through public expenditure.*" (Peková, 2011: 222)

Public expenditure is defined in a similar manner in a publication by assistant professor Eva Lajtkepová (Lajtkepová, E. *Veřejné finance v České republice: teorie a praxe*. Brno: Akademické nakladatelství Cerm, 2013), who defines it as "*relations of distribution and application of public budgets and non-budgetary funds.*" (Lajtkepová, 2013: 49). However, Lajtkepová adds a definition of public expenditure from an economic perspective, according to which public expenditure is the part of the product consumer collectively on the basis of public choice (Lajtkepová, 2013: 49). In another of her publications, the author defines public expenditure as "*flow of funds allocated within the public budget system to the pursuit of various fiscal functions of the state (or government, region, city and municipality), even based on the principle of a partial irrecoverability and non-equivalence.*" (Lajtkepová, 2013: 60)

In her latest publication (Hamerníková, 2017), dedicated to selected public finance issues, Hamerníková presents public expenditure as "*a certain part of the GDP, redistributed not according to individual decisions and preferences of tax payers, but through the fiscal system (i.e., the public budget system), based on three "non-principles" of public finance, and in the "public interest"*." (Hamerníková, 2017: 64)

It is appropriate to add a foreign outlook in comparison with the domestic understanding of the public expenditure concept. Romanian law professor Saguna, who has been subscribing to the French public finance school in his work consistently, defines public expenditure in his publication (Saguna, 2017) as "*the way of sharing and utilizing the monetary budget fund in order to attain the main objectives of the society*," (Saguna, 2017: 87) or as "*the way of sharing and utilizing monetary funds in public budgets so as to satisfy society' requirements*." (Saguna, 2017: 212)

An outlook on a part of French budgetary law can be added to obtain a more comprehensive view on the issues concerned. The French budgetary law theory, which can be said to be very specific for a number of reasons, and which is very interesting as a result, has the following form according to a French law professor and a leading French expert on public finance, Michel Bouvier. First of all, distinction is made between three categories of public expenditure:

- "operating expenditure of the state or self-governing regions" (i.e., expenses consisting of employee salaries and public sector maintenance; these are expenses which ensure the due functioning of the "service market")
- non-monetary expenditure (provision of public services, such as free education); monetary expenditure (for instance, social security payments)
- "capital expenditure" (expenditure towards the renewal or expansion of public asserts, for instance, the purchase of equipment, construction of buildings and infrastructure).

Therefore, from the French perspective, public expenditure is often defined as any and all expenditure outlaid by the state or self-governing regions in the three categories (listed above). (Bouvier, Esclassan, Lassale, 2012: 295–311)

Within the French public finance school, we could also mention the work of Paul-Marie Gaudemet which is very interesting and inspiring (e. g. Gaudemet, Molinier, 1996). P. M. Gaudemet defined Public finance law as "*the branch of public law whose object is the study of the rules and operations relating of public money.*" (Gaudemet, Molinier, 1996: 22) This concept of "public money" is contained in all his works. According to P. M. Gaudemet, public money is the crucial component of public finances. There is a consensus that public money is difficult to define with confidence. That is why public money was initially defined in France on the basis of the concept of public service (in French *service publique*), it means the concept which is absolutely central to the French administrative law.

Although the treatise on this topic would be beneficial, it would exceed the planned scope of the article.

The following main features of public expenditure can be inferred from the above. Public expenditure is:

1. public funds,
2. used, or re-distributed by the state (or self-governing regions),
3. (used, or re-distributed) by public choice,
4. (used, or re-distributed) through the fiscal system,
5. (used, or re-distributed) to satisfy the public interest.

The following general definition of public expenditure can be created using the above features:

Public expenditure means public funds used, or re-distributed by the state (or self-governing regions) by public choice, through the fiscal system, in order to satisfy the public interest.

This sub-chapter helped me to fulfill the aim of the article, i. e. to define the public expenditure concept.

3 Conclusion

The objective of this paper was to define the notion of public expenditure. To that end, I first focused on an analysis of this term in Czech legal regulations of general application. Having analyzed the key legal sources

of national budgetary law, it can be noted that they do not offer any definition of the notion of public expenditure, or rather, that they do not provide a sufficient basis for the construction of such definition.

Therefore, I focused on the relevant segment of public finance theory, and, drawing on specialized literature, I have first analyzed the individual approaches to the definition of public expenditure across virtually a whole century, giving consideration to both Czech and foreign approaches. I have then used the different approaches to compile the main features of the notion of public expenditure, or public expenditure as an integral part of every public budget.

I also a little bit focused on the French conception of public finance discipline, then I mentioned some French authors and I presented an illustration of their work.

Such main features helped me create a general definition of public expenditure:

Public expenditure means public funds used, or re-distributed by the state (or self-governing regions) by public choice, through the fiscal system, in order to satisfy the public interest.

In conclusion I can say that the aim of the article (to define the public expenditure concept) has been fulfilled and the hypothesis (the public expenditure concept is not defined in the legal framework of Czech budgetary law) was confirmed.

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MONEY AND CURRENCY INSTITUTES FROM LEGAL AND ECONOMIC PERSPECTIVE

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Abstract

In this paper, the author first outlined the general interconnectedness between jurisprudence and economics. Showing the two disciplines are relatively independent and autonomous, the authors emphasized the areas in which a so-called multidisciplinary overlap is required. In the second part of this paper, the authors selected two typical economic and legal institutes – money and currency, on which they explained the necessity of applying the interdisciplinary approach.

Keywords

Economics; Jurisprudence; Economic Theories; Money; Currency.

JEL Classification

B4; K3; G2.

1 Introduction

It would be hard to find two disciplines that are so intertwined as economics and law jurisprudence. They both research an identical object. However, what is often emphasized are the differences between the two disciplines. In the literature on that subject, there are usually mentioned the following differences:

- **In the method of contemplation**. Jurisprudence typically applies the inductive method of contemplation, whereas economics rather uses the deductive method. Lawyers usually try to find a conclusion

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for a particular case from a general norm. Economists try to deduce general conclusions valid for future from particular cases.

- **Internal versus external approach.** Lawyers approach law "from within", whereas economists rather come to law "from outside". Lawyers find important an ideological construction based on analysis of laws or judicial decisions, but economists focus on application of law in practice, functioning of legal institutions in the social systems, and on efficiency and influence of such legal institutions on these systems. Hence, the economic analysis researches law from a broader social perspective.
- **Ex post approach versus ex ante approach**. The traditional ex post approach is typical for legal thinking – lawyers apply a set of legal norms on a particular legal problem after such a problem occurred (what has already occurred cannot be completely eliminated). For instance, a judge cannot completely prevent occurrence of a problem, but he rather mitigates the consequences of the problem). Economics sticks to the so-called ex ante perspective. Economists do not focus the consequences of a particular judicial decision for the parties involved, but rather on how the decision is to influence the actions of other economic subjects facing a similar situation in the future.
- **Particularities versus aggregation.** Another crucial difference is that lawyers mainly focus on particular cases, whereas economists rather elaborate the influence of law on a group of subjects, i.e. on a particular system. Law approaches to every individual case independently, but economics has a tendency the particular cases aggregate. In this respect, economics uses, for instance, the term macroeconomic aggregates.
- **Holistic versus reductionist approach.** Jurisprudence tends to include all aspects of a legal norm or of a legal institute in the analysis of problems. In other words, for law all the relevant aspects of the problem to be dealt with are relevant. Economics rather focuses with a particular sector of reality. Economic analysis applies the method of abstraction, i.e. it presumes all variables to be constant except the one researched (ceteris paribus).

We agree with the above assertions from literature. The objective of this article is to contribute to the theoretical discussion within the financial law theory concerning the relationships between economics and law. First, we deal with the interconnection of the two from the general perspective, so that later we could focus on one of the particular institutes of financial law and economics, namely on money and currency, as a legal tender.

2 Jurisprudence and Economics as Two Intertwined Autonomous Disciplines

Both jurisprudence and economics are autonomous. Some authors[2] even believe that if the object of legal science is a doctrinal analysis of law, findings from other disciplines (including economics) shall not have place in such an outlined legal discourse. This strictly formalistic approach was typical for legal science of the end of the Nineteenth century and the first half of the Twentieth century, mainly in Europe. On the other hand, this strictly autonomous concept is rather on the decline. This simplified and deterministic approach mitigates the general objective understanding of the depth of any social issue. Thus, for fundamental and complex understanding of legal and economic reality, the two disciplines should pay more attention to research of their interconnections and mutual relationship. This will lead to a deeper understanding of social-economic reality and thus more effective solution of its issues.

The strictly formalistic approach to law was partially left when economic analysis started to be used when dealing with legal issues. Such an economic approach to law is mainly connected with academic institutions in Anglo-American culture. In this respect, we should mention that the ideas and contemplations about the interconnection between economics and law (jurisprudence) have strong tradition. For instance, we can refer to T. Hobbes (1588–1679), J. Lock (1632–1704), D. Hume (1711–1776), A. Smith (1723–1790) and many other authors.

2 For instance Becker, G. and Hayek, A. F.

3 Multidisciplinary Approach Efforts

The new wave of interest in multidisciplinary approach to legal issues is connected mainly with the famous article by Ronald Coase 'The Problem of Social Cost', which has become historically the most cited article in legal journals. Coase focused on the interconnection between economics and law with respect to transaction cost and assignment of property rights. Ronald Coase (1910 – 2013) is considered to be one of the main representatives of the New Institutional Economics.[3] This school of thought rejects the traditional neoclassical assumptions, i.e. perfect information and unlimited rationality of decisions. According to Coase, a party to contractual relationships behaves intentionally, but its decisions are of limited rationality, because such a party lives in a world full of uncertainty, limited information, etc. Institutions are both formal (e.g. constitution, laws, property rights, etc.) and informal (such as taboo, customs, traditions, ethical codes, etc.). The central topic of this theory are transaction costs. These costs occur in connection with concluding contracts. Coase came with presumption that trade in externality is possible and sufficiently low transaction costs lead to bargaining between the involved parties to enter into such contracts that allow maximizing wealth regardless of the initial allocation of property – the so-called Coase theorem. This approach intensifies the mutual relationship between economics and law and shapes new dimension and quality of the relationship.

It should be mentioned that the grounds of more intensive application of this multidisciplinary approach to law are broader. The theory often refers to the legal-institutional differences between the systems of law, i.e. the Anglo-American system on the one side, and the European continental system on the other side. What is mainly meant is the fundamentally different role of the particular sources of law and the relating different role of the judges. Aside from that, there are differences in legal culture, in professional selection of judges, different role of academic institutions, and many others.

A significant influence also came from the speeches at annual conferences hosted by the American Law and Economics Association (ALEA)

3 This ideas were developed from the late 1960s. It is sometimes called as a theory of property rights. Aside from R. Coase, it is also represented by B. C. North, O. E. Wiliamson and others.

and the European Law and Economics Association (ELEA). In this place, we should also mention that numerous papers on the subject of relationship between law and economics were published in such prestigious legal journals, such as Harvard Law Review, Yale Law Review or Oxford Journal of Legal Studies.

Regardless of these differences in the system of law, both of these approaches – the Anglo-American and the continental – agree that economics may be beneficial for both creation and application of law; mainly in the following areas:

1. Application of economic terminology for formulation and interpretation of legal terms.
2. Application of economic methodology for dealing with particular legal cases.
3. Application of economic methodology for learning about social effects of legal norms and institutes.

We believe that economics (mainly its methodological instruments) are crucial when analyzing the effects of law on social-economic processes. In some (sub)branches of positive law (e.g. in competition law, commercial law, financial law, etc.), economics plays vital role in the discovering and learning about legal reality.

Some authors[4] emphasize that there are different options to apply economic approach in law in European contact (as opposed to the American context). In this respect, we should mention that even in Europe had not been the development of law and jurisprudence uniform, it rather showed many differences. As for the Czech lands (and actually the entire former Austrian-Hungary), we should emphasize that the relationship between economics, or national economics and so-called cameral science, was developed in tight connection with jurisprudence. This happened mainly thanks to the Austrian school of economics,[5] which influenced both the economic and legal

4 For instance Posner, R. A. and Matthei, U.

5 This ideas were developed from 1880s, and it was based on psychological aspects of human action in social systems. This school of thought is represented, e. g. by K. Menger, E. Böhm-Bawerk a F. Wieser. In the Twentieth century, these ideas were further developed by so-called neoAustrian school of Economics (F. A. Hayek, M. Rothbard, and others).

thought in the Austrian Hungarian Empire at the end of the Nineteenth and in the early Twentieth century. Both of these disciplines, i.e. law and national economics, were part of study program of faculty of law in Prague. This approach to the two disciplines continued even after the Czechoslovakian state was established. The later great economists, such as Karel Engliš or Aloiš Rašín earned their degree in the faculty of law of Charles University in Prague. Numeral prominent economists were leading courses not only in Charles University, faculty of law, but also in Brno's Masaryk University, faculty of law (Engliš, Chytil, Loewenstein and others) As for the post World War I era, the faculty of law in Brno was popular due to its Brno's school of pure legal science (Kubeš, 2003), which happened also due to the interconnection of the two disciplines and the mutual inspiration.

In this respect, we should mention professor Engliš. His methodological contribution has not been properly appreciated, yet. Engliš is often mentioned in connection with the so-called teleological method he developed. This statement, however, is rather simplifying and not very precise (Holländer, 2012). From today's point of view, we should mainly appreciate Engliš's contemplations (Vencovský, 1993) that, from the practical perspective, deal with the issues of objective and function of legal norms. Transformed into today's terms, Engliš believed that when constructing a legal norm, we should consider their objective, which actually corresponds with the modern method of assessing the consequences of regulation in the legislative process (the so-called RIA).

In our opinion, more interest should be also given to the process of rising interconnected between law and economics from the globalization perspective. Despite the diverse approaches to cause and consequences of globalization, there is no doubt that globalization has economic roots. It is based on interconnecting national and international market and placing them into global economic ties. This leads to global integration of economic processes, such as production, trade, financial markets, information, etc. This leads to the rise of the influence of supranational entities which more and more affect not only the economic, but also the political processes on the global scale. Economics thus gets significantly more international, or even global character. Law, on the other side, which is mainly connected with national

states, still usually has "national character". Globalization is vitally connected with emergence of supranational institutions and structures, which simultaneously weakens the role of the "traditional" institutions of the national states and "national law". Thus, this has to be reflected in the national legislation. There is no doubt that this new phenomenon will initiate the necessity of new research of the relationship between law and economics. These facts start to be reflected in the legal theory both in the Czech Republic and abroad. This is done mainly in connection with globalization and internationalization of law (Večeřa, Machalová, 2010), etc.

4 Money and National Currency as Legal Tender

In this part of this article, we apply the abovementioned necessity of multidisciplinary approach to a particular area, i.e. on the institutes of money and currency. As the term currency may have more meanings in English, throughout this paper we use the term as a legal tender (in a particular state). Money and currency are thus two different terms, although they are interconnected and have strong relations. When trying to elaborate any institute, we first need to choose the perspective from which it shall be researched. Thus, the necessary condition is setting of a particular approach by means of which the chosen institute is looked upon, i.e. whether we research from, for instance, economic, legal, social point of view, or from the view of mathematics, medicine, etc. This is also true for the topic we chose, i.e. money and currency. There is no doubt that money and currency are understood differently if researched from the point of view of political science, sociology, mathematics or law. Here, we approach the two institutes from the legal and economic perspective. Thus the multidisciplinary approach will be applied.

5 Money in General

In this subchapter, we emphasize the differences between money and currency. The theory usually understand money as anything generally accepted when making a payment for goods or services or when settling a debt

(Černohorský, 2011; Mishkin, 2006). There are usually mentioned three basic functions of money:

a) money as a medium of exchange,
b) money as a measure of value, accounting unit,
c) money as a value for deferred payments (Sykhes, 1905).

The first function is usually explained in connection with the origination of the concept of money. Money occur in a hypothetical society, in which there had previously only been barter trade. Money make it easier to distribute work and exchange the products and services. Before invention of money, the person that created certain product had a hard time to find another person who wanted to trade its products for the products offered by the first producer. Money, as a medium of exchange made the transactions simpler (and lower transaction costs). Producer of a flint knife who wanted to purchase some bread no longer had to find a baker offering his bakery products in exchange for flint tools. He did not even have to deal with the "exchange rate" of these two goods.[6] The producer of a flint knife only had to find a person willing to purchase the knife and pay for it with a medium of exchange – money. In these early times, the medium of exchange was usually some kind of commodity with real value. The flint knife producer was then able to take the money and go to the baker to buy the bread. This hypothetical development from barter society to using medium of exchange in trade may serve as explanation of the first function of money although it is clear that it does not fully reflect the trade reality of the "pre-money societies", as even in these social groups, there were differences with respect to their size, social connections of the members, etc.[7]

The money function of "measure of unit" or "accounting value" helped to express a "general" value of a particular good. Above, we outlined a hypothetical transaction in which a producer of a flint knife demanded some bread. If, for instance, one flint knife could have been exchanged for 1 000 loafs of bread, it gives us an exchange value of the two goods. Using

6 If he received e. g. 1000 loafs of bread for a single flint knife, it is clear that he was not able to consume all the bread and he had to look for options on what to do with that.

7 Barter in the meaning of "you give me this, I give you that" was probably only among individuals who did not have very tight relationship, as in families there was probably system of common ownership of the goods.

this hypothetical exchange rate, we have this price information: 1 flint knife = 1 000 loafs of bread, whereas 1 loaf of bread = 1/1000 of a flint knife. However, what if the flint knife producer wanted to purchase a piece of fur from a trapper? He knew that he could get 100 pieces of fur for one flint knife, thus 1 flint knife = 100 pieces of fun, and 1 fur = 1/100 of a flint knife. He could later assume that for one piece of fur he could get 100 loafs of bread and thus one loaf of bread had value of 1/100 of a piece of fur. As we can see, without money, there are many exchange rates, because the value of each good can be expressed only in other goods. This made even the knowledge about prices and values very complicated. Money, as a unit of account, thus helped even with information about prices. They serve as a unit in which the price of all other goods can be expressed.

The function of money as a "value for deferred payments" or as "medium for storing the value" can be best understood again with the example of barter society. If a flint stone producer had exchanged his product for 1 000 loafs of bread, he would have had to deal with all the loaves of bread that he did not consume. Probably, due to the limited time in which they can be used, he would have to offer them on the market, which would bring additional transaction costs to him. Money put this problem (and transaction cost) away. He was able to store the money without having to worry about their "shelf-life".[8]

There are not doubts that money make trade easier. As such, it is mainly an economic institute. As a necessary economic institute, money has become also subject to strong regulation, which makes it also a legal institute. The institute of money (in general) has to be distinguished from the institute of currency.

8 Of course, there is a question whether this function is still valid in the era of inflation targeting when a certain inflation rate, as a drop in the purchasing power of money, is required. However, targeted lower purchasing power does not necessarily eliminate the function of money as a store of value (even the price of precious metals changes over the time).

6 The Relationship Between Money and Currency (legal tender)

Not all types of money are 'currency'. Only money which recognized by a certain legal order as legal tender are considered to be a certain state's currency. This means that currency is always money, but it is not true the other way around. Currency is also understood as national form of money or integrating supranational form of money (Černohorský, 2001). Bráf understood currency as *"the particular type of money which in a particular state is recognized as money by the legal order."* (Bráf, 1888). Grůň defines currency as *"a type of money which everyone is obliged to accept as a medium of payment and which is also a certain criterial tool for quantification of all processes in national economy"* (Grůň, 1996). He adds that it is the role of the state to define a general medium for payments by means of law.[9] Horna explained that currency is *"regulation of legal monetary unit and set of the means of payment in the particular state"* – according to him, the state should be the one defining the formal features of currency, its protection by law and its economic features (Horna, 1945). Horna understands money – with a reference to the work by Karel Engliš[10] – as *"a good of general indirect abstract usability."* (Horna, 1945).

Within the legal theory, the issue of currency is researched by the theory of monetary law. Monetary law is understood as a relatively independent part of legal order in which belong the legal norms regulating currency and monetary system in a particular state. Monetary law is not understood as an independent branch of law, but rather as a subsystem, which is – at least in the continental tradition – considered to be a part of financial law, or to be more precise a part of the non-fiscal part of financial law (Mrkývka, Pařízková, 2009). Mrkývka explains that monetary law actually ensures the existence of the primary object of finance as a legal category when the primary object is money (Mrkývka, Pařízková, 2009). It is typical for monetary law that it uses economic terms. For instance, when the law outlines certain types of money, creation of monetary institutes or when defining the powers of the central banks for carrying out monetary policy, monetary law has to "borrow" economic (or accounting) terminology.

9 Ibid.

10 Compare ENGLIŠ, Karel. *Soustava národního hospodářství*, p. 222.

When the term 'money' is used, it is usually done with respect to a certain currency. For instance, if we talk about money in form of cash, we mean banknotes and coins of a particular currency. Precious metals, such as gold or silver, are not considered to be cash, even some coins could be mint from these metals.[11] Precious metals can, however, if certain conditions are met, be considered as 'commodity money', not cash.

Typical non-cash money are some sorts of bank money. The bank money are represented by entries on bank accounts. If they are not backed by any commodity (as it is typical in the modern financial system), they are also called fiat money. Similarly to cash, even the bank money are in the form of a particular currency, i.e. they represent legal tender. The central banking theory recognizes two main groups of bank money – (i) deposit money and (ii) reserve money.[12] The former are mainly created within commercial banking, the latter by the central banks. Bank money, whether created by commercial banks or by central banks, as their liabilities, are currency – legal tender. On the other hand, the term currency does not cover such cryptocurrencies as, for instance, Bitcoin. Although the term 'cryptocurrencies' includes the word currency, it is not currency and it is not legal tender (although they have some money functions).

In modern countries, currency is not backed, as it used to be in the past, by a certain commodity, for instance by precious metals. Neither a banknote issued by the central bank, nor deposit money issued by a commercial bank gives right to its holder to request that the issuer changes it into some commodity. Some authors assert that cash is "backed" by the assets held by the issuing central bank. Nevertheless, this assertion extends the original meaning of the term "backing", because a banknote is not backed directly by the assets of the central bank, but from the accounting point of view, it rather represents a receivable of the holder against the issuing central bank. Thus, the "backing" only means that the central bank has certain assets on its balance sheet. The banknote holder, however, cannot change the banknotes for the financial instruments that the central bank holds as its assets.

11 It is not common in modern era.

12 For instance, compare TOBIN, James. Commercial Banks as "Creators" of Money. *Cowles Foundation Discussion Paper,* No 159, 1963.

In connection with the developing new technologies, there are ideas about new monetary institutes. In the last few years, there is a growing discussion among central bankers about creation of a new form of money, the so-called *central bank digital currency* (CBDC). Economists already started to analyze CBDC in their studies, but in the theory of financial law, the discussion about legal aspects of CBDC has not really started, yet. Although CBDC is still just a theoretical concept mentioned by central bankers, it is expected that CBDC would be realized within a couple of years. Several central banks[13] have already tackled research programs on how CBDC should be designed. It is understandable, as regulation by law usually targets the institutes already existing in society or in economy. However, not even in the economic studies is there general agreement on how CBDC should be called. So far, the economists usually use the following terms: "*digital central bank money*" (DCBM), "*digital base money*" (DBM),[14] "*central bank issued digital currency*",[15] "*digital cash*"[16] or "*central bank digital currency*" (CBDC). Czech legal theory has so far used the term CBDC (Schweigl, 2017) but the topic has not been giving much attention by the Czech theorists of financial law, yet.

As for the CBDC features – it is non-cash money, bank money. As such they are represented by accounting entries. CBDC are to be, as opposed to majority of deposit money, issued by central banks. Thus CBDC should be recorded as a liability on the issuing central bank's statement of financial position. They are not expected to be backed by any precious metals or any other commodity. As it was mentioned above, central banks also issue so-called reserve money – these are only accessible by the entities having a reserve account at the central bank, i.e. credit institutions. Accessibility to CBDC, as opposed to reserve money, is not to be limited only to credit institutions, but it should be accessible by general public as well. Principally, every person having capacity to own cash should be able to hold CBDC.

13 For instance, the Swedish Riksbank, Bank of England, Bank of Canada, and others.

14 For instance, compare Speech by Yves Mersch, Member of the Executive Board of the ECB, of January 16, 2017. Available: https://www.ecb.europa.eu/press/key/date/2017/html/sp170116.en.html

15 For instance, compare the study by Barrdear and Kumhof, 2016, Available: http://www.bankofengland.co.uk/research/Documents/workingpapers/2016/swp605.pdf

16 For instance, compare the Positive money institute. Available: http://positivemoney.org/publications/digital-cash/

So far, there is not clear whether the CBDC accounts will be operated by the issuing central bank or by commercial banks as a special account distinguished from regular bank account on which deposit money are held.[17]

Legal determination of the particular types of money, as a legal tender, i.e. forms of money expressed in a particular currency, is undoubtedly a task for legal theory. Financial law theory has long ago outlined theoretical aspects of cash, and partially the theoretical aspects of deposit money and reserve money. When starting to outline CBDC, it will definitely need to use the terms of economics or accounting.

7 Conclusion

Jurisprudence and economics are two relatively independent autonomous disciplines. They are however inextricably intertwined and pure economic approach (regardless of legal environment) or pure legal approach (regardless of economic reality) cannot be complex. We especially find important the using of economic terminology for formulation and interpretation of certain legal terms and using of economic methodology for formulation and interpretation of legal terms or for assessing the reflection of legal norms in human action. Economic methodology should not be avoided when analyzing the influence of law on social-economic processes.

Regulation of money and currency is typical area of regulation where the economics and law interact. We selected several examples of monetary legal institutes on which we showed that law may only outline such institutes by using economic or accounting terms. Finally, we emphasize the quote by Karel Engliš that *"lawyer who does not understand national economy is only one-eyed."*[18]

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17 Aside from there, there is even considered that CBDC could exist independently, on a special medium. Compare Cecilie Shingsley "Should Riksbank issue e-krona?", vice-governor Riksbank, November 16, 2016.

18 ENGLIŠ, K. and F. WEYR. *Vědecká ročenka*. Brno: Barvič a Novotný, 1935.

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TAX DEFINITION OF ECONOMIC ACTIVITY – THE LIMITS OF INTERPRETATION OF VAGUE TERMS OF WAYS OF CONDUCTING OR PERFORMING BUSINESS ACTIVITY

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Abstract

The introduction of the definition of economic activity into the Polish tax law is one of the examples of the relationship between tax law and economics, and precisely between tax and economic laws. The tax legislature in the shape of this definition must express some behaviours of the economic operators. These behaviours concern economic networks and, therefore, relationships with other business entities and market conditions. Vague terms were used by the legislature to express these behaviours. This is a problem for practice because of their inclusion in the legal definition, and also because of the need to take due account of the relationship between tax law and economics. The problem of the limits of interpretation of these terms have been analysed in the article having regard to the relationship between tax law and economics.

Keywords

Definition of Economic Activity; Vague Terms; Limits of Interpretation.

JEL Classification

H25; H21; K34.

1 General remarks

To introduce and then define economic activity in the Polish tax law is a difficult task, but in practice it has proven to be feasible. Despite the controversy over its formulation in tax law (Mastalski In: Adamiak, Borkowski, Borszowski, Mastalski, Zubrzycki, 2017: 56), this definition has been

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introduced in several tax laws, both in general (Article 3 Act of 29 August 1997 on the Tax Ordinance Act (Journal of Laws of 2017, item 201 as amended), as well as detailed tax law. The latter include Article 5 and point 6 of the Act of July 26, 1991 on Personal Income Tax (Journal of Laws of 2016, No. 2032 as amended), Article 15 (2) of the Act of March 11, 2004 on the Value Added Tax (Journal of Laws of 2017, item 1221 as amended) and Art. 1a sec. 1, item 4 of the Act of January 12, 1991 on the Local Taxes and Fees (Journal of Laws of 2016, item 716 as amended) Thus, without discussing the legitimacy of tax legislation, if such a definition is being used[2] a discussion of its normative nature should take place. The analysis of the shape of the normative definition of business activity in the Polish tax law is a broad issue; to elaborate it is to go beyond the scope of a single article. It would also be difficult to cover the whole of this issue, which is sometimes used in academic articles as an introduction to a discussion. This difficulty results from the necessity of closing down the framework of regulation of those behaviors of entities that have an economic dimension.

The legislator, when deciding also to define this area in the provisions of the Polish tax law, had a point of reference in the Act concerning freedom of economic activity (Article 2 of the Act of July 2, 2004 on Freedom of Economic Activity (Journal of Laws of 2016, item 1829 as amended)). The solutions introduced in the provisions of the tax laws can be assessed from the point of view of the degree of realization of the taxpayer's autonomy in comparison with the normalization of Art. 2 of the Act on Freedom of Economic Activity. One of the important moments in this definition occurred when the legislator took into account a certain characteristic of the behavior of those involved, so different from so-called consumer behavior[3] that allows it to be qualified as a business activity. The legislator classifies such behavior with reference to the manner in which the activity

2 Underlining the need for this debate, at least so far as the correctness of its formulation is concerned, are also the judgments of administrative courts where, despite the existing legal definition, the courts still have doubts as to whether to decide in a particular case that the entity's behavior should be considered an economic activity. An example may be the judgment of the National Administrative Court in Warsaw of February 7, 2017. II FSK 4025/14, LEX No. 2247898.

3 It is quite common to divide the behavior of entities as those carried out within the framework of economic activity and those outside of this activity, i.e. as a consumer.

is conducted (performed)[4]. This is justified by the shape of certain vague terms. Undoubtedly these regulations, which were also used in the tax definition of economic activity to characterize the behavior of various entities, can be assessed as the means of legislative technique ensuring the flexibility of the provisions of tax law (§ 155 paragraph 1 of the Regulation of the Prime Minister of June 20, 2002 on "Principles of Legislative Techniques", (Journal of Laws of 2016, item 283)). As part of an analysis of this issue, these expressions, which undoubtedly serve as vague terms, will be subject to examination, and therefore so will phrases indicating the conduct of the activity in an organized and continuous manner. In the article, due to volumetric limitations, consideration will not be given to the possible assessment of the remaining norms that the legislator has used to define the concept of economic activity, such as "profitability"[5]. Evaluating any degree of vagueness, or identifying categories of ambiguity, exceeds the scope of this study. In the case of the indicated expressions, there is no doubt that they create imprecision, as is also apparent from the tax case settled by the Warsaw National Administrative Court's judgment of May 17, 2017 II FSK 1069/15, LEX No. 2308658, where the Court emphasized the meaning of "(…) the organized and continuous nature of the activity (…)", and by the judgment of the Provincial Administrative Court in Warsaw of March 14, 2017 III Administrative Court /Warsaw 147/16, LEX No. 2289981, which adopted that it is to be understood as "(…) organized behavior in business transactions (…)".).

Limiting the extent of the analysis of vague terms related to the way of conducting (performing) the activity also puts aside any examination of the means of legislative technique which has been introduced in the provision of Art. 3 (9) of the Tax Ordinance Act for the extension of the scope of the definition itself. This does not imply expressions relating to the subject matter under the indicated regulation of the Tax Ordinance Act. They will be included in point 2 of this study when they are analyzed in a comprehensive manner. A separate study is required to search for

4 The study uses the expression "conducting" ("performing") because the analysis concerns vague terms contained in the three tax laws, where, depending on the normalization of the legislature, the words "conduct" or "performance" are used (see. Point 2).

5 This concerns gainful activity.

the limits of interpretation, due to the extension of the definition of economic activity through the use of legislative techniques to ensure flexibility in the tax law. This examination of the boundaries of interpretation will cover the regulations to which the legislator referred in Art. 3 (9) of the Tax Ordinance[6] as regards the manner of execution (in this case the term "performance" is used, as it applies in reference to Article 2 of the Act on Freedom of Economic Activity) of economic activity. Undoubtedly, this also has implications for "extending" the scope of definitions, but requires further analysis beyond this study.

Therefore, if the legislature decides to legalize the notion of economic activity within the framework of tax laws, then there is a problem that is characteristic of this situation when it comes to its creation and application. Excluding a certain point of reference in this respect from Art. 2 of the law on the freedom of economic activity, it may be cautiously stated that it would be difficult to implement this solution without taking into account the means of legislative technique providing flexibility. There is, therefore, a certain contradiction, namely, the introduction of a definition of a legal concept, and thus, of course, with the need to clarify it and to indicate a uniform application, which is undoubtedly important in terms of tax law and the method of regulation. Secondly, by introducing this type of legislative technique, the definition in a certain sense opens up, broadening its scope. For tax practice this is one of the major problems, and thus, on the one hand, the process of defining legal notions in tax law and, on the other hand, the "opening up of regulation" of that law by the use of the notion of vague terms, or even general clauses. These two legislative approaches can lead to different relationships when it comes to using these legislative techniques. It is possible to perceive the use of vague and general clauses, which is supposed to ensure the adequacy of the taxation law (overcoming the inadequacy of the legal text to social and economic realities; see, Leszczynski, 2001: 53), to the effect of changing social and economic reality (see Borszowski, 2017: 24 et seq.), and the creation of legal definitions

6 This involves encompassing with the definition of economic activity in accordance with this provision, any other gainful activity conducted in its own name and on its own or in another person's account, even if other laws do not include this activity as a business activity or a person performing such activity – as entrepreneurs.

justified by various grounds (in accordance with § 146 (1) of the Regulation on "Principles of Legislative Techniques"). A more complex relationship can be seen between such a relationship, as exemplified by the definition of economic activity, where the term is used in the form of vague terms.

It seems that such practice is difficult for the legislator but primarily for entities applying tax law. There is a fear of creating fictional definitions in the sense that their normative form is only formally equivalent to that proposed in accordance with the regulation on the principles of legislative technique. Through the use of vague terms, the question arises about their actual normative shape. Since the definition is "shown" in a particular case, there is a fear of redefinition.

This does not mean denying what is in the definition of economic activity in tax law. In view of the concrete concept, the use of such legislative techniques cannot be avoided within the definitions. It is therefore essential to analyze, at the stage of its creation, the selection of the appropriate means of ensuring its elasticity and the assessment of the degree of elasticity. These steps should then be repeated in the context of the proper localization of these means of legislative technique.

During the next stage, the one to which this article is devoted, the use of these terms should be assessed in the framework of the definition of economic activity. It is becoming crucial to find, or rather to seek, the limits of their interpretation. This is therefore, the purpose of this study.

In view of the solution adopted by the tax legislator in classifying the behavior of an entity as conducting (performing) an economic activity, consideration should be made on two levels, distinguishing the specific regulation from Art. 15 (2) of the Law on the Value Added Tax.

2 The search for the limits of interpretation of the expression of an organized and continuous way of conducting activity

An examination of the definition of economic activity as formulated in Art. 5a (6) of the Law on Personal Income Tax, but also that in Art. (3) (9) of the Tax Ordinance Act, as well as the definition which "functions" in Article 1a. Section 1 (4) of the Law on Local Taxes and Fees, may indicate vague terms which relate to the conduct (performance) of the business

activity. In the case of Art. 5a (6) of the Personal Income Tax Act, such an expression is inserted directly into the provision[7], whereas in Art. 3 Section 9 of the Tax Ordinance it appears in reference to any gainful activity within the meaning of the provisions on freedom of economic activity[8]. In turn, Art. 1a of Act 1, point 4 of the Act on Local Taxes and Fees also refers to the Act on Freedom of Economic Activity[9].

In the search for the boundaries of interpretation of these expressions, in the first place it is worth assessing the importance of the legislator's own[10] wording of the provisions of Article 5a (6) of the Personal Income Tax Act, as well as the wording to which the legislator requests to refer in the remaining provisions of art. 2 of the Act on Freedom of Economic Activity. In addition, the solution in Art. 15 sec. 2 of the Law on the Value Added Tax should be considered, as the legislator, implementing the provisions contained in Directive 112 (Directive 2006/112/EC of November 28, 2006 on the common system of value added tax OJ L.2006.347.1 of 2006. 12. 11), gives the definition of economic activity a different normative form. This therefore requires separate considerations in the next paragraph.

It should be emphasized that it should not be relevant to a search for these limits that, in interpreting the provisions of the Personal Income Tax Act as the designation of a certain link between the qualification to the definition of economic activity and the behavior of the subject, the word "conduct" was used, while by referring in the other two definitions to the Act on Freedom of Economic Activity, the legislator reproduces the word "performance". In other words, the use of these different terms as a contractually named connector should not be relevant to the search for interpretative boundaries. This cannot lead to a different range of behaviors qualifying as conducting or performing a given activity in relation to an organized and

7 This concerns conducting activities in an organized and continuous manner.

8 The legislator, as a result, reproduces the expression that was used in Art. 2 of the Act on Freedom of Economic Activity, and thus activity carried out in an organized and continuous manner.

9 The scope of application of the definition in art. 2 of the Law on freedom of economic activity was limited in a certain sense, but it does not affect the way in which this activity is performed.

10 By convention the term 'own' was adopted to emphasize the fact that the tax legislator introduces this expression without reference to the provisions of the Act on Freedom of Economic Activity.

continuous manner of its implementation[11], as well as their other diverse generic qualifications. By generic classification in this case, the general characteristics and specific actions taken within the framework of organized and continuous conduct (performance) of economic activity should be considered.

Further, it is necessary to clarify whether the importance of exploring the boundaries of interpretation should be based on the use of its own reimbursement, or the recasting of the provisions of the Freedom of Economic Activity Act? It should be assumed that, in this case, it should not matter that the term concerning the behavior of the entity was expressed explicitly by the tax legislator or taken over from the Act on Freedom of Economic Activity. This cannot lead to the adoption of a different range of behaviors considered as the conduct or performance of a given activity in an organized and continuous manner, nor to another generic qualification[12].

These considerations are a starting point for exploring the boundaries of the definition of vague expressions related to the behavior of an entity in the conduct (performance) of an economic activity. Of key importance will be remarks about the organized and continuous way of conducting (performing) the activity. It should be emphasized that the use of the expression "organized and continuous way of conduction (performing) business activity" is not an appropriate solution with respect to the terms adopted by the legislator in the already-mentioned provisions of the tax law. It is worth pointing out that a subject's behavior is always described in relation to a particular type of activity, e. g. construction or commercial, and thus its determination within a concretely defined activity allows us to assume that we are dealing with an economic activity. Therefore, the interpretation in this case should not refer to the business as it is generally described, but should focus on the behavior of the subject in relation to a specific type of business. Ignoring this aspect can increase the degree of flexibility and thus widen the definition of economic activity, which the legislator did not impose when attaching these legislative techniques to a particular type of activity.

11 The term "implementation" is deliberately used here as a synonym for conduct or performance.

12 Generic qualification should be understood in the same sense as for the previously analyzed situation.

It is therefore possible to refer to the conduct (performance*)* of a business activity as a collective term, while an analysis of the behavior of an entity should be carried out in relation to a particular type of activity.

In studying the limits of the interpretation of these vague terms[13] it should therefore be noted that this is not about the context of organization and continuity, but about their reference to the conduct (performance) of specific activities falling within the scope of the given provision. This is important in this case because it concerns the degree of flexibility introduced by the expression at issue within the definition. If the possibility is accepted of first studying the organization or continuity, in order to "impose" on it the way to conduct (perform) an activity, the degree of flexibility would be increased, as different terms related to organization would be applied. The very definition of "organization" is difficult to establish. There is no doubt that one should look for its universal meaning with auxiliary reference to terms used in other scientific disciplines, such as the science of organization and management, where, for example, the definition of organized activity is formulated several elements of organized activity are pointed out, i.e. the organization's purpose, its structure and particular activities, in Romanowska, Dworzecki, 2000: 13).

It is therefore necessary to establish "organization" and "continuity" in relation to a particular economic activity. However, those making this connection should take into account the way it is conducted (performed).

It seems that the discussed measures of legislative technique in question are of a preliminary nature in the sense that their activities may be interrelated in a variety of ways, where the assessment of these activities and the way in which they are linked should bear out their organization and continuity. It is difficult to assume whether this result of an evaluation[14] will refer more

13 The plural form of the vague terms was taken into account because of their examination in several indicated legal acts. It could be also considered that the only vague term would be the organized way of conducting (performing) the activity, and the other one would regard its continuous aspect. It seems, however, that due to the applied formulation, where de facto comes to join these two "aspects", there is no need to emphasize the two types of legislative techniques, which can also be justified by the need to avoid raising the level of flexibility.

14 In the form of organization and continuity.

to the links between these activities, or to the whole, and therefore to both the individual and their references to the whole. It is about getting the minimum in the sense of organization and continuity.

Moreover, it is worth emphasizing that apart from adopting the so-called initial[15] meaning of the investigated means of legislative technique, in a particular case the analysis of the behavior of the subject may indicate more than one way of conducting (performing) the activity, which should rather refer to the way of its organization.

Looking for the boundaries of the interpretations of vague terms, the way they are formulated should also be taken into account. The terms – *organized* and *continuous* way of conducting (performing) the activity provide a basis for indicating two conventionally named determinants, i.e. organization and continuity. Bearing in mind that some representatives of the doctrine of economic law use the notion of determinants to denote particular regulations that define notions of economic activity, the determinant in this respect will be the way in which economic activity is conducted or performed (Zdyb, 1998: 28–30). In turn, C. Kosikowski defines them as presuppositions (Kosikowski, 2013: Lex, commentary on Article 2). It cannot therefore be considered that the term determinants is so common in the field of economic law that it also includes, in every study, the definition of economic activity.

It is therefore necessary to examine whether the use of the term referring first to the organized (determinant of organization) and then to the continuous (determinant of continuity) of the way of conducting (performing) the activity has significance. In other words, in the interpretation of a particular case, do we establish the organized, and then the continuous way of conducting (performing) the activity? If, on the other hand, "continuity" is first found, and then "organization," will there be consequences for the given term and, as a result, for the definition of economic activity?

Undoubtedly, this term should in practice be applied so that both determinants have to exist. However, it is no coincidence that the legislator has adopted such a design of vague terms, where the first determinant

15 However, this is not the kind of understanding that will increase the degree of flexibility.

is organization, and subsequently continuity. This does not mean, however, that it is necessary to attach rigid consequences to each case. Such normative form is functional in the sense that in a particular case we first examine the determinant of organization and then continuity. When it is not possible to establish an organized way of conducting (performing) the activity, there is no ground for the study of continuity. One can also be somewhat simpler, recognizing that both determinants are related in the sense that the determinant of continuity additionally qualifies the determinant of organization. These comments only have the dimension of a certain pattern. It is difficult to rule out that in a particular case, it is possible to establish an organized way of conducting (performing) business activities without a determinant of continuity. Then, the definition of economic activity cannot be identified with the consequences for the definition itself. It could not be considered that an entity's behavior lies within the framework of an economic activity.

In seeking the boundaries of interpretation both determinants must exist, but does this mean that they need to exist at the same time? One should assume that this is just a standard solution. This does not mean that it is always necessary to recognize both of these determinants at the same time. The formulation used by the legislator is practical insofar as the determination of organization leads a study of the determinant of continuity. This does not mean, however, that in a particular case it is not possible to start with a simultaneous examination of both. The circumstances of the particular case will have an impact on this. It should, however, be borne in mind that there is no requirement for simultaneous completion of these studies. However, it is not possible to describe this situation in terms of fulfilling the scope of vague terms, if there is too little relation between the determinant of organization and continuity in the sense that de facto dissolution will occur. Too much "time distance" may make it impossible to state that both of these determinants have been found to be present.

As emphasized, the normative form adopted by the legislature is functionally justified, but does not imply an absolute requirement to establish, in each case, the determinant of organization. The circumstances of a particular case may indicate, simultaneously, both determinants. Theoretically, it is possible to establish a continuous way of conducting (performing)

business activity, and then to study "the organization". This situation should not be assessed where no scope has been established for the surveyed vague terms, which may be due to the specific nature of the economic activity. It is difficult to imagine a situation where the determinant of continuity has been established, and only after a too-significant "time gap", that determinant of organization. If, however such a case should occur, it may make it impossible to recognize that both factors have been found to exist.

3 Exploring the limits of interpretation when describing the way of conducting (performing)[16] an activity in Art. 15 sec. 2 of the Value Added Tax Act

In analyzing the issue in question, it is impossible to ignore the regulation of the definition of economic activity in Art. 15 sec. 2 of the Value Added Tax Act. However, the discussion itself may constitute a description of the way in which an activity, in the scope of this provision, is conducted (performed). The tax legislator, in creating this definition in line with the provisions of Directive 112, has not introduced an expression which would indicate the manner in which an activity is conducted (performed). It is therefore appropriate to examine whether such qualified behavior on the part of the subject has not been included. It is also worth noting that in the initial part of the regulation Art. 15 sec. 2 of the Act, the expression has been used to refer to all activities. It is undoubtedly an instance of a vague term, which does not indicate directly the determinants of the way of conducting (performing) the activity.

It does not appear, however, that this vague term should be interpreted so as to make it impossible to point out the manner in which the business activity is conducted (performed). Therefore, the view that there

16 Leaving the two words related to qualifying the subject's behavior is different in the case of the provision of the Article 15 section 2 of the Value Added Tax Act than in the previously discussed definitions. Under previous regulations, the tax legislator used the expression of conduct, and by referring to the provisions of the Act on Freedom of Economic Activity the term of performance was adopted. In this case, however, due to the expression – any activity – there are no grounds to determine clearly which term should be applied here. The expression relating to the liberal professions cannot be decisive, as it is too individualized to refer to the category of professional activities within the framework of liberal professions.

is no possibility of such qualification of the subject's behavior would hinder the already significant troubles in assessing the actions taken in the area of economic activity. In addition, the final part of the second sentence of Art. 15 sec. 2 of the Law may not be overlooked: here, the legislator points to this way, using the determinant of continuity. It should therefore be emphasized that in this vague term one should also look for a way of conducting (performing) the activity.

Serious doubts are raised by the use, in the definition in Art. 15 sec. 2 of the Value Added Tax Act, of a solution primarily based on a vague term for all activities for tax practice If, therefore, in the solutions described above, the boundaries of interpretation can be sought, referring to the introduced and conventionally defined determinants of organization and continuity, in the case of this regulation the issue of interpretation boundaries is much more difficult. This is undoubtedly a consequence of the solutions adopted in the definition of economic activity of Directive 112 and the difficulties that define economic activity in the assessment of the EU legislator. Therefore, referring to the title of the study, it can be assumed that the legislator "settles" the question of vague terms related to the conduct (performance) of economic activity by placing all activities in the definition of the term, refining it by referring to specific entities. This is a significant problem from the point of view of the construction of the legal definition, with a high degree of flexibility applied from the outset.

The adoption of such a means of legislative technique does not imply that it is necessary to use only a generally formulated way of conducting (performing) an economic activity. In spite of the fact that the indicators have not been introduced in this area (apart from the activities referred to in Art. 15 (2), second sentence, in fine), the question arises as to whether they are not the consequence of the vague term used to refer to a specific subject, such as a producer or a trader. It should be assumed that such determinants should be sought in the area of activity (any) of these entities. The legislator in this respect does not introduce "rigid" determinants which can be established in provisions that have already been analyzed. This does not mean, however, that they are not grounds for accepting qualifications as an economic activity, as noted both in the literature (Bartosiewicz,

2017: Commentary on Article 15, Lex) and in the case law of administrative courts. The National Administrative Court in Warsaw, in the judgment of June 6, 2017, I FSK 52/17 LEX No. 2321296, considering whether the actions of the judicial officer are carried out within the framework of economic activity, accepted, among other arguments, that these actions constituted "(…) the professional, economic execution of service providers' activities carried out in an organized and continuous way (…) ,'. Thus, the National Administrative Court in Warsaw, in the area of the analyzed vague term, noted a determinant of organization and continuity. In turn, an example of rich jurisprudence concerning the recognition of actions related to the sale of land, carried out as a business activity, is provided by the judgment of the National Administrative Court in Warsaw of May 10, 2017. I FSK 1639/15, LEX No. 2315482, where the Court accepted that "(…) the seller's activities take the form of vocational (professional) activities and, consequently, organized (…) ,'. This can be regarded as a recognition of the organizational determinant.

The issue of these determinants is, in a sense, a challenge for tax practice and would require a broader approach, taking into account the specific nature of all activities of particular entities, considering the tax law in particular, as well as the Court of Justice of the European Union.

As for the determinant of continuity, it appears in the final part of the regulation in Article 15, Section 2 of the act. Undoubtedly, it is applicable to those activities which have been indicated there[17]. Because of their specificity, they are qualified as economic activities with regard to this determinant.

4 Summary

The definition of a legal concept of economic activity has required the incorporation of legislative techniques to ensure the flexibility of tax legislation in the form of vague terms. Their inclusion in this definition raises concerns about the extent of its scope, and as a consequence, difficulty in specifying it. Therefore, the subject of the search for the limits of interpretation has become significant. In carrying out the stated purpose of the

17 This refers to activities involving the use of goods or intangible assets continuously for the purpose of gainful employment.

study it has been pointed out that, despite the introduction of normative solutions in various tax laws, it may be considered that these vague terms concern the conduct (performance) of business activity, which also occurs in the definition contained in the Value Added Tax Act and which differs from others in its normative form.

Therefore, in the search for the limits of interpretation, the indicators related to the conduct (performance) of a given activity in the field of economic activity have been pointed out and focused on, showing the direction of the findings based on these determinants. The dynamic development of economic activity leads to taxpayers adopting different behaviors, so that difficulties arise in qualifying their activities as within the framework of a particular determinant, and thus as activities featuring organization and continuity. This can also lead to doubts when establishing relationships between them in specific cases. It is not always possible to declare, concurrently, the existence of both of these determinants, which does not necessarily preclude the possibility of qualifying behaviors as those manifested as part of business activity.

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THE IMPACT OF LEGAL REGULATION AND ECONOMIC ENVIRONMENT ON THE REAL MARKET AND DECIDING OF THE BUYERS ("CONSUMERS")

Damian Czudek[1]

Abstract

This article will discuss the position of the buyer, particularly buyer as a consumer on the real estate market and the elements that influence his decision making in the acquisition of real estate. The aim of the article is to highlight changes in its position (focusing on the financial situation) in connection with several legislative changes that have taken place recently and also some practices that can change both the legal and real position of the buyer. The aim of the article is to confirm or rebut the following hypothesis: Public regulation of the financial and real estate market significantly affects the position of consumers when deciding on the acquisition of real estate. In particular, methods of scientific analysis and deduction will be used to verify the hypothesis.

Keywords

Real Estate; Real Estate Market; Consumer Loan; Tax on the Acquisition of Immovable Property; Real Estate Activities.

JEL Classification

K25; K34; R3.

1 Introduction

In recent years there have been significant changes in the real estate market in the Czech Republic. There is an increase in the number of individuals – consumers who no longer want to pay high rents and prefer to purchase

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their own mortgage loan. The amount of the repayment is comparable to the monthly rent. This is due to low interest rates, loans are at their historical minimum. On the other hand, there is an increase in the number of entrepreneurs and individuals who have enough free funds to buy second and other real estate. Buying immovable property is considered as a relatively stable and low risk investment with guaranteed returns. And of course, it also has an impact on the value of rents. It is probably the natural reaction of the market to economic growth and the economic situation not only in the Czech Republic but also in other countries of the European Union. Institutions that supervise various parts of the market are beginning to worry about possible negative impacts. The basic apprehension in the consumer credit market is that the possibility of everyone to purchase their own housing was promoted as a constitutional right of an individual (the Chamber of Deputies of the Parliament of the Czech Republic, 2017). And because of that it should be supported by the public administration. In practice, this means a general belief that public authorities should set the appropriate conditions for providing housing loans. The setting of these conditions is perceived as a public asset or, respectively, public service. This, of course, is in conflict with the powers of the supervisory authorities both at the level of the European Union and at the level of the Czech Republic. The Czech National Bank, as well as the Ministry of Finance, in line with the legislation and recommendations of the European Union, are undertaking gradual steps to increase regulation of the consumer loan market. The economic data used by these institutions point to an increasing risk of market instability of the market on consumer loans, resulting in significant market fluctuations and a negative impact on the whole economy. At the level of consumers, this will mean an increase in debt levels and an increase in the number of consumers who are unable to repay their liabilities. This, of course, is not desirable and therefore the supervisory authorities are trying to gradually introduce new preventive institutes. The purpose of this article is to confirm or rebut the hypothesis that public regulation of the financial and real estate market significantly affects the position of consumers when deciding to acquire real estate. In particular, methods of scientific analysis and deduction will be used to verify the hypothesis. The analysis method will briefly

describe the different levels of the new regulation and the current situation on the real estate market, and through the deduction method, conclusions will be drawn subsequently to help verify the hypothesis

2 Tax on the acquisition of immovable property

It has been almost a year since on November 1, 2016, Act No. 254/2016 Coll., Amending Act No. 340/2013 Coll., On Tax on Acquisition of Real Estate, became effective. It has brought a number of partial changes, however, the change of the taxpayer can be regarded as the most fundamental. The explanatory report to this amendment states that it is necessary to clearly define the person liable for the tax on the acquisition of immovable property. Under the legislation effective until October 31, 2016, it was possible to determine by agreement who would be the taxpayer of the acquisition tax on immovable property. In some cases, it was the transferor, in some cases the transferee. The explanatory report does not mention other relevant reasons why such a major change occurs. It can not be contradicted that, with regard to the acquisition tax, it is in line with the theoretical foundations of tax law, the concept where that tax is actually paid by the transferee. However, this is a fundamental change that affects the behavior of economic subjects on the real estate market, and therefore, such a conceptual change should be justified otherwise than by bringing the law into line with the theoretical-legal definition. The petitioner of amendment No. 254/2016 Coll., assumed that as a result of the adoption of a new concept of taxation of real estate transfers, real estate prices will fall by up to 3,8 %. However, the real estate market has developed differently as a result of many aspects in 2016. De facto, since 2013, we can see a gradual rise in real estate prices, which is mainly due to the over-supply of real estate. This overstatement has been compounded in the past two years by developments in interest rates on mortgage loans and overall economic growth. As a result, there was no expected fall in real estate prices. Real estate prices are rising. While it is possible to agree with the submitter that the legislation effective until October 31, 2016 has led to an ambiguous application, in my opinion the submitter has not sufficiently dealt with the reason why a fundamental change occurs and the payer becomes the acquirer. One of the reasons

given in the explanatory report is that if the taxpayer is a transferor there is a reduced incentive effect to pay tax and to communicate with the tax administrator to ensure tax collection, because the transferor is no longer the owner of the immovable property and therefore he is not sufficiently motivated to pay the tax. In my opinion, these reasons can not be accepted. The object of this property tax is not the ownership, but just the transfer (change of ownership) to the real estate. The motivation function is unclear even when the taxpayer is a real estate acquirer. As a result of the acquisition of a real estate there is a change in the structure of the assets held by the transferee. On the acquirer side, liquid assets in the form of funds are converted to low-value real estate. This is of course also connected with the possibility of the tax administrator's ability to levy tax unless he is paid voluntarily by the taxpayer. Assuming that the acquirer is a regular consumer who purchases an immovable property for homeownership and takes the mortgage loan to a large extent, it may be considered that the execution of funds on the transferor's bank account will be easier and more efficient than executing the immovable a thing in the ownership of the transferee.

Changing the taxpayer in the case of the tax on the acquisition of immovable property is a significant impact on the economic behavior of the real estate market entities. As such, it has a major impact on the development of the entire market and should be properly reasoned and justified, possibly timed with regard to the development of real estate prices.

3 Recommendation of the Czech National Bank to manage risks associated with the provision of retail loans secured by the residential real estate (hereinafter "CNB Recommendation")

The CNB recommendation was issued on June 13, 2017 following the recommendations of the European Systemic Risk Board, the recommendations of other international bodies and EU legislative acts. The Czech National Bank responds to the development of secured residential real estate loans. As mentioned above, since 2013 there has been a gradual rise in real estate prices. This growth was culminating in 2016. In addition, the conditions under which loans were granted were gradually mitigated. Thus, the number

of secured residential real estate loans and their volume increased, including the number and volume of loans provided at so-called 100 % of the price of the real estate to be purchased. These circumstances increased the vulnerability of the financial sector in the event of a negative economic environment, and therefore the Czech National Bank decided to intervene and issue recommendation for loan providers in order to tighten the conditions for their provision. The basic ideas of this recommendation were summarized by Governor of the Czech National Bank, Jiří Rusnok, as follows: loan applicants must have at least part of their own funds for the purchase of real estate and also have a reserve to repay the loan in the event of a fall in income or interest rate increase (Presentation of the Financial Stability Report, 2017). Therefore, the Recommendation is aimed at monitoring the ratios between the loan amount and the estimated value of real estate (Loan to Value – LTV), between total debt and annual income (Debt to Income Ration – DTI) and between repayment of the loan and net income (Debt Service to Income Ratio – DSTI). This leads to a reduction in mortgages above 80 % LTV. In the past, it was up to 40 % of loans above 80 % LTV, now providers comply with the recommended 15 % of quarterly production of loans over 80 % LTV.

The application of this recommendation de facto makes the conditions for loan applicants to finance housing more difficult. According to Eva Zamrazilova, the Czech Banking Association's principal economist, this recommendation will not affect the development of real estate prices (Tůma, 2017). In September 2017, there is an evident loss of interest in mortgage loans. It can be assumed that this phenomenon is partly related to the publication of the CNB Recommendation, partly reflecting only the actual state of the real estate market in the Czech Republic. Those interested in buying a real estate are looking for a good property for a long time, either because the market does not offer real estate according to their ideas or the price of the property is too high (Svačina, 2017). There is also a certain expectation on the part of those interested in buying a property because they assume that prices are artificially rising (also due to the conditions under which loans were granted until June 2017) and will gradually decline.

Additionally, interest rates have a significant impact on the development of property prices. If it increases, it can be assumed that buyers will activate themselves to take advantage of low interest rates, which can be followed by price increases.

4 Consumer Loan Act

On December 1, 2016, the new Act No. 257/2016 Coll., On Consumer Loan (hereinafter "The New Consumer Loan Act") came into force, which repealed the original Act No. 145/2010 Coll., On Consumer Loan and On Amending Certain Acts, as amended. The New Consumer Loan Act is also applied to consumer loan for housing as defined in Section 2 (par. 2) of The New Consumer Loan Act. In principle, there are three types of consumer loan for housing:

- a loan secured by immovable or right in rem,
- a loan specifically designed to acquire immovable property, but also to cover the transfer of a cooperative share, etc.,
- a loan granted by a building savings bank under the Building Savings Act.

One of the aims of The New Consumer Loan Act is to strengthen consumer protection in the housing loan segment, which has not yet been regulated at all (Government of the Czech Republic, 2017). The need to regulate this area was also the result of EU regulations. The New Consumer Loan Act introduced the Directive 2014/17/EU of the European Parliament and of the Council on loan agreements relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (hereinafter "MCD Directive"). The MCD Directive regulates not only product regulation (e.g. rules for dealing with customers), but also institutional regulation (e.g. business authorizations, entry requirements). The reasons for creating regulation at European Union level are an attempt to stabilize the market and create the conditions for a healthy future development in response to the crisis launched in 2008. The basic issues identified by the European Union bodies, which should

be addressed through the implementation of the MCD are (Government of the Czech Republic, 2017):

- incomparable, unbalanced, incomplete and unclear advertising,
- incomparable, inadequate and unclear pre-contractual information,
- providing inappropriate advice,
- inappropriate assessment of suitability and creditworthiness,
- insufficient early redemption,
- ineffective, inconsistent or non-existent regulation by providers or intermediaries.

During the implementation of the MCD Directive, the scope of consumer loan legislation was extended. As is apparent from the aforementioned provision of Section 2 par. 2 of The New Consumer Loan Act, the application of its provisions is not limited to consumer loans intended to finance real estate intended for housing. Whether the real estate is financed for housing or not is irrelevant in view of activating the provisions of The New Consumer Loan Act. The difficult examination and proving of the purpose of using the real estate do not apply.

The New Consumer Loan Act partly brings with it tighter conditions for assessing consumer creditworthiness. Tightening occurs especially in the segment of non-bank loan providers. At the level of the banking sector, The New Consumer Loan Act does not introduce significant changes in the consumer creditworthiness assessment. Naturally, even The New Consumer Loan Act does not provide 100 % consumer protection, especially in situations where the consumer obviously does not want any protection at all. As mentioned above, the Act provides for significant regulation of housing loan providers and, in particular, new regulatory mechanisms are introduced for non-bank providers. One way of circumventing The New Consumer Loan Act is to provide so-called business loans. Some non-bank providers therefore require the applicant to submit a statement from the Trade Register as a condition for the granting of a loan for the property. The loan applicants who do not have sufficient creditworthiness and creditworthiness to obtain a loan from the regular bank providers will then go to the Trade Licensing Office, where they will be able to register for free trade and issue a trade license immediately for CZK 1 000. To this, then the dishonest

provider will give them a so-called business loan. While it is one of the dishonest practices of circumventing The New Consumer Loan Act, the liability of the providers under the new act remains. Because the mere declaration of a trade license does not yet provide the use of the loan for business. The assessment by the supervisor will therefore go deeper (Rybová, 2017).

It was expected that as a result of the entry into force of The New Consumer Loan Act, the prices of the consumer loans for housing would be higher. This should be due to the introduction of institutes that strengthen the position of the consumer at the expense of contractual freedom and the position of the provider. This concerns in particular the legal regulation of the early repayment institute. The New Consumer Loan Act constructs this institute as the consumer's right to reduce the total cost of consumer loan to the amount of interest and other costs that the consumer would have to pay if the consumer loan was not repaid early" (see section 117 par. 1 of The New Consumer Loan Act). The consumer can then repay the loan without incurring high fees. The creditor, which is primarily the provider of the loan, is entitled only to reimbursement of the expense incurred in connection with early repayment (see section 117 par. 2 of The New Consumer Loan Act). The New Consumer Loan Act also further restricts this right to expense and determines when this right of creditor does not exist (section 117 par. 3) and also limits the amount of such reimbursement (section 117 par. 4 and 5). It was expected that loan providers would compensate their lost caused by early repayment in other way. However, the cost of housing loans has not increased in practice. It is caused by the current development of the real estate market, where the demand for real estate significantly exceeds supply and where the interest rates are so low.

5 Conclusion

The aim of the article was to confirm or rebut the following hypothesis: Public regulation of the financial and real estate market significantly affects the position of consumers when deciding on the acquisition of real estate. Three major changes in the regulation of the financial and real estate market were analysis in this article – the amendment to the Act on the

Taxation of Acquisition of Real Estate, the recommendation of the Czech National Bank to manage the risks associated with retail lending of residential real estate and The New Consumer Loan Act.

The tax on the acquisition of immovable property has changed significantly. The legislation, which originally stipulated that the tax was payable to the seller, was first superseded by the law whereby the parties could agreed who would pay the real estate transfer tax and was subsequently replaced on November 1, 2016 by a regulation stating strictly that the tax is paid by the acquirer. While from the point of view of financial law it is a systemic change, this change has a significant impact on the buyer's position and significantly influences his decision to acquire real estate. The buyer must have sufficient funds to pay not only the purchase price but also the tax on the acquisition of a real estate whose rate is 4 % of the value of the real estate. This change has not been sufficiently substantiated by the submitter and, in my opinion, did not reflect the current situation on the real estate market and other public regulation affecting this segment.

Other regulation that significantly influences consumer behavior in the real estate market is the CNB recommendation issued in June 2017. The recommendation was issued in response to the behavior of private banks in the provision of housing loans. The recommendation makes the conditions, under which housing loans are provided, stricter. There is a de facto restriction on loans that are provided at 100 % of the purchase price of the property. The CNB thus obliges buyers who buy real estate, to have their own funds to finance part of the purchase. It is a reaction to the already contented belief that everyone has the right to get their own housing on loan. The consumer could then buy a property without sufficient resources. This is of course also strengthened by the current low interest rates. But the lack of available resources at the outset indicates a significant risk of a shortage of available resources for the future. This will be particularly the case when the consumer's income falls, for example, as a result of a loss of employment, illness or parental leave. Consumers who take loan at the limit of their options pose a significant risk also from the point of view of the financial stability of the lending institutions. Failure to repay will result for the consumer in the lost of the property by which the loan was secured, for the

provider it means that there is a certain possibility of returning the funds provided, but these funds have returned in less liquid form. And if a certain amount of consumer gets into a similar situation as a result of changes in the economic situation, this will mean a significant impact on the financial stability of loan providers. For these reasons, regulation by the Czech National Bank is understandable. Nevertheless, the position of the consumer is significantly affected because he has to have enough of his/her own funds, because the so-called 100 % credit will not get.

The latest regulation discussed in this paper is The New Consumer Loan Act. From the point of view of the impact on consumer decision-making, it represents the smallest impact. In some cases, it even strengthens the consumer's position – for example by regulating the early repayment facility. Similarly to the CNB recommendation, as a result of the entry into force of The New Consumer Loan Act, the conditions for granting the loan are made stricter. At the level of loans provided by banks, there are only minor changes to the creditworthiness assessment of consumers. The new act has a significant impact on other loan providers. As a result of the adoption of this act, which sets out the essential conditions for their regulation, including mandatory registration, there is a significant reduction in the number of these other entities. This may, of course, have an impact on less well-off consumers who do not meet the conditions set by banks, and are therefore seeking other options for obtaining funds for buying a property. As a result of this act, these other possibilities are quite limited. In terms of consumer protection and financial market stability, however, this can be considered as a desirable and positive step

The hypothesis set out in the introduction to this article has been confirmed. Public regulation of the financial and real estate market significantly affects the position of consumers when deciding on the acquisition of real estate. Consumers are thus forced by public regulation to have a certain, and often significant, volume of their own funds. In terms of the requirements to ensure the financial stability of financial institutions, as well as the real estate and financial markets, the above-described CNB regulation and regulation consumer loan are desirable. For the tax on the acquisition of immovable property, this purpose is not apparent.

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HOMEWORKING AND TELEWORKING IN CZECH LAW

Pavel Godicky[1]

Abstract

This contribution deals with the draft amendment to the Labor Code in its part intended on homeworking and teleworking. The text introduces the legal conditions under the Framework Agreement on Distance Work concluded by the social partners at European level on July 16, 2002 in Brussels at the initiative of the European Council in order to modernize the organization of work using the information society resources to increase the productivity of enterprises through the flexibility of human resources use.

The main aim of the contribution, apart from the analysis and interpretation of the proposed modification, is to confirm or disprove the hypothesis that the impact of the use of both new forms of work performance would positively effect the practice of employment in all sectors of the Czech economy. The comparison of the amendment with the conventional forms of employment might show expected employers benefits (e.g. saving of wage and other costs) of the distance working use on the one hand but also related disadvantages (e.g. reduction in the operability of the management, the difficulties in controlling the use of working time and the non-traditional application of liability for damage) on the other hand, which might require further changes in legal regulation.

Keywords

Labor Law; Labor Supply and Place of Work; Costs; Hours of Work and Labor Productivity; Data Protection; Job Creation.

JEL classification

K31; J2; J22; J23; J24.

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1 Introduction

This contribution is a consideration of the amendment to the Labor Code (also referred to as the "Amendment") in its part introducing a modification of the work performed by an employee outside the employer's workplace and the follow-up arrangement according to which the employee schedules his working time into Czech law. At the time of this writing, the government's proposal for a significant amendment to Act No. 262/2006 Coll., The Labor Code (also referred to as the "Act") was before the 2nd reading in the Chamber of Deputies of the Czech Republic. Although expecting that the newly adopted text of the law by the Parliament of the Czech Republic will not be identical to the one proposed, it is still worth considering the assumed impact of one of the proposed changes.

The Government Amendment brings considerable changes in the text of the Act in terms of number and scope. The most important for the community of employers, apart from the changes concerning this contribution, are the changes in the organization of working hours, leave, the changing of the employment relationship and agreements on work performed outside of the employment relationship. While these change current and longtime effective regulation, the regulation of work outside the employer's workplace is basically new. The current wording of the Act permits, and in part creates, a framework for it, namely the provisions of § 2 sections 2 and § 317, but there is a lack of more detailed regulation of work which is referred to as homeworking and teleworking (also referred to as "remote home work"),

The Government's endeavor to introduce legal conditions for homework and teleworking has its roots in the Framework Agreement on Remote Work concluded by the social partners at a European level on July 16, 2002 in Brussels (hereinafter referred to as the Agreement) at the instigation of the European Council. The aim of the Agreement is to modernize the organization of work, using information society resources to increase the productivity of enterprises through flexibility in the use of human resources. The report in October, 2006 on the implementation agreement shows that in the Czech Republic this form of work is used the least in the European Union (Final Report).

If the new form of employment is to achieve the expected outcome, it must form clear and quantifiable advantages for employers in the Czech Republic. The aim of this article is to assess the contribution of the amendment to employers‘ practice, in particular to draw attention to the disadvantages and risks that it may bring with it, and to conclude if it raises an interest on the side of employers anticipated by the proposer of the Amendment.

To this purpose, we have the hypothesis that the Amendment will raise employer's interest, especially in the sphere of entrepreneurship. For the purpose of its verification, we will first try to interpret the above-mentioned provisions of the Act, then we will analyze their expected impact on the employment relationship in order to identify the benefits and disadvantages for employers and finally, by comparing them, we will determine whether or not one of the consequences of the use of homeworking and teleworking outweighs the other.

The contribution focuses on the legal regulation in the form of governmental proposal. Former regulation is, from a practical point of view, only partial and so far only of marginal importance. Therefore, its interpretation is mainly devoted to comments on the Labor Code (e.g. JOUZA, L. *Labor Code with comment including the application of civil code*).

2 Interpretation of the Amendment and analysis of its application

Above all, we will deal with the interpretation of the relevant provisions of the Amendment, namely § 317 and § 317a of the Act. The last provision is newly incorporated into the Act, although in part it has taken over the existing regulation of § 317 and the same applies to the new wording of § 317 (Government Bill Amending).

Remote homework

The provision of paragraph 317 section 1 provides the possibility of agreed work outside the employer's workplace in all basic labor law relationships and negotiated by the contract of employment or one of the agreements for work performed outside the employment relationship. The Amendment does not expressly specify the time extent of the work done for the employer

in such a way, only the provision of section 6 excludes the use of a scheme of work done outside the employer's workplace in cases where the employee does so only exceptionally (Janšová, 2017: 30). Taking into consideration the wording of section 4, which requires the employer to allow an employee working outside the employer's workplace upon his request a contact with other employees at the employer's workplace, we can conclude that the work outside the workplace will be done by the employee on a regular basis and therefore the place of work will be an employee's place of residence or other by him designated place (also referred to as the "household").

The provision of § 317 section 2 and 3 deal with the issue of costs incurred by employees working outside the employer's workplacec (Explanatory Report). The employer's management activity, carried out through the instructions of the senior employees, takes place here at a distance. As an employee, according to § 2 section 2 of the Act, carries out dependent work on the employer's costs, the proposed adjustment must take into account the above-standard costs to the employer. It expressly provides for an employer's obligation to cover the costs of communication with the employer as well as other unspecified costs incurred by an employee in the performance of his work. This distance communication will be performed via telecommunication or postal services. It will be up to the employer whether the employee will be equipped with the technical means in an employer's possession or that the means of communication owned by the employee will be used. In this context, it is possible to consider the costs associated with the acquisition of the means of communication, their maintenance and repair.

The Amendment also mentions other non-specified costs that an employee will incur while working and the employer must also pay for them. Their formation will depend on the type of work performed by the employee. According to the wording of section 2 any of the above mentioned costs may not be included by the employer in the wage, salary or remuneration of the agreements for work performed outside the employment relationship and may be paid on a flat-rate agreed expectably in the contract of employment or in one of the agreements. (Explanatory Report)

This regulation is followed by the provision of section 5, according to which the employer may use an electronic communications network for connection with the employee. The employer is then obliged to provide at his own expense the technical and software for the performance of the work by the employee, unless the employee uses his own equipment for that purpose. In either case, the employer is required to ensure the protection of data processed by remote transfer using appropriate software. It is therefore necessary to assume the additional costs associated with the maintenance and repair of the electronic means of communication. Employees are obliged to do so in order to avoid the leak of data and informations related to the performance of their work or to misuse them (Explanatory Report).

The aforementioned section 4 provides employees the prerequisite for social connections with other employees and thus prevents their eventual sense of exclusion from the working group. The employer must allow the employee to contact other employees and, if he so requests, also allow him/her to regularly visit the employer's workplace. For this purpose, the employer will have to define the time and place of such meetings (Final Report).

Schedule of working hours

Paragraph 317a section 1 provides employers with the possibility of agreeing with the employee, in addition to performing work outside the employer's workplace, also the regime of a working time scheduled by an employee (Explanatory Report). Since both the current provision contained in Part Three, Title II of the Act and provision of the Amended does not recognize such a method of working time schedule, it must be inferred, that the provisions in question are specific provisions, which may be invoked by the parties to the employment relationship only when negotiating work done outside employer's workplace. In the matter of such an arrangement, the employee will decide what days he will work, how long his shift will be and when it will start.

As a consequence of the agreement pursuant to § 317a, the use of further specified modifications to the law in the subject relationship is avoided. This is primarily about setting:

a) the schedule of working time,
b) idle time,
c) the interruption of work due to adverse climatic conditions.

Work performance of an employee who works outside the employer's place of work and who also has autonomy in the working time schedule can not interfere with impediments on the employer's side due to operational causes or those caused by adverse weather. However, according to the diction of the Amendment, it is not possible to exclude the application of the provisions on idle time caused by natural disasters and other impediments on the employer's side (Final Report).

The Amendment does not exclude the application of the provisions of the Act on work breaks, rest periods and overtime, and therefore the employee should have respected the restrictions inherent in the scheduling of his working hours. However, given the merits of the case and also with regard to exclusions from the entitlement to some types of remuneration listed below, this regulation will not be probably applied by the employee and verified by the employer.

The Amendment further excludes the application of the provisions of the Act on remuneration for the work done:

a) doing overtime
b) on holiday (except for provision of § 115 section 3 on compensation for the salary which the employee lost as a result of the holiday falling on the normal working day and the provision of § 135 section 1 on non-curtailment of salary for the same reason)
c) at night
d) in a difficult working environment
e) on Saturdays and Sundays

and the provisions on a special salary supplement and a surplus salary supplement (Explanatory Report). If an employee performs his work for the employer within the above-mentioned time, we can deduce that he replaces

the time he should have done this work during a normal working day, but did not do so. If he worked on a day off, on holiday, at night or doing overtime, it can again be deduced that he actually took time off by having an adequately determined start of his/her next shift. Similarly, the same employee may not be allowed to pay a supplement for a longer continuous work interruption. For work done in special working conditions, an employee's supplementary allowance never can belong to the nature of the matter.

Finally, the Amendment excludes an entitlement to wage or salary compensation for other important personal impediments to work on the employee's side, unless otherwise determined in a decree of government pursuant to § 199 section 2, or in the case of the temporary incapacity (a quarantine) of an employee under § 192 of the Act (Final Report). Every employee may have important obstacles to working, which cause the need to provide time off. An employee working outside an employer's place of work, who schedules his time of work, in contrast to other employees, may adapt to such obstacles, and therefore can not fairly demand time off. However, discrimination against such an employee cannot be accepted as serious impediments to work where the entitlement to compensation for a salary is laid down in Government Decree 590/2006 Coll. For the same reason, the employee also includes a compensation of salary and remuneration from agreements for work performed outside the employment relationship in the case of serious personal impediments to work according to § 192 of the Act. For this purpose and for the purpose of the payment of wage compensation pursuant to § 115 section 3 (a holiday fell on a normal work day) the employer must determine the scheduled weekly working time of shifts for this employee.

2.1 The impact of the Amendment on the employment relationship

Let us try to guess how the conclusion of an agreement on the place of work outside the employer's workplace and the scheduling of working time by the employee will affect the content of the employment relationship.

Managing the employer

An agreement on the place of work outside the employer's workplace, most often in the household of the employee, will change the way in which the work is done by this person. The senior employees will not be in direct and immediate contact with the employee, which will affect the way the work instructions are given, the interaction with the other employees and also the possible control of the work done (Jouza, 2008: 809). In order to ensure the proper performance of the work by a "distant" employee, it is first and foremost necessary to ensure a working and quality connection. This cannot only mean the technical aspect of the matter but also its personal aspect. Both the employee him/herself and the management and co-workers must be equipped with the skills necessary for distance communication. Again not only on a professional level but also by the abilities that are a prerequisite for the comprehensible exchange of verbal communications concerning the performance of work.

The agreement on the employee's own working time schedule even more significantly changes the position of both parties. It will restrict one of the employers' labor-law managerial powers by moving them to that of the employee. There will be a clear increase in the independence of the employee in fulfilling the work tasks when he will determine when and how long he will do the work for the employer. Such a way of performing work is therefore only possible for activities that are not continuously dependent on the activities of other employees and which do not require constant supervision by senior management (Bělina, 2015).

Liability for damage

Arranging work outside the employer's workplace will effect assessing the liability for damage, and only for damage incurred by the employee. The incurrence of his liability for damage on the side of employer according to § 250 of the Act in the level of general responsibility as well as in the level of special responsibility according to § 251, § 252 and § 256 of the Act shall not be affected by the fact that he performed the work tasks outside the employer's workplace. If the employer has suffered damage as a result of a breach of duty by an employee (for example, by acting contrary to the

employer's instructions), the decisive criterion remains that the damage occurred during the performance of work tasks or in connection with their performance, no matter where the work was physically performed.

In cases of the Liability for damage under the liability agreement according § 252 and liability for the loss of entrusted items according § 255, the employer's position in the course of their claim will even improve. Valuables or things entrusted to employees will be located in his household and thus be out of the reach of other employees when the corresponding employee will have them in their full power and can secure them against loss or destruction.

However, the Amendment has a major impact on the employer's liability for damage. Recall that the law is distinguished in this respect from the general liability of the employer for damages, the liability for averting of damage, the liability for damages to deposit items and the liability for damages in the case of injuries at work and occupational diseases. All these variants of liability, excluding the liability for the averting of damages, have a significant impact on the fact that the employee is working outside the employer's workplace (Bělina, 2015).

The general liability of the employer for the damage on an employee's side is constituted by the Act in the provision of § 265 on the basis of an employer's breach of statutory duties or willful conduct by himwhich is contrary to good morals, including the unlawful conduct of other employees acting on his behalf. The exclusion from this responsibility is, at first, damage to the means of transport used by the employee in performing work tasks and, secondly, damage to tools, equipment and objects used in the same way, but in both cases without the employer's consent. Both of these exceptions to the general liability of the employer for damage are constituted in the course of its application by the employee, together with proof of the existence of the conduct contrary to the law, and the burden of proof on the employee. In practice, therefore, the employer's position on general liability for damage can be assessed as a stable advantage, with no occurrence of its cases happening more than rarely. If the employer uses variants that the employee working at home uses his own work items, the employer's liability will be incurred for the damage he has incurred much more frequently.

However, the employee's probative position will be significantly better whether he has entered into an agreement with the employer for their use to perform the work tasks and has been reimbursed by the costs incurred within the meaning of the proposed wording of § 217 sections 2 and 3 or not. Moreover, the position of the employer will be more difficult by the fact that it is very difficult to rebut the employee's assertion that the damage occurred during the performance of the work tasks (Jouza, 2008: 808).

Employer Liability for damage to an employee's health is established by the Act as the objective responsibility for an outcome that can be limited only by proving the employee's fault at its inception. This partial or total exemption from liability must be proven by the employer, which in practice is often not easy even if the health of the employee has been damaged at the employer's workplace. If such detriment has occurred in a domestic work, the possibility of waiving liability is virtually nil (Jouza, 2008: 809).

Unlike the two previous types of liability for damage, with the employer's liability for damage to the deposited items of an employee, domestic work causes such damage to be essentially eliminated. Employees do their homework and therefore do not bring their personal belongings to the employer. Although the employer is obliged to allow an employee working outside the employer's workplace, at his request, contact with the other employees, but the employer determines the place of the meeting, also with regard to the risk of such damage.

2.2 Disadvantages and advantages of application of the Amendment

The outlined application shows the probable impact of the arrangements for remote home work and the working time scheduled by the employee in employment relationships. Let us try to specify the obvious disadvantages and benefits, as well as the risks and options, if it is the employer's decision to use this work performing regime.

Restrictions on the employer's management activity

The first disadvantage is the fact that an employee working in his household cannot be managed and controlled in the usual way during his work

shift in the workplace. This will be particularly evident in contact with his direct senior managers and, where appropriate, other senior staff. Giving work instructions and tasks, checking their performance and often requiring feedback between the employee and the employer will take place remotely, and this may cause problems, in particular, in understanding their content. It will therefore be necessary, even at the risk of possible additional costs, to ensure the quality of the means of communication and the necessary competence of the persons on both sides.

While the reduction in the efficiency of the management of an employee by its senior staff may not be significant, the control of employee performance, especially use of his working time, is essentially theoretical. The current development of the operation of telecommunication and electronic communication networks and their interconnection prevents the employer from verifying otherwise than physically whether the employee is at work at that time. The same applies to quality control by the employee performing the work. If the employee is also entitled to schedule his working time, such a check is irrelevant. Employers then have only the incentives available to ensure that the employee performs the workloads optimally, as well as the possibility of a time limitation or termination of the job (Jouza, 2008: 809).

Necessary expenses

The second disadvantage for employers is the need to cover the costs of securing communication with the employee working in his/her household. To equip the household by means of communication and its software, to secure connections with the employer's premises, and to train the employee for their proper use, will all require costs that otherwise would not have been necessary and, if only in part. Also, in the case of senior management employees, the need for "training" for the purpose of acquiring or improving computer skills cannot be ruled out. In the case of the use of the necessary means and equipment acquired by the employee it is possible to reduce the said expenses, however, it can be expected that the employee will demand compensation for the wear and tear of his property within the meaning of § 190 of the Act and will also be entitled to compensation of damages arising from the use of his/her property to perform work tasks.

Compensation of damages

The third apparent disadvantage is the risk of fulfilling the obligation to compensate damages on an employee's property and/or on his health suffered while performing work tasks in circumstances that the employer cannot adequately verify for the purpose of exercising the option of limiting or waiving this responsibility. In particular, the description of the course of events in the case of harm to an employee's health caused by an injury at work will be entirely in the hands of the injured employee and therefore a representation can be expected to support the full compensation. It should be noted that this is the weakness of both the newly proposed and current statutory regulation in that the employer is also responsible for the state of the measures to ensure the safety of work at the place which is outside his workplace. Whether this problem can be solved through a contractual arrangement that imposes certain obligations on the employee to ensure safety and health at work will show the future (Jouza, 2008: 813).

If the damage arises on tangible equipment provided by the employer to the employee's household (the means of communicating with the employer and other work equipment), there can certainly be expected employee's statements about the cause of the damage leading to release of his responsibility according to § 252 section 5 and § 255 section 6 of the Act, which will not be easily disproved by the employer (Jouza, 2008: 808). In addition, it is highly probable that an employee will use such equipment for non-work purposes, and the employer will be hardly able, without the expense of other costs, to identify such conduct and forfeit the violation of § 316 of the Act. It is a question of whether this problem can be addressed by the compulsory household insurance of an employee resulting from the agreement of performing work outside the employer's place of work and, where an appropriate flat-rate share of the cost of the connection is. From the wording of the Amendment we tend to think it will not be. Also, the option of using telecommunication means and the means of electronic communication owned by an employee is taken into consideration, but this solution is linked to the obligation to reimburse the staff for the costs incurred by the employee mentioned above.

Benefits of remote home work

The undoubted advantage of the employment method in question for all employers is the saving of wage costs. The newly introduced range of bonuses and salary compensation for other important personal impediments on the part of an employee where an employee who performs work outside the employer's workplace and schedules his working time loses his entitlement is in the longer term a significant financial item for each employee that grows proportionally with the number of employees so employed. In the case of a higher number of such employees or even the entire workplace, the employer may also expect savings in the costs associated with the use of the premises in which the workplace is located, spent on their purchase and equipment. If the workplace is owned by the employer, then it can be used for other purposes or capitalized appropriately.

It is also possible to evaluate the above mentioned as a benefit in the reduction of the risk of the liability of the employer for damage to deposited items. Domestic work introduces work in a familiar work environment, and we can infer from this characteristic that also the risk of employee health damage at work will be minimal compared to a standard work environment. Finally, the also aforementioned improvement in the position of an employer in claiming the compensation of damages under the liability agreement or under the loss of entrusted items can also be included in the benefits.

Presumably the most significant benefit of the Amendment, at least in terms of the state employment policy, is the motivation of employers to employ people with disabilities (also referred to as PWD). For many practical reasons, employers often hesitate and refuse to recruit disabled people for employment. The agreement on the performance of work outside the employer's place of work and scheduling working time by an employee shall be positively reflected on both sides of the employment relationship negotiated with PWD.

An employee with the legal status PWD performs work for an employer also in a familiar environment that he can adapt to the job himself and perform work at a time when his state of health fully allows it. The possible adverse impact of the workplace of the employer and other employees on his/her work performance is also eliminated.

From the employer's point of view, this benefit will be reflected both in wage costs and in the possibility of using the specific instruments of an active employment policy. An agreement to work outside the employer's workplace with the PWD will bring savings in the costs otherwise incurred by the employer for workplace adjustments due to employee disabilities, the amount of which again increases proportionally with the number of such employees (Pšeničková, 2015).

The state employment policy works with a range of incentives to motivate employers to negotiate employment relationships with job seekers. An important group of job seekers are people with disabilities. The European Union and its employment strategy, which is also the initiator of the Amendment, are creating job support tools through the European Social Fund (namely the 2014–2020 Employment Program).

Employers who make use of the amendments to create new jobs for PWD can thus achieve active employment policy instruments that ensure the right to special protection and the right to special working conditions for such an employee. These include, in particular, rehabilitation (the theoretical and practical preparation for work) and protected jobs including the allowances connected with them. By employing persons with disabilities, employers can also avoid paying a compulsory contribution to the state budget according to Act No. 435/2004 Coll. Therefore, the possibility of employing PWD is interesting for all employers (Steinichová, 2010).

Advantages and disadvantages assessment

It follows from the above that the new form of employment according to the Amendment is suitable for employers in the business environment. Public sector employers' interest will be rather hypothetical when the performance of work in offices and other public corporations has a strong subordinate character (a managing factor) and is always associated with a certain place for contact with the public (the factor of the work place).

Furthermore, it is obvious that employers from the entrepreneurial sector will only take advantage of the proposed homeworking and teleworking rtegulation only in combination with the use of an arrangement according to which the employee who performs the work in this way also schedules

his working time (Kubíčková, 2012). Only the savings that such employment brings are offsetting the limitations in the management and control of the employee. Therefore, the use of remote home work seems appropriate for activities that are supportive (eg. marketing) to the main activity of the employer and which the employer would otherwise ask from entrepreneurs. Consideration is also given to the routine work of administrative or technical management, having a "separate character" not directly related to the operation of a business activity or small handicraft work.

3 Conclusion

This paper dealt with the question of whether, the new conditions of homeworking and teleworking offered by the amendment to the Labor Code, will generate an expected positive response from the employing community. We have put forward the hypothesis that the change will bring out interest, especially among employers in the business environment.

Based on the interpretation of the relevant part of the Amendment and the comparison of the positive and negative aspects that emerged from the analysis of its expected impact on the employment relationship, we can state that in an employer's decision about using the possibility of arranging a place of work outside the employer's workplace with the scheduling of working time by an employee, will outweigh the expected out-coming benefits over the disadvantages. To one side of the imaginary scales will be put savings in wages and other costs and the possibility of using active employment policy funds, on the other side, the limitation of an employer in his managerial activities towards employees and the additional costs and damage risks. Given that the negative impacts can be prevented or reduced to a certain extent and, moreover, if not necessarily occurring on a regular basis, savings will always otherwise occur, and we can conclude that the Amendment will bring real incentives for employers from the business sector.

In conclusion, the aim of this contribution was fulfilled and the hypothesis was confirmed.

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ECONOMIC LAW IN FINANCIAL LAW

Michal Janovec[1]

Abstract

This article is going to deal with the question what is the Economic law? In Czech law system, Economic law is part of financial law, although we don't use such a term. The aim of this article is to analyse where to set the Economic law and answer to question whether is the Economic law the same as non-fiscal part of Financial law. This paper is not willing change any set up of financial law, it is more to find possibility of adjustment the Economic law as a such. Some of the terms and areas placed in non-fiscal part of financial law would be more suitable for Economic law. The non-fiscal part of financial law regulates social relations in which the cash flow is only secondary because the main point of interest is the regulation of money itself and of the monetary system as well. The non-fiscal part then deals with currency law, foreign exchange law, public banking and insurance law, the legal regulation of supervision of the capital market and credit unions, and, finally, the hallmarking law. These areas are strongly connected with the economy, so there is a possibility call it all together The Economic law.

Keywords

Economic Law; Financial Law; Non Fiscal.

JEL Classification

K 20 Regulation and Business Law.

1 Introduction

Economic law is a term that does not itself cause any difficulty, and I can also say that neither its content in general does not cause any interpretative

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discrepancy. All this is only at first glance, especially because it is not a term used or anyhow associated with specific legal content (at least in Czech Republic). The purpose of this contribution is not to define content and to fulfil such a term, but rather to analyse and define its scope, in conjunction with the non-fiscal part of financial law.

First what need to be evaluated is financial law as a such and its own place in the system of law and then I can move forward to position and content of non-fiscal part of financial law. In many European countries, there is no such think like financial law or its own meaning is interpreted differently country by country, legal system by legal system. Those different positions of financial law could make financial law less significance in system of law or in society in general. That would be great mistake to overlook financial law as a very important part of law which is strongly connected with national economy. One of the side goals of this article is to promote financial law in the eyes of professional lawyers or economists and public as well.

On the other hand, I would like to point out or adjust usage of term the Economic law as a clearer designation for some part of financial law. Selection of few parts of the Financial law, could be united in subject/field/term called Economic law.

2 The system of financial law

Before delimiting the system of a legal discipline, it is necessary to defend the independence of the given discipline. Financial law undoubtedly is an independent discipline as it fulfils the establishing criteria which generally justify the existence of an independent legal discipline.

According to Mrkývka (Mrkyvka, 2004: 32) these criteria include

- independent and specific subject of legal regulation,
- methods of legal regulation,[2]
- internal cohesion of legal norms,
- social acceptance of the discipline

[2] Mrkyvka states the specific methods of legal regulation of financial law, the public-law character of regulation, the attributive share of public authority, the dominant power character of legal relations, an independent specification of financial law obligations, financial law acts, and the imperative character of legal regulation Cf. (Mrkyvka, 2004: 32).

All these criteria are met by the discipline of financial law, thereby setting itself free from other legal disciplines.

The subject of financial law is specific social relations involved in various financial activities and reflecting a number of financial phenomena. Financial law governs in particular those relations in which the state is involved and which indirectly or not affect the base money or its parts (Bakeš, 2012: 12) To put it simply, financial law is not concerned with relations with a contractual basis – these rather belong to civil or commercial law.[3]

Financial law is a specific public-law discipline with close bonds with administrative law; in fact it broke free from it. But financial law also has a lot in common with private-law disciplines, which deal with legal relations involving payments and money – the contractual positions of the subjects are, however, equal.

Experts and the lay public alike accept and respect financial law as an independent discipline. Discussions surrounding its position are a thing of the past and to cast doubt on this discipline as public-law part of the Czech legal system is now virtually unheard-of.

For the purpose of the classification of supervision within the system of financial law is crucial the discipline-defining criterion of internal cohesion of legal norms – the uniqueness of the system of financial law. The defining systemic features are:

- a higher rate of mutual legal norms in contrast with norms from other legal disciplines,
- a relative autonomy of the given set of legal norms from the norms of the other disciplines (Prucha, 1994: 34).

Despite the unquestionable existence of the system of financial law, financial law is not codified in a unified way and is instead fragmented into several independent acts. As a result, there is a wide range of norms with not so rigid links between them. I hold that financial law as a whole defies entire codification, mainly due to the vast scope of interest of all its subdisciplines.

The closest bonds exist between individual subdisciplines of financial law and then also between mutually close subdisciplines which form two

3 This does not apply without exception, however, because financial law also deals with state loans and the sale of the state property.

different systems on the basis of their purpose and their character: fiscal and non-fiscal parts of financial law. The system of financial law is defined by the internal differentiation of its branches into coherent groups of financial-law norms as regards their content and the similarity of the social relations that they govern (Mrkyvka 2004: 56). With the increasing rate of globalisation the range of public financial activities changes, thereby creating new limits to the scope of financial law.

The scope of financial law naturally increases with the increase in financial activities of the public sector and with the increasing number of state interventions into economy. It means that financial law has a wider scope in those countries where economic interventions are frequent; this subsequently influences the system of financial law there, too.

Most experts in financial law divide the system into two parts: the general and the specific (Bakeš, 2012: 12) part, though there is hardly a consensus about the existence of the general part because it is only with great difficulty that one can find a common core for all subdisciplines of financial law. Likewise, there are no common sources of law in the technical meaning of the word; yet, I am convinced that the general part of financial law can be accepted – chiefly because of the fact that there is a common characteristic for all financial-law norms: they govern financial relations.

The main division within the system of financial law is to be found in the specific part, namely the division into the fiscal and non-fiscal parts. The former is defined by those social relations in which the primary interest is to regulate the cash flow in the public budgets. The non-fiscal part, on the other hand, regulates social relations in which the cash flow is only secondary because the main point of interest is the regulation of money itself and of the monetary system as well. This division is essential for those common notions and principles on which the general basis of both subdisciplines is formed. This in turn enables a better and a more transparent interpretation and application of financial-law norms. The fiscal part of financial law includes the arrangement of budget law, tax law, and customs law. The non-fiscal part then deals with currency law, foreign exchange law, public banking and insurance law, the legal regulation of supervision of the capital market and credit unions, and, finally, the hallmarking law.

Financial law can also be divided (apart from the abovementioned division into the general and specific parts) into procedural financial law (norms of procedurally legal character[4]), administrative financial law and criminal financial law. These subdisciplines however exceed the scope of this work and will not be discussed in any greater detail.

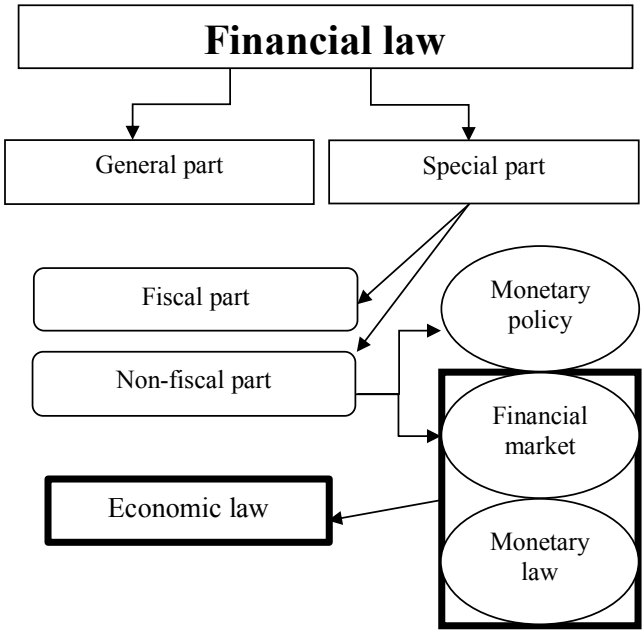
If we accept the idea that financial market supervision entails supervision of the banking sector, credit unions, the capital market, insurance industry, pension savings companies, pension funds, exchange offices and, finally, institutions in the area of payments, then it is, beyond any doubt, true that financial market consists of basically the same areas as the non-fiscal part of financial law, the only exception being the presence of financial market law in place of currency law (for more information see the subchapter below). Yet, it would be wrong to claim that the financial market is the same entity as the non-fiscal part of financial law; however, it is possible to say that financial market law falls within the realm of the non-fiscal part of financial law. This statement hints at the independence of financial market law; it indeed meets the discipline-defining criteria of independence and specificity of the subject of legal regulation. The subject of legal regulation here is legal relations which are formed within financial markets, i.e. within their various branches. The other discipline-defining criteria of financial market are identical with those met by financial law. Therefore, I do not think that it would be correct to call for a complete independence of the discipline of financial market law; it is nonetheless not erroneous to accept the existence of financial market law within the realm of financial law, i.e. in its non-fiscal part. Financial market supervision is then conceived of as a branch of financial market law. This theoretical assessment of financial market law enables a more transparent and easier understanding of the structure of financial law, but it also enables a more accurate classification of what this book deals with, namely the issue of financial market supervision. If it is clearly stated what financial market law is and where it belongs within the legal system, it is then much easier to delineate the area of financial market supervision and to determine by which means it is performed and what is the nature of the legal relations under supervision.

4 The procedural position of subjects, the procedural actions when deciding the matters of superiority and inferiority and the procedural actions of subjected entities – e. g. self-application within the system of tax law and the legislative process, too.

It is now time to turn our attention to a branch of financial law which comprises the subject of this book: financial market supervision, which is a section of legal regulation in the non-fiscal part of financial law as the following diagram illustrates.

The above explanation, we came to the area – the sub sector of financial Law, in which it appears and is firmly embedded in the subject of this article, i.e. financial market supervision is section occurring particularly in the context of legal regulation of non-fiscal financial law, which is well documented in the following diagram.

Diagram No. 1: Financial law



Source: author

3 Financial market and Monetary law

These two areas of non-fiscal part of the Financial law could be unified in term of Economic law. I don't think there is any sub part of these two, which could be excluded from the Economic law. The main subject of Economic law is Law of the Financial market and that's also the reason I will analyse it in wider scope bellow, unlike the Monetary law. The reason is quite simple – the Monetary law (and especially monetary policy) is more economic topic and the analysis of this matter with go far over the aim of this article.

3.1 Financial market

The financial market in almost all its areas (including that of the capital market in the form of money and capital) has developed rapidly in the past decade. The effects can be seen in the increasingly more and more interwoven web of national markets and the diminishing differences between individual financial sectors. Big financial groups' importance and influence has been on the increase and, in general, the world has witnessed international financial globalisation. This all called for gradual changes to financial supervision and its organisation. For example in the Czech Republic there used to be four supervisory authorities – conceivably too many for such a small financial market.[5]

The financial market is a system of relations, instruments, entities and institutions that enable the accumulation, distribution and allocation of temporarily available financial funds on the basis of supply and demand. The financial market makes it possible to redistribute available funds on a voluntary contractual basis (Kotáb In: Bakes, 2012: 102).

The financial market is primarily used to trade financial instruments, most notably securities and other entities. Most of the trade deals with financial instruments with a long payback period – more than a year. In this case we talk about the capital market. Scheffrin has it that the capital market

5 It was a supervisory model divided into sectors – each sector took charge of a different segment of the financial market. The CNB was responsible for banks, the Commision for Securities for the capital market, the Ministry of Finance for insurance companies and pension funds, and the Office for Supervision over Credit Unions for savings and credit unions.

is a market where money is provided for a period longer than one year (Sullivan, Sheffrin, 2003, 283). Finances from the capital market are obtained with a view to financing long-term investments of trading companies, households but also governments. Typical financing instruments include long-term bonds, bank and consortium loans, mortgage loans and mortgage bonds. The capital market also makes use of equity securities (shares and profit participation certificates), which have basically no fixed payback date. Short-term markets are those financial markets where instruments have paybacks periods of days, months or the maximum of one year. Typical instruments include short-term securities, loans, credits and deposits to be paid back within one year, e. g. bills of exchange, short-term bonds, deposit certificates (deposit slips), interbank deposits, short-term bank deposits etc. Sheffrin (Sullivan, Sheffrin, 2003: 283) concludes that financial markets are used for short-term financing, sometimes for loans to be paid almost 'overnight'. Capital markets, on the other hand, are used for long-term financing, such as the purchase of shares or credits where the payback date is not expected in less than a year.

This is, indeed, the division proposed by Kotáb (Kotáb In: Bakeš, 2012: 103), namely the division of financial market into the capital and money markets according to the character of traded instruments (financial claims) and the period of their validity. I consider money markets and capital markets parts of financial law, which is a view confirmed by Zucchi (Zuchi, 2017), who is convinced that the money market and the capital market are not the only branches of financial market, although they are the most important ones and the most frequently employed as well.[6]

It is extremely important to distinguish between securities and financial instruments, for these are most certainly not the same notions. Financial instruments are the most general types of assets which can be traded. Apart from securities financial instruments also include futures, forwards, swaps and other instruments, clearly different from securities.

6 Financial markets often include other disciplines belonging to the financial sector, including those which are not directly connected with the acquisition of finances, e. g. the commodity market.

Financial markets consist of seven parts, for which I suggest the term 'the classification of financial market disciplines': (Kyncl 2007: 1–8)

- money market (including payments, electronic money and systems of payments)
- foreign exchange market
- banking and co-operative banking
- insurance and supplementary pension insurance
- capital market
- precious metals market (the legal discipline is usually called hallmarking).[7]

This classification has one disadvantage, namely the fact that there seems to be a big overlap with the content and classification of non-fiscal part of financial law (excluding currency law). As a result, there might arise a certain amount of confusion over what belongs to the financial market and what does to the non-fiscal part of financial law. This can be avoided if one reminds oneself of the diagram No. 1 above: it is clear that the non-fiscal part of financial law is a broader concept than the financial market, which is, in fact, its (i.e. the non-fiscal part of financial law) subset.

Polouček's (Šoltés, Kulhánek In: Polouček, 2009: 201) classification offers an alternative view – it seems to be, in my opinion, a criteria-based classification:

- primary and secondary markets
- bond markets, stock markets, commodity markets, and foreign exchange markets
- spot markets and terminal markets
- national financial markets and international financial markets (further divided into foreign markets and Euromarkets)

In primary financial markets there are traded primary issues of financial instruments whereas secondary markets trade financial instruments which have already been issued. The second group takes into account the nature of the instrument, which is being traded (Šoltés, Kulhánek In: Polouček, 2009: 209–2014). Kotáb (Kotáb In: Bakeš, 2012: 104). adds that the

7 Personally, I feel that a better label is 'commodity market' because I would include here also commodities which do not belong to precious metals.

foremost function of primary markets is the acquisition of financial capital for new investment, while secondary markets focus on the sale of already-issued financial instruments where the main objective is to ensure liquidity for investors, i.e. to make it possible to convert financial instruments into liquid finances. The third group mentioned here is centred on the time elapsed; it distinguishes between spot markets (business is realised within several days after it is sealed[8]) and terminal markets[9] (the day of realisation, including the derivatives, is put back to a stated date in the future). The concept of the national financial market is, of course, a relative one: for entities based in the Czech Republic the national market is the Czech one while all the others are, naturally, foreign markets. International financial markets in the currency valid for the given state are foreign markets whereas international financial markets in a foreign currency (from the point of view of the country in which the market is based) are Euromarkets (Kotáb In: Bakeš, 2012: 2014–2015).

From the above-mentioned classifications I prefer the discipline-based one, even though it is, taken at face value, a carbon copy of the classification of the non-fiscal part of financial law (with the exception of currency law). This is discussed here in the chapter on the classification of supervision within the system of law. Nonetheless, this does not diminish, I believe, the plausibility of the classification, for it offers an accurate division of the financial market into individual subfields. One cannot deny the fact that the second classification is also valid but it focuses on criteria rather than disciplines, which (when applied) means that each discipline could appear – according to the selected criterion – in a number of groups.

I find the discipline-based classification of financial markets more appealing also because I deal with supervision of the entire financial market including some particularities in individual disciplines. Still, I offer a further modification of the discipline-based classification to make it even more fitting:

- credit market (including banking and co-operative banking)
- capital market

8 For example, it is typically 3 working days for the SPAD business system at Prague Stock Exchange, plc.

9 A specific example here could be the purchase of some shares with the delivery taking place in six months – the so-called forward transaction.

- monetary market
- insurance market
- foreign exchange market
- commodity market

Banking and co-operative banking can be labelled as credit institutions since their common distinctive feature is the provision of credits (loans) – hence the collective name 'credit market'. The notion of banking also includes financial services provided by banks; unless these services (though provided by banks) belong to a different financial market discipline. The basic banking activity is the accumulation of temporarily available finances of the depositors; these finances are then made available again in the form of loans. This enables the flow of money in economy and the amount of temporarily available finances in circulation is multiplied (Wikipedia.org). Co-operative banking is realised via credit unions – they differ from banks in the legal form (credit unions may only be founded in the form of a society), the amount of the required basic capital (CZK 35 million as opposed to CZK 500 million for banks), and the range of clients for whom credit unions may offer their services (members only). In all other respects, especially as far as prudential enterprise rules are concerned, credit unions need to meet the same requirements as banks (CNB, 2017). For this activity it is, of course, necessary to possess a licence issued by the relevant state authority.

The capital market is a place where the capital is traded by means of securities and their derivatives. One can say it is a subset of the financial market (Wikipedia.org). Out of all financial market disciplines the capital market is the most interesting for this book and its main topic (supervisory integration) because the capital market's basis is the transfer of money (in the form of issues) and the purchase of securities from subjects in surplus (investors, often as consumers) to subjects in deficit (issuers – those who issue securities). The capital market is part of the financial market in every country. There are two types of capital markets, namely regulated and unregulated ones. Regulated markets are mainly stock markets (in the Czech Republic it is the Prague Stock Exchange, plc. and RM-System Czech Stock Exchange, plc.). The majority of European capital cities and developed countries have their own regulated market, chiefly in the form of a stock exchange.

Unregulated markets trade with securities and other financial instruments; however, they are not regulated (e.g. multilateral commercial systems which can only be run if certain conditions set by the state are met).

Despite being interconnected, these two parts of the financial market must be kept apart since they perform different activities and they behave in a different way when it comes to handling finances.

In the past, highly developed and dynamic capital markets often brought about financial innovations and newly-emerged segments of the market, with which countries had to deal by means of regulation and supervision. Owing to the considerable administrative burden and the sheer complexity of the task, the problem used to be solved by establishing a new institution that took care of those new supervisory and regulatory duties. Thus, a range of specialised institutions gradually emerged, each of which only took care of a certain part of regulation and supervision. It was impossible for it to cover the entire spectrum. Even though this specialisation enabled closer inspection of the securities market, it, of course, also led to a gradual loss of the overall view. This happened for instance in Great Britain or the USA (Pavlát, 2003: 17).

The notion of monetary market was discussed above when I talked about the differences between monetary and capital markets. These financial market disciplines are, to my mind, the most dynamic disciplines and their supervision is, therefore, subject to constant changes and modifications which attempt to react to the current situation in the world, both politically and economically speaking.

The insurance market is supposed to secure the most important values (like health or life) often threatened by a number of external factors. Insurance helps to minimise the risks of both economic and non-economic activities. There are specialised institutions which offer insurance services, for which they need a licence issued by the state authority; these institutions are called insurance companies.

The foreign exchange market is a market where foreign currencies are traded in a cashless way. Money only figures here in the form of deposits on foreign currency accounts. The foreign currency market, on the other hand, is a market where foreign currencies are traded in cash. An ordinary foreign

exchange office is an example of the clients' form of the foreign currency market. Anybody willing to enter the business may do so without any restrictions (Mikolášová, 2017). Foreign exchange markets are the sphere of activity for dealers (who are end consumers), brokers (who arrange deals for others; particularly if the dealer in the transaction wishes to remain anonymous), and market makers. A market maker is a dealer who on a working day has the obligation of revealing (on request) the foreign exchange rates. It is a person who seals business with dealers; thus they are, as a matter of fact, foreign exchange officers in a cashless form. The same role of a market maker in a foreign currency market is performed by a foreign exchange officer, who exchanges cash. Regulation and supervision in this area is carried out over both the foreign exchange and foreign currency markets. Any activity can only be performed if one possesses a licence issued by the given state authority.

The commodity market enables the purchase and sale of commodities. The principle operating here is the very same as the one in the capital and monetary markets, but the subjects of transactions are, needless to say, commodities. Commodities are goods which are traded in the market regardless of quality. The supplies from various suppliers are mutually replaceable. Thus, cars cannot be called a commodity, because they are made in many versions at different prices. By contrast, copper is a homogenous product which can be traded at a unified price at global markets (Wikipedia.org).

The overview of financial market disciplines above discussed the characteristic features of the disciplines themselves – the segments and their subjects which operate there. When assessing the importance of the financial market and its segments' influence on the economic situation, I would like to express my conviction that they affect society and economy enormously; that is why their proper working order and their correct setting play a key role in achieving economic stability and prosperity. Given the fact that the workings of the financial market (and its segments) are not merely customary – the financial market is regulated, i.e. it is delimited by legal norms and then through legal norms supervision is carried out over its activities – it is therefore crucial to set the 'rules of the game' and to anchor them in the system of law. In practice, it means delimiting regulation (the

rules for entrance into the market and the code of behaviour there as well as the subsequent application of supervision and inspection). All segments of the financial market have existed for some time; they keep developing and so do regulatory and supervisory mechanisms. The very fact that individual segments have evolved, separated and, to a certain degree, standardised in various forms (in particular as part of legal norms) to be later accepted by society is a relevant justification of the existence of regulation and supervision of the financial market. If the financial market existed without regulation and supervision, it would be nothing more than a mere chaotic grouping of entities and their activities without proper rules; this would, no doubt, result in a system of total economic instability.

4 Monetary law

Monetary law and monetary policy are quite closely related terms. Monetary law is necessary legal base for national (or supranational) currency and monetary policy comes from the monetary law. I see it currently more and more important internationally as an international Monetary law which is focused on cross border transactions and the Monetary unions. There is of course national monetary law, but these international relations take greater importance for financial stability as such.

In my opinion Monetary law is set of social relations happening between states and/or Financial institutions including central banks based on legal codes, treaties, protocols and unions dealing with currency and cross border transactions.

The very same applies for Financial market and Monetary law – global integration which is strongly connected with economy.

European monetary Integration has never taken place in isolation from international developments. International and European monetary law address the same principled problems of monetary cooperation: how to proceed with financial transactions cross-border where no global currency exists (There is the attempt to make a European currency real for whole European union, but is long time run. With the European Economic and Monetary Union, a full-fledged monetary union. between sovereign States has been established for the first time in history (Herrmann, Dornacher, 2017: 2).

Well-functioning market depends on getting the rules, institutions and instruments that govern it right. And the source of the euro area's difficulties, is that policy-makers failed to do so. For this reason, it would be wrong to conclude that Europe, or the euro, has failed. It was policy that failed. But importantly, policy can also be fixed. What we need now, therefore, is to finish what we started in 1999 and make the euro area work (Mersch; 2014).

Monetary policy is a method adopted by the monetary authority of a country to control the supply, availability, and cost of money (Definitions.uslegal.com).

Monetary is economic topic which suits more in national scope policy (although there is for example EU monetary policy of European Central Bank). It belongs to non-fiscal part of the Financial law. On the other hand, Monetary law reflects more international activities of different states and institutions, although there is national monetary law regulating mainly local currency. From this point of view, the Monetary law is part of Economic law.

5 Conclusion – Economic law?

In general, let me conclude, that there are only few differences between non-fiscal part of Financial law and the Economic law. One of them I tried to explain above especially in Diagram No. 1. The goal and the aim of this article was to try to find out what Economic law is, where it belongs in the system of law and what are the connection points with Financial law. There is no doubt, that Economic law exists, it set up in Financial law and there are strong connections and similarities with Non-fiscal part of the Financial law

The question I need to answer is whether could be Economic law independent law discipline? The best answer to such a question is maybe to set up a new question. Why? Is there really any need to have another independent law discipline, although it could be unification of few others, especially when they are part of financial law anyway. It really doesn't need to be independent law discipline, but it could be used as another name for non-fiscal part of financial law in connection with international element. The reason is quite simple, it's because of the simplicity of the name – the Economic law. It's just easier for non-professionals to understand, there is something connected with the economy. Its also more understandable for internationals from those countries, where is no Financial law as we know it. So,

the question should not stand "Should be the Economic law new branch of law", but "could be the Economic law used as another name for Financial market law and Monetary law"? The answer is yes, it could be and in some cases, it should be rather used this way, especially when we talk internationally or about only these parts of the Financial law, without wider relations with another part of the Financial law, such as the Tax law.

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Wikipedia.org

Definitions.uslegal.com

FINANCING OF PUBLIC TASKS CARRIED OUT BY ENTREPRENEURS ON THE EXAMPLE OF SUBSIDIES TO NON-PUBLIC KINDERGARTENS

Rafał Kowalczyk[1]

Abstract

The process of privatization of public tasks should be treated as an increasingly popular way of carrying out public tasks. Despite the benefits for both the public entity and the private entity, which performs publicly financed from the budget, the parties often dispute the financing rules. The legislator in various ways regulates the principles of financing public tasks carried out by private entities. Examples of such regulation are tasks related to the financing of educational tasks carried out by private entities. Frequent changes in legislation and lack of correlation with other regulations give rise to constant doubts as to the financing of these tasks. This study is an analysis of the case of funding from the local government budget for the financing of running non-public kindergartens mainly from the point of view of the method of calculating grants to private entities performing such tasks. Dominant methods in the study are the dogmatic and empirical method, although the discussion also requires the use of the historical method.

Keywords

Budget; Non-public Kindergartens; Grant.

JEL Classification

H4; K3; R5.

1 Introduction

The process of privatisation of public tasks should be treated as an inevitable but also a desirable way of carrying out public tasks by private entities.

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Despite the undoubted benefits for both the public entity and the private entity, such an arrangement also creates conflicts and even litigation over the rules for financing the tasks entrusted. Under Article 43 of the Public Finance Act, the right to perform publicly funded tasks is vested in all entities, unless separate acts provide otherwise. The execution of public tasks by private entities entails the need to finance these tasks from public resources, which is done by a public entity. The method of financing is most often based on a subsidy mechanism in which, under the rules resulting from the Act or the agreement concluded between the interested parties, the amount due to the contractor carrying out the task is agreed and transferred to the contractor. Therefore, each entity meeting the accepted criteria and acting in the area of public use under the above-mentioned provision should have access to public funds and, to a certain extent, use them to carry out financial tasks (Kleszczewski, Commentary on Article 43 of the Public Finance Act). An example of such a regulation, in which the legislator decides to allow wide access to the public task, while ensuring the provision of public funds to carry out this task, is the one relating to running non-public kindergartens. The originality of this issue is primarily due to the lack of uniform and consolidated legislative regulation, followed by different practice of applying the law. The mechanism of calculating and granting subsidies to the entrepreneurs running non-public kindergartens, the legal nature of the subsidy granted and the type of legal relationship that exists between the public entity and the entrepreneur, make this a very comprehensive subject allowing for extensive legal considerations based not only on the dogmatic method but also on the historical method, and, fist of all, on the empirical method. In spite of the rather detailed statutory regulation of the rules for calculating and providing subsidies, the practice of applying the law, in particular, shows many areas of doubt and conflict between the parties. This document is a case study that has inspired the author to make a few comments, some more detailed than others, on poor quality of legislative practice (in the author's opinion) and the still questionable nature of the subsidies granted to entrepreneurs pursuing economic activity described in the introduction.[2]

2 Types of capital expenditure are listed in the Public Finance Act in Article 236, all other expenses are to be classified as current expenditure.

In accordance with the provisions of the Education System Act, a legal or natural person undertaking to run a pre-school education institution in non-public form shall be required to be entered into the register kept by the municipality competent for the place of running the activity in such form. Under Article 90(1), non-public kindergartens, including special kindergartens, primary schools and lower secondary schools, including those with integrated classes, except for primary special schools and special lower secondary schools, and primary art schools, receive subsidies from the municipality budget and the rules for granting them and rules of accounting of the subsidies are governed by a resolution of the municipality council. The amount of subsidies for non-public kindergartens is regulated by law, as a constant relation to current expenditure from the self-government budget allocated to public kindergartens. Nevertheless, these seemingly clear statutory provisions raise a lot of doubts, especially if the evolution of these provisions and the lack of systemic legal solutions are taken into account. However, in the beginning, it is necessary to start with the general issues concerning the budget subsidy itself.

2 Legal character of education subsidy

The budget subsidy is a financial and legal instrument mentioned in the Constitution of the Republic of Poland, and defined by the Public Finance Act in Article 126, pursuant to which the subsidies are the funds from the state budget, the budget of local self-government units, and the state special-purpose funds, subject to special accounting rules, which are earmarked for financing or co-financing the execution of public tasks under this Act, other acts or international agreements. The above-mentioned provision points to at least three essential elements of a subsidy as a transfer of public funds. First of all, the subsidies are subject to special accounting rules, and secondly, the possibility of providing them must derive from the law (the Public Finance Act or other act) or an international agreement, and thirdly, they are granted for the execution of a public task; The Public Finance Act lists three types of budget subsidies: targeted subsidies, specific subsidies and earmarked subsidies, and each type is governed by separate provisions of the Act. It should also be noted that, in practice, the functioning

of mixed subsidies is possible, as is evidenced by both the doctrine and judicial decisions. The subsidies, provided under the Education System Act, are the examples of subsidies of such mixed legal nature. Due to their legal status, these subsidies should be classified as a special type of subsidy, combining the characteristics of at least two types of subsidies. Taking into account the normative division, these subsidies should be called earmarked-targeted subsidies. It is true that some support the view that subsidies provided under the Education System Act are only earmarked subsidies: "Subsidies granted on the basis of the Education System Act are earmarked subsidies within the meaning of Article 131 of Public Finance Act and are subject to subsidy-specific legal regime specified in the Act in relation to not only granting and paying out subsidies, but also in relation to special rules for the refund of subsidies to the budget of local self-government unit" (Resolution of the Regional Audit Chamber in Zielona Góra of March 5, 2014, Lubus.2014/672).

However, the prevailing view in the case law and literature is the recognition of subsidies described above, in the category of earmarked-targeted subsidies: The subsidies can only be used to cover current expenditure of an educational establishment or school. In the light of this wording of Article 90(3)(d) of the Education System Act it is not possible to assume that a subsidy can be spent on any purpose related to the activity of an educational establishment (…). This means current expenditure, and not all the expenses. The costs covered must fall exclusively within the scope of tasks in terms of education, upbringing and care, including social prevention. (…). It is granted to entities outside the public finance sector for co-financing their current statutory activity, but also for a specific purpose, i.e. for co-financing of specific tasks of an educational establishment that is in the field of education, upbringing and care, including social prevention (excerpts from the reasons for the judgement of Provincial Administrative Court in Krakow of 29 December 2016 I SA/Kr 1304/16).

The characteristic element of earmarked subsidies is the fact that they are provided for the beneficiary's current activities, as opposed to targeted subsidies, in which the subject matter of their use is important. Referring this to the mixed nature of the earmarked-targeted subsidies, it is important to characterise them as subsidies provided to fund a specific, defined range of current activity of the beneficiary, i.e. not all current expenditure, but

a strictly defined type of the activity which is important from the point of view of the entity providing the subsidy. Such a conclusion can be drawn based on both the grammatical and systematic interpretation of the Act, as well as the historical interpretation and the practice of applying the law, since the legislator, by regulating the purpose of providing education subsidies, has indicated and continues to specify the direction of expenditures funded from subsidies.

According to the above-mentioned provisions, the subsidies referred to in Article 90(1)(a)–(3)(b) are intended to co-finance the execution of tasks of schools, kindergartens, other forms of pre-school education or educational establishments in terms of education, upbringing and care, including special education and social prevention. The subsidies can only be used to: cover current expenditure of schools, kindergartens, other forms of pre-school education and educational establishments, including any expense incurred for the purpose of running a school, kindergarten, other form of pre-school education or educational establishment, for the purposes specified in the Act, including but not limited to the remuneration of a natural person leading a kindergarten, other form of pre-school education or educational establishment, if he or she performs the function of a director of kindergarten or educational establishment or conducts classes in other forms of pre-school education, respectively, for the purchase of fixed assets and intangible assets, including: books and other library collections, teaching aids for the didactic and educational process carried out in schools, kindergartens and educational establishments, sports and recreation equipment and other assets mentioned in the Act. What is important, the subsidy can only be used to cover expenses related to the execution of tasks referred to in paragraph (3)(d) incurred during the budget year for which the subsidy is granted, regardless of the year the tasks relate to.

The provision of Article 90(4) has delegated (and continues to delegate) the authority to the council of the local self-government unit to set the procedure for granting and accounting the subsidies referred to in paragraphs (1)(a) and (2)(a)–(3)(b), as well as the procedure and scope for verification of their correct use, taking into account, in particular, the basis for subsidy calculation, the scope of data to be included in the application for a subsidy

and in the settlement of accounts related to it, as well as the time limit and method for settling the subsidy. All of the above findings lead to the conclusion that the legislator treats the subsidies provided to educational entities as subsidies of particular kind, where the way in which they are calculated is as important as the manner in which they are used. The role of education subsidies is not to subsidise the entire activity carried out by an educational establishment or a unit running it, or to cover all their expenses (see: judgement of the Provincial Administrative Court in Krakow of December 12, 2012, file no.: I SA/Kr 1304/12), but its role is to subsidise an educational establishment (and not the entrepreneur) for the purpose of performing a public task. Hence, it can be argued that the budgetary subsidy is intended to reflect those expenses which serve the public entity directly to carry out the public task consisting in running an educational unit which performs its statutory tasks. This does not mean, however, that any expenditure made in a public educational unit is directly related to the performance of the public task consisting in running a kindergarten. Adoption of the thesis that any expenditure planned in the public (self-government) budget, which is not a capital expenditure, made for or by a public educational unit, is directly linked to the achievement of the purpose of the educational unit, would lead to absurdity. It must be assumed that budgets can also include such expenses that do not directly serve to perform the statutory tasks, although they relate to the functioning of this unit. These can include marketing expenses, the expenses to improve employee skills or other expenses which are not directly related to maintaining an educational unit in terms of covering the cost of the performance of tasks. What is more, these expenses may be subject to fluctuations related to an increase or decrease in the expenditures on individual cost groups, which would result in automatic changes to the amount of budget subsidy, for example, due to periodic employee training or subsidisation of their education. As a result, such a situation would lead to a change in the amount of subsidy, despite no change in the amount of expenditure for the execution of educational task (performed by a public educational unit). On the assumption that a subsidy is to be equivalent to the expenditure incurred by a public entity to carry out the task, and on the other hand, the type of expenditure to be covered by the subsidy is indicated

to the beneficiary, a blind assumption that any expense, which is not a capital expenditure, is adopted to calculate the budget subsidy, is in conflict not only with the purpose of their provision, but it also contradicts the logic.[3]

3 Calculating the education subsidy

Once again, it is important to mention the subsidy feature determined at the beginning, which is the execution of a public task. So if the amount of the subsidy exceeds the costs of achievement of this goal, then the law has been undoubtedly infringed. This reasoning indirectly arises from the arguments of the judicial decisions, which emphasise that the education subsidy is not aimed at financing the total expenditure incurred by an authority running the educational establishment. Whereas it assumes that only some current expenditure directly related to the performance of tasks in terms of education, upbringing and care, including social prevention, are to be funded. Other expenses, whether an expense is a current or capital expenditure, resulting from the obligations of the entity running a non-public establishment, are to be borne by the entity running an educational establishment. The assumption, on which the structure of the subsidy in question is based, is the fact that non-public educational establishments are funded by a number of sources. The subsidy is only one of them, another source – governed by private law – are the payments made by those using the services of the establishment (excerpts from the reasons for the judgement of Provincial Administrative Court in Krakow of December 29, 2016 I SA/Kr 1304/16).

The view that not all the expenditure planned in the self-government budget can be treated as a basis for calculation of subsidies to non-public kindergartens, is further supported by the organisational form of running public kindergartens. According to Article 79 of the Education System Act, public kindergartens can only be run in the form of budgetary units, and therefore in the organisational form provided for by the Public Finance Act with close links to the budget in terms of all its revenues and expenses (Article 11 of the Public Finance Act). This means that all the revenues of the budgetary unit and all its expenses are budget revenues and expenses. And since

3 Types of capital expenditure are listed in the Public Finance Act in Article 236, all other expenses are to be classified as current expenditure.

a budgetary unit cannot have other expenses than those that come from and are included in the budget (except for separate accounts and expenses covered by them), any expenditure made by the budgetary unit, and therefore also the kindergarten, must come from the self-government budget. The expression "any expenditure" should be understood as both current expenditure, which is aimed directly at the performance of tasks related to running a kindergarten and the expenses which only indirectly relate to the tasks mentioned-above. And therefore, it is impossible to blindly assume that every budgetary expenditure provided (included in the self-government budget) to a budgetary unit (public kindergarten) is spent on the task of running a public kindergarten. Can it be considered that the budgetary expenditure for the training of kindergarten staff on the status of self-government employee is related to the performance of the tasks of a kindergarten, and moreover, that this expense should be taken into account when determining subsidies to non-public entities? Even where the courts accepted the otherwise convenient thesis that current expenditure is the expenditure which is so classified by the Public Finance Act, it is also possible to note that superior values are taken into account, which should be followed by public entities in the management of public funds: when specifying the basis for calculation of the subsidies, the legislator indicated the current expenditure (undoubtedly interpreted in the same way this term is understood under the Public Finance Act), but as set in the budget and dedicated to a specific purpose – the functioning of a public kindergarten. This means that the reference to the expenses planned and related to the functioning of a public kindergarten is made. The basis for calculating the subsidy is the sum classified in the municipality budget as a category of expenditure for a specific purpose – the functioning of a public kindergarten – and not as a category of all current expenditure incurred by a public kindergarten (excerpt from the reasons for the judgement of Provincial Administrative Court in Wroclaw of July 14, 2015 III SA/Wr 2/15). The accuracy of the findings made by the Administrative Court must be emphasised, as it established that the appropriateness of the expenses incurred should determine if they can be recognised as the basis for calculation of a subsidy.

The provisions of the Education System Act refer to the category of current expenditure when determining the amount of budgetary subsidy. The provision of Article 78 b(1), by referring to the basic amount of subsidies to kindergartens, states that this is to be understood as the amount of current expenditure planned for running of the kindergartens by the municipality, excluding special kindergartens and kindergartens, where the planned current expenditure funded from the budget of the European Union exceeds 50 % of their planned current expenditure (…). Although the dominating view in the judicial decisions and among supervisory authorities is that in relation to the concept of current expenditure one must refer to the Public Finance Act and to the division into capital and current expenditure used in Articles 235 and 236 thereof, this thesis raises doubts resulting both from the interpretation of these provisions and the judicial decisions. For the reasons set out above, and because it is not possible to apply analogy in the framework of public law (and both the Education System Act and the Public Finance Act belong to such category), the possibility to use all current expenditure (within the meaning of the Public Finance Act and executive regulations), planned in the self-government budget, for the calculation of subsidies to non-public kindergartens, is at least debatable and questionable. This is because it is not possible to uncritically adopt the budgetary classification as the basis for recognition of expenditures for the performance of a public task as a basis for calculation of the subsidy, by referring only to the provisions of a procedural and formal nature, in isolation from the concept of purposeful and economic expenditure of public funds. The provisions related to budgetary classification are used for proper aggregation of individual revenues and expenses, and do not reflect the purpose of allocating budget expenditures, while the Education System Act emphasises the purpose of financing both public and non-public kindergartens and other educational establishments, i.e. the activity in the field of education, care and upbringing. This purpose is also emphasised in judicial decisions: (the judgement of Supreme Administrative Court of Poland of August 26, 2014, file No. II GSK 1002/13),[4]

[4] Budget accounting regulations, which are acts implementing the Public Finance Act, such as the Regulation of the Minister of Finance on the detailed classification of income, expenses, revenues and expenditure, as well as funds from foreign sources, also use the category of current expenditure when making their internal classification based on the direction and type of expenses, on the basis of classification scales such as Sections, Chapters and Articles.

The expenses of an entity running a kindergarten, not acting as teaching staff, cannot be financed by subsidies, as they are not included in the tasks of a school or educational establishment in terms of education, upbringing and care, including social prevention. The purpose of the subsidy is not to subsidise the execution of tasks of the authority running a kindergarten (the owner), since under Article 90(2)(b) of the Education System Act of September 7, 1991, the ultimate beneficiary of a subsidy is to be a pupil (kindergartener), to whom the kindergarten provides the services of education, upbringing and care. The main goal of budget classification is to implement the principle of openness and transparency, by ensuring the uniformity of financial operations in public financial plans. It is not possible to decipher expenses for the execution of a particular task using only the names in the budget classification. This is because the resources allocated to a particular task, in subjective terms (aimed at the execution of a specific task), are something other than the expenses incurred by a particular public finance sector unit (in this case by a budgetary unit) to perform various tasks, not necessarily basic tasks (resulting from the essence of functioning of such unit), and entrusted to it for performance. Otherwise, all the expenditure made by the indicated entity (including those not intended for the execution of statutory task) is taken as the basis for calculation of education subsidy. This is the starting point for calculation of the subsidy for a specific task performed by a private entity. And, therefore, the subsidy becomes an instrument to fund the entity, and not the task.

In conclusion, the correct way of calculating the subsidy should assume that not all the expenditure incurred by an organisational unit is related to the performance of its task (in this case educational task), and, consequently, the tasks which are neither directly nor indirectly related to the performance of this task should be noted and not be taken into account.

4 The procedure for obtaining a subsidy in the event of dispute

The non-established rules regarding the jurisdiction of the court adjudicating on the issues of payment of budget subsidies are also worth mentioning here. The situations, where the entrepreneurs running non-public kindergartens verify the amount of the education subsidy granted and paid, are more and more often. In the case of a dispute that cannot be resolved amicably, the parties must rely only on the judicial system. There are discrepancies in doctrine and case law, whether the claims for the payment of the

subsidy should be treated as civil law cases, or whether they are public law cases, subject to the cognition of administrative courts. It cannot be overlooked that the subsidy is based on the provisions of public law (the Public Finance Act), and its nature assumes the inequality of the parties to a legal relationship, which consists in making an authoritative decision regarding the subsidy amount and purpose, as well as the entity which is granted the subsidy from the budget. Also, its payment, if it is not based on the agreement between the beneficiary and the authority granting the subsidy, exhibits the characteristics of an administrative action. In addition, when evaluating the way of claiming of a wrongfully paid or misused subsidy, one should pay attention to the strictly administrative way in which such claim is regulated, which means that it should be resolved by the Administrative Court (see Pilich, Commentary to the Education System Act, commentary on Article 90, point 2). They should take into account the judicial decisions of administrative courts, which see the complex and ambiguous nature of cases for determining and paying education subsidies. For example, in the reasons for the judgement of Provincial Administrative Court in Wroclaw (of July 14, 2015, III SA/Wr 2/15) it is stated that: the Mayor's ordinance determining the rates of this subsidy is an act of local self-government unit body other than the act of local law of local self-government unit bodies adopted in the field of public administration. So, in the case, there is no justification for dismissing the complaint indicated in the defence. The right to challenge such an ordinance results from Article 101(1) of the Act on Municipal Self-Government, under which, the right to lodge a complaint to the court is vested in the entity that is able to demonstrate that the ordinance infringes its own legal interest or right. Since the applicant is the authority running the non-public kindergarten and the day care centre in the territory of the municipality, and therefore the educational establishments eligible for subsidies under the Education System Act, the applicant is undoubtedly entitled to bring an action against the ordinance of the Mayor of P. in question, determining the subsidy rate. Therefore, the preliminary question should be to determine what is the subject of the challenge (what is the basis for the statement of claim). If it is an administrative act, such as an act issued by an executive body for the purpose of determining the

amount of the subsidy, according to the author, the case should be treated as an administrative case and decided by the administrative court. The recent legislative changes also support this view.

5 Conclusion

The lack of uniformity and, above all, the complexity of the provisions make the legal situation governing the financing of non-public kindergartens still unclear. In addition it deviates from the systemic complexity status. This is mainly explained by the poor quality of national legislation, because the legislator does not observe and does not take into account even the most legitimate demands of doctrine and practice of applying the law, despite the fact that Article 90 of the Act has been changed as frequently as 16 times since the adoption of the Act! Referring to the observations raised in this study, it should be stated that the uncritical adoption of only grammatical interpretation of the provisions of the Education System Act, in isolation from the cardinal principles of public finances, related to the purposeful and economic expenditure of public funds, must lead to the situation in which the non-public kindergartens will receive a subsidy, the amount of which will not reflect the expenditure incurred in carrying out the public task. Of course this does not mean that the financing of entrepreneurs carrying out the activity described-above should be abandoned. However, this cannot happen at a loss for the self-government budget, and consequently for the public kindergartens. Clear, systemic and regulated principles of calculating and granting the subsidies subject to uniform rules for claiming them should become a standard, especially in the situation of conducting such active pro-family policy as can be observed in the Republic of Poland. Nevertheless, the changes are possible, which is supported by the fact that as of January 1, 2017 paragraph 11 was introduced into Article 90 by the legislator, stating that the act of granting the subsidy referred to in Article 90(1)(a)–(8) constitutes an action in the field of public administration, which means that the administrative courts are competent to decide on the claims relating to subsidies to non-public kindergartens.

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NEW RULES OF BUDGETARY RESPONSIBILITY AND THEIR IMPACT ON PUBLIC FINANCES[1]

Michal Koziel[2]

Abstract

In consequence of economic crisis, countries tried to react to unfavourable economic development in some ways. Because of this situation, mainly the rules of budgetary responsibility and adoption of so-called budgetary rules became a hot topic. At present time, this topic stands aside mainly in the Czech Republic where public finances are being economised with surplus after long period of time. However, an obligation to adopt those rules still exists because it results from not only regulations of the European Union but from international agreements as well. The act on budgetary responsibility rules was approved in the beginning of this year being at that time out of interest of both professionals and laymen, although, it provoked many responses at the time of being submitted to the Chamber of Deputies. This act follows the regulations of the European Union and adjusts the rules of budgetary responsibility for public institutions. This article deals with those rules, discusses the obligations implemented by those rules as it comes to public institutions; it determines the term public institutions and critically evaluates particular rules. The main aim of this article is to have a think about in what ways those new rules can influence public finances and economic activities of public institutions. During the elaboration, the methods of analysis, synthesis, deduction, induction and statistical method have been applied.

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Fiscal Rules; Rules on Budgetary Responsibility; Public Finances; the Czech Republic; Public Institution.

JEL Classification

K10; K30; E60; E62; H87.

1 Introduction

In connection with public indebtedness, the question of so-called fiscal rules becomes the topical issue. The set of rules is meant, which should lead to stoppage of public indebtedness growth as well as to its continual decrease so that public institutions would be motivated to approving the balanced or surplus budgets. Those rules are being continually implemented by individual EU member states namely because of the pressure made by the European Union itself. The way and form of implementation differ though. While some of the rules become a part of international form, others can be implemented into the constitution's or act's texts. Last but not least, they can occur in the form of political proclamation.

In the Czech Republic, two acts include the basic rules for public finances management; it is the Act No. 218/2000 Coll., on budgetary responsibility rules and changes of some connected acts (budgetary rules) and the Act No. 250/2000 Coll., on budgetary rules for regional budgets. Both those regulations are covered by the constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, which consists of the fundamental postulates and limits towards public institutions.

However, above mentioned rules have not included the fiscal rules in a sense because those were not implemented into the text. Such unfavourable status has been tried to be adjusted by the Czech lawmaker but there was always more or less relevant reason to stop this effort. Recently, the Czech Republic has not had an essential problem with state budget; last year, after a long period of time, public finances were managed with surplus. Even though, the Chamber of Deputies approved the Act No. 23/2017 Coll., on budgetary responsibility in the turn of 2016/2017 actually with no media interest. This act includes the fiscal rules in their particular sense. It has to be said

that this is only halfway solution because the drafted package of legal regulations involved also a draft of constitutional law on budgetary responsibility, which did not become the part of legislative process though. In case this would succeed, the Czech Republic would have the fundamental fiscal rules embodied at the highest possible level.

The main aim of this article is to have a think about in what ways those new rules can influence public finances and economic activities of public institutions. The basic hypothesis is that fiscal rules have a significant impact on public finances. During the elaboration, the methods of analysis, synthesis, deduction, induction and statistical method have been applied.

2 Fiscal rules

Above mentioned fiscal rules are being advanced mainly by International Monetary Fund, the European Union and Organization for Economic Co-operation and Development and are the part of Fiscal Responsibility Framework. For the first time, the Fiscal Responsibility Framework was introduced in New Zealand; in 1990 s, this country faced the same problems as most of European countries face now (Bende-Szabó, 2013: 76) In the frame of fiscal rules, Antoš (Antoš, 2015: 31–40) further determines institutional fiscal rules and numerical fiscal rules. Institutional fiscal rules react to the need for the transfer of budgetary responsibility authority to an independent institution while numerical fiscal rules are defined based on some of indicators of public finances status. Numerical fiscal rules can be defined easily as "permanent limitation of fiscal state policy by simple numerical limits for budgetary aggregates" (Bocák, Dózsa, 2014). Kind of fundamental postulates are meant, which should be followed by the lawmaker and executive power of particular countries when managing public finances and setting public budgets at different levels. Controlling process and sanction mechanism should be the part of fiscal rules in case those are not abided by.

As time went on, several types of numerical fiscal rules have been determined. Those are:

- **budgetary balanced rule** – by the limitation of deficits, it helps to make public budget stable and continually leads to its balance (usuall deficit up to 3 % of GDP),

- **debt rule** – it determines strictly the limit of public debt related to GDP (currently, this rule has stabilized at the level of 60 % of GDP),
- **expenditure rule** – it limits expenditure increase related to the expenditures in previous year related to GDP etc.; it also limits such expenses, which can be financed by debt policy tools,
- **revenue rule** – it determines a permissible level of tax burdens determined as a percentage of the GDP, or a concrete allocation of the additional budget revenues (International Monetary Fund, 2009)

Recently, an independent fiscal institution is being established, the aim of which is to monitor and control the budgetary discipline (so-called organizational part of the budgetary responsibility frame or institutional fiscal rule). Further, medium-term and long-term budgetary frames are being implemented and are obligatory when setting budgets, determining concrete terms in constitutions or acts, saying to what date the public finances are to be consolidated or e.g. the rule of Pay-as-you-go. The rule Pay-as-you-go is also called the rule of continuous financing meaning that each draft of legal regulation, which would decrease state revenues or increase state expenses, has to be accompanied by a draft outlining how to balance this difference (e.g. by tax increase or cuts in other fields). (Marková, 2010: 696) Newer fiscal rules try to be more flexible regarding the economic development.

States implementing the fiscal rules recently, are those: Austria, Columbia, Italy, Portugal, Serbia, Spain, Great Britain (budgetary balanced rule); Hungary, Serbia, Slovakia, Spain, Great Britain (debt rule); Ecuador, Israel, Japan, Namibia, Poland, Romania, Spain and the USA (expenditure rule). (International Monetary Fund, 2012)

International institutions have significant impact on forming the fiscal rules; those institutions help to implement particular rules into the national legal orders. Besides the European Union, implementing those rules intensively since 1990 s, other transnational subjects such as the Eastern Caribbean Currency Union, the West African Economic and Monetary Union or the Central African Economic and Monetary Community are active in this field as well. (International Monetary Fund, 2012)

Fiscal rules can be implemented in different ways and at different level. The rules arranged at constitutional level are evaluated in the best way, followed by legal regulations and coalition statement; the lowest place of evaluation is hold by political duty of some political authority (minister of finances etc.) In accordance with those and other criteria, the European Union created so-called Fiscal Rule Index, through which the level of fiscal rules in the EU states is being compared. By this index, considering 2013, the first place was hold by France followed by Germany and Spain. The worse position was hold by Malta, Slovenia and Romania. The Czech Republic hold unfavourable 24th place. (European Commission, 2015)

Among the basic advantages of mentioned fiscal rules, their impact on public indebtedness and deficits is, further their unambiguity and clear arrangement in the form of numerical determination and thus violation of them (and consequences related to it) is always evident; also fact that they focus mainly on macro-economic indicators is considered the advantage. In Poland, there has been such research provided aiming to what rate the number of rules limiting public indebtedness at constitutional and legal level (fiscal rules) influences the decrease of public indebtedness. By the authors of this research, positive relation between implementation or existence of fiscal rules and effectiveness of public finances system can be seen. (Sowiński, 2011: 207–216) Among the main disadvantages of some fiscal rules, not considering economic deviations as well as dependence on their application in practice are. While economic deviations and unexpected events can be reacted to by suspending the part of rules or by their adjustment, their application in practice is the biggest risk. Even properly set fiscal rules can lose their sense in case those are used in improper way or are not executed strictly (e.g. composition of Fiscal Board and limitation of Constitutional Court authority in Hungary or "nationalization" of pension funds in Poland and Hungary).

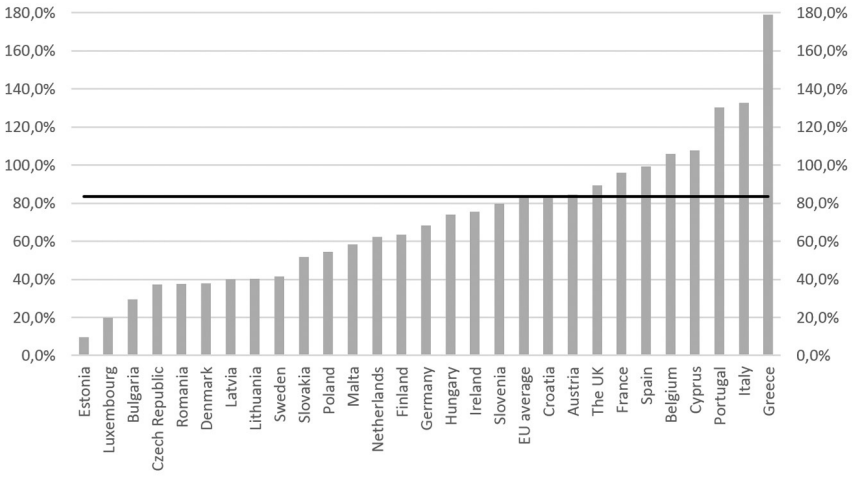
3 Impact of European Union law on fiscal rules level

European scope of public indebtedness limitation is the inseparable part of the studied topic. Legislation of the European Union requests such rules being adopted by individual member states, which would lead to stabilization

of public finances. Most of domestic limiting tools is implemented just because of the EU impulse. Total indebtedness of the EU member states achieves currently 83,5 % of GDP EU (see Graph 4.1) and recently, is of decreasing character. Therefore, the EU is interested in further indebtedness limitation.

The European Union tries to fight the public indebtedness and budgetary irresponsibility in different ways. Nevertheless, the effects of this fight are not visible in such fast way, in which the representatives of the EU think they would. In my opinion, it is caused by the fact that European institutions and EU legislation are not prepared to dynamic changes in the world and are not able to follow fast developing society sufficiently. Ratification of Lisbon Treaty has lasted two years until all member states became persuaded of its necessity. The same situation is seen now. Treaty on European Union and Treaty on the Functioning of the European Union do not contain the tools to react flexibly to deepening crisis and their change made in usual way would last too long. Therefore, particular member states – mainly Eurozone states, which were influenced by Greek crisis and Italian and Spanish problems try to find different, alternative solution.

Graph 4.1: The ratio of public debt to GDP in EU countries



Source: Eurostat (http://epp.eurostat.ec.europa.eu/)

The European Union is extraordinary also by the fact that it has its own budget. This budget should be approved each year as the balanced one, which is determined by Treaty on the Functioning of the European Union in its article 310 par. 1 – annual budget has to be balanced as it comes to revenues and expenses. In case, the European budget would end in deficit, it has to be included into the expenses in the following year. Also for this reason, the EU budget does not contribute to the sum of member states indebtedness.

Nevertheless, the role of the European Union as for implementation of new fiscal rules into the legal orders of individual member states is considered the fundamental one. It is just the European Union having mechanisms to enforce the fiscal rules into the legal orders of member states. Either it is by Directive of the European Council 2011/85/EU of October 8, 2011 on requirements for budgetary frameworks of the Member States, which has to be implemented into their legal orders or by making political pressure to ratification of so-called Fiscal Pact – Treaty on Stability, Coordination and Governance in the Economic and Monetary Union or by directly used regulations of the EU. In the consequence of those legal regulations, the Czech law on budgetary responsibility rules has been adopted as well.

4 Act on budgetary responsibility rules

The act on budgetary responsibility rules adjusts this responsibility of public institutions and determines a scope of authority of National Budgetary Council. This act is quite short; however, it contains the definition of fundamental terms out of this field (e.g. public institution, budget, prognosis, corrective component, expenses frame etc.). It also determines the rule to calculate the public debt. This act also implements expenses frame of state budget and state funds as well as arranges the way of its determination. The basic rule, which the act is based on, is the state's and regional self-governing units' obligation to take care of healthy and sustainable public finances, to support economic and social development, employment and inter-generation cohesion. Sustainable status of public finances should become the result of above mentioned effort.

In its 35 articles, the act determines the definition of public institution (further discussed), budgetary responsibility rules (the obligation of public institution to set the budget and medium-term prospect). Further, this act sets the conditions how to publish information and how to elaborate macroeconomic and fiscal prognoses. By this act, the Ministry of Finances should each year elaborate budgetary strategy of the public institutions sector for the period of the following 3 years as well as it determines the amount of total expenses of the public institutions sector. (Act on Budgetary Responsibility Rules, Art. 4–18)

The core definition is included in art. 13 of this act determining the rule for setting the debt amount of the public institutions sector. By this article, when determining the debt amount of the public institutions sector (after the finances reserves are deducted when financing the state debt expressed as percent ratio on GDP), the debt of the public institutions sector is used (which arises up to the end of previous calendar year and nominal GDP of previous calendar year being submitted to the European Commission by the Czech Statistical Office in the first half of current year based on directly used regulation of the EU arranging the use of Excessive Deficit Procedure). (Act on Budgetary Responsibility Rules, Art. 13)

The act also arranges three debt zones namely when achieving 55 % of ratio public debt/GDP and when achieving 60 % of ratio public debt/GDP. After achieving the first level, thus 55 %, such regulations are activated limiting the public institutions in public means treatment, e. g. by long-term tools of planning. After achieving 60 %, the only rule is set namely the obligation to submit the plan of the public debt's decrease.

5 Definition of public institutions sector

The fundamental and core term going across the entire act, the term public institution is. Determination of this term is the essential one because the public institutions are those, who are obligated to follow the rules as it comes to public finances treatment.

In the sector of public institutions, the below mentioned units are considered the public institution (it has to meet condition: it has to be registered as the unit of public institution sector by Regulation of EP and Council No.

549/2013 of May 21, 2013 on European system of national and regional accounts in the EU and in the register of economic subjects managed by the Czech Statistical Office):

- state, organizational part of state and state facility having similar status to organizational part of state,
- state-funded institution,
- state fund,
- public research institution,
- public university,
- legal person, the founder of which other public institution is and which is mainly financed by revenues from public institution and managed by public institution,
- health insurance company,
- self-governing unit,
- voluntary municipalities association,
- regional council of cohesion region,
- public-funded institution founded by regional self-governing unit, voluntary municipalities association or by Prague city district,
- another economic subject matching the marks of public institution by Regulation of EP and Council No. 549/2013 of May 21, 2013 on European system of national and regional accounts in the EU. (Act on Budgetary Responsibility Rules, Art. 3)

Above mentioned shows that the public institutions sector is by this act being dealt with in very wide way. Obligations given by this act are related to very wide spectrum of subjects. Most of those subjects does not have to be experienced in long-term planning or annual budget determination and this fact becomes the problem. Nevertheless, the basic rule is clear. Any subject has to behave budget-responsibly even if it manages public finances indirectly. It has to maintain those finances in economic way and in accordance with the rules included in the Act on budgetary responsibility. (Koziel, 2016)

6 National Budgetary Council

National Budgetary Council is independent body according to the act on budgetary responsibility, which acts in the field of fiscal and budgetary policy. The fundamental scope of authority of this council results to a certain extent from the EU requests (mainly from Directive No. 2011/85/EU). By law proposers, its core will be in monitoring the public institutions' economic activities and evaluating the fulfilment of budgetary responsibility rules. (Explanatory report, 2016: 13)

The task of National Budgetary Council is to identify the debt amount and announce it, evaluate the fulfilment of numerical fiscal rules, monitor the development of public institutions economic activities, elaborate the report dealing with sustainability of public finances etc. The members of this council are voted by the Chamber of Deputies for the period of 6 years and are not allowed to take any instructions or ask for them from different body or person. This council consists of 3 members – chairman and 2 members; it has its Office of disposal, which arranges tasks related to professional, organizational, administrative, HR and technical issues. (Act on Budgetary Responsibility Rules, Art. 21–33)

It is very difficult to evaluate the National Budgetary Council at present time. Its competences are known though, however, the body itself has not been established yet fully. Nevertheless, already now the professionals are afraid of interventions, which can be possibly made by legislative and executive power thus are afraid of its independence. (Zbíral, 2013: 170) In Hungary though, Smuk (Smuk, 2013: 311–316) or Kecsö (Kecsö, 2013: 170) criticize an equivalent of our National Budgetary Council, so-called Fiscal Council for making the step from democracy towards technocracy because all three members of this council are mainly white-collar workers, not politicians but even though they have crucial impact on political questions.

7 Impact of new rules of budgetary liability on public finances

As it is clear out of previous chapters, new rules of budgetary responsibility have fundamental impact on the field of public finances. Either the public finances would be defined as a specific financial relation between authorities

and public administration institutions (in the frame of economic system from the point of economy view) on one hand and other subjects on the other hand or they would be legally defined in sense of money sum as public incomes and public expenses, there are many ways of public finances being influenced by new accepted rules. First, it is necessary to mention that new rules limit public institutions fundamentally when economizing public means. Public institutions are just those administrating majority of financial means in economy and those moving them. In case those public institutions would be pushed to limit mainly expenses in case they would try to achieve the determined level of public indebtedness, it can have far-reaching consequences as it comes to economic growth.

It has to be also taken into consideration that big part of public means is managed by regional self-governing units and those will be influenced by implementing changes as well. Further, it can be said that the purpose of newly accepted rules is to lower the level of public indebtedness, which itself has fundamental impact on public finances as such. Last but not least, implementation of concrete definition of public institutions sector, the act on budgetary responsibility rules clearly determines, which institutions become the part of this sector and which do not, and thus, at the same time, it determines the subjects themselves administrating public finances (if public finances are considered money sum).

8 Conclusion

As it comes to the Czech Republic, current level of fiscal rules whether state or regional self-governing units was until recently insufficient. This situation is being tried to be improved by the lawmaker by new act on budgetary responsibility rules. Whether this effort will be successful or not, time reveals. However, it is necessary to take positively just this effort itself. The form of adoption of new fiscal rules is to be considered negatively. Original project though has also involved a draft of constitutional act on budgetary responsibility. This act was not approved. Therefore, mainly request for sustainability is being weaken because newly adopted rules can be changed by governmental majority any time in order not to limit the government when managing the public means. In case of approval of the fiscal rules at constitutional level, higher stability would be guaranteed.

Public institutions, among which self-governing units, public universities, health insurance companies, different state-funded organizations are, should follow the rules in order to reduce the public debt growth. In this context, smaller municipalities have to be considered; the question is whether they will not be limited in their investments because those often achieve an amount of one-year budget.

Problem can arise when determining the sector of public institutions itself. While some institutions are clearly public (state, municipality, health insurance company), there are often seen such institutions operating between public and private sector; those often manage both the public and private means. The practice will show where the boundary will be determined.

All above mentioned partial conclusions lead to a declaration that (as said in chapter 7) newly accepted budgetary responsibility rules would fundamentally influence public finances in different meanings of this term. This situation clearly shows how the law influences the economy and vice versa. By acceptation of new act on budgetary responsibility rules, economic quantities will be influenced. At the same time, the reason for acceptation of this act is nothing else but the threat that the level of public indebtedness would achieve undesirable values as well as the need to regulate the increase of public indebtedness, to limit and, in ideal case, to decrease it to acceptable value.

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COMPENSATION FOR NON-PROPRIETARY DAMAGE IN PRACTICE OF MOTOR THIRD-PARTY LIABILITY INSURANCE

Martina Krügerová [1]

Abstract

Each person taking part in a vehicular traffic is responsible for damage caused by a special type of such traffic. Liability for damage caused by vehicle is considered a civil issue. As for the Czech Republic, clear rules were valid for long period as it comes to compensation for non-proprietary damage. New legal regulation, the Civil Code, brought the change in the system and scope of compensation. The aim of the article is to evaluate the changes when compensating non-proprietary damage from the point of consequences – legal and economic ones. Compensation will be presented by practice of the motor third-party liability insurance.

Keywords

Liability for Damage; the Motor Third-Party Liability Insurance; Compensation for Damage Caused.

JEL Classification

G22; K0; K13; K15.

1 Introduction

Each person taking part in the operation on the land communication is liable for a damage caused by the specifics of such operation. The operation is provided on publicly accessible communications. A damage can be related to not only the road users but to the third parties as well.

The fundamental source of legal regulation of motor third-party liability insurance the Act No. 168/1999 Coll. is, on liability insurance for damage caused

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by the operation of a vehicle and on amendments to some related acts (the Motor Third-Party Liability Insurance Act – further MTPL Act). The regulation of Ministry of Finance of the Czech Republic No. 205/1999 Coll. is an implementing regulation, by which the act No. 168/1999 Coll. is provided.

Legal relationships resulting from a concluded insurance (liability insurance for damage caused by the operation of a vehicle) are based on the act (see above), insurance contract and insurance conditions. A legislation of insurance contract is involved in the Civil Code specifically in § 2758–2872, unless stipulated by the MTPL act otherwise.

Liability for damage caused by vehicle operation is considered a civil liability. The fundamental source of this legislation, the Act No. 89/2012 Coll. is, the Civil Code. In the Czech Republic, there have been clear rules applied as it comes to compensation of non-proprietary damage. The amendment of the Civil Code brought the change in the system and scope of compensation; proprietary and non-proprietary damage compensation is adjusted specifically in § 2894–2971.

Non-proprietary damage compensation is a significant change for the Czech legislation, which not always has been accepted positively. Mainly court practice has to deal with a new way of evaluation of injury and diminishing of social position without a support of cancelled regulation. Courts can award a justified and sufficient compensation for persistent health effects. The aim is not to describe all changes and the way of compensation in detail but to outline their impacts in MTPL insurance. For example, Vítová, Dohnal, Kotula (2015), Achour, Pelikán (2015) or Žďárek, Těšinová, Škárová, Waltr, Púry et al. (2015) refer to more detailed study of the rules and principles of damage compensation. The practice examples of non-proprietary compensation for health damage are mentioned by e.g. Těšinová (2014).

The aim of this article is to evaluate the changes when compensating non-proprietary damages namely its legal and economic consequences. Practically, the impact is to be analyzed on the damage caused by the vehicle operation.

The article includes and uses the data of the Czech Police statistics (Overview on accidents rate on land communication in the Czech Republic, 2012, 2013, 2014, 2015 and 2016), the Czech Insurers Bureau statistics and the Czech Insurance Association statistics and annual reports.

2 Principle of motor third-party liability insurance

Legal relationships resulting from a concluded insurance (liability insurance for damage caused by the operation of a vehicle) are based on the act (see above), insurance contract and insurance conditions. Legislation of insurance contract is involved in the Civil Code specifically in § 2758 – 2872, unless stipulated by the MTPL act otherwise. The way and scope of damage compensation is based on § 2951 and subsequent of the Civil Code and is specified in § 6 and § 7 of MTPL Act.

Liability for damage is considered a liability relationship connected with the concrete vehicle. It is not a vehicle insurance as thought very often. Not insured vehicle is related to a car insurance e. g. in connection with stealing the vehicle, natural car damage etc.

Based on MTPL insurance, the insurer is obligated to provide with compensation, which the right of entitled person (mostly the insured person) to have compensation performed is connected with. By § 2861 (2) of the Civil Code, compensation of MTPL is paid to the injured party. However, the injured party does not become a participant of legal relationships of the insurance neither in case a loss event occurs. The injured party is not entitled to the performance if he is not entitled by the insurance contract or other law. The only Motor Third-Party Liability Insurance is considered such law. Direct entitlement of the injured to compensation provided by the insurer by § 9 (1) of given act is thought a contribution for the injured. The injured is not depended on cooperation with the insured causing the damage, who would have to report a loss event to the insurer.

It has to be stressed here that even in this case, it is about the right to compensation performance as it comes to the insurer not about the right to damage compensation. The insurer is not the one causing the damage and is not liable for it. The insurer only performs his obligation based on the insurance contract. Claims of the insured or the injured party with direct claim is always considered the right to insurance performance not the right to damage compensation. As Jandová, Šlauf and Svejkovský (2014) state, this determination is followed by all other contexts such as limitation of this right, local and factual jurisdiction or the option of exemption from court fees.

Towards the insurer, the injured is entitled to insurance performance, towards the insured the injured is entitled to damage compensation. The injured has to prove his entitlement to damage compensation.

Based on MTPL insurance, the insured is entitled to have the compensation paid by the insurer in scope and amount by the Civil Code as follows (MTPL Act, § 6 (2)):

- caused damage of health or death,
- reasonably spent costs related to the care of injured animal and damage caused by impairment, destruction or loss of property as well as for damage incurred by a loss of property if a natural person lost the capability to take care of it,
- loss of profit,
- reasonably spent costs related to legal representation when prosecuting claims to above mentioned damages.

To have the insurer paid compensation, the damage has to be caused by vehicle operation and the insured has to be entitled to damage compensation. Damage has to be caused while the liability insurance was in force with exception of its interruption.

Special mean of operation is the term explained by the practice of the court. By the Judgment of the Supreme Court (25 Cdo 3925/2013), the vehicle is considered operational even it creates the barrier for other road users as a consequence of the driver's failure and such barrier represents a danger of collision. The fact whether the engine of such vehicle is working or not or the vehicle became not operational before the loss event and why is not taken into account.

The insurer provides with compensation only in amount the insurance contract is concluded for, i.e. by the insurance contract and insurance conditions. The insurer's performance can be limited. In case there are no limits determined in the contract, the insurer is obligated to compensate full damage, which the insured is liable for. In the Czech Republic, there is no offer of non-limit MTPL insurance provided so far. In case the insured paid the compensation directly to the injured, he is entitled to be compensated by the insurer in amount of performed compensation, which would be otherwise paid by the insurer based on the insurance contract.

In the MTPL Act, there are minimal limits of compensation given. For each injured or dead – 35 000 000 CZK including the costs spent for the care paid by public medical insurance and regressive claim by § 6 (4). For property damage and profit loss (by § 6 (2 (b) and (c)) – minimum 35 000 000 CZK not taking the number of the injured into account; if the sum total of the claims by more injured parties exceeds the limit of insurance compensation included in the insurance contract, compensation to each of them is reduced in proportion of this limit to the sum total of the claims by all the injured parties.

Such case can occur when concluded limit of insurance is not sufficient to compensate the damages. Concluded MTPL insurance does not rid the insured of liability. However, the insured is still liable for damage and is obligated to use own financial sources. If we think that even care paid by public medical insurance, the costs for medical care can become astronomic – hundreds of thousands or even millions of CZK. Then, situation when concluded minimum limit is not sufficient to cover all costs can occur. This fact is also the reason why some clients choose the insurance variants with even higher limits being set by the law. The insurance companies offer the limits up to 250 million CZK.

In conclusion of this part, sanction claim is to be mentioned. The insurer has the right to make his claim for performing the indemnity towards the insured if there are reasons mentioned in § 10 of the act on liability insurance for damage caused by the operation of a vehicle. As it comes to compulsory insurance (which MTPL is), in accordance with the Civil Code, the insurer is not allowed to reject the insurance indemnity to the injured party. Otherwise, it would be a conflict with the meaning of compulsory insurance, purpose of which is to protect the injured interests. It is the insurer's will, in what scope he will apply his regressive claim. There is the only one limitation namely the amount of insurance indemnity he performed in concrete insurance event. Sanction can be applied towards both vehicle operator and vehicle driver, who is responsible for damage caused by vehicle operation.

3 Change in compensation evaluation

In the area of the Czech Republic, clear rules were applying when compensating non-proprietary damage. The Civil Code valid up to April 30, 2004 did not regulate the claim of the bereaved as for compensation in case of death

of close relatives if this death was caused by the person causing this death or by loss event. To achieve the compensation of non-proprietary damage, protection of person could be used, which enabled to award also finances in case moral satisfaction would not seem to be satisfactory (§ 13 (2) of the Civil Code). In connection with the amendment of the act No. 168/1999 Coll., on liability insurance for damage caused by the operation of a vehicle, the change of the Civil Code was approved. New claim to one-time compensation was implemented for the bereaved for damage caused by death. The Civil Code involved the rule of this claim in § 444 (3). Compensation amount was determined as a lump sum in amount of 85 000 CZK (in case of unborn child loss) up to 240 000 CZK (in case of bereaved husband, child or parents). Courts also accepted the financial award beyond the frame of § 444 (3) of the Civil Code.

New legal regulation of the Civil Code brought the change in system and scope of compensation, concretely proprietary and non-proprietary damage compensation is adjusted specifically in § 2894–2971.

In connection with above mentioned, non-proprietary damage is distinguishing by health damage and death. In case of death of the injured, his rights and obligations pass to his successors in title. Those could be entitled to claim to the insurer (depended on the scope of the insured's liability for caused damage).

By § 2959 of the Civil Code, in case of health damage or death, the wrongdoer has to redress a mental suffering of all relatives by financial compensation balancing all their suffering. In case such compensation cannot be determined, it is set by moral rules. Courts were in difficult situation how to determine a loss of a relative.

The finding of the Czech Constitutional Court of December 22, 2015 I. ÚS 2844/14 became the guideline to consider the compensations for secondary damage; this court determined the fundamental criteria for compensation for both the injured and wrongdoer. *By mentioned finding, circumstances, which should be taken into account, are mainly those:*

a) intensity of relationships between the plaintiff and the dead person,

b) age of the dead and the bereaved,

c) question of financial dependency of the bereaved on the dead,

d) possible provision of another satisfaction.

Circumstances at the side of wrongdoer, which should be taken into account, are those:

a) approach of defendant (repentance, compensation, apology etc.),

b) impact of event on mental sphere of wrongdoer,

c) his property status and

d) scope of causing or scope of co-causing of dead person.

The same situation was in case of making decision about the amount of compensation for the injured's health. Cancellation of regulation No. 440/2001 Coll., on compensation for pain and diminishing of social position. So called consideration regulation determined individual diagnoses and damages for pain and suffering by particular number of points and compensation was calculated by those points (one point equaled 120,– CZK). The reason for cancellation was not to have courts been limited by the regulation but make them have the option to award a fair and sufficient compensation for health consequences mainly for serious health consequences.

Newly, by § 2958 of the Civil Code, when harming the health of the injured, the wrongdoer redresses the damage by financial amount equalizing suffering fully and further, non-proprietary damages. If the harm to health interferes with the future prospects of the injured, the wrongdoer has to compensate him for the difficulties in attaining his proper social position. If the amount of compensation cannot be determined, it is determined in accordance with moral rules.

Among the claims the injured can apply to when his health is harmed, are those: damages for pain and suffering, compensation for reasonably spent costs related to treatment, compensation for diminishing of social position, compensation for earnings loss during a sickness and after it, compensation for pension loss and material damage.

With the aim to make decision making of courts easier, the Supreme Court elaborated in cooperation with Company Medical Law, the insurers' representatives and other legal and medical professions the Methodology for compensation for non-proprietary damage[2] (further Methodology)) to assess the level and intensity of encroachment on primary victim's health. This Methodology is of no obligatory character but it is recommended

2 Text of Methodology is of disposal on the Supreme Court website since April 14, 2014. Available: http://www.nsoud.cz

by the Supreme Court. Methodology can help to calculate damages for pain and suffering and diminishing of social position. By Těšínová (2014), Methodology provides with the guideline to determine the compensation for damages for pain and suffering, however, there is sufficient space to consider the unique concrete case. The principle of calculation of damages for pain and suffering remains basically the same. In addition, an assigning of the points to diagnoses remains the same. The way of damage calculation was determined and the value of point was increased. The value of point is being determined each year. The way of calculation of diminishing of social position is arranged in new way. There are not considered only diagnoses but mainly all impacts on the injured's life as well, his limitations in civil and leisure life.

Determination of concrete amount of compensation remains the subject of negotiation between the insurance company and the bereaved or it is given by court. In practice, the insurance company recommends compensation being based on its own investigation. Determined amount should be adequate to the concrete situation and in accordance with commonly granted amounts for similar loss event. In case the injured would not agree with the offer, he can take it to court. However, even in the court, he has to defend his claim to compensation. The proof of all claims of the injured or the bereaved would become the basis for successful compensation. Also in this case such rule is applied that it is not possible to mix the claims of primary and secondary victims of loss event. Thus, it is necessary to distinguish the application of § 2958 of Commercial Code considering the primary injured and § 2959, purpose of which is to compensate the secondary injured (4 Tdo 1402/2015-97).

Another important point is to distinguish whether the injured claims the compensation in criminal trial or civil proceedings. In case of criminal trial though, infliction of criminal sanction to criminal act's perpetrator is considered particular satisfaction. It can be thought that in case of civil proceedings, compensation amount could balance also criminal sanction of the wrongdoer.

In this connection, it is necessary to point out the obligation of the insured wrongdoer resulting from MTPL act and from MTPL insurance to inform

the insurance company that the injured applied his claim at court or other relevant authority. He also has to inform the insurance company about the process and result of such proceedings. Or, in cooperation with the insurer to defend himself against inadequate compensations of non-proprietary damage by submission of correcting mean against the particular verdict about non-proprietary damage compensation.

4 Impact of compensation for non-proprietary damage on MTPL insurance

As said above, the insurer provides with insurance indemnity only in the scope of concluded insurance contract and insurance conditions. In the Czech Republic, the insurance indemnity is limited by the limit of insurance indemnity. The insured pays the insurance for his protection. The insurer is obligated to determine such insurance amount, which would guarantee a feasibility of duties originated by liability insurance provision (§ 3 b (1) of the act on MTPL insurance).

Table 1 and figure 1 show the total balance of MTPL insurance. In 2015, MTPL costs exceeded received insurance by about 2 milliard CZK (MTPL loss 10 %), in 2016, slight improvement was expected, the loss achieved 9 %.

Table 1: Overview of Motor third-party liability insurance (MTPL)

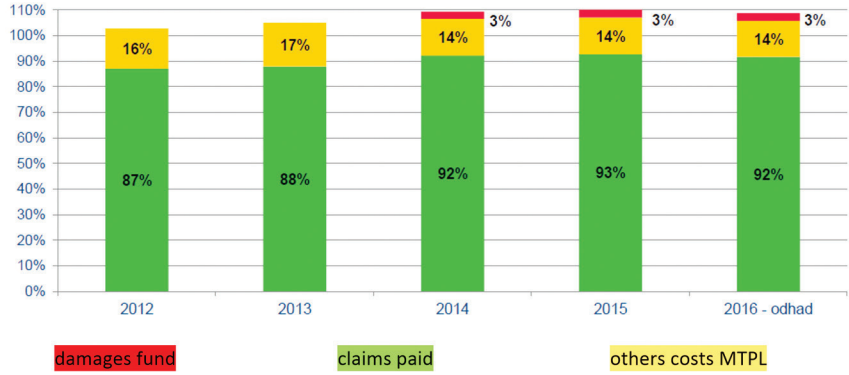
	2012	2013	2014	2015
MTPL premiums earned (CZK ths)	19 352 616	18 963 870	19 544 975	20 233 783
Total MTPL costs* including MTPL expenses (CZK ths)	19 896 929	19 901 471	21 400 815	22 274 669
Total number of damages	257 330	259 951	246 703	258 397
Number of damages with health claims	10 777	11 981	11 552	10 598

* Total MTPL cost = total incurred losses in the particular year as to December 31 (claims paid + RBNS + IBNR)

Source: own processing based on Annual report of Czech insurance association (2015, 2014, 2013) and on Matoušek, Jedlička, 2016

By Matoušek, Jedlička (2016), unfavourable balance is given by continuing increase of damages for pain and suffering and non-corresponding increase of insurance in the most risky segments.

Figure 1: MTPL compared with annual insurance (100 %)



Source: Matoušek, Jedlička, 2016

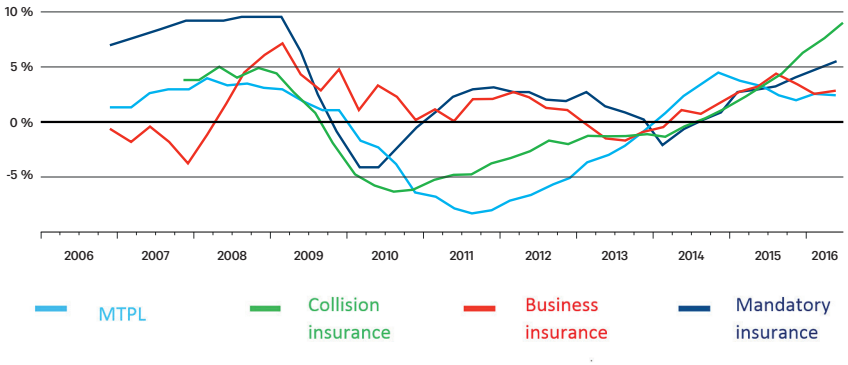
As it comes to car insurance, its highest amount was in 2005, being 4 043 CZK (graph 2). In 2013, average insurance was lower by 1 300 CZK (in amount of 2 770 CZK and this amount was the lowest one within the period of obligatory insurance). In 2012 and 2013, insurance companies were preparing for the fundamental legislative changes. Since September 2013, the obligation of paying the fire brigade departures has been implemented. Since January 1, 2014, obligation of paying 3 % of the insurance value to the fund of damages protection were implemented as well as the changes in compensation for non-proprietary damages.

Bad balance of given insurance is the reason for prices fight in the field of MTPL insurance. The rate decreases beyond the economically acceptable edge. Insurance companies try to segment the clients and thus to determine particular prices of insurance. They consider the age and experience of drivers, number of transported people comparing to car age, region, in which the car is used, engine performance, drive type. Bonuses and extra premiums' implementation should be the result of above mentioned consideration.

However, prices increase is insufficient. Insurance companies are offering the insurance for very low prices for long period of time and thus they cannot create the reserves for compensation of damages – see graph 1. The result of this situation is that MTPL insurance is recently going beyond profitability edge.

Even there are clear signals leading to the need of insurance price increase, insurance companies still keep average price in amount of 2 800,– CZK. The entire market stagnates and prices are increasing only in the most risky segments (young drivers, articulated lorry). Prices of MTPL insurance are increasing insufficiently – see Figure 2.

Figure 2: Development of annual changes MTPL premiums to other non-life insurance



Source: Urban, 2016.

In case, MTPL insurance would not change, situation will become worse also regarding continual increase of compensations for life or health damages. Table 2 shows the indicators of car accidents in the Czech Republic focused on accidents with health or life consequences. In 2016, the police investigated 98 864 car accidents, in which 545 people died, 2 580 people were injured seriously and 4 501 people were injured slightly. Those data match the facts found out up to 24 hours after the car accident. Consequently, i.e. between 24 hours after accident up to 30 days, additional 66 people died. Contrary to 2015, the number of people consequently died is lower

by 12 people. In 2016, the police investigated 21 386 car accidents with health or life consequences; 611 people died (i.e. by 127 people lower than in 2015) and 27 016 people were injured (damaged). (The Police of the Czech Republic, 2016).

Table 2: Development of car accidents indicators in the Czech Republic

Year	2012	2013	2014	2015	2016
Number of car accidents	81 404	84 398	85 859	93 067	98 864
Out of it only with material damage	60 900	64 056	64 805	71 506	77 478
Out of it with health or life consequences	20 504	20 342	21 054	21 561	21 386
Killed*	681/742	583/654	629/688	660/738	545/611
Seriously injured	2 986	2 782	2 762	2 540	2 580
Slightly injured	22 590	22 577	23 655	24 427	24 501

* Data match the facts found out up to 24 hours after car accidents/plus up to 30 days after car accident[3].

Source: own processing based on statistics of Police of the Czech Republic (2012, 2013, 2014, 2015, 2016)

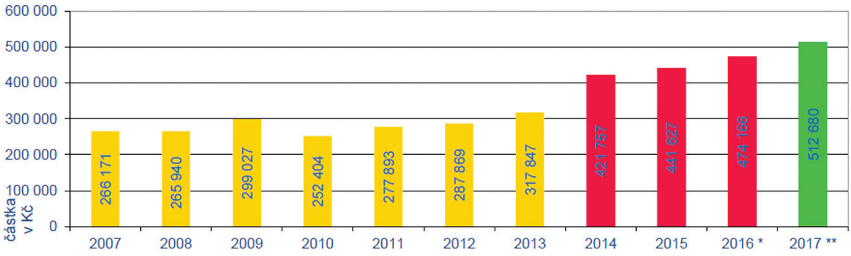
In the figure 3, there is clear trend in the increase of average amount of health damage seen compensated by MTPL insurance.

In 2013 (last year before application of new Civil Code), average health damage achieved 318 000,– CZK out of obligatory insurance; in 2016 then already 474 000,– CZK. For 2017, the Czech Insurers Bureau estimates double increase contrary to 2013.

3 *Since 1980, reports of car accidents are monitoring people died in car accidents in period from 24 hours up to 30 days after car accident parallelly. This 30 days period enables to see the consequences of car accidents caused by road operation participants in more objective and comprehensive way. This practice is in accordance with United Nations Economic Commission for Europe recommendations and is common in most EU countries.* (Overview on car accidents on road communications in the Czech Republic, 2016).

The costs of insurance indemnities are increasing for long time. Such fact has to be taken into consideration that higher level of compensation and thus higher injured's protection resulting from new Civil Code has impact on insurers in milliards.

Figure 3: Average amount of health damage paid by MTPL insurance



* amount of average damage up to 10/2016
**estimation of Czech Insurers Bureau for 2017
Source: Matoušek, Jedlička (2016).

From the data of Hradec and Matoušek (2015), the increase of one-time compensation paid to the bereaved is resulting. Up to 2014, average one-time compensation was in amount of 1,1 million CZK, in 2015, average amount was 2,5 million CZK per one damage, which represents the increase by 227 %. Similarly to that, other claims increase such as damages for pain and suffering or diminishing of social position.

5 Conclusion

The aim of this article was to apply the changes when compensating the non-proprietary damages on the MTPL insurance and the impact of legislative changes on the economy and entire market profitability of MTPL insurance.

MTPL insurance is considered the specific insurance because of several reasons – obligation of given insurance contract conclusion under the conditions given by the law, the number of concluded contracts and the number of loss events. As it comes to legislative changes, it is important to take

the cancellation of regulations related to one-time compensation for the bereaved into account as well as regulations dealing with compensation for pain and suffering and diminishing of social position. Determination of concrete amount of compensation remains the subject of negotiation between the insurance company and the bereaved or it is given by court.

At present time, an institute of non-proprietary damage compensation for primarily and secondarily injured is on the increase in the Czech Republic. And, by decision-making practice of courts, its shape becomes clearer. In criminal trials dealing with loss events caused by vehicle (MTPL), courts in some cases award the bereaved a high amount compensation for the death of their relatives. In such case, the insured has to inform the insurance company obligatory (based on MTPL insurance) about criminal or other proceedings in order to make the insurance company be able to help within the proceedings.

Economic impact of legislative changes was clear for all participants. Even though, insurance companies have not been able to cope with this development. Competitive pressure of the insurance market is the main reason for this situation. Average insurance has slightly increased since 2013, however, up to 2015, the insurance has increased only in accumulated way only by 3 %. Such increase could have not covered presumed impact of new Civil Code on the amount and scope of insurance indemnities. Total balance of MTPL insurance supports the above mentioned. In 2015, the costs of obligatory insurance exceeded received insurance by about 2 milliards CZK (loss is 10 %), in 2016, slight improvement of situation was expected, loss achieved 9 %. When calculating liability insurance, insurance companies have to consider such trend, that compensations for car accidents victims will grow multiply. In addition, they have to make MTPL insurance of higher quality so that they would be able to meet their obligations fully within long period of time.

For further excursus, comparison of the judicature and awarded amounts in case of death caused by transport accidents and other events leading to relative's death (e.g. at medical malpractice) would be of a desire.

An analysis of relation between technical innovations and driver's liability would become interesting (e.g. automatic driving systems) in connection with motor third-party liability insurance and damage compensation.

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WORKING HOURS

Jana Martiníková [1]

Abstract

Working hours are considered a very important term in the labour law as well as no less important economic term. The contribution deals with working hours as for legal aspect, namely from the point of the Czech law view. It is focused on legal regulation of some selected questions related to this topic. In this paper, there are principles of given law determined and some problems when being applied in practice are mentioned. The main aim of this contribution is to confirm a hypothesis that legal regulation of working hours influences an economic decision made by an employer. The paper is elaborated based on reviews of literature and interpretation of labour-law regulations. Knowledge gained out of an analysis is applied on practical examples.

Keywords

Working Hours; Flexible Working Hours; Account of Working Hours; Overtime; Limits of Working Hours.

JEL Classification

K310; J530; J810.

1 Introduction

Working hours are the category connected legal, economic and social aspects. As the term of labour law (Bělina et al, 2014), (Andraščíková et al, 2013), it is defined as the time when the employee is of disposal for the employer to provide the work. It is the time period, during which most of the rights and duties are realized within the labour-law relationship. As the economic category, working hours (Galvas et al, 1993) are about

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the amount of production and provided services while the size of working hours account influences their amount directly. Working hours are extensive element of work rate. Social aspects of working hours are mainly perceived in connection with harmonization of working, private and family life.

The aim of this contribution is to present the Czech legal regulation of the selected questions connected with working hours and to point out some concrete problems occurring in practice. By elaboration of this article, a hypothesis should be proved that legal regulation of working hours influences an economic decision making of the employer.

This article is focused on special working regimes and limits of working hours. (Bukovjan, Brůha, 2016), (Janečková, 2014), (Šubrt, 2010). Legal regulation is the part of Labour Code (Act No. 262/2006 Coll. as amended). Special working regimes are chosen in order to present such legal regulation, which gives the employer the space to use the working time effectively by flexible forms of working hour's arrangement. The limits of working hours represent such duties, which the employer has to follow and the bans, which has to be respected. In this contribution, such limits are used as examples dealing with overtime job and working hour's adjustments of some employees. Serious operational reasons are their common mark being the only legal reasons to realize overtime as well as to reject the employees' application for the suitable adjustment of working hours in given cases.

This article is elaborated based on the review of literature and interpretation of legal regulations with the use of relevant practice of the court. Knowledge gained by their analysis is used when applied on the practical examples and recommendations for the employers' practice.

2 Special working regimes

Flexible working hours and working hours account are considered special working regimes. The contribution involves some specifies of their legal regulation as well as practical problems related to them.

2.1 Flexible working hours

Flexible working hours are considered the special working regime[2]. By its implementation, employers can react to different conditions influencing their activities, e. g. operational, economic, climatic, technological etc. Employees then can partially organize their working time by their private needs (Andraščíková et al, 2013: 177–178). Flexible working hours include the period of the basic and optional working hours, the beginning and the end of which is determined by the employer. Employee is obligated to work the basic working time by a given schedule of working hours. The length of the basic working hours is of the employer's competence and the Labour Code does not determine any limits. Optional periods of working hours are determined by the employee and thus he/she actively participates in the determination of his/her working hours. As far as the flexible working hours are concern, here the rule that the only employer organizes the working hours and is fully responsible for it, is not used. When flexible working hours are being organized, the employee is responsible for it as well (Bukovjan, Brůha, 2016: 6).The most frequent questions when applying the flexible working hours consider below mentioned circumstances.

Since January 1, 2012, the rule that the flexible working hours begins and ends with optional periods of working hours, among which the period of the basic working hours is implemented, is not valid any more. Nevertheless, this routine still survives (and can be still used), although the legal regulation gives more space to organize the flexible working hours based on the needs of both the employers and employees.

When applying the flexible working hours, average week's working hours have to be fulfilled during the equalizing period determined by the employer. This period is to be maximum 26 weeks in sequence or 52 weeks in sequence if it is agreed in a collective agreement (i.e. agreement with the union). Equalizing period of given maximums is not too practical for the organization of the flexible working hours. Shorter period can be recommended e. g. one month. Also Bukovjan and Brůha (2016: 6) state that long equalizing period brings the risk of postponing the optional working hours towards

2 Up to effect of currently negotiating draft of Labour Code, flexible working hours are defined as the way of working time arrangement.

the end of equalizing period and of possible non-fulfillment of the working hours fund; or, contrary to that, the risk of advanced optional working time. Such deviations can become contra-productive for the employer.

The Labour Code does not ban the implementation of the flexible working hours only for some working places or departments or only for some employees. It has to be stressed that the rule of equal approach towards all employees as for adjustment of working hours has to be followed. In case the implementation of flexible working hours to only some employees would bring unjustified benefit to those employees, such act would be breaking the law and it would not be defensible by a statement that the flexible working hours are not of legal claim. In other words, the employer cannot organize the working hours of the employees with the same working content and the same working hours in the way, some would be given the flexible working hours and some not. It has to be also mentioned that the employer is not allowed to use his right to adjust the working hours and to change the form of working hours to punish the employee for the breach of discipline. This statement results from the decision of the Supreme Court case file reference number 21 Cdo 1288/2009 of September 15, 2010. In this decision is also stated that if the employee would not accept such change, he/she would not be accused of the breach of discipline. Flexible working hours can be changed to the standard one only in order to achieve the meaning of legal norm thus to determine the working hours considering the work character, operational conditions, better use of working hours or satisfaction of the employee's needs.

Sometimes, employers order to employees to work during the optional working hours. Such act is not proper. Employer is not allowed to ask employees to work during the optional working hours. In other words, organization of working time during this period is of employee's responsibility, as said above. For example, employer determines the period of the basic working hours from 9:00 a.m. to 2:00 p.m. Optional working hours are determined from 7:00 a.m. to 7:00 p.m. Employee is obligated to work the basic working hours within the given period. If he/she is asked to work between 3:00 p.m. and 4:00 p.m., employer's act is against the law. (Janečková, 2014: 11)

In connection with the flexible working hours, there are also considered embarrassments in work in practice. Fundamentally, embarrassments in work are being concerned only in such scope, which influences the basic working hours except temporary sickness. Embarrassments in work are considered the work performance if they interfere with the shifts. There is each day of average shift's length considered. However, if those embarrassments are considered the results of not fulfilled average week working hours within equalizing period, it is necessary to distinguish two situations. (Bukovjan, Brůha, 2016: 6) In case the employee was not limited by any qualified embarrassments in workwhen he/she was obligated to fulfill the equalizing period (e.g. temporary sickness, care of sick child etc.) nor any barriers at employer's side, then his/her negligent approach towards duties fulfillment can be considered because he/she could and should fulfill his/her obligations. Such act can be perceived as the breach of discipline with all consequences. However, if the employee does not fulfill average working hours within the equalizing period because of objective reasons, it is not considered the breach of discipline.

In such cases, the rule is applied that the salary is not paid for not worked period and it is not important why the employee has not worked. In case the employee is rewarded monthly and at the end of equalizing period (e.g. 26 weeks), he/she has not fulfilled the average week's working hours and even though he/she earned full salary such overpayment can be equalized in the salary paid for the last month of the equalizing period. (Bukovjan, Brůha, 2016: 6) It means that the salary would be equalized in amount of not worked hours, which are missing in full average week's working hours of the equalizing period.

As it comes to overtime within the flexible working hours, it has to be pointed out that it is evaluated after equalizing period. The Labour Code says that overtime is the work beyond given week's working hours and beyond the basic working hours. It means that overtime can be realized only within the optional period of working hours. Practical example can be mentioned here published in explanatory statements of AKV (Association for development of collective negotiation and labour relationship) (Bukovjan, Šubrt, 2017: 4) considering the overtime within flexible working hours and the

ban of overtime worked by pregnant employee. In those cases, it is recommended to agree and arrange in advance that the pregnant employee would work the number of hours equal to average week working hours within equalizing period. Otherwise, real risk exists that at the end of equalizing period overtime is found out. Violation of the ban of overtime is considered the administrative offence and can be punished by the penalty up to 1 mil CZK. If the employee has the employment contract for shorter working hours and overtime is considered the work above the frame of given week working hours, then the work above agreed working hours does not have to be considered the overtime. It is necessary to guarantee the work not exceeded given week working hours.

Further, it has to be pointed out that the flexible working hours cannot be applied when the employee goes for business trip, when urgent working task is given within the shift, the beginning and end of which are strictly determined. They also cannot be applied because of operational reasons, at the time of important embarrassments in work and because of other reasons given by the employer. For example, such working place is considered when work of one employee is conditioned by the work of another employee, so both have to be present at work. For all those cases, the employer has to give the beginning and the end of the shift in the frame of week's working hours in order to avoid possible disputes mainly because of overtimes, employer's liability for the damage, which the employee suffer within tasks fulfillment.

In connection with Labour Code amendment (currently negotiating), improvement of legal regulation of standby duty under the flexible working hours is discussed. Standby duty can be agreed only beside the basic and optional working hours. Practice of some employers is the reason for improvement because they order standby duty also within optional working hours, by which the rights of employee are shortened related to flexible working hour's regime – by a preamble related to Labour Code amendment (Parliamentary paper 903/0). (Bukovjan, Brůha, 2016: 6) polemize this reasoning saying that with regard to contractual character of standby duty and the fact the employee is paid for it, new legal regulation is groundless. Standby duty cannot be hold within the basic working hours and within the

part of optional working hours; however, if the employee finishes the work within the optional time and leave the working place, he/she can connect his/her rest time with standby duty. This argument can be agreed with.

Flexible working hours is quite often used in practice. It is also often perceived as an advantage mainly for employee, who can organize his/her working time. Its implementation can bring the advantage also to the employer. In the beginning of this sub-chapter, there is an option of effective organization of working time pointed out related to concrete conditions of the employer. Further, a saving of financial means for salaries can be mentioned as it comes to embarrassments at work (they are involved into working hours only if they are the part of the basic working hours) and the saving of overtimes. Record keeping of working hours of each employee becomes partial disadvantage, which is considered the administrative burden by the employers.

2.2 Working hours account

Working hours account was implemented into the legal regulation 10 years ago. The aim of such implementation was to give the tool to the employers so they would be able to adjust the working hours and thus they could flexibly react to the need for different working time depended on the sale, decrease or increase of demand, during the seasonal work etc., i.e. by economic and operational needs. Working hours account is the way of working hour's organization. Regarding the fact there are problems with application of the account, new legal regulation is drafted (with possible effect since January 1, 2018), which defines working hours account as a special working regime together with flexible working hours. It can be expected that this new legal regulation would contribute to better use of working hours account by the employers, who have rather not used this institute so far. In case the regime is well organized in the frame of working hours account, effective and optimal use of working hours can be assured as well as decrease of overtimes and harmonization of working and family life of the employees.

With connection with above mentioned information, it has to be stressed that the adjustment of working hours account is and will be only frame one in the Labour Code. To implement such working regime, the rules cannot

be elaborated in detail. Detailed rules have to be arranged by the employer in accordance with his concrete needs. (Šubrt, 2010: 9) This is, above all, also the reason, because of which the employers do not want to use the working hours account.

The fundamental principle of the working hours account is an option, when the employer can equal the period with higher need of work with the period with less need of work. Working hours account can be applied only in the business sphere, which matches its purpose. Employer can implement it by collective agreement or by internal regulation in case, the union is not present in the company. The length of equalizing period does not have to be longer than 26 weeks in sequence. Only collective agreement can determine this period up to maximum 52 weeks in sequence. Employer is obligated to report working hours account and salaries account within this period. Working hours account compares given working hours with factually worked hours within equalizing period. Salary account compares fixed salary with real salary claim within equalizing period. Fixed salary is not allowed to be lower than 80 % of average salary[3]. After equalizing period is finished, difference in worked time is being found out – BALANCE contrary to working hours fund for this period (Šubrt, 2010: 9) and difference between real salary and paid fixed salary for this period. If salary claim is higher than paid fixed salary, the employer pays such difference. However, in case real salary is lower than fixed one, employee is not obligated to pay the difference back to employer.

One of the reasons for improvement of regulation of working hours account, questions regarding shortening of fixed salary were. Fixed salary is not paid for the working time, during which employee does not work. The law does not deal with shortening of fixed salary. By common process as it comes to the shortening of salary, the salary should be shortened in ratio the length of not worked time/total length of working time arranged in given calendar month. Working hours are not even within the equalizing period, in some months is of small, in some months of big range and this is considered the

3 Or 85 % in case collective agreement involves such agreement that overtime during the equalizing period (not exceeding 52 weeks in sequence) will become a part of working hours only in the following equalizing period (up to max 120 hours).

specifics of working hours account. In case, the employer arranges small amount of working hours in one month, also short-time assessment at work can mean disproportionate lowering of salary or even no payment of it. The stating report of the Labour Code amendment says that this does not match the meaning of working hours account and therefore, the right to salary and the right to settle the working hours for the entire equalizing period is recommended. Fixed salary would be shortened in given month by multiple of non-worked hours and by amount being calculated as a ratio – sum of assumed fixed salaries in equalizing period/total number of hours, which has to be worked by the employee within the equalizing period. Shortening of fixed salary compared to the entire equalizing period is more accurate and fair mechanism because the shortening of salary compared to calendar month damages the employee's rights. (Parliamentary paper 903/0)

Evaluation and solution of overtime becomes the practical problem. Let us use the concrete example what cannot be considered overtime as it comes to working hours account. The employee working in the frame of working hours account has his working hours determined from Monday to Friday, from 7 a.m. to 3:30 p.m. On Monday at 11 a.m., the employer ordered him to leave because there was not enough work to do. On Tuesday, the employer ordered the employee to work to 8 p.m. in order to compensate yesterday's lack of work. On Tuesday though, the employee worked 12 hours (without any breaks). Thus, this work cannot be considered overtime; in equalizing period those two days' worked hours would be evened (instead of 8 + 8 hours it would be 4 + 12 hours = 2 shifts).

As it comes to working hours account, it cannot be allocated to the concrete days and hours. In practice, ordered shift beyond the working schedule is marked as plus shift and cancelled shift as minus one. However, such process is not applied only when ordering or canceling the shift but also when prolonging or shortening the shift. Employer thus can order the plus work or short shift any time, which is not acceptable by the employee (Šubrt, 2010: 9). Also because of this reason, new definition of working hours account is drafted as the special working regime, in which the employer does not have to arrange the given week working hours or shorter working hours. Based on this legal regulation, the employer can legally order or agree

work beyond shift schedule even there are not conditions for overtime fulfilled. Time when shifts are not scheduled is considered holiday. This way, employees are protected against ordering the work any time without limits. (Parliamentary paper 903/0).

To make it complete, it has to be mentioned that overtime of previous equalizing period can be transfer to the following equalizing period in amount of max 120 hours. Such option has to be agreed in the collective agreement. Employer thus can transfer overtime hours of period, in which big load of work was needed, to the period, in which the load of work would not be so big. Transferred overtime hours are not compensated by extra pay for overtime but employee would get increased standard salary (by 5 %). This draft is criticized by Šubrt (2011: 11) saying that if economic cycle is long-termed and equalizing of consequences of big loads and small loads of work cannot be solved within a year, such situation can be thought positive. He criticizes the draft saying that adjustment regards only surplus of hours but it does not deal with not fulfilled working hour's fund. However, as for this point, the change is not discussed.

Questions occur also about not paid days off in case employee asks for them and he works under the conditions of working hour's account. For example, equalizing period is determined for 26 weeks and employee works 3 months in equalizing period and asks for another 3 months of unpaid leave in this period. Employer, who provides the employee with this leave, would not pay any standard salary within this period. This procedure can be rationalized by the statement that the employee is entitled to get standard salary within the equalizing period and it cannot decrease under given amount; this salary is paid for working hours in given calendar month even the employer has not ordered the work. However, employee is not entitled in case he does not work within arranged working hours. So, if employer arranges the work for the entire equalizing period and the employee is given unpaid leave, it means that he would not work thus he is not entitled to the standard salary. (Pospíšil, 2016: 4)

Working hours account has its specifics as it comes to assessments at work and salary for those. Working hours are arranges for the whole equalizing period but the work is ordered differently from this schedule. Working hours

schedule is significant for evaluation of assessments at work including temporary sickness and holiday. Different procedure, in which the employer would not arrange all working hours in working hours account in the equalizing period, would harm the employee just in connection with salary compensation for assessments at work and holiday. New (assumed) regulation specifies that if the employer arranges working hours into shifts, he has to assign the work to the employee. In case the employer would not do that, time within which the employee does not work in shift, is considered assessments at work due to the employer. The employee is entitled to get the salary compensation and time when he does not work is considered the worked time. By this adjustment, such cases would be excluded when the employee would get neither standard salary nor its compensation.

3 Limits of working hours

Legal regulation of working hours includes such rules and conditions, which are to be followed by the employer when arranging working hours, but, at the same time, he is limited by. Those can be called limits of working hours. They involve mainly scope of working hours, overtime, night work, rest time, work safety, equal treatment of all employees etc. This article includes overtime, conditions and max scope of which limit the employer. Further, claim to working hours adjustment of employees' groups determined by the law will be discussed as well, which maybe is not such a clear limit in connection with working hours but employer is obligated to respect it when arranging working hours of those employees. Those examples are to be showed, common attribute of which such reason is allowing the employer to realize overtime and reject the employee's request for suitable adjustment of working hours. In both cases, those are serious operational reasons.

By the law, overtime is defined in two ways. First, it is such work done by employee under the order of the employer or with his agreement above determined week working hours resulting from in advance given work schedule and is done beyond shifts schedule. Second, the work done above given week working hours in order to do the work, which was not fulfilled during this week working hours because of days off, which were given to the employee based on his request. Those definitions include both

positive and negative definition of overtime. (Bělina, 2014: 212). Definition of overtime is related with overtime exceptionality determined by the law. As Andraščíková et al. (2013: 187–188) state: "…as for overtime, exceptionality is an imperative of the first category. In any case, overtime cannot be the part of planning and scheduling the working hours. The law clearly says that overtime is the work above determined working hours."

It is suitable for practice to determine clear rules for ordering the overtime and for its acceptation in the working rules or any other internal regulation. Mainly, a person being entitled to order overtime and approve it has to be assigned as well as what form would be used to do so. It is the way how to avoid possible disputes whether overtime was done under employer's agreement or not. (Janečková, 2014: 12). No each work done outside the frame of given working hours can be considered overtime. Always, it is only ordered or agreed by the employer. Contrary to that, if work exceeds given week working hours determined by the law, it is overtime (condition – work ordered or agreed by the employer – has to be fulfilled) even the employer did not arrange the week working hours outside the law. Employer's agreement with overtime can be given not only explicitly (orally or in written) but tacitly as well. (Decision of Supreme Court CR 21 Cdo 1985/2008). Situation when the employer determined the salary considering possible overtime or he is aware that the employee does overtime without his order and he did not stop this work, is considered the agreement of the employer. An opinion of the Supreme Court expressed in Decision 21 Cdo 4166/2015 is the same.

Overtime is limited by maximum amount of hours[4]. Limits are determined for individual weeks and for the calendar year. Overtime ordered by the employer and overtime done above the limit of ordered overtime based on agreement with the employee are distinguished. Employer can order overtime only because of serious operational reasons in the scope of max 8 hours per week and 150 hours per year. Beyond this scope, the employer can request overtime only based on the agreement with the employee and respecting max 8 hours per each week. Overtime cannot exceed in average

4 This article pays attention to the only general arrangement of overtime; the specifics of overtime in health industry are not mentioned.

more than 8 hours per week within the equalizing period (max 26 weeks in sequence). Only collective agreement can determine this period for 52 weeks in sequence. It does not mean that the collective agreement can influence the total scope of overtime, it has only prolong the period, in which overtime has to be equal to average 8 hours per week. (Janečková, 2014: 12) For example, as it comes to the employer not having agreed collective agreement with equalizing period of 26 weeks, the employee can achieve up to 208 overtime hours per each 26 weeks, i.e. 416 overtime hours per 52 weeks (12 x 208). As for the employer with the collective agreement with equalizing period of 52 weeks, the employee can achieve up to 416 overtime hours per each 52 weeks (52 x 8).

Such question is connected with this example – how many overtimes the employee can have in the period of 52 weeks (if agreed in the collective agreement). Simple answer is 52 x 8 = 416 hours. Another answer stated by Andraščíková (2013: 187–188) is that 8 overtime hours can be worked on in such week being really worked by the employee; week not being worked because of sickness or holiday cannot be considered worked because it is not worked above determined week's working hours. This answer is stricter and can be agreed with. Also Kocourek and Dobřichovský (2016: 181) state that the limit 416 overtime hours is only theoretical limit. It has to be lowered by the time of employee's absence as said above.

Overtime has to be strictly reported. The employee can see it and make copy of it. Practical example proves that even in case the employer does not fulfill this duty and overtime is hard to prove, employees can achieve their rights to compensation (premium) for overtime. The employer – construction company – faced situation when employees worked overtime during May – August because of the agreed order's deadline. This employer did not report overtimes but he promised to give the employees bonuses, which he would paid after this order is finished. However, he did not pay those bonuses and above that, he denied overtime work. In such cases, employees can make a claim to controlling authorities (Labour Inspectorate) or file a lawsuit. The Supreme Court's opinion is clear (Decision 21 Cdo 2878/2009); it says that the fact that the employer does not report overtimes means only the fact that overtime cannot be proved by any documents. Overtime and its scope

is to be found out from other facts. In case, court comes to a conclusion that overtime was done but amount of claim cannot be found out or with big troubles, determines the amount of claim by its deliberation.

As said above, serious operational reasons are the only reasons for overtime and for rejecting the request for the shorter working hours or other suitable adjustment of working hours. Such employees are considered, for which the law regulate the special working conditions. Those take care of the children of up to 15 years of age, pregnant employees and those taking care of other person needing the care of II, III or IV level. In practice, this reason is often being used inadequately by the employers. Determining really serious reasons is not easy. Individual cases are to be evaluated individually regarding concrete situation. Possible disputes can be solved by the only court. It means that the employee has to do such work agreed in employment contract under agreed working conditions until the court makes its decision. Most of time, employment is lost because the employee cannot do his/her work because of objective reasons (pregnancy, care of child or dependent person).

Decision of the Supreme Court 21Cdo 1821/2013 determining the criteria for evaluation of serious operational reasons can serve as a guideline. Those reasons are: number of employee, their mutual replaceability, determination of work of those employees, intensity of engagement into the operation.

It has to be stressed that in case the employer rejects the request for adjustment of working hours, he has to justify serious operational reasons taking above mentioned criteria into account. Usually, employees being not replaceable would be thought. However, the option whether the work of such employee could be delegated to the other employees has to be considered. By the draft of the Labour Code, in case of rejection, the employer will be obligated to demonstrate it in written. In case of lawsuit, employer will be the one, who would have to prove the existence of operational reasons. (Landwehrmann, 2016: 9–10). Mentioned Decision's consequence is that status of operation will be always taken into account, which was at the time of rejecting the request for adjustment of working hours.

4 Conclusion

Working hours is the topic having legal, economic and social aspects. The aim of this article was to outline the Czech legal regulation of some questions related to the working hours, determine principles of their legal regulation and present some problems occurring in practice. Elaboration of this theme aimed to prove the hypothesis that legal regulation of working hours influences economic decision making of employers.

For this contribution, questions were chosen related to the special working regimes as well as to limits of working hours. Examples were used to demonstrate the options. On one hand, legal regulation gives the employers chances to organize work and working time in effective way, on the other hand, it limits him to do so. With the use of flexible working regimes and working hours account, the employer can take economic, operational and technological conditions into account when arranging working time. Thinking about deviations in demand, lowering the salary costs, respecting the need to harmonize working and private life are another aspects he should consider. All these elements have positive impact on labour productivity and competitiveness. However, when deciding the working hours, employer is limited by the law by many rules. This contribution involves examples presenting the limits connected with overtime, adjustment of working hours of some employees. Limits of working hours generally represent particular borders, in the frame of which the employer has to make decision. Thus, they can be perceived as the problems.

Questions being chosen for this article present the impact of legal regulation on economic decision making made by employer and prove the hypothesis that legal regulation of working hours influences economic decision making of employer. At the same time, it can be seen that the needs of economic practice influences the legal regulation (see above mentioned draft of the Labour Code). In case legislation misses its purpose, the practice can influence it requesting its adjustment. This goes for not only working hours or labour law but for other legal fields as well.

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SOURCES OF HEALTH CARE FINANCING IN SWEDEN AND POLAND[1]

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Abstract

The subject of this paper are public sources of healthcare financing in Poland and Sweden. The Polish healthcare system does not have a single source of financing. The financing model currently in place is based primarily on the proceeds of the National Health Fund which are ensured through collection of health insurance contributions. Public sources of healthcare financing also include the state budget and the budgets of local government units. Healthcare system in Sweden is based on the local government units and it is financing by the budgets of these units. Health insurance contribution does not exist in Sweden. Authors have identified differences and similarities in the examined healthcare financing systems and sources. This paper also includes conclusions with a view of the future law in Poland.

Keywords

Health Care; Financing; National Health Fund; Sweden; Poland.

JEL Classification

K32; D73; H41.

1 Introduction

The issue of sources of health care financing in individual European Union countries is of major importance for their social security systems. EU legislation does not require Member States to establish specific regulations

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for financing health care systems, or a catalogue of the sources of their financing.[3] The specific competences of EU bodies arise from the XIV Treaty on the Functioning of the European Union[4]. According to art. 168, sec. 1 of TFEU, EU action that complements national policies is aimed at improving public health, preventing diseases and human ailments, and removing sources of mental health threats. Member States are required, in liaison with the European Commission, to coordinate their health policies and programs (art. 168, sec. 2 of TFEU). However, autonomy in the field of organization and financing of health care is introduced by art. 168, sec. 7 of TFEU. Pursuant to it, EU activities are carried out in compliance with the responsibilities of the Member States in defining their policy concerning health, organization and delivery of health services and medical care. The European Union also imposes an obligation to manage health services and medical care and to divide the resources allocated to it (art. 168, sec. 7, sent. 2 of TFEU).

EU Member States, in the absence of an obligation to uniformly form health care systems, introduce their own legislative solutions. Differences and similarities may occur between different systems and the sources of their financing. Consequently, the purpose of this study is to identify them on the example of the Polish and Swedish health care systems and to formulate conclusions *de lege ferenda* for the catalogue of sources of health care financing in Poland.

2 Principles of organization and financing of the Swedish health care system

The Swedish health care system is based on a budget model and is financed primarily from local budgets and the central budget (Anell, Glengard, Merkur, 2012: 56). It is rated as one of the best systems among highly developed countries (Dziubińska-Michalewicz, 2005: 1). The basic legal act regulating the rules of its operation was until now the Health Care Act of 1982. On April 1, 2017, the new act of February 9, 2017 on health care entered

3 Also referred to as the "EU".
4 EU Journal od Laws C 326/49 of 26. 10. 2012; also referred to as "TFEU".

into force.[5, 6] Swedish health care has been divided into three levels: state, regional and local. At national level, responsibility for the proper functioning of health care is borne by government administration bodies. The broadest responsibilities and powers in this area are those of the Minister of Health and Social Affairs. He is primarily responsible for organizing the health care system, providing health care services to citizens and making expenditures for this purpose, as well as for social care issues (Marco, 2010: 16).

The aim of the Swedish system is to provide health care on equal terms to all citizens. Medical services are guaranteed regardless of age, place of residence, social and material status and disease risk. (Skawińska, 2009: 73) Obtaining health care is therefore not determined by the fulfilment of specific conditions by the recipient, such as compulsory or voluntary health insurance. (Ljungholm, 2014: 141) Pursuant to § 1, clauses 1 to 5 of chapter V of the Act of 2017 (formerly § 2, sec. 1–5 of the Act of 1982), public health care should be readily available based on respect for patient autonomy and integrity, meet individual needs including the continuity and safety of health care, and promote good contact between patients and health care personnel. Regardless, healthcare management should be organized in such a way that it meets the requirements for care and safety and promotes cost-effectiveness (§ 28 of the Act of 1982 and § 1 of chapter III of the Act of 2017).

There are also government agencies within the organizational structure of the Swedish health care system, including the National Council of Health and Social Care (*Socialstyrelsen*), the National Institute of Public Health (*Folkhälsoinstitutet*), and the Swedish Social Insurance Institution (*Försäkringskassan*). The competence of the National Council of Health and Social Care is primarily to develop norms and standards for health and social services and the prevention of infectious diseases. The National Institute of Public Health is an entity subject to organizational control by the Minister of Health and Social Affairs. Its scope of tasks includes health promotion

5 Hälso- och sjukvardslag (1982:763) of June 30, 1982. The Act entered into force on January 1, 1983. Available: http://www.riksdagen.se (February 10, 2017); hereinafter referred to as the "Act of 1982".

6 Hälso- och sjukvardslag (2017:30) of February 9, 2017. Available: http://www.riksdagen.se [cit. May 10, 2017]; hereinafter referred to as the "Act of 2017".

and preventive healthcare. These tasks are accomplished through information activities concerning the basic knowledge of the state of scientific research in medicine, the effects of which are provided to the government administration bodies and bodies of local government units. The main task of the Swedish Social Insurance Institution is to manage the functioning social insurance institutions[7]. Its competencies related to health care include primarily tasks related to preventive health care and a decrease in diseases. The purpose of the Institution's activity in this area is to restore the ability of the insured persons to work (Ljungholm, 2014: 56–57).

The tasks of the governmental administration in the field of health care include primarily setting the direction for the development of publicly funded health care. They also maintain control over the effectiveness of the health care system and its compliance with the established goals and plans (Ciura, 1993: 1).

However, the Swedish health care system is based mainly on local governments at the regional level with the participation of government administration bodies[8]. In Sweden, there are 21 district (regional) councils that have overall responsibility for the functioning of health care (Ljungholm, 2014: 143). Their responsibilities include providing health services to citizens residing within the administrative boundaries of individual councils (Sorensen, Drummond, Kanavos, 2008: 39). They cannot limit the patient's choice of the healthcare provider. Where the recipient does not have a permanent place of residence within the district and needs immediate medical attention, the regional health authorities are obliged to provide it. In some cases, district councils may agree to provide health care to patients who do not require immediate medical attention and are not permanent residents of the region (§ 1 of Chapter IX of the Act of 2017).

The area of competence of district councils also includes the issue of regulating payments for medical services provided to private medical entities. They also have the power to regulate the market of entities entitled to provide health services within the public health care system (their decision

7 These include primarily sickness, parental and pension insurance.

8 Regions are the equivalent of self-government voivodships in the Polish administrative division of the country.

conditions the creation of new medical entities and the maximum number of patients to whom the services may be provided by one entity over the period of one year) (Marco, 2010: 16–17).

The activity of the bodies of local government units at communal level relates primarily to broadly understood social services. Their healthcare-related competences include public school health care, geriatric care, nursing homes and home care for elderly people (chapter XII of the Act of 2017). Therefore, local governments at the municipal level do not have such significant powers as district councils and government administration bodies.

It is understood that the Swedish health care system is decentralized (Calltorp, 1999: 2). District councils have substantial autonomy in the financing of tasks related to health care and the planning of health services. The organizational structure of the health care system is varied within individual district councils. There are, however, tendencies towards centralization of the provision of health services, e. g. by combining medical entities (Anell, Glengard, Merkur, 2012: 29). District councils and municipal bodies operating within the Swedish health care system are supervised by the National Council of Health and Social Care. It is authorized to monitor and control the activities of the concerned bodies. Within the framework of supervision, the council may also support the activities of district councils and municipal bodies.

Within the public health care system, there may also exist private medical entities. However, most hospitals are public[9]. In the case of other types of medical entity, their quantity varies. It depends on the given district. In some of them, the number of private health care providers, providing services under the public scheme, exceeds 60 %. There are also districts where the activities of private entities in the health sector financed by public funds is marginal (Anell, Glengard, Merkur, 2012: 66).

The main source of health financing in Sweden are regional budgets. Their basic income includes local taxes. Participation in the financing of health care also includes municipalities and government administration bodies, where state budget funds are available. (Rönnberg, 2011: 19) However, they do not constitute a significant source of funding for health care. In Sweden,

9 There are only a few private hospitals.

there is also a system of compulsory fees paid by patients for the provision of certain healthcare services. However, there are difficulties in establishing accurate relationships between individual sources at the regional level. This results from the decentralization of financial responsibility in the Swedish health care system (Anell, Glengard, Merkur, 2012: 35).

Regional budgets play a vital role in financing the public health care system. Approximately 80 % of spending on public health tasks comes from these budgets. These expenditures represent about 90 % of total budget expenditure (Dziubińska-Michalewicz, 2005: 2). Their main source of income are income taxes of regional nature. Regional councils have the power to impose tax rates on these taxes, in line with Sweden's principle of self-government (Rönnberg, 2011: 21). However, there is no significant differentiation in the legal structure of regional taxes. It is assumed that the level of tax revenues is significantly affected by the number of residents in the respective regions (Dziubińska-Michalewicz, 2005: 2). The revenues of regional budgets, however, are not related to specific types of expenditure (Moks, 2010: 157). There is therefore no correlation between the amount of tax revenues received and the scope of expenditures earmarked for the implementation of the region's tasks related to health care.

There is also a national system of equalization of incomes of particular local government units, based on the redistribution of tax revenues obtained from the collection of regional and municipal taxes (Anell, 2005: 244–245). Its aim is to guarantee to all municipalities and regions equal financial conditions, necessary for the fulfilment of their tasks. The criteria for calculating the amount of subsidy for a given district are: the amount of tax revenue, the scope of expenses, as well as demographic and socio-economic factors (Marco, 2010: 26). The aim of the revenue-compensation system of local government units in Sweden is primarily to ensure the implementation of public tasks at a similar level across the country (Anell, Glengard, Merkur, 2012: 60). The funds received by individual regions within the functioning compensation scheme are not closely related to the expenditure made. Their amount depends only on the scope of expenditure. However, there is no legal obligation to spend them for strictly defined purposes (Anell, Glengard, Merkur, 2012: 60).

Expenditure of public funds at the disposal of regional councils is based on contracts concluded with healthcare providers (Dziubińska-Michalewicz, 2005: 2). District councils have autonomy in establishing mechanisms for financing health care services for their residents. In some districts, part of the remuneration for the services provided under the contract depend on the provider achieving the specified goals. The remainder is determined on a flat-rate basis and depends on the number of the registered patients (Anell, Glengard, Merkur, 2012: 67).

The financing of healthcare services by regional councils is therefore largely dependent on the effects achieved by healthcare providers. They do not receive a certain amount of funds from the regional budgets, allocated for the provision of healthcare services under the public scheme for the concerned financial year, as the principles of determining the amount of received funds are based on the type and quantity of services provided (Dziubińska-Michalewicz, 2005: 3).

An additional source of funding for health care in Sweden are the fees charged to patients in connection with their use of certain statutory benefits (*out-of-pocket payments*). The legal regulations on fees for the services provided are included in § 1–8 of chapter XVII of the Act of 2017. Under the terms of this chapter, patients may be required to pay fees under the conditions set by the district or municipal councils. District councils are entitled to set fees for individual health care services provided under the public scheme. They vary and depend on the type of the service provided to the patient. These fees may not, however, be collected from patients who have reached the age of 85 and from patients who are under the age of 18 years[10].

The new Health Care Act also upholds the principle of reducing the fees charged to patients. Achieving an amount of money indicated by the regulations will result in a lack of obligation for the patient to make further payments in exchange for the received health care services (§ 6 of chapter XVII of the Act of 2017). There is therefore a maximum statutory limit for annual fees which patients are required to pay (Anell, Glengard, Merkur, 2012: 63).

10 When a patient under the age of 18 does not appear within the specified time period to receive a specific health care service, his or her legal guardians may be charged a fee.

Irrespective of the obligation to pay fees for the certain types of medical services, there is also a co-payment obligation. It concerns certain health care services, primarily medical consultations (Dziubińska-Michalewicz, 2005: 3).

The principle of the participation of the patient in the financing of the service he is entitled to was therefore adopted in the Swedish health care model (Ciura, 1993: 4). The main purpose of financing or co-financing by the patient of certain medical services is primarily to limit the use of services provided under the public scheme when the patient's state of health does not require it. (Dziubińska-Michalewicz, 2005: 3)

The public health system in Sweden is also financed to a small extent by subsidies from the state budget to individual districts. However, there are no standard rules governing the number of subsidies and the rules for their distribution (Ciura, 1993: 1). The amount of this grant, which is intended to finance public health care tasks, is subject to negotiations between the governmental administration bodies and the district councils represented by the District Councils Federation (Ciura, 1993: 1).

In Sweden, there are also private types of health insurance. They are autonomous in relation to the public health care system. Their primary goal is to ensure efficient access to health care services, without the necessity for a patient to use the public health care service. Private health insurance, however, is of marginal importance from the point of view of sources of health financing in Sweden (Moks, 2010: 158). Private funding for the financing of voluntary health insurance represents only about 0,2 % of the total resources allocated for health care in Sweden (Anell, Glengard, Merkur, 2012: 65).

Health care in Sweden is an essential part of the social security system, the main principle being the right of citizens to have access to health care services (Ciura, 1993: 7). The Swedish model is primarily effective in the field of disease eradication (Dziubińska-Michalewicz, 2005: 6). It is subject to continuous reforms aimed at increasing its efficiency and reducing its operating costs.

The positive characteristics of organization and financing of health care in Sweden include, first and foremost, widespread access of citizens to the services provided, based on their legitimate needs and the responsibility

of local government bodies for the functioning of the system. It should be stressed that the Swedish health care model is highly effective, which is reflected in the very high life expectancy of citizens (Marco, 2010: 19).

3 Sources of health care financing in Poland

Health care tasks in Poland must be financed by public funds.[11] This obligation arises from art. 68 sec. 2 of the Constitution of the Republic of Poland. Pursuant to it, the public authorities provide equal access to publicly funded health care services to all citizens, regardless of their financial situation. The provisions of the Constitution of the Republic of Poland do not specify, however, the individual public sources of financing for health care, or the rules governing their disposal. This issue was left to the ordinary legislator.

The principles of organization and financing of health care result primarily from the Act on health care services financed from public funds and the Act on medical activity[12, 13]. The Polish health care system is based on an insurance financing method. According to art. 97 of AHCS, the entity responsible for managing the health care system is the National Health Fund[14]. Its tasks include, in particular, ensuring the availability of publicly-funded health care services by concluding health care contracts, determining the quality and availability of health care services, and managing the revenues at its disposal (art. 97 of AHCS).

The primary revenue of NHF are health insurance contributions. It is also the main source of health care financing in Poland. The planned revenues of the National Health Fund in 2017 due to the collection of health insurance contributions are expected to amount to over PLN 73 billion.[15,16] Since the Swedish health care system is not based on the insurance funding method and does not

11 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended); further referred to as the "Constitution of the Republic of Poland".

12 Act of August 27, 2004 on publicly funded health care services (Journal of Laws of 2016, item 1793, as amended); further referred to as "AHCS".

13 Act of April 15, 2011 on medical activity (Journal of Laws of 2013, item 217, as amended); further referred to as "AMA".

14 Further also referred to as "NHF".

15 Annual financial plan of the National Health Fund for 2017. Available: http://www.nfz.gov.pl [cit. May 24, 2017].

16 On the legal structure of health contributions, see more (Lenio, 2014) and (Lenio, 2017).

include health insurance contributions, the Polish regulations for this coverage will be briefly presented. The legal structure of health insurance contributions has been regulated in the provisions of chapter IV of AHCS. With regard to the rules of determining its amount, regulations resulting i.a. from the Act on the social insurance system, the Act on the farmers' social insurance and the Act on personal income tax are applied. The obligation to pay contributions is determined by the scope of public health insurance[17, 18, 19, 20].

The rate of the contribution and the principles of the contribution basis assessment are of major importance for the amount of the health contribution. The contribution rate for most insured groups currently amounts to 9 % of the contribution basis. The method of determining the health contribution basis depends on the affiliation of the insured person to the group (art. 81 of AHCS)[21]. The basis for the health contribution basis assessment for the broadest group of insured persons is the revenue earned by a person within the meaning of the Act on personal income tax or a benefit arising from a specific title which is economically close to or identical to the revenue. For certain groups of insured persons, the basis for the health contribution basis assessment is flat-rate and does not depend on their revenues (e.g. for entrepreneurs).[22, 23]

17 Act of October 13, 1998 on social security system (Journal of Laws of 2016, item 963, as amended).

18 Act of December 20, 1990 on social insurance for farmers (Journal of Laws of 2016, item 277, as amended).

19 Act of July 26, 1991 on personal income tax (Journal of Laws of 2016, item 2032, as amended).

20 Compulsory health insurance covers primarily employees, farmers, persons conducting own non-agricultural business activities, persons working on the basis of agency contracts, contract of mandate or other service contract, or co-operating persons, the unemployed, as well as judges and public prosecutors, pensioners, priests and uniformed service officers. Voluntary health insurance is a supplement to compulsory insurance. As such, its scope is limited.

21 The rules for calculating health premiums for farmers and their families have been regulated in a different way. According to Art. 80 of AHCS, the contribution rate for this group of insured persons is in most cases 1 zloty per conversion hectare.

22 This group includes, among others, employees, contractors, outsourcers, members of agricultural production cooperatives, pensioners, judges, uniformed officers.

23 According to 81 sec. 2 of AHCS, the basis for calculating the contribution charged to entrepreneurs is the declared amount, but not less than 75 % of the average monthly salary in the corporate sector in the fourth quarter of the previous year, including contributions from profit. The remuneration in the fourth quarter of 2016 amounted to PLN 4404.17 – Announcement of the President of the Central Statistical Office of January 18, 2017 on the average monthly salary in the corporate sector with profit distributions, in the fourth quarter of 2016 (MP, item 53).

The budgets of local government units also constitute an important source of financing for health care[24]. Local government units are responsible for expenditures related to the creation, operation and liquidation of medical entities, including independent public health care facilities[25]. Local government units are in particular obliged to cover the net loss incurred in an independent public health care institution and, shall it be liquidated, to take over the whole of the institution's liabilities (art. 59 of AMA). Such expenditures are of considerable economic and legal importance, since the debt of IPHCI currently stands at approximately PLN 7–8 billion. The necessity for the budgets of local government units to bear them restricts the possibility of financing other own tasks of local government units.[26]

It is also possible to create and access by local government units to medical entities acting in the form of limited companies [spółka kapitałowa] (art. 6, sec. 2, clause 1 of AMA). [27] Expenditures of local government units related to the formation and access of medical entities in this legal form mainly concern the purchase and acquisition of shares, and contributions. These are therefore the property expenses referred to in art. 236, sec. 4 of the Public Finance Act [28]

Another type of local government unit expenditures for the implementation of health care tasks are subsidies granted to entities performing medical activities in accordance with the provisions of chapter V of AMA. The legal basis for granting subsidies is, above all, art. 115 of AMA.[29] It does not restrict the objectives of local government units which can make this kind of expenditure. Consequently, local government units of all ranks

24 Further also referred to as "LGU".
25 Further also referred to as "IPHCI".
26 Supreme Chamber of Control (Delegation in Opole), Restructuring of selected independent public health care facilities using public assistance (information on control results). Available: http://www.nik.gov.pl (access 20. 05. 2017).
27 Local government units may also operate medical entities in the form of budgetary units (art. 6, sec. 2 of AMA).
28 Act of August 27, 2009 on Public Finance (Journal of Laws of 2016, item 1870, as amended); hereinafter also referred to as "APF".
29 The provisions of chapter V of AMA also provide the possibility of transferring public funds to entities performing medical activity on the basis of a contract, whose *essentialia negotii* arise from art. 116 of AMA.

are entitled to grant subsidies in accordance with the provisions of chapter V of AMA. All medical practitioners ay be beneficiaries of the subsidies (art. 115, sec. 3 of AMA).

Funds from grants may be granted and intended for strictly purposes, defined in art. 114, sec. 1, clauses 1–6 of AMA. [30]The catalogue of the enumerated tasks to which expenditures of local government units may be allocated proves that the subsidy referred to in art. 115 sec. 3 of AMA is of purpose.

Moreover, health care services may be financed from the local government budget. Until the date of entry into force of the Act of June 10, 2016 amending the Act on medical activity and certain other acts, the organization and financing of health care services were reserved exclusively to the competences of NHF and the minister competent for health matters.[3132] According to art. 9a of AHCS, in order to meet the needs of the local community in the field of health protection, local government unis, taking into account in particular the regional health needs and the availability of health care services in the voivodship, may provide guaranteed benefits to the residents of the community.[33]

Accordingly, the scope of the expenditure on the implementation of health care tasks from the budgets of local government units is very broad. These units make expenditures related to the creation of medical entities, their operation, as well as the award of guaranteed benefits by these units[34].

30 These include: implementation of tasks in the field of health policy programs, health care and health promotion programs, repairs and investments, as well as implementation of projects financed with non-repayable foreign funds.

31 Act of June 10, 2016 amending the Act on medical activity (Journal of Laws, item 960).

32 The budgets of the LGUs could only be made on the basis of art. 48 sec. 1 and 3 of AHCS. expenditure on health policy programs. Health care services could be provided on their basis.

33 According to art. 5 item 35 of AHCS, guaranteed benefits should be understood as the provision of health care services financed wholly or co-financed by public funds. The principles of their financing from local government budgets are laid down in art. 9 b of AHCS. It takes place on the basis of an agreement between LGU and the provider selected by means of competition.

34 Territorial self-government units also finance other health care tasks mentioned above. For example, it is only necessary to indicate the expenses of LGU made for the implementation of tasks related to alcohol prevention or under the Act of July 29, 2005 on counteracting drug addiction (Journal of Laws of 2017, item 783).

Another public source of funding for health care in Poland, of significant legal and economic importance, is the state budget. Tasks related to medical rescue and some health care services, as well as the establishment, access and operation of medical entities, whose forming entities are government administration bodies, are financed from its means.

According to art. 6, sec. 1 of AMA, the State Treasury, represented by a minister, a central government body or the voivodship, may create and run medical entities[35]. The Act on medical activity treats in the same manner the situation of medical entities (including IPHCIs), for whom the forming entities are local government units or *stationes fiscі*, acting in the name of the State Treasury. The mode of financing their activities, including coverage of net losses of indebted enterprises, is similar to the aforementioned principles concerning the expenditure of funds from self-government budgets for the creation and operation of medical entities[36].

Another important direction of spending public funds from the state budget are tasks within the scope of medical rescue[37]. The principles of their funding are derived from the provisions of the Act on state medical rescue[38]. Within the system there are governmental bodies competent to perform the tasks of the system, as well as units of the system, which comprise hospital emergency departments and medical rescue teams, including aerial medical rescue teams (art. 32, sec. 1 of ASMR).[39] Most of the tasks from this scope are financed indirectly from the state budget. This concerns mainly the tasks of medical rescue teams (art. 46, sec. 1 of ASMR). They are financed from

35 In the form of a limited company, a budgetary unit, a military unit, or IPHCI.

36 The type of budget from which public funds are allocated for the creation (accession) and operation of medical entities does not determine the rules for spending public funds for this purpose (except for the differences arising from the provisions of the Public Finance Act).

37 The state budget is not, however, the sole source of funding for medical rescue in Poland. Services provided by hospital emergency departments and organizational units, specialized in the provision of health services necessary for medical rescue, are financed in the manner specified in the provisions of the AHCS, within financial means resulting from the NHF financial plan. There is also the possibility of financing emergency medical care by the Minister of Health, other relevant ministers, LGU, and on the basis of multiannual programs established by the Council of Ministers.

38 Act of September 8, 2006 on State Medical Rescue (Journal of Laws of 2016, item 1868, as amended); also referred to as "ASMR".

39 According to art. 18 points 1 and 2 of ASMR, these are: the competent minister for health matters and the voivode.

the state budget, from its elements disposed of by voivodes[40]. They entrust the conduct of the proceedings concerning the conclusion of agreements with disposers of medical rescue teams and the settlement and control of the performance of contracts to the director of the competent branch of the NHF. Its competences include the conclusion of an agreement within the means provided for this purpose. A characteristic feature of the way of financing medical rescue teams is therefore depriving the voivods of the possibility of directly spending public funds. The state budget also finances the operation of aerial medical rescue teams. Tasks of this kind of teams are financed from the part of the state budget, which is managed by the Minister of Health (art. 48, sec. 1 of ASMR). [41]

The state budget is also the source of funding for other health care services. Pursuant to art. 97, sec. 8 of AHCS, the state budget also finances (from the part which is at the disposal of the Minister of Health), in the form of a special-purpose subsidy, the services provided in accordance with: art. 26, sec. 5 of the Act on counteracting drug addiction, art. 21, sec. 3 of the Act on upbringing in sobriety and counteracting alcoholism, art. 10 of the Mental Health Act, art. 15, sec. 2, clause 12 of AHCS, as well as art. 42j of AHCS. [42] [43] Funds transferred in the form of subsidies are transferred to the National Health Fund in accordance with the provisions of the Act on financing certain health care services in the years 2015–2018[44]. The Act introduced flat-rate rules for granting subsidies referred to in art. 97, sec. 8 of AHCS. [45]

40 Excluding aerial medical rescue teams.

41 His duties include, first and foremost, the conclusion of contracts with air carriers, whose detailed procedure is based on art. 48 fo ASMR.

42 The Act of October 26, 1982 on upbringing in sobriety and counteracting alcoholism (Journal of Laws of 2016, item 487, as amended).

43 The Act of August 19, 1994 on the protection of mental health (Journal of Laws of 2016, item 546, as amended).

44 Act of September 25, 2015 on financing certain health care benefits in the years 2015–2018 (Journal of Laws, No. 1770); further referred to as "AFCHCB".

45 Some of the benefits for foreigners are also financed by the state budget (from the part left at the disposal of the minister competent for internal affairs). Whereas the Minister of Justice finances, from the part of the budget of which he is the disposer, the provision of healthcare provided free of charge on the basis of art. 102, item 1 and art 115 § 1 of the Code of Criminal Executive (Act of June 6, 1997 – Executive Penal Code, Journal of Laws No. 90, item 557, as amended).

Health care funding sources also include European funds allocated under regional operational programs, the 2014–2020 Operational Programme Infrastructure and Environment, and the Operational Programme Knowledge Education Development 2014–2020. However, they are not a significant source of health care financing. The burden of health financing rests with the Member States and not with the EU.

4 Conclusions

The differences and similarities between Polish and Swedish sources of health care financing result mainly from the health system functioning in these countries. The adoption of a particular organisational model determines the source catalogue of its funding. The division of competencies between different bodies of the health system is the cause of different funding rules for their tasks in this regard. The insurance model and the budget model are, by definition, essentially different in the aspect of the sources of their financing. The main source of health care financing in the insurance model is the contribution, whereas in the budget model it is the state budget or local government budgets.

The Polish healthcare system is not fully an insurance model. It is only based on the insurance funding method. Therefore, it is possible to point to the negligible similarities between Polish and Swedish sources of health financing. They result from the fact that the sources of funding for both systems are the state budget and self-government budgets. The state budget in both Polish and Swedish health care models is not the main source of financing.

The similarity in the Polish and Swedish systems of health care financing are the financial outlays from the budgets of local government units. Such budgets in both countries have their own sources of income, primarily in the form of local taxes. In Sweden and Poland there are also mechanisms for equalizing the horizontal income of local government units. The funds originating from them are allocated by the local governments to all tasks performed by them. There is no legal obligation to allocate them to strictly defined purposes. However, it is important to point out the different role of local government budgets in financing health care. In the Swedish system, they are the main source of funding for public health care tasks.

Since the Polish and Swedish health care systems are based on different organisational models, there are many differences between them. The National Health Fund is responsible for the organization and financing of healthcare services in the Polish system. In Sweden, no health insurance contribution has been introduced, while it is the main source of funding for health care in Poland. There is therefore no separate public levy dedicated to the financing of health care, the income from which would be materially securing the state's tasks in this regard from the point of view of the needs of the recipients. The Swedish health system does not have a close relation between public income and expenditure allocated to the functioning of the Swedish system. All of the regions' income is spent on the total expenditure made to meet all the tasks assigned to them.

The allocation of funds from the contribution as the main source of funding for the health system in Poland is different. Revenues received by NHF arising from the contribution are allocated exclusively to the financing of the healthcare-related tasks entrusted to it.

Decentralization of the Swedish health care system has led to the burdening of individual regions and municipalities with the organization and funding of its tasks. Expenditure of Swedish regional budgets are much broader in scope than expenditure borne by the budgets of Polish local self-government units at each level. Entrusting individual regions with the provision of health care to their residents resulted in the need to transfer the responsibility for health care financing to those regions. The regions have not received specific funding for the performance of such tasks. This does not mean, however, that the catalogue of their own incomes does not take into account the need to pay for health care financing.

The introduction by the Polish legislator of a model of health care based on the insurance method has resulted in a reduced expenditure scope of local government units, allocated to financing the system. Therefore, the role of local self-government budgets in the Polish and Swedish health care systems is definitely different. Expenditure from the budgets of Polish self-government units are intended primarily for the creation and operation of medical entities and optional financing of their tasks, as well as the

guaranteed health care benefits for the residents of the unit. The budgets of Swedish regions finance almost all of the total number of tasks related to public healthcare.

The Swedish legislator has shifted the burden of organization and funding health care to local governmental bodies at the regional level. As a result, regional budgets are the main source of funding for these tasks. This is justified by Sweden's budgetary organisational model of health care. The Polish health care system is not based on the budgetary method of financing, yet the expenditures of budgets of local government units occupy an important place in its structure.

A significant difference in the directory of Polish and Swedish sources of health financing is the widespread use of out-of-pocket payments in the Swedish system. The scope of such fees in the Polish health care system is very narrow. They primarily concern some specialized and dental services. This is due to the fact that the vast majority of health services (including primary health care) are funded under universal compulsory or voluntary health insurance. Moreover, the public sources of funding for health care in Poland and Sweden have been constructed in a different way, as evidenced by the above differences. It is therefore justified to argue that it is not possible to adopt legislative measures from the Swedish legislation without taking into account the specific nature of the national legal order.

In light of the findings made in this study, however, the conclusions *de lege ferenda* can be formulated. As it has already been established, Swedish local government units receive financial support from the central budget in the form of grants for tasks related to health care. A local government in Poland does not receive such funds, although it is an important element in the organization and financing of health care. It would therefore be desirable to consider the possibility of awarding grants from the state budget primarily to local self-government entities running IPHCIs which generate a net loss (negative financial result).[46] The possibility to apply by local

46 These institutions provide health services under contracts concluded with the National Health Fund. In most cases the cause of their debt is too low a value of benefits set out in the agreement with the National Health Fund in relation to the objectively determined costs of granting them. Therefore, the LGUs have the legal obligation to cover the loss generated by IPHCI, or to liquidate it.

government units for a subsidy in related to IPHCI's debt has already taken place in the Polish legal order. However, they could only be used to pay off the debt of the liquidated institution and were granted until the end of 2013 (art. 196–203 of AMA).

Therefore, it seems justified to introduce the possibility of financing by local government units, as their operators, of the net losses on the indebted institutions, but from additional funds allocated for this purpose by the state.

The Swedish health system, based on the activities of local self-governments, is highly rated for its quality, efficiency and funding principles. However, the proposal to introduce Swedish solutions into the Polish legal system and to establish the main source of funding for the health care of local budgets seems to be too far-fetched.

This is primarily due to the wording of art. 68, sec. 2 of the Constitution of the Republic of Poland, which expresses the principle of equal access to health care services financed from public funds. In the case of introducing a model of health financing based on local government funds, it would be necessary to secure public funds that would guarantee equal access to health services for the residents of individual local government units, regardless of their economic potential. It seems that this could not be done by statutory transfer of the local government units' new own income, as its amount varies from one year to another. There would be a risk that they might not be able to provide funds in the amount adequate to the costs incurred by the local government units to organize the health care system. It seems that the only way would be to introduce mechanisms to subsidize the activities of local government units in this regard from the state budget. In such a case, the state budget would become the main source of health care financing instead of the local government budgets. Therefore, it cannot be assumed that this would be the adoption of legislative solutions from the Swedish health care system.

The introduction of fees imposed on the recipients on such a large scale as it is in Sweden also seems questionable. The Constitution of the Republic of Poland guarantees access to health care services financed from public funds. Participation in health care costs would entail the need for additional public levy in the form of a public fee for the use of a particular health care

service. It would therefore lead to a situation where the recipient would be required to bear a double public-law burden for the same purpose (health insurance premium and public service fee). However, a wider analysis of this issue goes beyond the scope of this paper.

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THE GENERAL PART OF FINANCIAL LAW

Petr Mrkývka[1]

Abstract

Finding the content of a general part of financial law, due to its nature, is the basis for ensuring its unity, quality creation and realisation. In particular, this contribution brings excursion to the relationship between public financial activity and financial law and provides an essential insight into the concept of the general part of financial law.

Keywords

Public Financial Activity; Law; Financial Law; General Part.

JEL Classification

H; K.

1 Introduction

Within the framework of major legal systems and also national legal systems, legal science differs in the concept and systemic inclusion of regulation of monetary relations, finances and related social relations. If based on the European continental legal culture, then there would be one fundamental problem: Is this a coherent system of legal norms that has the characteristics of a separate legal branch?

The reception of Roman law in the European continental legal culture leads to the maintenance of traditional legal purism, to distinguish between public law and private law, but to what extent is it sustainable and necessary in today's world? Legal science in the Czech Republic follows a traditional

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concept of financial law as a legal regulation of social relations related to public financial activity. Financial activity is essentially a direct or indirect management of the monetary mass. (Bakeš, 2012: 4) It is assumed that public financial activity and its related social relations are regulated by the public law method. Other financial activities will depend on the rules of private law. However, even in the case of state's monetary mass management, the instruments of private law are often used in a number of moments. On the contrary, private entities in the position of *potentior persona* with regard to its status obtained by law (e.g. banks) act towards their clients as an extended hand of the public authority. A typical example is the application of measures against legalisation of proceeds from crime and financing of terrorism.

If traditionally conceived financial law does not succumb efforts on its atomisation (Mrkývka, 2015: 22), in particular separating tax law (Czudek, 2015: 42), its expansion should be considered. Whether it would be appropriate to regulate financial activity comprehensively and to include in the subject of financial law all social relations in which direct or indirect management of the monetary mass takes place.

2 Public financial activity

2.1 The concept of public financial activity

Public financial activity is the financial activity of the state and public self-government. Public financial activity consists of monetary activity, foreign exchange activity and funding activity as the direct management of the monetary mass. This is accompanied by the indirect management of the monetary mass which is for example control, supervision, surveillance, accounting, balancing, statistics and programming (planning). In individual segments of public financial activity state has a different role than public self-government. Public self-government does not have a direct share in the implementation of monetary and foreign exchange activities (Schweigl, Blažek, 2017: 86), but mainly it is the application of fiscal decentralisation (Sowiński, 2016: 83), which is known as the term "fiscal federalism" (Mrkývka, 2016: 179). Through its funds the state ensures the fulfilment of the general state functions and the government ensures the meeting its programme objectives. Similarly, this

is the case of all categories of public self-government entities. The creation of a material basis for the functioning of the public sector and its financial functioning has in many respects similar features as in the case of non-public (private) sector. This leads to the gradation of views that both state and local self-government can be managed as a company. Let's leave aside to what extent it is possible, right and consistent with the principles underpinning the current concept of democratic parlamentarism. There are, however, similarities in the money-making instruments, which in essence are identical for both sectors. Nevertheless, the public sector has specific restrictions preventing undesired indebtedness and in line with the principles of legality and legitimacy can only choose the means that are permitted. Another element is the system of control and signalling mechanisms which should ensure the timely application of the instruments to achieve the desired state of the public economy and also the economy as a whole. On the other hand, the private sector can carry out its financial activity, as well as the whole economic activity, freely unless certain limits are imposed by law, especially in the form of imperative norms. (Tomášková, 2017: 224)

The overlapping of private and public law instruments of public financial activity in the case of public economy and at the same time the public law interference into non-public, non-state or private spheres leads to a consideration that the traditional view of financial law as a pure part of public law is outdated.

2.2 The environment of the implementation of public financial activity – the environment of the implementation of financial law

Public financial activity is undertaken in a diverse environment of realisation of a wide spectrum of social relations. Its legal regulation is in many ways dependent on the existence of phenomena, behavior and social relations that are primarily regulated by the norms of other legal sectors. At certain moments, norms of financial law as primary regulation of public financial activity have an impact on behavior primarily attributable to other regulation. It may be the intention of the legislator to use the tools of financial law to achieve desirable behavior. It may also be a pathological impact of these

norms on the natural behavior of the subjects of the non-financial relations. This deformation of the natural behavior lege artis can take the form of circumvention, abuse of law or power arbitrariness. In essence, it must be borne in mind that the subject of regulation of any broad financial law is always implemented in a certain legal environment regulated by norms of another legal branch. The presence of financial law in a given environment can be guaranteed everywhere where its components are monetary phenomena. This means any presence of money. In the subjective and objective aspects of given social relations. The presence of money may be part of the social relations's content as a monetary obligation, or a right or authorisation expressed in money.

Money, regardless of its form, is part of the monetary system of the state and its monetary sovereignty. The state determines the form of the currency, lends its administration (in the sense of public service) to a relatively independent public institution – the central bank. The state decides on dependence or independence on other currencies and values. And the central bank is watching over the stability of the currency, or, above all, the price stability of the economy. All this leads to power interferences to the monetary phenomena and, in particular, to monetary and financial services. The determination of their legal framework and the supervision of the financial market is conducted not only in the interest of consumer protection and the protection of the financial market as such, but consequently as the protection of the currency.

The condition of the currency has an effect on the condition of public finances and the state of public finances can have an impact on the currency. Crisis phenomena in the global world confirm the need not only for a complex observation of monetary phenomena but also for the necessity of a comprehensive approach to their legal regulation. Likewise, it is necessary to treat the conditions of implementation of this legal regulation.

Financial law can be continuously understood as the legal regulation of public financial activity, even if the requirement of a comprehensive approach to the creation of a legal regime of monetary relations is fulfilled. Law is a mutually interlinked system of legal norms governing the human community. Legislative cries about the independence of legal sectors, as witnessed in case of the new Czech codification of private law (Act No. 89/2012 Coll),

are out of reality. Perhaps this is an effort to express the indisputable dominance of civilian regulation. Nevertheless, civil relations do not hinder the effects of financial regulation, respectively the implementation of public financial activity. Perhaps the principle of the new Civil Code: *the application of private law is independent on the application of public law*, is also a challenge for financial law, by using the private law environment for its purpose, not to deform this environment. The ideal status would be the symbiotic nature of law, where the legal standards of various branches respect one another and in particular respect the purpose of the regulation. Which interest they protect and what should be achieved by the regulation. Financial law is accessoric by its nature and is based on and is dependent on the existence of other legal branches. Money for its life needs movement and it takes place in the whole variety of social life.

2.3 Requirements for public financial activity and financial law

For public financial activity and modern financial law, certain postulates have to be adopted:

- Public financial activity is a complex activity aimed at smooth functioning of the state as a whole.
- Public financial activity is realised as a social activity with impacts in all spheres of social life.
- Public financial activity includes the creation and implementation of the legislative framework of all monetary relations.
- Public financial activity respects the environment of its realisation. It does not deform and does not discriminate the primary regulation of this environment and does not deform its natural form.
- Public financial activity respects the type of economy and the fundamental socio-political principles of the state and its organisation.
- Public financial activity respects ties to other states, their associations and international organisations.

The current traditional financial law and possible financial law *sensu largo*, which also includes the regulation of financial relations indirectly related to public financial activity, has to deal with the existence and content of its general part.

3 The general part of financial law

The systematic of financial law comes also from its determination. Its fundamental problem is the nature of financial law, which is not codified. All attempts to codify financial law have failed (Kosikowski, 2000: 49). The legal regulation of public financial activity thus has the character of a set of incorporated legal norms. These norms are linked to each other mainly by public financial activity. The intensity of the mutual ties is determined by which segment of public financial activity is regulated and which instruments of the regulation method predominate. The systematisation of financial law has the nature of a purpose-based organisation of legal norms. Depending on the purpose of the arrangement, the appropriate criteria will be used. This is for example the subject of regulation, the environment of the implementation of public financial activity, the distinction between centralised and decentralised financial activity, etc. From financial legal literature it is also possible to observe the systematisation with respect to the publication's target reader.

Any system arrangement leads to the creation of bipolar clustering of norms. These groupings thus include norms of a general nature relating to the regulation of all behaviour within a given range of social relations. Consequently, there are special norms, which focus only on certain situations or relations. When separating the general regulations of the different social relations'circuits and their mutual comparison, the proximity – almost identity of the general basis of regulation of more circuits can be found and ultimately we reach the general legal regulation of all financial activities. In this way a hypothetical general part of financial law can be found. Indeed, this process was also mentioned by the prominent nestor of the Czechoslovak science of financial law Slovinský (Slovinský, 1985: 41). We know what it should involve, but finding its real content is the task of the doctrine of financial law and application practice. The legislative power in the Czech Republic in this respect does not help to achieve such goal. It has not created a general legal framework for public financial activity and tends to further break the existing legal regulation. Foreign exchange law in the Czech Republic can serve as an example. In 2016, from the comprehensive Foreign Exchange Act, which had the characteristics of the foreign exchange law

codex, did not remain even the general part. It is not possible to agree with the view that foreign exchange law has disappeared, only the Foreign Exchange Act did. There are still provisions regarding the state's actions on handling foreign exchange values and the possibility of introducing crisis instruments with the aim to remedy the undesirable situation that are related to selected foreign exchange values.

The general part of the sector represents its most stable part, it is the basis of its existence, preservation and further development. The common ground is that the general part includes norms which lay down the general principles of financial law, legal forms and methods of public financial activity, the system of public authorities conducting financial activity, the basic features of the financial position of other entities, general provisions on the organisation of financial control, its forms and methods. (Balko, Babcak, 2009: 27)

There is also some skepticism about the existence of the general part of financial law in the literature. (Chojna-Duch, 2003: 40–42) The skepticism would be legitimate if it is to be a comprehensive set of legal norms. This fact is actually lacking and due to the unwillingness of the legislators to form a general framework in the form of an organic act at all, it will unlikely emerge in the foreseeable future. An example might be the fate of the so-called financial constitution, an organic law that was supposed to be a divide between the constitution and ordinary laws of budgetary law. This law was not adopted in this hierarchical level and became just an ordinary law (Act No. 23/2017 Coll).

From a doctrinal point of view when looking at financial law as a branch of law, it must be borne in mind that every branch of law has its general basis from which its creation and realisation are evolved. Thus, even those sectors that do not explicitly express their general part with one legal norm.

In case of view of financial law as a didactic discipline, the general part is basically a general theoretical introduction to the study of financial-law issues (Jánošíková, 2016: 50; Mrkývka, 2014: 9–124). In its essence, the lawful interaction of law and economics, respectively the mutual coexistence of law and economy is demonstrated here. Authors quite often insist only on introducing the basic economic terms and laws relating to money and

finance. The theory of tax law, as one of the segments of financial law, is supplanted by tax theory without any accent on the legal nature of taxes. This approach is also evident in other segments of financial law didactics. The balance of presentation of economic and legal aspects in the financial law didactics is necessary and the same approach must be followed in case of its examination. The correctness of Professor Milan Bakeš's statement is fulfilled, when formulating main tasks of financial law science he stated the need to examine the relationship of financial law and the needs of economic reality, as well as the implementation of the state's financial policy (Bakeš, 2006: 19). Thus, the general part should be understood in the didactic sense as well. But even in this case, it is not a general part of financial law within the meaning of the legal sector; it is not a set of legal norms. The legislator and application practice, however, is given a lecture on general knowledge of financial law and therefore on the interaction between economics and financial law.

4 Conclusion

The European and world's experience in overcoming economic crisis moments indicates that they have an impact on all segments of financial activity. They affect both private and public sector. They influence the condition of currencies and public funds, which confirms the need to maintain a comprehensive approach to the regulation of public financial activity and finally to the need to address the regulation of finances as a whole. For a complex legal regulation of finances it is necessary to resolve the general principles and general terms on which this regulation will be built. This is not an easy task, but necessary for the formation of high-quality financial law and good functioning of the society.

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EFFECTIVENESS AND EFFICIENCY OF LOCAL TAXES

Ivana Pařízková, Eva Tomášková [1]

Abstract

The contribution deals with local taxes in the Czech Republic. Local taxes are classified as local revenue. Economic base of local governance is still the most important and the most complicated issues of local governance. Local governances need economic independence for filling their tasks and for avoidance of inadequate state to the local activities. For this reason, local governances needs their assets and their revenue. Economists, journalists and public want to gain maximum of public goods with a high quality. For this reason, effectiveness and efficiency in public sector have to be solved. The main goal of this contribution is to know how to measure effectiveness and efficiency of local taxes and detect if local taxes are important for own economic independency of local governances. First, local fees as local taxes and the situation with local taxes in the Czech Republic are described. Second, difference between terms effectiveness and efficiency is specified. Next, the possibility measuring of effectiveness and efficiency at the local taxes are analysed. Description, analysis, synthesis are used as method for writing this contribution.

Keywords

Public Sector; Effectiveness; Efficiency; Local Taxes; The Czech Republic.

JEL Classification

G3; H2; H7.

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1 Introduction

Efficiency and effectiveness are economic terms using especially in companies. These terms are connected with public sector during the last years. The reason is that efficiency and effectiveness is using at public spending and large of public sector in the most of countries. Economists, journalists and public want to spend minimum of public expenditures, they gain maximum of public goods with a high quality, and they want to increase their total utility.

The issue dealing with efficiency and effectiveness in public sector is complicated. The reasons are unclear definitions, difficult measuring and evaluation of some criteria of public sector efficiency. There are some limitation for comparing the situation in different countries because every country has specific environment.

In the theory of public finance presented in the European Union the opinion prevails that the functioning of developed market economy is possible only under the assumption that the system of market regulation will be supplemented by an efficient system of state regulatory interventions in reasonable cases.

The financial system of state expresses the relation in which corporations of territorial self-government, including the state, and also the manner how areas of competence and their income resources are dividing in it are standing against each other. The arrangement of financial-economic relations between such corporations includes the division of tasks as for the expense side and mainly the division of tax area between individual subjects of the public power as for the revenue side. The range of tasks, which belongs to self-governing unions within the public power in a state and which causes expenditure, which can be specified in a dual concept with the respect to competence, which belongs to a state, and within the limits of self-government between individual territorial self-governing unions. The division of powers as a result of historical development and political construction of state is a matter of significant nature, matter of usefulness and economy. (Comp. Marková, 2008: 122) The normative determination of individual tasks of state and self-governing units is an exceedingly difficult task from

the point of law-making, maybe even impossible. Nevertheless, the section of public power entrusted to self-governing unions must fit to the whole, which is represented by the public power in a state. (Pařízková, 2008: 238)

Revenues of public budgets with the tax nature are subject to many critical reservations, when the most serious is based on the fact that the distribution by state bodies is still significant, because only a half of tax income is imminently connected with a relevant municipality. (Pařízková, 2008: 238) The second reservation is based on the non-existence of truly local taxes, i.e. taxes of which revenues municipalities would be able to decide by themselves, especially to set their rates. So until municipalities will not be able to at least partially affect the amount of tax income, there will be still a certain threat for their self-governing position. (Pařízková, 2015)

It is a question, why local fees are categorized as a tax income of municipalities and not as non-tax? We can find this opinion frequently in professional literature and this topic is also often discussed even by the lay public. Although legislatively-technically local fees are not a tax, as it is obvious from their title, because they are not marked as taxes, but they belong between tax incomes because of their economic nature. (Pařízková, 2008: 238) Because of this reason it is important to explain the economic difference between the term tax and fee, when the nature of fee is a payment for received benefit on payer's side, so the equivalent of mutual fulfilments is obvious here. By contrast, taxes are resources obtained without any immediate consideration, without directly connected counter-value. The element of equivalence is missing here. If we will accept this theoretical distinguishing and we will perform the proper analysis of local fees based on relevant laws, then we will come to the conclusion that the conception of non-equivalence corresponds with their nature, i.e. a tax institute. (Pařízková, 2008: 238) A payer is not receiving directly any service in connection with their payment of any fee as, for example, in the case of administrative fees. (Pařízková, 2015: 178) From the legal point of view taxes and fees are payment duties, which are imposed by a state by its relevant act and of which main purpose is to get incomes for the payment of society-wide needs, i.e. incomes for the public budget. (Radvan et al., 2008)

The paper deals with the issue of effectiveness and efficiency at municipalities from the view of local taxes and try to offers some new view for efficiency and effectiveness in this sense. The main goal of this contribution is to know how to measure effectiveness and efficiency of local taxes and detect if local taxes are important for own economic independency of local governances. Local governance need some economic independency for filling their tasks and for avoidance of inadequate state to the local activities. For this reason, local governances needs their assets and their revenue. This paper detect if local taxes are important for this economic independency and try to know how to measure efficiency and effectiveness at local taxes. Compilation, comparison, analysis and synthesis were method used for writing this contribution.

2 Local taxes

Municipalities have the power to select and impose particular local fee from the system of local fees on payers within its territory and they are imposed in the form of generally binding ordinance of municipality within its self-government, while such ordinance shall also specify details about its collection. At the same time any municipality shall specify even the rate of fee, which must be in compliance with the Act on the local fees, which includes the maximum possible rate or the range of rates. So the amount of the same fee can be different in different municipalities. (Pařízková at al., 2013: 45)

So the local fees are the only payment with the tax nature, (Marková, 2008: 122) they have the facultative character, which means that elected bodies of municipalities, local government, are deciding, if they will be collecting fees from the system of local fees from natural or legal persons and which they will be collecting. However, municipalities are collecting such fees, so they will obtain other financial resources to their budgets. (Comp. Pařízková, 2008: 238)

The Act is specifying following types of the local fees:

- fee for dogs,
- fee for the spa or recreational stay,
- fee for the use of public space,
- fee from the entrance fee,

- fee from the accommodation capacity,
- fee for the permission to enter selected places and parts of municipalities with a motor vehicle,
- fee for the operation of the system of gathering, collection, transport, sorting, use and elimination of the municipal waste,
- fee for the appreciation of construction plot by its possibility to connect it to the construction of water pipeline or sewerage system.[2]

By the implementation or non-implementation of particular fee, the specification of certain amount of particular fee type, simply the overall selected structure and form of local fees selected in its district, the municipality can affect the frequency of certain activities within its territory to the certain extent, e. g. order in a municipality, tidiness in a municipality etc.

Local taxes and fees must meet certain criteria. In the first place it stands that their revenues belong to a municipality, which means that it has a fiscal and regulatory function. A municipality is also the subject, which is specifying tax rates, is defining the tax base and is assessing, collecting and administrating the fee. Any fee is just as any tax the non-refundable, public income serving the realization of municipal and public needs, it is the periodic non-equivalent payment, because there is not any direct consideration provided for it. Maybe the most important function of the local fees is the effort to increase the income of municipal budget, even though revenues are not so high. However, even the regulatory benefit of the local fees, as it was indicated above, is not insignificant for municipalities. As an example, we can further mention the regulation of undesirable expansion of stall sales, breeding of dogs in certain localities or flats or the limitation of traffic in some parts of towns and municipalities. (Pařízková at al., 2013: 45)

So different fees have the regulatory and fiscal function to varying degrees. It is possible to talk about the mainly regulatory function in the connection with the fee for dogs, for the use of public space and the fee for the permission to enter selected places and parts of municipalities with a motor vehicle. The fiscal function prevails in connection with the fee for spa or recreational stay, from the entrance fee, from the accommodation capacity and especially with the fee for the operation of the system of gathering, collection,

2 Act of the Czech National Council No. 565/1990 Coll., on the local fees, as amended.

transport, sorting, use and elimination of the municipal waste and the fee for the appreciation of construction plot by its possibility to connect it to the construction of water pipeline or sewerage system of which purpose is to cover part of resources, which a municipality expended in the given area. (Mrkývka, 2016)

However, any municipality should bear in mind also the other points of view connected with the implementation of the local fees at the same time, especially if it has the sufficient personnel and financial ensuring, we mean especially small municipalities, for the performance of administration of the local fees. (Comp. Pařízková at al., 2013: 45)

3 Efficiency and effectiveness

According to economic dictionary, the term efficiency means a measurable concept, which is quantitatively determined by the ratio of useful output to total input. Efficiency is marked as one of the characteristics of productivity. Efficiency try to impede of wasting money, resources, efforts, money or time in production. The efforts should be to use the best practice for doing the things, successfully and without waste. It is possible to realize with two ways. First, we try to gain a large production with using the same resources. Second, we try to gain the same quantity of production with using smaller resources. One of possible measurement of efficiency is to compare the inputs and outputs. It is necessary to pay attention to the same or similar conditions because different industries or have different inputs and outputs and it is very difficult to compare these different industries. The same situation is with comparing of countries. Every country has its specific conditions; from this reason is comparison problematic.

Efficiency is often used at private sector because the environment of private sector help to eliminate inefficiency more than at public sector. Private sector is specified with:

- clear ownership,
- clear objectives and ways to fulfil these objectives (very often it is business performance),
- competitions which are the most important reason for improving.

From this reason, measurement of public sector efficiency is more complicated in comparison with private sector. In public sector, business performance is not the best objectives because public sector has to fulfil different objectives which are very difficult measurable. Niskanen (1971) suggests that public sector managers try to utility-seeking budget maximize instead of output maximize. He noticed that efficiency in public sector can increase through increasing of competitive environment, better controlling and sanctioning system.

Application of improving efficiency is connected with a few steps:

- detect inefficiency
- analyse inefficiencies
- suggest the ways for elimination the inefficiency
- choice the best one suggestion for elimination of inefficiency
- implement the best one suggestion
- measure efficiency after implementation the best one suggestion

Every steps bring many issues, which can be at public sector difficult to realize. The first two steps – detect and analyse inefficiency are the easiest. The most difficult are choice the best one suggestion because there are a lot of suggestion and every suggestion has its advantages and disadvantages. Implementation of the best suggestion is very difficult as well because there are many impediments to implement the chosen suggestion.

There are two types of efficiency. The first type is named as qualitative efficiency. This approach analyse a number of operations which are realized in defined time, e. g. if realization one project was planned for two years and it was finished in eight years, efficiency is 25 %. Quantitative efficiency is the second type. This approach compare real inputs and maximum possible of outputs. If it was possible to gain one hundred of outputs in the time and it was gained only seventy, efficiency is 70 %.

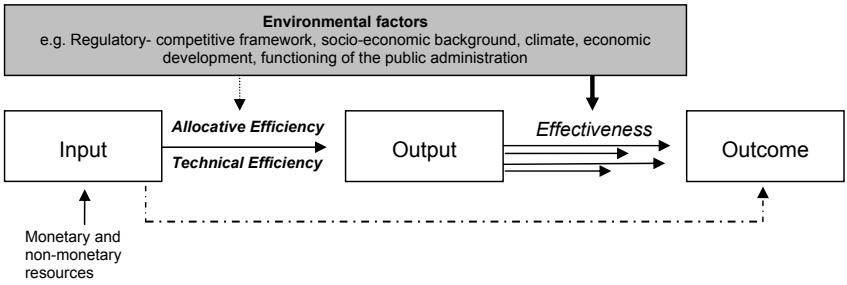
Effectiveness is the concept of being able to achieve a final objective. Final objective is often marked as outcome. In economic disciplines, effectiveness is relating to getting the right things done. According to Drucker (2006) effectiveness is the ability which every company can and must learned.

Effectiveness is divided into technical effectiveness and allocative effectiveness. Technical effectiveness is based on production of maximum possible amount of output from given amount of input or with minimal possible amount of input realized the same level of output. Maximal level of effectiveness means that economics is on the production possibility frontier (output cannot be increased without increasing inputs or it cannot be decreased any input without decreasing output). This technical effectiveness is based on the approach of "the best practice". (Koopmans, 1951) The best practice is method that chooses the approach generally producing superior results to any alternatives. Allocative effectiveness reflects the link between the optimal combination of inputs taking into account costs and benefits and the current output achieved. It is necessary to have attention to allocation. Effectiveness of allocation is only if it was chosen the best one combination of inputs that means output cannot be achieved by choosing a different set of inputs. (Mandl, Dierx, Ilzkovitz, 2008)

It was mentioned that effectiveness measure the impact of the objectives. Effectiveness has a long-term effects, the shortest period for measuring effectiveness is 3 or 5 years. It is necessary for measuring of effectiveness to register all public speeding. It is in praxis very difficult to realize because a lot of employees of public administration realize a few projects together at the same time. For this reason, it is difficult to measure the faithful public speeding of one selected project.

Effectiveness is very often confused with efficiency. Mandl, Dierx and Ilzkovitz (2008) analyse relationship between efficiency and effectiveness. Effectiveness and efficiency is influenced by environmental factors. These environmental factors include institutional, structural or country-specific factors, which are beyond the control of public authorities. These factors can be eliminated using regulatory environment, institutional setting or even climate. Wilson (2005) notice that these factors can help to improve efficiency and effectiveness of public sector. Table 1 show Conception of efficiency and effectiveness.

Figure 1: Conception of efficiency and effectiveness



Source: Mandl, Dierx and Ilzkovitz (2008)

Increasing of effectiveness and efficiency in public sector needs time. Unfortunately, time is absence in public sector. Political environment is periodically changing and every political team choose their own objectives and ways to fulfil these objectives. Politicians are interested in visible outcomes of their political programmes. From this reason, politician prefer the objectives and outcomes characterized with short-term effect.

4 Measuring of effectiveness and efficiency at local taxes

How was mentioned above, it is possible to measure quantitative and qualitative efficiency. Unfortunately, qualitative efficiency is not possible to realize at local taxes. It is possible to realized quantitative efficiency in short dimension. Quantitative efficiency should to realize using comparison of maximum revenue, which can gain from local taxes and current revenue of local taxes. It is very problematic to know maximum revenue of local taxes. Laffer curve shows this limitation. It shows dependency of tax rate and total tax revenue. A higher tax rate do not mean higher tax revenue.

Development of total quantity of revenue can shows basic assess of quantitative efficiency. Development of total quantity of revenue have to increase during the analyzed period. Total revenue from local taxes increases about 1,24 % in comparison of September 2016 and September 2015 (Ministry of Finance of the Czech Republic). Municipalities have the highest revenue from local taxes connected with municipal waste collection. Total revenue

from this local tax was more than 3,5 bil. CZK in 2015. Local tax connected with using of public area was on the second position with a large distance. Local tax connected with spa or recreation stay places on the third position see Table 1.

Table 1: Local taxes in 2015 (in thousand CZK)

Municipal waste collection	3 565 910,08
Dog license	276 639,36
Spa or recreation stay	326 569,58
Using of public areas	632 412,40
Admission	52 920,24
Accommodation capacity	239 546,28
Motor vehicle entry	20 206,98
Real property transfer tax	10 691,55

Source: Jirásková, 2017

Effectiveness is divided into two types – technical effectiveness and allocation effectiveness. It is possible to realize technical effectiveness using cost analysis connected with tax acquisition and its development. Every municipality has to consider carefully supposed costs connected with new local tax. The first step before assessing a spa or recreation stay tax is detailed analysis of accommodation capacity; influence of new taxes on potential tourists, costs connected with this tax and expected revenue. Generally, it is very difficult to know costs connected with every local tax because municipalities do not register costs connected with specific local tax. Municipalities register only costs connected with waste collection. For this reason, municipalities should try to register costs connected with local taxes, e. g. how many time of employees attend to administration of every local tax. The size of costs could be quantified from this information.

Revenue from local taxes have to be higher than costs connected with these local taxes. If the cost are higher than revenue from local taxes, municipalities have consider keeping the local tax. This consideration is not valid if the revenue from local tax create equivalent value and contribute to meet the costs e. g. municipal waste collection. Cancelation of municipal waste

collection tax should mean that a municipality has only costs connected with waste collection. Other side, a high municipal waste collection tax can cause situation that citizens of this town move to different town with low rate of municipal waste collection tax.

Allocation effectiveness is connected with maximization of utility. It is possible to review from the total utility point of view and from utility of every citizen point of view. Peková, Pilný and Jetmar (2012) show that profitability and individual utility influence evaluation of public sector outcomes. Every citizen try to maximize his or her own utility. According to this presumption, almost every citizen want to life in the city without local taxes. The reason is that the citizens save money and time. Complete different situation is at utilization of local government. Municipalities try to have revenue from local taxes to paying all costs connected with these taxes. Municipalities' utility maximization differ from citizens' utility maximization. It is very difficult to specify the general right rate of utility in both of these groups.

5 Conclusion

The contribution fulfil the aim of the paper. It is described characteristics of local taxes specify efficiency and effectiveness at local taxes a try to measure efficiency and effectiveness at local taxes in the Czech Republic.

The local fees do not represent a large income of municipal budgets, they are not exceeding 2 % of the total revenues of local budgets in the Czech Republic in average, however they are suitably supplementing incomes and they are decreasing the tension present in the financial administration of municipalities. (Pařízková, 2008: 238)

The local fees are the topic, which should affect every citizen of the Czech Republic on a certain level, who wants to have more comprehensive notion about the economic development of the society in the broadest sense. In the content of municipal budget it is possible to find the direction, which the society takes, through the income and expense items of budget, which are supporting or solving certain issues, which means the local fees with the respect to the solved matter. Results of economic activities of municipalities

are documenting the economic difference of individual regions in the Czech Republic and they are giving evidence about the activity of local self-governments. (Pařízková et al., 2013: 147)

To sum up, efficiency is difficult to measure at local taxes. There are many limitations for its measurement. It is possible to measure only one part quantitative efficiency – increasing total revenue from local taxes. This type of measure can be incorrect because the reason for increasing total revenue from local taxes can be influenced with many factors, e. g. economic development, changes in tax rate, changes in condition of environment. Municipalities can measure technical effectiveness but they need to know costs connected with every local tax. The worst situation is at measurement of allocation effectiveness. Municipalities have to know utility for measurement allocation effectiveness. There are a few group related to local taxes – citizens, companies, non-profit corporation and local government. Utility of local taxes change in every of group and there are differs in utility within every group, e. g. every citizens has their rate of utility.

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MINOR TAXPAYERS

Michal Radvan[1]

Abstract

This article deals with the status of minor taxpayers, due to the recent case law especially in the area of charges on communal waste. The aim of this article is to find the optimal regulation *de lege ferenda* concerning the position of minor taxpayers and their rights and duties. Text disproves the hypothesis that every person incl. minors must fulfil all tax duties set by law. To achieve the aim of this article and to confirm or disprove thy hypothesis, recent case law in given area with regard to regulation *de lege lata* is analysed, incl. taxes never discussed by the courts. Paper points out changes in legal regulation in the area of local charges taxpayers. At the end, the ways of tax administration, incl. possibilities *de lege ferenda*, for different taxes *sensu largo* (personal income tax, value added tax, immovable property tax, tax on acquisition of immovable property, court and administrative charges, local charges, charges on communal waste) are presented.

Keywords

Tax; Tax Law; Taxpayer; Minor; Charge on Communal Waste.

JEL Classification

K34; H2; H71.

1 Introduction

The tax law theory does not deal with minor taxpayers, neither in the Czech Republic nor worldwide. There is no doubt that there are many taxes

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to be paid by minors. They can own and dispose of the property (both movable and immovable) and pay immovable property tax or tax on acquisition of immovable property. They can get incomes from different sources and of different types (dependent activities, sport and artistic activities, rents, gifts, inheritances, etc.) what is connected with a duty to pay personal income tax or even value added tax. All minors are producing communal waste and they should pay charges on communal waste. Some are holders of dogs what means to pay a dog charge. If staying in the hotel during the holidays, they have to pay any of the tourist charges. Under certain circumstances, it could be necessary to pay administrative or even court charge, etc.

As far as I know, there is no state worldwide regulating specifically the rights and duties of minor taxpayers. In the Czech Republic, the regulation is the same for all categories of taxpayers, no matter if they are minors or adults, with several exemptions adopted in last five years in case of local charges. This way of regulation does not deserve criticism because the principle of equality is one of the most important principles in tax law and tax proceedings. But the decision-making practice of Czech courts is different and it seems it is necessary to deal with these issues more preciously.

The aim of this article is to find the optimal regulation *de lege ferenda* concerning the position of minor taxpayers and their rights and duties. I will work with the hypothesis that every person incl. minors must fulfil all tax duties set by law. To achieve the aim of this article and to confirm or disprove the hypothesis, it will be necessary to analyse recent case law in given area with regard to regulation *de lege lata*, incl. taxes never discussed by the courts. The method of comparison will be used to point out changes in legal regulation in the area of local charges taxpayers. To conclude all thought, the method of synthesis will be used.

As all the case law dealing with minor taxpayers is connected with charges on communal waste, in chapter two it is necessary to analyse the definitions of taxpayers of charges on communal waste. Chapter three will critically analyse the case law in the examined area, so that in the conclusion it will be possible to define the optimal regulation *de lege ferenda* concerning the position of minor taxpayers and their rights and duties for all the taxes and not only for charges on communal waste.

2 Taxpayers of charges on communal waste

There are two, resp. three possibilities to collect charges for the municipal waste management:

1. The local charge on communal waste, officially called the charge on the operation of the system for picking, collection, transport, sorting, recovery and disposal of municipal waste, regulated by the Local Charges Act;[2]
2. The charge on communal waste according to the Waste Act;[3]
3. The contract between the communal waste producer and the municipality.

Both charges have their pros and cons, as stated for example by Slavik and Pavel (2013), or Radvan (2010, 2012, 2016). Dealing with the taxpayers, the local charge on communal waste is paid by each natural person with a permanent residence in the territory of the municipality.[4] Similarly sets the Slovakian regulation (Babčák, 2010: 327). The problematic issue is that quite a lot of taxpayers are really living and producing their waste somewhere else than where they officially reside: they work or study in other municipality, they are staying in hospital, in jail, etc. The charge on communal waste according to the Waste Act is paid by every natural person producing communal waste. Such a model is used for example in Poland (Popławski, 2012, 2013). For the tax administration, it is difficult to identify the producer of the communal waste and to prove he is really producing any waste.

2.1 Taxpayer of local charge on communal waste – historical overview

The local charge on communal waste occurred on January 1, 2002. The taxpayer was basically defined as the natural person with a permanent residence at the territory of the municipality. This rule was not changed until June 30, 2012. As it is obvious, the act was taking into account only the criteria of the residence. The age of the taxpayer, his ability to pay, or any other criteria were not relevant. The municipality had and still has the right to set

2 Act No. 565/1990 Sb., as amended.
3 Act No. 185/2001 Sb., as amended.
4 The taxpayers are also natural persons who own a building designated for individual recreation, an apartment or a house, where does not live any person paying the charge. In this case, just as an amount equivalent to the fee for one natural person shall be paid.

exemptions in the bylaw – generally binding ordinance. But really rarely the municipality decided to create the exemption for minors.

The amendment to the Local Charges Act valid since July 1, 2012, was a reaction to the academic discussions and real life problems of minor taxpayers.[5] It states that if the taxpayer is minor at the time of the payment duty, the minor taxpayer and his/her legal representative are responsible for the payment of the charge jointly and severally. The legal representative has in such a case the same procedural status as the taxpayer. If the charge is not paid, the tax administrator has right to assess the charge to any legal representative or the minor taxpayer. This regulation was not very clear and caused many problems in practice. For example, it was not defined preciously when exactly the taxpayer has the payment duty, as usually the charge should be paid during the table period – taxable year. The tax administrator had right to decide who will pay the charge according to its best knowledge: if he knew the minor taxpayer had financial sources, it could assess the charge directly to this minor, otherwise the charge was assessed to the legal representative/s.

That is why another amendment was adopted by the Parliament and it came into force on January 1, 2016. It states that if the taxpayer who is minor at the maturity date of the charge has an unpaid tax duty, the taxpayer's duty is passed on to the legal representative. The legal representative has in such a case the same procedural status as the taxpayer. The tax administrator assesses the charge to legal representative/s (in case of more legal representatives, they are responsible for the payment of the charge jointly and severally). The same rules apply to the taxpayer's guardian, if there is any. This regulation is still valid, but formally it causes problems. The main practical one is that if the charge is paid before the maturity date of the charge (mostly by parents – legal representatives), the taxpayer is the minor. However, the amount must be credited to the account of the tax administrator no later than the last day of the maturity date. Not all taxpayers know this rule, especially if the general Tax Code[6] states that if the tax amount is credited to the account within five working days after the maturity, there is no sanction. Unfortunately, this rule is not applicable for charges. In case

5 Of all local charges, not only local charge on communal waste.
6 Act No. 280/2009 Sb., as amended.

the charge is paid (money is sent from the account) by parents in the name of the minor during the last day of the period for charge payment and money is credited to the account of the tax administrator after the end of this period, the taxpayer is not the minor anymore, but the legal representative: the taxpayer's duty was passed on to the legal representative at the moment of the maturity. Practically, this formally wrong regulation does not cause problems, as tax administrators somehow (definitely not according to the Tax Code or any other legal norm) credit the payment to the minor's tax account and not the legal representative's one.

It must be added, that the taxpayer of the charge on communal waste according to the Waste Act is still the same and no amendments specifying similarly to the local charges the rights and duties of minor taxpayers were ever adopted.

3 Case law

3.1 County court Ostrava – 2014

The first case dealing with the minor taxpayer according to the legal regulation effective until the end of June 2013 was discussed before the County court in Ostrava in June 2014 (County court in Ostrava: 22 Af 78/2012-46). One of the objections was the unconstitutionality of the legislation that makes minors taxpayers. The court states that principally it is not unconstitutional state in which a minor has a tax duty because even a minor could be a subject of property rights and s/he has rights under the parental responsibility of his/her legal representative. If a minor has a tax duty, his/her legal representative is responsible for the fulfillment of that duty under her parental responsibility. The reparation of the minor's damage is realizable by way of the claim against his/her legal representative. The court concluded that if a minor is liable to pay a charge under the Local Charges Act, the legal representative is responsible for the fulfillment of this duty within the framework of his parental responsibility provided by the Act on Family,[7] resp. Civil Code[8] since January 1, 2014.

7 Act No. 94/1963 Sb., on Family, as amended, Art. 31.
8 Act No. 89/2012 Sb., Civil Code, as amended, Art. 858.

3.2 County court Brno – 2014

In the same time, in August 2014, the County court in Brno (County court in Brno: 62 Af 78/2013-48, County court in Brno: 62 Af 52/2013-66) states that the provisions dealing with the local charge on communal waste taxpayer should be interpreted not as a rule defining the taxpayers, but as a rule stating the number of persons for whom it is necessary to pay a charge. The obligation to pay a charge, with reference to this provision, cannot primarily prosecute minors as taxpayers, but their legal representatives. In such an interpretation, however, the court excludes the definition of a taxpayer from the law, and it is not at all clear who should pay the charge. However, the definition of the taxpayer is the basic structural element of each tax *sensu largo*. Without determining the taxpayer it is not possible to assess and collect the tax. The court even states that the minor should pay the charge itself only if s/he has his/her own property or own income, otherwise s/he should not. In this, inequality between "wealthy" and "poor" minors is to be seen (Radvan, 2014: 147).

3.3 Supreme Administrative Court – 2014/2015

Both cases from Brno and Ostrava were later dealt with the Supreme Administrative Court. Concerning "Brno case", the senate of the Supreme Administrative Court in November 2014 (Supreme Administrative Court: 1 As 116/2014-29) states that the decision of the County court is wrong: the local charges act unambiguously defines the taxpayers and it is not possible to interpret the text as a rule stating the number of persons for whom it is necessary to pay a charge. If the charge was assessed to minor and the legal representatives did not pay the charge, the tax administrator has right to recover the charge after the taxpayer, i.e. the minor.

Another senate of the Supreme Administrative Court dealing with the "Ostrava case" believed that the regulation effective until the end of June 2013 is unconstitutional and in April 2015 (Supreme Administrative Court: 9 As 211/2014-97) sent the case to the Constitutional Court. There is an academic question whether the Supreme Administrative Court is not a little alibistic and why the case was not sent only to the extended senate, if one of the senate has a different opinion than the other who has already solved the same case.

3.4 Constitutional Court – 2017

The Plenum of the Constitutional Court in August 2017 (Constitutional Court: Pl. ÚS 9/15) accepted the proposal of the Supreme Administrative Court to pronounce unconstitutionality of Art. 10 b/1/a of the Act on Local Charges, in the version valid until June 30, 2012, in so far as it imposed obligations on minors. The Constitutional Court concluded that the legislation imposing a tax burden on minor taxpayers, regardless they have the means to pay the tax (or at least the possibility to obtain such means), impedes them irrespective of the possibility of affecting the imposition of a payment obligation (e.g. by refraining from charged activities), or at least of exempting the payment obligation, is contrary to several articles of the Charter of Fundamental Rights and Freedoms, namely Art. 32/1 in conjunction with Art. 4/4 (absence of special protection for children and adolescents), Art. 3/1 (ineligible discrimination on grounds of social origin) and Article 11/1 in conjunction with Art. 4/4 (strangling effect of the charge).

There are several reasons why not to agree with the findings of the Plenum of the Constitutional Court. These issues are to be discussed in the conclusion, as it is necessary to find the way how to tax minors generally, respecting the reasons stated in the Constitutional Court's decision.

4 Conclusion

As the decision of the Constitutional Court is final, it has no sense to bring arguments why it is wrong. The hypothesis that every person incl. minors must fulfil all tax duties set by law was unfortunately disproved. At the moment, the most important question is what is the impact of this finding on all other charges and taxes *sensu stricto*, incl. local charge on communal waste and charge on communal waste according to the Waste Act payable by minors?

The Constitutional Court mitigates my concerns mentioned in Radvan, (2014: 149) that there is a risk that minors will not pay any taxes *sensu largo* and there will be a possibility for tax avoiding. Court states that the legislator has the power to decide that taxpayers of a certain tax or charge will be minors. However, if the legislator decides to do so irrespective of whether the minor has any taxable property or income, or whether s/he has the possibility

to avoid charged activities (if s/he does not have the appropriate means), then the legislator must take into account that there may be cases of excessive hardness and take appropriate solutions (Constitutional Court: Pl. ÚS 9/15, 80). On the other hand, the Constitutional Court states that if the activities to minimize excessive hardness are based on administrative discretion and only at the stage of tax payments (and not during the tax assessment), such a regulation is not sufficient enough (Constitutional Court: Pl. ÚS 9/15, 78).

The legislator should also consider whether the charge is levied for consideration by the state or municipality (Constitutional Court: Pl. ÚS 9/15, 80). This rule is not applicable for taxes, as there is no consideration at all; the same applies to several charges, but not for the charges on communal waste, as there is always the consideration: the municipality manages the waste. The argument of the Constitutional Court that the parents are within their maintenance obligation the producers of the waste even it was really produced by their children is incorrect. Especially if the Court argues that the maintenance obligation does not include the (tax) payment obligations (Constitutional Court: Pl. ÚS 9/15, 59).[9] In these consequences, the Constitutional Court suggests the parents as legal representatives (and not the minors) should be the taxpayers.

The most important question is the tax administration of different taxes and charges for the future; how the finding of the Constitutional Court can influence the assessment and collection of these taxes *sensu largo*? Probably personal income tax and possibly value added tax should be administered in the same way as nowadays as the minor taxpayer has adequate sources to pay the tax and s/he can decide whether s/he will run taxable activities (dependent activities, sport and artistic activities, rents, etc.). In case of gifts and inheritances, in the Czech Republic taxable within the personal income tax, the situation should be the same. Concerning immovable property tax, the minor taxpayer has the property and he should be able to pay the tax, while dealing with tax on acquisition of immovable property, s/he has the right not to buy the property and not to pay the tax. The same rule applies for most of the court and administrative charges. The general rule that every, even minor taxpayers is responsible for his/

9 For details, see Gregorová, Hrušáková, Stavinohová, 1997.

her tax debts is stated in the Tax Code. I do believe that Czech courts have no reason to invalidate regulation *de lege lata* and the legislator does not have to approve any amendments. To improve even more the relation between a minor taxpayer and a tax administrator, the legitimate representative could stand surety for the minors.

Special regulation is needed for the other charges, especially charges on communal waste. In case of contracts between the communal waste producers and the municipalities, the contract itself should state the person responsible for payments, even for more waste producers, incl. minors. Both charges on communal waste (local charge on communal waste, charge on communal waste according to the Waste Act) should be unified. Even if the legislator does not accept one type of charge on communal waste, the position of minor taxpayers must be the same. The existing regulation of the local charge on communal waste seems to be adequate; only certain short time limit (5 days) should be added for cases the charge is paid on the last day of the period for charge payment so that money is credited to the account of the tax minor taxpayer legally. I.e. it is important to state that the tax duty is transferred from a minor taxpayer to his/her legal representatives on the 6th day after the end of the period for charge payment. The same rule as for charges on communal waste should be applied on dog charge (if we accept the incorrect tradition that minors could be holders of dogs). Concerning tourist charges, it is important to unify the regulation of current two types of charges. As the charge is collected from tourists by the provider (hotel) together with the price, in practice existing regulation causes no problems. To clarify the legal regulation, the best solution would be to determine the provider as the taxpayer.

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