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Petr Mrkývka, Jolanta Gliniecka, Eva Tomášková, Edward Juchniewicz, Tomasz Sowiński, Michal Radvan (eds.)

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PREFACE

This publication is the result of cooperation of many entities, universities, law departments, departments of financial law from several countries and many years of their experience.

It is the direct result of the third edition of the research project "self-government21" concerning on the finances of local government implemented by the Center for Local Government Law and Local Finance Law of the University of Gdańsk and the Department of Financial Law of the Faculty of Law and Administration of the University of Gdańsk.

The culmination of the research conducted as part of the project was the 3rd International Conference on Local Government Finances, entitled: "Territorial self-government in 20 years after the administrative reform of the country, the balance of hope and postulates for the future", and the International Seminar on Financial Law of Local Self-government "Financing local government and its tasks, in the regional policy of the European Union". The conference was organized in Gdańsk on 16 April 2018.

The conference, together with the Center and the Department of Financial Law, was co-organized by the Department of Financial Law and National Economy and the Faculty of Law of the Masaryk University in Brno and the Regional Accounting Chamber in Gdańsk.

The cooperation of both cathedrals has been going on for several years. It is becoming more and more strict and concerns a growing scientific space. Its confirmation is the cooperation agreement, which the Department of Financial Law of the Faculty of Law and Administration of the University of Gdańsk and the Department of Financial Law and National Economy of the Faculty of Law of the Masaryk University in Brno concluded in 24 of November 2015. A similar agreement in a broader scope was also made by the Law faculties of both universities. Since then, the cooperation of both departments of financial law and both scientific centers has intensified even more.

The Gdansk University Centre for Self-Government and Financial Law (hereinafter – Centre) is an all-university, non-departmental unit of the University of Gdańsk which runs the activity aimed at the society integration as well as meeting the needs of non-academic communities. The centre has its seat at the Faculty of Law and Administration of the University of Gdańsk. It carries out its programme objectives related to self-government law, especially the local finance law as well as tasks realized in conjunction with the Chair of Financial Law of the Faculty of Law and Administration at the University of Gdańsk in the whole field of public finances and finance law.

The main objective of the Centre is especially the realization of its own projects or projects developed in cooperation with other academic and non-academic partners, public and private institutions, non-governmental organizations and others whose aims are coherent with the aims of the Centre. The Centre cooperates with other domestic and foreign scientific and didactic institutions, offering specialist courses and lectures on self-government law and local finance law. It participates in the organization of scientific and research meetings promoting scientific research activities, as well as consulting services.

One of the important forms of the Centre's activity is initiating and supporting various publishing undertakings which integrate the scientific society. It has already organized several international scientific conferences and seminars, moreover, issued a number of publications – mostly of international character. The Centre is also the publisher of an academic quarterly focused on financial law – Financial Law Review which is published in cooperation with De Gruyter Open in the electronic form and in English.

The Centre also carries out such research projects as "The Financial Law towards Challenges of the XXI Century" and "Self-Goventment21" which is a specialized form of the former research trend and focusing on the finances of local self-government. The Centre cooperates with numerous units of local self-government, non-governmental organizations, organizations grouping local self-governments and many other institutions.

The main partner and the initiator of the Centre is the Chair of Financial Law of the Faculty of Law and Administration at the University of Gdańsk. Every activity of the Centre is primarily realized in cooperation with the

Chair of Financial Law and, in the first place, with its research workers. The Chair of Financial Law introduced the idea of the research project "The Financial Law towards Challenges of the XXI Century" and realized the first conference. The Centre took over the aforementioned idea and realized the subsequent editions of the research project, enriching it by creating a variation of it which is devoted to finances of local self-government – a project titled "Self-Government21". Over time other institutions started cooperation with the Centre, first the Faculty of Law and Administration at the Cardinal Stefan Wyszyński University in Warsaw and then the Chair of Financial Law and the Faculty of Law at Masrayk University, Brno, Czech Republik. Currently, the Chair of Financial Law of the Faculty of Law at the University of Paul Joseph Šafárik in Košice, Slovakia is also about to start cooperation with the Centre.

Constant cooperation with the self-government and governmental administration, in particular with the Regional Accounting Chamber in Gdańsk, significantly raises the substantive level of research projects and publications, and strengthens the practical aspect of research.

So far, together with the Chair of Financial Law of the Faculty of Law and Administration at the University of Gdańsk and in particular cases also with some or all of the mentioned partners as well as numerous NGOs, the Centre has already realized 7 research projects which resulted in 7 international conferences and international seminars witch supplemented or extended chosen issues of the conferences:

- I International Baltic Conference on Fincancial Law: "The Financial Law towards Challenges of the XXI Century", Gdańsk – Nynäshamn – Stockholm, 8–11 October 2010;
- II International Baltic Conference on Financial Law: "The Financial Law towards Challenges of the XXI Century", Gdańsk – Nynäshamn – Stockholm – Gdańsk, 19–22 April 2013;
- III International Baltic Conference on Financial Law: "The Financial Law towards Challenges of the XXI Century", Gdynia – Karlskrona-Gdynia, 24–27 April 2015;

- Международный научный семинар по налоговому праву: "Принципы противодействия уклонению от уплаты налогов в Польши и России" (International scientific seminar on tax law: "The Principles of Countering Tax Evasion in Poland and Russia"), Gdańsk, 27 April 2015;
- IV International Baltic Conference on Financial Law: "The Financial Law towards Challenges of the XXI Century", Gdynia – Kopenhagen – Gdynia, 21–24 April 2017;

The development and elaboration of the research program "Financial law in the face of the challenges of the 21st century" and the implementation of subsequent editions of this research project were enriched with research projects devoted to local government finances "self-government21". They resulted in 3 scientific conferences and 2 international scientific seminars devoted to the finances of local government units:

- I International Conference on Finance and Finance Law of Self-Government Units: "Sources of Local Government Financing in the Light of Modern Regulations", Gdańsk, 15–16 September 2014;
- II International Conference on the Finance of the Local Self-Government: "Local Government Financing and its Tasks and European Charter of Local Self-Government. Practical Problems, Gdańsk, 25 April 2016;
- **International Seminary of the Financial Law of Local Government: "Local Government Financing and its Tasks and European Charter of Local Self-Government", Gdańsk, 25 April 2016;**
- III International Conference on the Finance of the Local Self-Government: "Territorial self-government in 20 years after the administrative reform of the country, the balance of hope and postulates for the future", Gdańsk 16 April 2018;
- and the International Seminar on Financial Law of Local Self-government "Financing local government and its tasks, in the regional policy of the European Union". The conference was organized in Gdańsk on 16 April 2018.

Altogether the Chair of Financial Law of the Faculty of Law and Administration at the University of Gdańsk and the Centre has published

a dozen or so volumes of publications whose authors are several hundred researchers from several dozen research centres all over Poland, Chech Republik, Slovakia, Latvia, Croatia, Kazakhstan, and Russia, and for several years, publications have been regularly published in cooperation with the Department of Financial Law of National Economy of the Faculty of Law at the Masaryk University in Brno in the Czech Republic:

- Dobaczewska, A., Juchniewicz, E., Sowiński, T. (eds.): *System finansów publicznych. Prawo finansowe wobec wyzwań XXI wieku / The System of Public Finances. The Financial Law towards Challenges of the XXI Century*. Warszawa: CeDeWu, 2010. (ISBN 978-83-7556-326-9 [Gdansk Uniwersity]; EAN 9788375563269. ISBN 978-83-7556-327-6 [CeDeWu]; EAN 9788375563276).
- Dobaczewska, A., Juchniewicz, E., Sowiński, T. (eds.): *Daniny publiczne. Prawo finansowe wobec wyzwań XXI wieku / Public Levies. The Financial Law towards Challenges of the XXI Century*. Warszawa: CeDeWu, 2010; (ISBN 978-83-7556-329-0 [Gdansk Uniwersity]; EAN 9788375563290 i ISBN 978-83-7556-328-3 [CeDeWu]; EAN 9788375563283).
- Gliniecka, J., Wróblewska, M., Juchniewicz, E., Sowiński, T. (eds.): *System prawnofinansowy. Prawo finansowe wobec wyzwań XXI wieku / Law and Finance. The Financial Law towards Challenges of the XXI Century*. Warszawa: CeDeWu, 2013; (ISBN 978-83-7556-572-0 [Gdansk Uniwersity]; EAN 9788375565720. ISBN 978-83-7556-568-3 [CeDeWu]; EAN 9788375565683).
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- Dobaczewska, A., Juchniewicz, E., Sowiński, T. (eds.): *Finanse publiczne jednostek samorządu terytorialnego. Źródła finansowania samorządu terytorialnego we współczesnych regulacjach prawnych / Public Finance of Local Government. Sources of Local Government Financing in the Light of Modern Regulations*. Warszawa: CeDeWu, 2014. (ISBN 978-83-7556-700-7 [Gdansk Uniwersity]; EAN 97883755657007. ISBN 978-83-7556-676-5 [CeDeWu]; EAN 9788375566765).

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- Gliniecka, J., Drywa, A., Juchniewicz, E., Sowiński, T. (eds.): *Finansowanie samorządu terytorialnego i jego zadań, a Europejska Karta Samorządu Lokalnego / Local Government Financing and European Charter of Local Self-Government*. Warszawa: CeDeWu, 2016. ISBN 978-83-7556-847-9; EAN 9788375568479.
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- Dzwonkowski, H., Gliniecka, J. (eds.): *Prawo finansowe / Financial law.* Warszawa: C. H. Beck, 2013. ISBN 978-83-255-5021-9.
- Gliniecka, J. (ed.). *Financial Law*. Gdańsk-Warszawa: Wolters Kluwer, Wydawnictwo Uniwersytetu Gdańskiego, 2016. ISBN 978-83-78-65-460-5.
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- *Financial Law Review,* 2017, no. 2 (1–4). Available from: http://www.ejournals.eu/FLR/
- *Financial Law Review*, 2018, no. 3 (1–2). Available from: http://www.ejournals.eu/FLR/

Currently, the Department of Financial Law of the Faculty of Law and Administration of the University of Gdańsk, Center for Local Government Law and Local Finance Law of the University of Gdańsk, and the Department of Financial Law and National Economy of the Faculty of Law, Masaryk University in Brno, already are in progress carry out the 5th edition of the research project "Financial law in the face of the challenges of the 21st century" and preparations for the 5th Baltic International Financial Law Conference "Financial law in the face of the challenges of the 21st century", which will take place on 10–13 May 2019 during a cruise through the Baltic Sea and on the Swedish island of Öland.

Tomasz Sowiński

PART 1: LOCAL GOVERNMENT FINANCES – GENERAL ISSUES

FINANSE SAMORZĄDU TERYTORIALNEGO – ZAGADNIENIA OGÓLNE

INDEPENDENCE OF PUBLIC FINANCE IN FRENCH LOCAL GOVERNMENT

Richard Bartes[1]

Abstract

The paper looks into selected issues of local government finance in France. The paper is of an interdisciplinary nature and as such it covers a financial theory aspect as well as a philosophical aspect of the topic. The paper also combines a historical insight introducing the beginnings of public finance and financial independence of the French local government since the French Revolution. It further expands this topic through selected issues covering the evolution of public finance in local government in the 20th century and a contemporary view where the author reflects the potential new challenges for the financial management of local authorities. The aim of the paper is to confirm the hypothesis that the independence of public finance in local government in France is being increasingly weakened to the benefit of the state.

Keywords: France; Public Finance; Public Finance Management; Local Government.

JEL Classification: H71, H72, K34.

1 Introduction

We must always acknowledge any opportunity in the form of expert conferences, symposia, seminars or publications that make it possible to analyse or highlight the issue of finance or, more specifically, finance management in local government, and all issues necessarily associated with it.

Like in the past, today's public still does not fully appreciate the role and position of public budgets in public administration in general, and namely

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in local government, i. e. the issues of so-called municipal or local budgets. However, the issue of the economic basis of local government is one of the most important and the most complex issues of local government because without its appropriate arrangement the municipality would be unable to fulfil its own self-governing function (Pařízková, 1998: 8–9).

In the past, Vilém Funk, the First-Republic professor of financial law, already remarked on this oversight of local government finance saying that the Austrian-Hungarian financial science was almost exclusively concerned with the state finance management which can be explained by the fact that all public administration was concentrated in the hands of the state and only very little autonomy was granted to municipalities (Funk, 1929: 343).

Since the French financial science has much more far-reaching roots than the above-mentioned science formed during Austria-Hungary (let alone Czechoslovak science), and the paper is also focused on selected problems related to the knowledge of the French local government finance, both from the historical and contemporary point of view, it is only appropriate to introduce the beginnings of the building of the French local government finance. In this context, it is important to mention the basic philosophical schools that shaped the issue of finance since the Revolution, as well as the fiscal independence of local government in France.

Subject to further discussion is the evolution of the French local government finance in the second half of the 20th century and further yet the current problems of local government in France in the financial area.

The aim of the paper is to confirm the hypothesis that the independence of public finance in local government in France is being increasingly weakened to the benefit of the state.

The aim of the paper was achieved through the methods of analysis and synthesis, description, historical description and comparison methods.

2 Beginnings of the Formation of Local Government in France and its Independence

In the first place it is important to note that economic difficulties of the second half of the 1970 s predicted a deep and long-lasting crisis which

in France, as well as elsewhere in the world, led to a situation where the state was being regarded as the origin of the problem and local self-governing units were considered to be a solution. This complete shift in paradigm was perfectly illustrated by the words spoken by the newly elected US president Ronald Reagan at his inauguration on 20 January 1981: *"In this present crisis, government is not the solution to our problem; government is the problem."*

During this period that was described as the Glorious Thirty (*Trente glorieuses*) in France territorial self-governed units were celebrated unlike the largest public or private entities that lost a lot of their reputation when the slogan "*small is beautiful*" was quickly spreading all over the world. This was because the public actually began to notice that a deep transformation of the state was beginning to take shape enabling the development of financial independence of local governments. At this precise moment the economic area joined the administrative and political areas with the aim to implement a decentralised organisation of society. This was believed to be a path to economic renewal as well as an answer to the crisis in public finance.

During the continuous thirty-year process it was possible to see that the state was gradually decomposing and then renewing again, however, without achieving a stable and unifying form that would harmoniously integrate central and local authority. It is worth noting that achieving such stability is all the more difficult when globalization develops in society and, at the same time, the deficit and public debt increase in a way that has become quite typical of this period (Tartour, 2012: 21).

At present, nonetheless, a system of so-called local taxes is being criticised in France because it seems to be outdated. However, what were the initial mishaps and what was the context of the French tax system genesis at the local government level and of the independence of public finance management?

2.1 Prospects of Local Government's Financial Independence in France

First questions pertaining to the local financial independence began to be born during the French Revolution. The cancellation of various tax

privileges[2] on the night of the 4 August 1789 helped a revolution in the local government taxation system. It was also enhanced by the effort to put an end to some other specifics of the local government in the fields of public benefits and the taxation rules unification. The strong aversion to the authorities (namely the king) and other representatives of the state power also helped the effort to reform the tax system. The inconvenience of the original system was aptly described by professor François Burdeau who said: *"individual king's decisions in the 18th century often have to tackle a troublesome journey from the kingdom's centre to its end"* (Burdeau, 1983: 13).

Following the Revolution, the departements, districts and municipalities were assigned new powers. These powers included a full independence in determining public benefits, collecting them and, subsequently, administering tax revenues. One of the necessary goals at this time was to end the hegemony of Paris. However, the endeavour to achieve the aforementioned at the time was affected by the fear of returning to the privileges of the Old Regime (not only in tax issues). Thus the question remained whether it was possible to perceive a certain precursor of financial independence of self-governing territorial units to the extent as we understand it today. I do not think so because precisely in this revolutionary context the struggle against absolutism prevailed over the effort to achieve the financial independence of the local government which was obviously affected by this.

2.2 Main Concept of French Decentralisation Prior to the Revolution

Professor François Burdeau distinguished three main schools of thought within which individual levels of local government have neither the same importance nor the same role. Individual representatives of these schools approach the issues of local government in different ways.

The first school are so-called traditionalists who prefer the "moderate" central power, possibility of dialogue and stand in the way of the power

2 The fight against privileges was not directed only against the tax privileges of local government but included also the tax privileges of clergy and nobility. These privileges represented an actual loss of profit. This reversal resulted in riots, namely among those who enjoyed the privileges.

only if it is deemed as necessary. François Fénelon[3] believed that power should be given to "individual estates", the tyranny of Parisian lords should be removed and "general estates" should be empowered to control "individual estates" as well as to decide on matters related to the Kingdom. Traditionalists propose to keep the dominant position at individual levels of government and the state should be content with a more limited scope of power.

In the work *L'Esprit des lois*, Charles Louis Montesquie as a representative of the traditional school also denounces the Parisian supremacy saying: *"Previously, every village in France was the capital city; nowadays only large cities are; every part of the state was the centre of power; nowadays everything relates to the centre, and this centre is basically the state itself"* (Montesquie, 1748: 59). Montesquie, like Fénelon, claims that individual estates must take on an economic role. However, unlike Fénelon, Saint-Simon or Boulainvilliers, Montesquie does not criticise the nobility.

The real essence of the traditionalists' reform lies above all in the overthrow of the absolutist power rather than in an attempt to continue creating the independence of the local government and subsequently to protect it which is rather a means of achieving this reform and not a result in itself. Traditionalists believe that by involving individual levels of local government as an instrument of reform the nation as a whole can participate in the country administration.

The second school is a utilitarian concept represented mainly by Mirabeau, Necker, physiocrats or Marquis d'Argenson. The primary objective of this school is to find efficiency in a wider but also narrower sense. It is thus impossible to consider as a goal the public benefit or the economic benefits of individual local government levels which are rather one of the means to achieve a coherent administrative structure as well as a greater efficiency of the local tax system and the end of the Parisian supremacy which is the root cause and consequence of the weakening of local government and, at the same time, a symbol of national failure. Utilitarians emphasise that the country cannot benefit from the weakening of regions.

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3 French poet, theologian and writer. His most important work are The Adventures of Telemachus.

Marquis d'Argenson[4] differs from other advocates of utilitarianism by being friendly to the local assemblies (which were controlled by the lords at the time) through which citizens are allowed to administer taxes, public works and services with the aim to improve and streamline the overall functioning of the government. As for physiocrats, they prefer local assemblies composed mostly of landowners.

Putting aside the debate about local assemblies that exercise their powers under the control of lords or individual estates, these aforementioned advocates of utilitarianism agree on the need to introduce elected local authorities which will have mainly tax powers. The difference between local assemblies and these elected bodies lies within the scope of the tax powers entrusted to them. At the same time, utilitarians warn against the individualism and egoism of individual levels of local government. In their opinion, the unity and equality of the nation should be the merit of all.

The last school to be mentioned is the concept of patriotism. The supporters of patriotism understand the decentralisation in two different ways. As for as the struggle with the tyranny of central power, patriots strongly advocate individualism and the peculiarities of individual levels of local government. On the other hand, as far as the issue of equality and unity of the nation is concerned, the privileges of individual levels of local government are forgotten. In the patriots' opinion, the nation is made up of all citizens, not a few individuals (Tartour, 2012: 24).

In these three approaches to decentralisation we can see the framework of individual levels of local government in relation to the guarantee of equality of citizens and, further, in the attitude toward the Parisian despotism. Nonetheless, the question of introducing the principle of local financial independence is not addressed.

2.3 Genesis of Local Government's Financial Independence in France

The previously mentioned revolutionary doctrines seek to achieve the unity of the nation. This is why the local assemblies should be elected according

4 French Minister of War and promoter of free market who published his article on Jean-Baptist Cobert and the "*laissez-faire*" principle in *Journal Oeconomique* in 1751.

to these doctrines in order to defend national interests without sacrificing any financial independence of local government. "*For fear of municipal disobedience, federal departmental collapse, increase in their sovereignty and legislative separatism, the independence granted to these different levels of territorial administration was defined in order to ensure the unity and inseparability of the nation*" (Wolikow, 2003: 21).

Thus the constituent assembly decided to assign certain powers in the tax area to individual levels of local government. Since then, the regions were abolished, municipalities were subordinated to the districts and the districts were subordinated to the departements. The departements were just another sub-unit of the state and served the interests of the nation by participating in the general administration. However, the departements did not actually fulfil the function of local government, they rather corresponded to deconcentrated administration.

The beginnings of decentralisation and financial independence of local governments appear under the ambiguous term "*d'affaires particulieres*" in Article 5 of the Act of 22 December 1789. At the time, the structure of local government bodies was developing in France and their competences were developing along with them. The rights and overall independence of elected members were settled among the members of these bodies, i.e. nobility, clergy and the third estate. These municipal bodies are "*domestic authorities and it is up to the family to elect their representatives, and they are responsible for their official activities only to the family*" (Bligny-Bondurant, 1909: 168). From then on the municipalities and districts were able to enjoy certain freedoms and privileges while the departements remained subordinated to the central power.

3 Changes in the Local Government Finance Management in Today's France and their Impact on Financial Independence

In recent years, there has been a noticeable change in France (some French academics, such as Bouvier, 2017: 771, for example, even refer to a "metamorphosis") in the financial management of local government, both in its practice and in the theory of the local sector public finance. The control

of local public expenditure became highly important, becoming absolutely indispensible in the control of all public finance.

It is a fact not only in France that local governments have to deal with issues that go far beyond their traditional basic framework in the area of management and administration of their finances. Local government is literally confined in a network of increasingly complex and interrelated structures and relationships. This is a kind of an interactive system that is composed of various elements which becomes increasingly complicated. In order for the local government to react to this, it is necessary for it not only to keep its original powers but also to adapt these powers to the new needs and, if necessary, expand them. However, this requires consideration of newly emerging issues.

The reverse side of the coin in this gradual development often lies in the administrative difficulties which the development raises. These problems are even stronger in France where they collide with the traditional rules of public governance. The complexity of these "networks" or intricate relationships in which local government finances find themselves *nolens volens* have difficulties trying to function smoothly as well as with full transparency due to the complexity.

With regard to the functioning of the French local government finance system which is not always necessarily free of problems and, furthermore, because of the potential problem of transparency, the next obvious question is the need for more control. The system of local government finance is very difficult to manage but also to control because of the increasing complexity and entanglement of various systems and information transpiring in these systems. Such a system as a whole may also appear to be relatively vulnerable because if a single important element in the chain fails the chain effect will cause the failure of other elements which are closely related to it and, in an extreme situation, the whole system may collapse. The advantage of this entangled network could be the fact that each territorial self-governing unit benefits from this interaction. However, the opacity necessarily stemming from the interconnectedness of these networks can be considered as a disadvantage which implies an increased need for effective control, determination of its form or determination of control objects.

Therefore, the question is whether it is better to prioritise improvements in the efficiency of local government management in the field of finance, including its control, or rather to simplify it, which has been attempted since the Revolution in 1789.

The gradual and natural development, however, also needs to reflect the need to change the view of the discipline of local government finance. On the other hand, traditional problems prsist, such as the issues related to the continuing increase in public spending or the need to reform the tax system (especially in France). However, I believe that these problems can be perfectly analysed and, above all, understood only with a thorough knowledge of the overall context of local government finance, including its history. In other words, a perfect understanding of the current developments in the local government finance, or rather identifying its cornerstones and, at the same time, the problems are prerequisites for assessing and considering any further reforms in this area.

In the aforementioned last thirty years, the local government in France managed to respond to the gradual changes which it had to face and to which it more or less reacted. At the same time, we can observe a new challenge for individual territorial self-governing units that are already aware that the traditional concept of government financed through public allocations (in France in the form of so-called local taxes, in the Czech Republic mostly in the form of local fees) is currently linked with private-law aspects that operate on different principles than the traditional concept of management established in the public sector.

Another challenge for territorial self-governing units stems from the previously mentioned "confrontation" between aspects of the private and public spheres in the field of local government management forms. It can be noted that such a confrontation could be seen in the past in the traditional French subsection of public finance law, namely the public accounting. Public accounting, although it is a traditional instrument of the French understanding of public finance, underwent a major reform in 2006 during which the public accounting adopted some elements from the private sector and accounting based on the principle of accruals was introduced in public sector entities in France. The desired objective was to increase efficiency

and, at the same time, the transparency of the financial activities of public entities, including the territorial self-governing units. This model of private accounting applied to public accounting is working well in France. Therefore, it may be thought that this may be an inspiration for further adoption of private law aspects in the public sphere in France. In order to increase the efficiency of the financial management of territorial self-governing units, it may be assumed that some management methods that are applied in business entities, could be adopted. If private sector practices are adapted to the needs of the public sector as they managed to do it in the case of the French public accounting reform, this could become a way to improve the functioning of local government and its public finance management.

This "revision" or redefinition of local government finance management could go hand in hand with a new definition of the nature of local government public finance management. There is criticism, however, that in France the revisions already made were too pragmatic and kept a too long distance from the issues of local financial management because they were unable to reflect the changes that were taking place. But without identifying these changes properly there is a serious risk that we will not be able to define appropriate targets to be achieved by the revision and, furthermore, we will be unable to identify specific problems that have been affecting the public finance management by local governments (Bouvier, 2017: 773).

Since the second half of the 1970 s, attention has been paid to the financial relations between territorial self-governing units, phenomena related to budgetary and financial problems as well as phenomena arising from the theoretical controversies brought about by the welfare state model as a result of its growing difficulties. Under the influence of various economic schools, such as Chicago's Public Choice or the ultra liberal libertarian schools, and under the influence of economists such as F. Hayek who contributed to the revival of liberal economic theories, ideas were born to replace the Keynesian policy with a policy striving for a greater liberalisation of economy. This liberalisation meant, among other things, a redistribution of public funds within the state economy (we can mention, for example, a greater economic support to businesses); at the local and regional level the governments were granted more responsibility in the social and economic

areas. Such decentralisation became a typical phenomenon of the liberal economic theory in France within which the territorial self-governing units actively participated in the development of the country's economy and their elected representatives had the task to stimulate the economic development at the local government level. It was in this context that the French local government was given a new task called "*local economic development*" (in French *le développement économique local*) (Bouvier, 2017: 774).

Nowadays, the term local economic development is an inseparable part of the public finance management by local government which underlines its financial independence.

3.1 New Challenge for the French Local Government?

In order to achieve the generally expected goal, i.e. to improve the coordination of public finance and improve its control, lively debates took place in France some 20 years ago about introducing the so-called financial laws[5] also for local governments. These debates culminated in 2000, at the time of culmination of the debate about the reform of the original organic regulation on financial laws of 1959 (in French "*Loi organique relative aux lois de finances"*, hereinafter "LOLF"), which came into effect on 1 January 2006. However, the financial laws for local governments were never introduced because this would have required a perfect preparation of conditions (not only legislative) for their application as well as a consolidation of public budgets and public accounts in France.

In the end, it can be assumed that it is quite difficult to achieve an integration of multiple approaches within the same system at one time even if a healthy condition of public finance is at stake. Nowhere in the world is it easy to combine legal changes (in this case in the form of introducing financial laws at the local government level), political interests or influence of interest groups, the concept of public financial management both at the state and local level, and the consolidation of the system of public budgets and public accounts. It could be a continuation, perhaps even a completion,

[5] So-called financial laws are a specific type of laws in France and countries that adopted the French concept of public finance. Within financial laws we distinguish the law on state budget, law on the state financial statement, law that changes during the budget year, and law on social security funds.

of the process of modernising public finance in France for which the introduction of LOLF in 2006 became an important milestone which significantly transformed the French budgetary law[6] and reformed the French public accounting system with the aim of harmonising the political power and the diversity of French public finance.

3.2 Changes as a Reaction to the European Union?

The development of public finance management is undoubtedly a phenomenon that has been determining the transformation of public finances in the last 30 years. Changes have taken place in the control of public expenditure and efficiency of management. This development has been largely influenced and more or less governed by the secondary law of the European Union (formerly European Community standards) as well as by the principle of its functioning and its objectives. In particular, the European and Monetary Union has created the basic framework for the transformation of the public finance system and the changes that have taken place in recent years and will most likely continue. Part of this is the acceptance of various commitments to comply with the financial management rules arising from the so-called "budgetary discipline". The discipline is primarily designed to respect a number of financial criteria such as, for example, limitations on public debt and public deficit or public budget balance.

Secondarily, the discipline leads to a comprehensive or even consolidated approach to public finance which is perceived as a system including government finance, local government finance and social security finance. According to Article 2 of the Protocol (no. 12) on the excessive deficit procedure forming an annex to the Treaty on the Functioning of the EU, "public" means everything that concerns public administration, i. e. regional or local authorities and social security funds. It is obvious that this concept does not differentiate various sectors of public finance and, on the contrary, it can be assumed that the above-mentioned sectors are interconnected (not only financially) and that the weakening of one of the sectors can weaken all of their interrelationships. It also follows from the above that individual

6 Since 2006 the French budgetary law can be described as programmatic, multi-annual and specific.

territorial self-governing units of which there are hundreds in the Czech Republic and thousands in France are a potential threat. The territorial self-governing units are not a threat in their own right but the differences and sudden changes in their wealth, population or size of their territory can be.

In order for the state to be able to react to such changes it is possible to monitor the implementation of central control which as a consequence reduces or directly suppresses the financial independence of the local governments (which is already happening in France in any case) because this is a challenge to decentralisation or at least a concept that makes a difference between independence of management and decision-making autonomy. In my view, however, it is necessary to defend the financial independence of local government and to seek mechanisms other than central control, for example, which disrupt the above-mentioned financial independence of the local sector. This can be a new challenge for both current and future concepts of public finance. I believe that this is not an insurmountable challenge or an insoluble task requiring high-level knowledge and experience in the field of public finance. On the contrary, I believe that this issue, or rather its handling, is mostly of a political nature and finding the necessary political consensus can be the greatest challenge. Finally, the aim is to find a balance within the state belonging to a certain economic or monetary union. Such a union in itself has its own system of control and surveillance and this is also the case for the European Union. There are many ways to regulate public finance management in local government but choosing a specific way of regulation will always be a predominantly political choice.

4 Conclusion

The objective of the paper was to confirm the hypothesis set out in the introduction, i. e. that the independence of public finance management in local government in France is being increasingly weakened to the benefit of the state. This objective has been achieved. The confirmation was achieved through an overall analysis starting from the historical beginnings of the public finance management of the local government in France and its financial independence in the period around the revolution in 1789 to the present

time characterised by the attempt by the French state to usurp the historical rights of municipalities in this area.

The above was followed by the development in the last approximately 30 years during which the local government finance management was developing along with the new challenges facing it. The possibility to apply financial laws was mentioned (which have not been adopted yet) at the level of territorial self-governing units. The influence of the European Union on the local government, namely its finance management, was mentioned.

The fact that in France it is possible to observe a gradual diminishing of financial independence of territorial self-governing units in recent years is crucial with regard to the essence of the paper. This is manifested, for example, by the abolition of so-called local taxes the revenues from which were allocated to local governments. These revenues are being replaced by various subsidies on which the French territorial self-governing units are reliant but to which they do not have any legal entitlement. Thus, the current issue of fiscal independence of local government in France appears to be one of the top problems to be addressed. It is not just a purely professional or economic or financial issue. It is chiefly a political question and a question of political will and compliance. Last but not least, it is also a question of defining the role, organisation and positioning of the state and of territorial self-governing units in French society.

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FINANCIAL LAW AND SOME LOCAL FINANCE PROBLEMS

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Abstract

The article highlights development patterns in financial law, its subject, system, interbranch institutes and the institutes of the category of "local finance" in particular. The authors emphasize the significance of legal financial institutes for public and municipal administration, as well as for the regulation of public relations in the system of local self-government. Some scientific issues related to the institute of local finance are analysed, including the changes in the subject, the system of modern financial law and the limits of legal regulation. The issues related to the stimulating function of financial law and local finance as a legal financial category are highlighted. The main idea of the contribution is that the concept of local finance should develop as a legal financial institute, be explored in the theory of financial law and enshrined in financial legislation. Arguments are provided to prove that the given proposition is directly related to the efficiency of social, economic and cultural spheres of public life and the development of local self-government, as the development of any region, territory or a municipal unit requires financial support. The authors use historical and comparative law scientific methods.

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JEL Classification: K34, K40.

1 Introduction

Since the 19th century the economic theory and the legal financial theory have been arguing about the scientific category of "finance" and "local finance", their nature, essence and the limits of their regulation.

The issues related to the development of financial law science are called forth by the need to enhance the management system of state and municipal management in the country and the existing Russian legislation.

The research of various problems in the legal regulation of financial relations, particularly tax and budget ones, is determined by political, economic, social, demographic, ecological and other living conditions of the Russian society.

Today's world sets new tasks for the society and for the state, mainly in terms of economy. Economy continues to be of uttermost importance, but at the same time social aspects acquire equal significance. The level of citizens' well being, their life expectancy and standard of living reveal the level of the economic development of the country. And this development starts in particular locations – in one's city, town, block and house. The quality of roads, schools, hospitals, shops, recreation and cultural development centres, sports facilities, catering and shopping facilities are directly related to the level of development of local finance.

Economic processes cannot be spontaneous; they are subject to consistent, comprehensive and consolidated legal regulation carried out on the basis of standards of financial law.

In this respect there arise questions about the interpenetration of law and economy; the limits of intervention of legal means into economic relations, about the interdependence of economic and socio-cultural spheres and environments, which is particularly obvious in the periods of social and economic reforms.

It is well known that legal regulation may not only contribute to the economic development, but may slow it down, too.

In modern theoretical legal studies it is noted that "There are two extremes that have a negative effect on economic reforms: excessive regulation of the market mechanisms that require more freedom, and, on the contrary, lack of adequate legal support of the relations that are subject to state control" (Issues in the Theory of Law and State, 2005: 66)

For this reason, among the fundamental challenges for the science of financial law there are still such issues as the subject of financial law, the system and structure of financial law, the method of financial law and the certainty of the framework of its categories.

2 Some Provisions of Legal Financial Theory and the Concept of "Local Finance"

The objective of modern financial law as a science can be formulated with the help of German economist of the century before last, Karl Eheberg, whose words still sound quite modern: "*Financial science is a branch of knowledge that is worth careful consideration partly due to the theoretic significance of this study for basic education, partly due to its wide practical application. It is particularly important for all those who can directly (for example, officials or members of advisory or legislative bodies) or indirectly (by means of one's right to vote, or the right of assembly or via the press) gain influence on social life*" (Eheberg, 1893: 11–12).

All of these are closely interrelated both as part of the science of financial law, and in terms of the existing branch of financial law.

In this respect we'd like to highlight some conceptual (to our mind) moments relevant to the development of the issue that has been touched upon in the given contribution in terms of theory of financial law. We'd like to dwell on the changes in the subject-matter of Russian financial law and, correspondingly, in the financial system; as well as the growing necessity to clarify the framework of categories. The given issues are important as they influence the efficiency and quality of legal regulation and administrations of finance. The authors suggest that the scientific society should take part in the discussion and carry out a scientific research in order to find new ways of local finance administration. And it is in this respect that certain issues of legal

financial regulation that arise in the sphere of local government and related to local finance are considered. According to the authors, it is reasonable to consider the category of "local finance" not purely economic or absolutely legal, but economic and legal. Formal enshrinement of the concept of "local finance" in the existing legislation will allow one to classify it and identify it in the theory of law as a legal and financial institute and use it in state and municipal administration further on. The authors are convinced that efficient local finance administration is essential both for the social and economic growth. There often arise practical issues related to allocation and control, which calls for scientific analysis and consideration of the reasons they appear. Lack of local finance, scarity of its sources, lack of balance of local budgets, inefficient legal regulation of budgets – these are just few of the issues that require scientific resolution. Based on the analysis of the theory of financial law the authors suggest the following hypotheses and try justifying them. Local budgets seem to be the most optimal form of local finance accumulation. Modern world does not yet have a better way of managing states than via a budget. The funds accumulated in the budgets continue fulfilling the distributive, controlling and stimulating functions in modern economy. Emphasizing the urgency of the need for equal economic and social development of territories in municipal units, we suppose that all the issues that have been touched upon here are within the sphere of regulation by financial law. We consider financial law to be the branch of law that nowadays is capable and obliged to provide more active support to the economic development of local government, its financial basis and local economy management. Without the assistance and use of financial and legal institutes it is impossible to manage any economy, including the municipal level. All of the hypotheses mentioned above are based on the scientific analysis with the involvement of a historical legal method.

3 Development of the Theory of Financial Law on the Subject

The subject of financial law is public finances and the activity connected with their mobilization, accumulation and usage. The social relations that appear in connection with local finance are classified as public, too.

Traditionally in the theory of financial law the given activity was referred to as the financial activity of the state.

Public financial relations are the subject of legal financial regulation. According to the official legal doctrine, financial law is an independent branch of Russian law belonging to public branches of law.

The question of independence of financial law and the place of this branch within the system of law was a subject of considerable scientific debate in the Soviet times.

The statement that financial law is an independent branch, but originally was part of public and administrative law, was first formulated by R. O. Khalfina in 1952 and was shared by such prominent Soviet jurists as M. I. Piskotin, S. D. Tsypkin, B. N. Ivanov. (Khalfina, 1952: 194–195)

Other representatives of the Soviet science of financial law, e.g. E. A. Rovinsky, M. A. Gurvich, who contributed a lot to the presentation of its fundamental theoretical principles, adhered to a different point of view.

Admitting the fact that financial law is an independent branch of law, they, on the contrary, believed that it had appeared simultaneously with public and administrative law.

A detailed account of the fact that financial law had not withdrawn from other branches of law but appeared as an independent branch was made in 1976 by V. V. Bescherevnykh in the book "The Competence of the Union of SSR in the budget sphere".

Thus, in this area the issue was almost resolved at the end of 1960s – early 1970s.

Based on the general provisions of the theory of branches of law that differed mainly in the subject of legal regulation, such modern theoretic scientists of financial law as E. Y. Gracheva, O. N. Gorbunova and S. V. Zapolsky joined those who believed that financial law had not withdrawn from other branches, but is an independent branch of law. (Financial Law: Textbook for Bachelors, 2017: 27)

It is interesting to note here that when proving the autonomy of financial law, P. M. Godme points out that "*the connection between finance and economy, the flexibility and transferability of this part of property and, as a consequence, its possible*

abuse, require that public finance should be regulated by special public norms… These norms influence all spheres of life and form an independent branch of law". (Godme, 1978: 41)

When formulating the methodological criteria of determining the subject of financial law in the existing legal field of market economy, modern theorist of financial law S. V. Zapolsky made an interesting observation that "*one should severe the historically formed rigid ties between the subject of financial law and the financial activity of the state by admitting that a purely legal concept and a maximally political phenomenon cannot be synonyms and that they are in permanent and partly opposite correlation*". (Zapolsky, 2010: 294)

Thus, the transition to market economy and the transformation of forms of ownership resulted in the appearance of new socio-economic relations and resumed the debate on the subject of financial law. Besides one should note here that the appearance of the institute of local government and local finance in Russia is also related to the given period. Such concepts had never existed either in the socialist economy or law, therefore their development was parallel to the evolution of financial law.

While preserving legal inequality, state coercion and imperativeness, legal financial relations got enriched by money and credit and investment relations and supplemented by a whole system of guarantees, restrictions and exceptions.

The relations connected with the financial activity of the state and municipal units, state control in the financial area, budget, money emission, taxes and insurance that are traditional for financial law found their new development.

Order, stability and protection of the sphere of public finance remain the main objectives of modern Russian financial law. And it applies fully to local finance, too. There is not a better way of managing the economy of a territory or a municipal unit than via local budgets where local finance is consolidated. Allocation of local financial resources and their control are carried out within local budgets. As a feedback to the stimulative budgetary function one can look at the taxes and levies collection rate of local budgets. The qualitative and quantitative indicators of the local budgets revenues reveal the state of the economy of a corresponding territory clearly.

The whole set of relations mentioned above is related to common (public) interests both of the state and the citizens, due to which they belong to the sphere of public legal financial regulation.

We share the theoretical proposition that "*there is a natural transformation of financial law from an instrument of securing absolute predominance of the state in the sphere of finance into a well-developed legal scheme of "interaction" of the state represented by its bodies, citizens and production collectives with equal legal opportunities for each of them*". (Zapolsky, 2010: 294)

As Frank put it, "The state is incapable of creating paradise on Earth, but it exists with the aim of preventing the emergence of hell".

One should remember that modern financial law relies on objective economic laws and is aimed at supporting social justice.

To our mind, the goal of modern financial law is to harmonize the interests of all of the participants of the financial turnover, including local finance and the system of local government.

3.1 Local Finance in Legal Science

As we have already written before, being "the science of public economy, studying state economy and the social bodies that are subordinate to it, such as provinces, municipalities, cities and rural communities" (Ilovayskiy, 1904: 3) financial science has been developing independently. All local financial issues were already part of the subject of research of financial legal science back at the beginning of the last century. A vivid example of it can be found in the ideas of a Russian legal and financial expert S. I. Ilovaysky, who explained it in his textbook on financial law that local unions had taken an active part in public life; the state shared a lot of its functions with them, and the role of local unions was constantly growing. A lot of local bodies worked along with the state at the task of satisfying various public needs, and conducting their own affairs… And therefore one just can't ignore either their activity on the whole or their affairs in particular. (Ilovayskiy, 1904: 3) The historical approach allows us to conclude that the science of financial law has always distinguished local finances, noted the significance of their role in local administration and differentiated their regulatory support respectively. With the transition to market economy, modern

scientists have come to the conclusion that there is no better way of running a state than with the help of money. (Gorbunova, 2012: 278) No management issues can be dealt with without solving the accompanying financial problems. By sending the money flows accumulated in the budget or non-budgetary funds in the right direction, the state ensures stable development and achievement of its social, economic and political goals. The given statement is equally relevant to both tiers of administration, i.e. the state and the municipal ones. One can observe this by making the analysis of the budget and tax system for the period of a few years (but that is a different subject). It is fair to refer municipal units to the subjects of financial turnover in the sphere of local finance, and local finances accumulated in local budgets are public monetary funds.

3.2 Financial Law Capabilities in Terms of Dealing with the Issues in Local Finance

One should note here that at the modern stage of social development there is a fundamental change in legal mechanics and regulation of social relations, as the capabilities of the latter have increased considerably. There is legal regulation of both economic relations and social processes, and there's interaction between the two.

At the municipal level, the stimulation of the managed systems inside the state structure is carried out with the help of financial resources, too, i.e. there is more and more focus on finance and the norms of law that regulate it.

The influence of finance on the administration processes can be vividly illustrated at the example of a reform of local self-government. Thus, when the powers to support the vital activities in their territories were delegated to the municipal bodies, the amount of budget allocated to them was reduced, too. As a result, the municipal bodies did not have the funds necessary to perform their primary functions.

The fact that local government is enshrined in the Russian Constitution as one of the fundamentals of the constitutional order and that it is proclaimed to be independent of the system of state authorities predetermines its financial autonomy.

According to the Constitution of the Russian Federation, local self-government shall ensure the independent solution by the population of the issues of local importance, of possession, use and disposal of municipal property. The local self-government bodies shall independently manage municipal property, form, adopt and implement the local budgets, introduce local taxes and dues, ensure the protection of public order, and also solve other issues of local importance. (Constitution of the Russian Federation, Art. 130, 132)

Financial autonomy of local authorities is directly connected with their competence, i.e. a set of powers that they have to deal with issues of local significance in the territory of the municipal entity. Thus, to identify the amount of material and financial resources necessary for a municipal entity, one should identify clearly local authorities' competence.

At the same time, according to Article 132 of the Russian Federation, local bodies can be lodged with particular state powers and provided with material and financial means necessary for their exercise. The exercise of the vested powers is controlled by the state.

The Constitution of the Russian Federation guarantees local bodies are a compensation for additional expenses emerging as a result of decisions adopted by state authority bodies. (Constitution of the Russian Federation, Art. 133)

The given constitutional guarantees and their realization in terms of local governments gives rise to the problem of budget decentralization in the science of financial law.

At present, tax revenues of local budgets include the receipts from: land tax; personal property tax; unified agricultural tax; unified tax on imputed income for particular types of activity; tax imposed due to the patent system of taxation; state duties charged in the corresponding territory. (Budget Code of the Russian Federation, Art. 61, notes 1–5)

The analysis of the norms of the Budget Code of the Russian Federation allows one to conclude that from the viewpoint of the organization of the vertical of power, the measures taken in the financial activity of the state are fully complete, and the idea of centralization of financial resources in the federal budget has been implemented. Financially, all the subjects of the Federation and local authorities are basically made dependent

on the federal budget. Financial equalization is carried out in accordance with Article 16 of the Russian Budget Code with the help of inter-budgetary transfers.

The modern stage of development of the Russian society in terms of strengthening the basis of the statehood shifts the question of searching for the best ratio of centralism to decentralization in the state financial organization from theory to a purely practical area.

"*Any initiatives of whatsoever significance aimed at the decentralization in the sphere of administration are unlikely to succeed unless they are accompanied by the corresponding initiatives in the sphere of finance*". (Piskotin, 1884: 228)

Finance penetrates all aspects of social and state life; any state decision that was not given a proper financial consideration or is not regulated by the norms of financial law has a harmful effect both on the state and local administration.

Local budgets revenues should not be based on centralized financial resources, but on the decentralized budgetary funds. Municipal entities should be interested in the development of their own income base, without which they are not capable of performing the tasks vested to them by the Local Government Act. It has been a long time since scientists, publicists and practicians started speaking about the fact that local governments are incapable of dealing with any issues in their territories without financial autonomy. Receiving funds from the centre leads to a welfare mentality and does not contribute to their efficient utilization.

"The funds that were earned by the municipal bodies themselves will be used much more effectively than the financial aid from the higher-ranking budgets… Autonomy, sufficient and stable financial resources and tough mechanisms of political and legal accountability for the results of work are the key constituents of stimulating local and regional authorities' effective work". (Rossiyskaya Gazeta of 20. 2. 2006: 3)

It is necessary for the local authorities to have the need for the development and creation of new enterprises, new businesses, mainly small and medium, for the implementation of new investments. It is possible only when the revenues coming form their profit become the sources of income for their budgets.

In this respect, the historical experience accumulated in the budget activity of the Soviet state in the second half of the 20th century brings us back to the idea of creation of an income base for local budgets by leaving them part of the tax revenue collected in their territories. The tax revenue that regulated all local budgets at that time was the revenue from the general sales tax (which is similar to the modern VAT). The idea was to direct the percentage profit from it to the local budget proportionate to the revenues received from the local territory. Just like the modern VAT, this tax was mainly collected in the sphere of trade of goods and services, which takes place everywhere. So this tax is most voluminous, stable, flexible and well distributed across the territory of the state and all its subjects that take part in the budgetary process – without any exceptions. On the analysis of this past experience of using this revenue as a regulating source of the budget, one can conclude that it enabled them to balance the budgets of all territories and allowed the territories to undertake expenditures from their own real funds. The amount of local territories' own finance increased in proportion to how successful all the bodies of power were in terms of local economic development and management across all the territories of the state. At the same time, all bodies of power, both state and municipal, were interested in increasing the overall volume of funds from the given source of income, in increasing the budgetary revenues and reaching the budget revenues targets in the country on the whole.

In elaboration of the hypothesis of the limits of legal financial regulation in the system of local government there arises a question of its interrelation with the legal municipal regulation. Any interaction with the local finance, and therefore with the local budget, local taxes and levies, intergovernmental regulation and issues of local value, one can clearly see the intertwinement of legal norms of such legal acts as the Budget Code of the Russian Federation, the Tax Code, Federal Law of 6 October 2003 №131-FZ "Concerning the general principles of local governments organization in the Russian Federation". (Federal Act no. 131-FZ of 6 October 2003)

Thus, it appears that the subject of financial law comprises the relations connected with public finances, local finances, their organization and circulation.

Up to now scientists working in the sphere of financial law have not reached a consensus regarding its system and structure.

The debate on the system of financial law that has been going on for years leaves some questions unanswered, for example, the question about the limits of state coercion in terms of legal financial relations; about finances as a sphere of power and property relations; about the inclusion of new institutes into the system of financial law, i.e.g "local finance". Let us assume there is a direct correlation between the development of ideas on the subject of financial law and its system, their definition, legislative enshrinement and the efficiency of legal financial regulation.

The law enforcement practice brings the legal financial theory to the elaboration of a single concept of legal financial regulation based on the rejection of absolute imperativeness and state coercion in the financial sphere.

There have been repeated attempts in the science of financial law to bring order into the development of legal financial institutes as part of the development of the federal "Finance Act" or The Basics of Financial Legislation, which will certainly serve as an impulse for their natural consolidation, eliminate the gaps in legal regulation and their collision. Enshrining the institute of local finance could be part of the given act.

The author of the given idea that has been supported by a number of prominent Russian jurists is O. N. Gorbunova. (Gorbunova, 2012: 144–164)

4 Conclusion

The importance of issues in the organization and reinforcement of public finance and public economy has always been characteristic of the Russian state and is historically traditional.

The refusal from top-down ("command-and-control") methods of economy regulation has revealed the insufficiency of civil regulation and urged the scientific search for a method of combined regulation.

The objectves of financial law as a branch of law are determined by its role of a regulator of social relations in modern society.

The value of legal financial regulation under the conditions of market economy decreases considerably in case of non-critical attitude

to the financial and legal pureness of the institutes that are part of financial law. Therefore there is a need for thorough theoretical insights into the concept of "local finance"and it further legislative enshrinement.

Rapid autonomous development of subbranches, modern institutes and categories of financial law together with the lack of unity in legal financial regulation lead to lack of coordination of legal impact in financial sphere, including the system of local self-government.

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THE ROLE OF PUBLIC POLICY (WITH AN EMPHASIS ON ECONOMIC GROWTH) IN THE MODERN STATE

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Abstract

The environment, in which today's economies are present, is a complicated and interconnected economic mechanism. The formation of current economic conditions is related to the process of integration and globalization. Within the scope of this paper, the authors' goal is to identify the impact of policy on the economy, with an emphasis on GDP growth and public debt. General scientific methods, analysis of the development of selected economic indicators, comparison, and synthesis were used to meet the goal.

Keywords: Economics; Policy; Government; Economic Growth.

JEL Classification: H700.

1 Introduction

New economic changes (economic arrangements) also require new approaches – a multidisciplinary approach to assessing, analyzing and implementing economic measures in the context of a particular form of economic policy. The specific form of a country's economy is always the result of mutual

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interaction[3] between politics and the economy. As stated by Eucken, the interdependence of the economic order is an essential reality of life, especially of modern life, and its perception and knowledge is a prerequisite for the understanding of all problems related to economic policy in conjunction with the state or legal policy – in this context, law plays the role of a mediator of political decisions. (Eucken, 1990).

The content of the paper is based on the set goal outlined in the abstract, leading to a scheme of the starting points in finding the correct answer to what the current role of a political factor in a modern state should be, since economic measures (e.g. taxation, social security, investment support, state budget setup, etc.) implemented within the framework of economic policy influence the economic activity in the country and thus create conditions for future economic results. Authors, using the comparative method of macroeconomic data in the selected economies, pointed out the potential causes of disproportions between countries and the impact of public policy on macroeconomic developments. The purpose of the paper is to emphasize the need for a deeper analysis and interconnection of economic and political science knowledge in order to create a revised practical economic policy meeting the requirements of the economies of the 21 st century.

2 A Scheme of the Development of Modern Economies

In connection with the trends of changes that have taken place and are constantly taking place in the world economy, we can characterize the development of today's modern economies as a process of internationalization of production with several aspects. The world economy today is a very disparate whole, in which mature economies meet with developing economies. The leading group of the world economy is an informally associated group of countries known as the G8 (USA, Canada, Germany, Great Britain, Japan, Italy, France, Russia), which significantly influences the world economic situation and thus the economic level of individual countries (Lipková et al., 2011: 72–73).

As documented by data in Table 1, the average rate of annual GDP growth per capita over the period of 1950–1980 was markedly different in some

[3] The outcome of mutual influence is conditioned by the overall maturity of the country, the degree of democracy, the quality of the legal environment, etc., not excluding the ethics of individual and collective action.

countries. We can see that some national economies grew enormously in the 20th century, and therefore it is appropriate to ask how it is possible that some economies (such as Japan and Germany) have thrived so markedly and others have not? Despite the fact that historically there are several explanations for a significant economic boom in these countries, it is problematic to look for a universal answer, since each of these countries has its own specifics (availability of resources, raw materials, human and technical potential, etc.). If we were to gravitate towards any explanation (e.g. the post-World War II plan recovery for Germany and Japan, labor discipline and responsibility), it is not entirely clear what caused the sudden deviation from the performance of these economies in the next periods.

Table 1: Average annual GDP growth rate per capita (%)

Country	1950–1960	1960–1970	1978–1980
Australia	2.0	3.7	2.4
Belgium	2.0	4.1	3.1
Denmark	2.5	3.9	2.2
Finland	3.3	4.2	2.5
France	3.5	4.6	3.0
Ireland	1.8	3.8	2.3
Italy	4.9	4.6	2.1
Japan	6.8	9.4	3.8
Canada	1.2	3.7	3.1
Germany	6.6	3.5	2.4
Netherlands	3.3	4.1	2.3
New Zealand	1.7	2.2	-
Norway	2.7	4.0	3.9
Austria	5.7	3.9	3.8
Sweden	2.9	3.6	1.2
Switzerland	2.9	2.8	-0.1
USA	1.2	3.0	2.0
Great Britain	2.3	2.3	2.0

Source: our own processing based on Olson, 1982

Could economic interdependence be one of the reasons for the decline in the economic performance of some economies? The fact is that the volume of trade, labor migration, and international indebtedness reached (in relation to the global product) the value of the 1990s already from the 1870s, and almost every major economy has adopted a single monetary system (the Golden Standard). The world economy between 1870 and 1913 grew faster than ever before. But, what really allowed such an economic boom? Undoubtedly, the economic results of that time were affected by various factors (such as the Industrial Revolution), as well as the political situation, or the existence of political-economic clusters, which made it possible to achieve a real degree of international economic integration.

Political-economic integration and globalization in its present form bring both positive and the negative aspects to the countries concerned. It is a historical fact that economic-political empires[4] had achieved a real economic boom, but eventually they gradually collapsed anyway. Since 1900, the world has experienced intense economic integration and globalization, but this does not automatically brings only benefits to those countries that have joined and continue to engage in this process. The economic history of the 20th century is a history of both the regression and the economic boom of national economies. But, the 21st century also gives us some examples of the decline in the relative economic importance of some long-term economically advanced countries (e.g. England, USA) (Čipkár, Červená, 2012).

The economic aspect of the political factor in the economy is represented by regulation in any form. We have encountered discrepancies between theory and practice in the past, so even nowadays it is not surprising that theory suggests something, it proposes solutions and practice implements them, but often in a modified way. Of course, we encounter contradictory opinions[5] on the the importance, meaning, effects, need, and implementation of regulatory measures even at the theoretical level (such as indebtedness,

4 As a last resort, these empires could use their power, yet their approach to exploiting economic opportunities, in terms of the diversity of their own colonies, was to apply differentiated economic models according to existing local conditions.

5 For example, Eucken states in this context that today's relationship of power groups to the state is only a power play (Eucken, 1990).

taxation, the social system, etc.). (Červená, 2013). But it does not change the fact that the actual macroeconomic decision-making of the competent parties always has concrete impacts[6] and effects on microeconomic subjects as well. Failure to provide solutions and the non-intensive and inadequate resolution of the "illegal" economy problems, as well as the modernization of the role of national economies in the globalization processes, is economically "impoverishing" us already in the present. By monitoring the evolution of the current and past economic situation of European economies, we could also reach a positive assessment of some areas of social life (such as social security, employee protection, consumer protection, etc.), but in this context, do we ask who will ultimately benefit from it? What will lead to an increase in the social standard in a state where its economy clearly indicates that costs (e.g. in the form of debt increases – as shown in the data in Table 2) will increase continuously to the detriment of future generations? It seems that some political decisions affecting economic developments, whether at national or transnational level, have nothing to do with the long-term positive economic outlook.

Table 2: General government gross debt

Country/year	2013	2014	2015	2016
Austria	81.3	84.4	85.5	84.6
Belgium	105.6	106.7	106.0	105.9
Bulgaria	17.0	27.0	26.0	29.5
Croatia	82.2	86.6	86.7	84.2
Cyprus	102.2	107.1	107.5	107.8
Czech Republic	44.9	42.2	40.3	37.2
Denmark	44.0	44.0	39.6	37.8
Estonia	10.2	10.7	10.1	9.5
Finland	56.5	60.2	63.7	63.6
France	92.3	94.9	95.6	96.0
Greece	177.4	179.7	177.4	179.0
Germany	77.5	74.9	71.2	68.3

[6] For example, the impact of taxation as part of tax policy (tax rates, tax relief, etc.), levy rates, interest rates, and subsidies on the economic activity of entities.

Country/year	2013	2014	2015	2016
Hungary	76.6	75.7	74.7	74.1
Ireland	119.5	105.3	78.7	75.4
Italy	129.0	131.8	132.1	132.6
Latvia	39.0	40.9	36.5	40.1
Lithuania	38.7	40.5	42.7	40.2
Luxembourg	23.4	22.4	21.6	20.0
Malta	68.7	64.3	60.6	58.3
Netherlands	67.7	67.9	65.2	62.3
Poland	55.7	50.2	51.1	54.4
Portugal	129.0	130.0	129.0	130.4
Romania	37.8	39.4	38.0	37.6
Slovenia	71.0	80.9	83.1	79.7
Slovakia	54.7	53.6	52.5	51.9
Spain	95.5	100.4	99.8	99.4
Sweden	40.4	45.2	43.9	41.6
United Kingdom	86.2	88.1	89.0	89.3
EU-28	85.7	86.7	84.9	83.5

Source: our own processing based on Eurostat data, data extracted on 24/4/2017 (online data codes tec00127 and tsdde410)

The economic policy pursued by several, not only European, states during the 20th century contributed to the fact that they became active, but, at the same time, this also gradually undermined their state power and led to the decline in economic performance. That is why today it is more than necessary for states (i.e. political power) to realize that there are certain principles which (if accepted) could return meaning to the state of the 21st century… so the economic policy of a state should aim at limiting (or eliminating) economic power groups (both private and non-private). Also, it seems that further development of self-government bodies has not yet proven itself – which was and is only associated with an additional increase in the cost of running the administration, thereby increasing the bureaucratic burden that complicates the lives of citizens and micro-entrepreneurs in particular. (Románová, 2017: 127–146). The state must not get involved in the circul vitios process,

the economic activity of the state should be directed towards the formation and maintenance of the economic order (creating economically acceptable conditions) and not towards the management of the economic process. How, then, should the boundaries of the state's activity be defined in this regard? When we think of the importance of the economic function of the state, we conclude that the essence of this issue is not the quantity but rather the quality of the state's activities; so what does this mean? A modern state, as a regulator of economic processes, should pay its constant attention to the weakening of the influence of power groups and limit the impact of economic policy leading to an increase in bureaucratic burdens.

Local authorities of all regions should be actively involved in creating the most appropriate administrative, institutional and infrastructural conditions for the future development of the regions, so that existing disparities were mitigated and regional disparities were not further deepened. (Hrabovská, 2016)

3 Scheme of Modern State Formation

The disintegration of the traditional structure of societies[7] and the origins of the concept of a modern state in Europe date back to the time of the French Revolution, or rather from the beginning of economic industrialization, which was closely linked to the formation of new social strata (which inevitably had to be reflected in changes in the field of politics, law and economics). In fact, the historically traditional form of society was shaken by two revolutions, one of them being a political-social revolution (going back to ca. 1789), and the other was essentially industrial revolution (ongoing since 1770), while the consequences of these two revolutions being cumulated and resulting in new problems that required a conceptual change in the economic order.

In most European countries, we can now encounter a state establishment that, despite presenting the decentralization of state power and the removal of bureaucratic obstacles, still exists in the form of a central state power with a predominance of bureaucracy but with the loss of its own national

7 During this period feudal land ownership disappeared, the guilds disappeared, as well as certain forms of self-government, and so on.

authority. Today it is a fact that national states, despite the increase in their activities and in the attempt to create and influence their own economic order, are increasingly beginning to find themselves in the negotiating position, or as the executor of decisions of other entities (in particular transnational non-private and private ones). The adoption and the weakening of national competences is linked to sovereignty, which was used to enforce the law of general business conditions, to the emergence of economic power groups and their influence[8] on the economic process (changes in the structure of ownership rights gradually took place during the 19th and especially in the 20th century, due to changes in the technical-informational and production conditions, and therefore one of the typical cases of today's business entities are corporations with scattered ownership).

As stated by Staňek in his monograph, although there is an intensive discussion about the role of the state, the minimization of the state, etc., which the author believes is only a misunderstanding of the situation in connection with today's economic problems (most states in a bad economic situation are now missing internal tax and budgetary resources) and also in connection with the limitation of national economic sovereignty[9], we can come to the "feeling" that the functions of the modern state should gradually be reassessed, or the state apparatus reduced. Regulation at national level can succeed only in some areas, since transnational regulation is increasingly important. (Staněk, 2010: 68 etc.)

The regulation of economic processes is now an indispensable part of the economic life of a society. Concluding from the given thesis, the role of the state is to set up regulatory measures so that the mechanism of their operation leads to long-term economic growth and not to a steady increase in state indebtedness. It is true that meeting such a goal at the level of national regulation is not always easy for states that are part of an integration group, which is reinforced by the existence of transnational regulation, thereby restricting the ability of the state to adopt its own decisions at national level. Nevertheless, the legislative power should permanently deal with alternative

8 For example, Eucken states in this context that today's relationship of power groups to the state is only a power play (Eucken, 1990).

9 In particular, small national economies are no longer a determining factor in development and are becoming increasingly dependent on entities outside their own country.

ways of regulating the economy responsibly and not contribute with its interventions to the complexity and inefficiency (and often to nonsensicality) of creating conditions for the economic life of its citizens and entrepreneurs, taking into account that, in fact, the real contribution to the creation of the overall product in the economy are mainly producers (business entities), thus any inappropriate intervention in the market environment will lead to a loss of efficiency of the economy as a whole.

National governments are now in a contradictory situation when they are forced to implement internal restructuring measures in the area of expenditure and, on the other hand, they are required to redefine their functions (e.g. in relation to market regulation, security, social security, etc.). Today, one of the fundamental problems is the fact that the costs and consequences are borne by those who did not cause these phenomena. In such a configuration, when concurrently dealing with the internal conflicts of the society[10] it is not possible to solve all the problems and all the phenomena that have accumulated. The logical conclusion of this knowledge is the rigorous differentiation of measures which should have an intrinsically consistent, albeit seemingly contradictory situation, as they should include both regulatory and liberalization processes at the same time, and also redefine the main function of society and consequently its infrastructure, i.e. the state, in the future. (Staněk, 2010: 164).

Legal state should secure the right of its citizens in two directions: against the enforcement power of state administrative authorities, which violate the personal freedom of citizens (often under the pretext of public interest) and at the same time protect them against mutual threats. At the end of the 19th and in the early 20th century, we encountered a strong enforcement (and the realization) of the idea of a legal state with the simultaneous implementation of laissez faire economic policy, which can also provide us with an answer to the question of whether the rule of a legal state is compatible with the principle of economic free market policy? Constitutional rights were extended in the 19th century as institutes of the legal state, and state power (the lawfulness of the administration and its review by the administrative

10 Today, they represent demographic changes, greening of society, redistribution of wealth in society, etc.

courts) was separated. But what prevented or is preventing the mutual real functioning of the legal state and economic policy based on the minimization of state intervention today? Here we encounter the fundamental facts that represent a real obstacle to such coexistence, especially in the situation where monopolies exist in the markets (they limit the personal economic freedom of an individual), the functioning of legal institutes is being modified (evolving and changing) through interaction with the market form and economic arrangement system, the law created by the economy in some areas naturally pushes away the right artificially created by the state. In a modern state, the legal state is realized only one-sidedly, its function is limited in relation to the formation of the economic order.

4 Conclusion

The solution to the economic problems of today's world should not only be tied to the current situation, but, above all, to the understanding of the nature of the problems and their impacts in the long run. Discrepancies arising in the perception of individual problems often lead to uneconomic and only political solutions … what is and will be the result of such solutions can be observed from the historical development and the state of ongoing economic changes.

Well-functioning markets are an inherent assumption for the increase of economic growth in countries. Institutional economics perceives the market as a certain social arrangement that allows for repeated exchanges between different economic entities, while the market is created (and influenced) by specific institutional rules. Efficient organization of exchange[11] is the objective of ensuring the proper functioning of the market and thus of enhancing the economic performance. Contracts and agreements concluded in the context of market processes are governed by certain rules (both formal and informal) that regulate the transactions aimed at seeking, negotiating, concluding, monitoring and enforcing economic activity between entities, while it should be noted that all formal contracts are cost-related[12] to their creation, implementation and change. However, the emergence

11 In terms of reaching the lowest transaction costs.
12 Such costs also include political costs.

of a market organization requires negotiation between potential partners (where an individual as an economic subject only takes part in contractual market relationships with limited options for their own individual negotiation), with the limits on the influence of economic processes at the macroeconomic level are clearly determined (given) by the passing of the vote in parliamentary elections[13]; after that, specific economic measures and their implementation are decided on by politicians and civil servants.

The usefulness of policy existence (as a political factor) is of course inherent in the modern conception of the state, but the fact that politicians (and all those who have the power to influence the economy) need to start making decisions and act in accordance with the interests of economic subjects remains a fundamental problem. A situation when there is only one person or a group of people forced to regulate their actions will lead to a decline in the economic benefit of the individual as well as the whole society. Finally, we must state that the search for a compromise between the economic and political views of economic governance and their mutual interaction that leading to the economic efficiency of society in the long run remains a permanent topic of discussion and subject of scientific research. Economists have offered, offer, and hopefully continue to offer guidance on how to manage economic processes (macroeconomic and microeconomic); it is up to politicians and competent entities whether they will take them into account and respect them… but for now, it often doesn't look like that.

5 Acknowledgement

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13 Parliament is a legislative instrument that sets concrete rules for the functioning of the economy. The government, as the executive of the parliament, represents the most influential apparatus for the performance of economic policy – it formulates and quantifies economic objectives and at the same time represents the highest institution in the process of forming economic and political conditions at the time of its operation.

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JUDICIAL REVIEW OF TAXING DECISIONS AND THE INDEPENDENCE OF POLAND'S LOCAL GOVERNMENT UNITS

Agnieszka Franczak[1]

Abstract

This article examines the independence of Poland's local government units from the perspective of judicial review of these local governmental units and their taxing decisions. The objective is an analysis of the problematic issues regarding the authority of local government units to lodge challenges with administrative courts regarding taxing decisions issued by the local governments' boards of appeal in taxing procedures. The consideration of said issue is conducted using the dogmatic method supported by a review of selected doctrine viewpoints. The deliberation is supplemented by empirical examinations of taxing decisions made by said local appeal boards and judicial opinions issued by Poland's administrative courts.

Keywords: Tax; Law; Independence; Taxing Decisions; Judicial Review; Local Government.

JEL Classification: H21, H71, K34.

1 Introduction

The issues revolving around local government independence is one of the primary matters for theorists as well as practitioners. Local government independence is not unconditional; it is restricted by laws generally in force whose status are the benchmark of legal activity and regulations establishing the limits of jurisdiction and authority. In considering said independence, the examination must be focused on an analysis of jurisdictions where this prerogative exists. In developing this analysis, the financial independence of local authorities is considered from the point of view of judicial

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review of decisions made by local government taxing authorities. The objective of this article is an analysis of the problematic issues regarding the authority of local government units to lodge challenges with administrative courts regarding taxing decisions issued by the local governments' boards of appeal in taxing procedures. The effort will be undertaken to assess the current legal regulations pertaining to judicial review of taxing codes as they apply to guaranteeing the financial self-sufficiency of local government. The deliberations were based on the dogmatic method and supported by a review of selected doctrinal opinions. Furthermore, empirical studies of local government taxing decisions and administrative court opinions supplemented the deliberations.

2 The Essence of Local Government Independence in Poland

Independence is the consequence of decentralized public administration, and this self-reliance is treated as a vital attribute of local government. In accordance with the European Charter of Self-Government (Art. 4, Paragraph 2), communities have – as defined by law – full freedom to act in every instance that has not been delegated to other organs of authority. This regulation sets out the principle of local government independence which establishes a certain directive for law-makers at this level, and a decree of compliance for all other entities having contact with said local government i.e. establishing a particular jurisdiction for local government where it may pursue limited activity (Jagoda, 2011: 44). Local government independence is one of the primary tenants of the Constitution of the Republic of Poland. This particular tenant insures that local governments have wide discretionary powers pertaining to local issues to satisfy community needs in its territory. Poland's legislature, in establishing judicial protection for local government independence in its Constitution (Art. 16 along with Art. 165), and associated constitutional laws, neither the Constitution (nor ordinary legislation) define said protection. Consequently, local government independence is excluded from the contents of constitutional and legislative norms. Art. 16 of the Constitution regarding local government independence indicates that local entities act "*in their own name and their own responsibility (…) as entitled within the framework of laws pertaining public tasks*," as established

in the framework of "public service participation." Academic representatives cannot agree how to define this concept of 'independence'; neither can they classify it. It appears that in the science, there are various aspects of independence (Dolnicki, 2003: 56–57):

- independence in forming the internal governmental system for local units (Art. 169, Paragraph 4 of the Constitution),
- financial independence meaning self-determination in executing essential public tasks regarding financial management in its own name and responsibility regarding revenue and expenditure (Art. 167 of the Constitution),
- taxing independence in the authority of local governments to levy taxes and charges as defined in laws (Art. 168 of the Constitution),
- independence to hold assets – units of local governments have legal status to own property and other assets (Art. 165 of the Constitution),
- public law independence where a local government unit can carry-out public tasks (Art. 163 and 166 of the Constitution).

However, as the Constitutional Tribunal of the Republic of Poland clarifies, independence is a protected value, not absolute. The protection of said value cannot exclude, abolish or overshadow legislated law regarding the shaping of relationships within the state: this independence depends on, among others, the local government within said framework of laws (Poland's Constitutional Tribunal, K 38/97). The Tribunal clarifies that this independence does not have an absolute character, and the legislature retains the right of intervention into the activities of local governments and their units (Constitutional Tribunal, K 1/96). Deliberations pertaining to the independence of local governmental units must focus on analyzing areas where this independence arises. This developed analysis will consider the financial independence of local governmental units as they relate to judicial review of taxing decisions issued by the local tax authority.

3 Judicial Review of Local Governmental Units' Authority in the Area of Tax Laws Pertaining to Levies and Charges

The primary task in protecting the independence of local governments in their relation to oversight authorities, and enforcing compliance of the law by local governmental units regarding establishment and

implementation of local tax ordinances falls to administrative courts. Even though administrative courts have clear authority to intervene into the legislative competence of local governmental bodies, the courts do not have typical oversight powers over said bodies but over the legality of their activities, which oversight was written into the system of how oversight works (Zimmermann, 1991: 47). Judicial oversight of local government authority regarding taxes addresses issuing opinions in cases of appeals involving (Pietrasz, 2012: 736–737):

- approved tax ordinances by local governmental bodies,
- oversight reports by regional chambers of audit regarding local governmental bodies' activities,
- tax rulings issued by local government taxing bodies. (It should be stressed that before an appeal can be directed to an administrative court, the appeals process must be exhausted which means that the ruling appealed to the court must originate with a decision of an appeal board. This does not exclude a court verification of a decision rendered by an appeal board.),
- inactive legislation,
- written interpretation of tax law regulations issued by local government tax bodies for individual cases.

In accordance with Art. 1 of the law establishing the structure of Poland's administrative courts (PUSA), administrative courts will review with regard to lawfulness rulings issued by local governmental bodies. It appears the law causes an independent court review on the basis of an initiative of an appropriate entity i.e. registering a complaint (Dąbek, 2015: 270).

4 Local Appeal Board Tax Ruling Complaint

Court review of local government bodies' competence pertaining to taxes, in accordance with Art. 3, Section 2, Point 1 of PUSA, pertains to issuing rulings about complaints to tax rulings issued by local taxing bodies. Registering a complaint with an administrative court regarding a tax ruling initiates a verification process that the local taxing authority adhered to the tax law in its taxing procedure. Tax or service ruling complaints to administrative courts on decisions issued by a local body can be raised only

after exhausting appeal processes which serve the plaintiffs in their procedures against taxing bodies. If someone is dissatisfied with a tax ruling made by a local authority (city, commune, district), their first step is an appeal to the appropriate local government appeals board – the second instance. In terms of further remonstrance, the plaintiff can petition the administrative courts basing the complaint on the ruling of said appeals board (Małysz-Plich, 2012: 220). The authority for the local government appeals boards addressing tax issues can be found in the Tax Code under Art. 13, Section 1, Item 3. In accordance with the cited regulation, the appeals boards fulfill the function of a tax authority appeal body against tax rulings of various, first instance local taxing authorities (wójt – commune; mayor – city; burmistrz – town; starosta – county; voivodship marshal) as an initial step. These appeals boards also hold the status of a higher instance as a revenue entity (Section 3).

Another fundamental issue is the designation of which entities are authorized to appeal a tax ruling to the administrative courts. This issue raises the greatest controversy in that a commune, a local government entity, can challenge a decision issued in an appeal process in the case where the issuing agent of the first instance is a wójt, burmistrz or city mayor (Dembczyńska, Pietrasz, 2009: 133). The question whether the local governmental body is party to proceeding pertaining to the rights of a third party when the original ruling was issued by one of its own offices. Both in the period of earlier regulations defining judicial-administrative proceedings and at present, there are varying opinions to the question of whether a body of a local government is entitled to a challenge in proceedings before an administrative court when one of its own offices issued the initial ruling. Generally speaking, there are three solutions (Kubalski, 2008: 72):

- ruling that even though a unit of a local government has a legal interest in a proceeding, said unit is not a party in said proceeding – denial of standing in administrative proceedings – and therefore said unit cannot appear as a challenging party before the administrative court,
- ruling that a unit of a local government has valid standing as it has a legal interest in the case, but excluding that unit on the basis of regulations in the Code of Administrative Procedure, or ruling that a unit

of local government may be a party in administrative proceedings which is led by one of its offices, and thus giving it standing to challenge in judicial-administrative proceeding.

Those favoring the first alternative indicate that an office cannot be a judge in its own case; and the unit of local government, as the issuer of a taxing ruling through its offices, does not appear as an owner but as an entity authorized to issue such ruling as representative of the state (Kiermaszek, Mikosz, 2005: 26). They further indicate that while the local government is vested with ownership powers, these powers must be ceded as the unit remains in conflict with the competence to adjudicate a tax ruling on the laws and taxpayers obligations which remain outside the system of public administration (Kiermaszek, Mikosz, 2005: 26). T. Woś stresses that even if a local government performs its tasks, it still serves the state. If the provision of law grants an office of a commune the competence to issue rulings in individual cases, it still remains in a controversy with an appeals entity and therefore does not have the grounds for recognizing the standing of a local government body to bring challenge to an administrative court: the same applies to the legal interests of said local government whose office issued the initial ruling – first instance (Woś, 1996: 103–104). This position dominates judicial case-law. The Naczelny Sąd Administracyjny (Determination of Supreme Administrative Court: SA/Wr 990/90) has determined that without regard to the entity involved, or its legal interest, in the administrative proceedings, a local government unit is not a party in said proceedings when the proceedings pertain to public administration and involve an office of said local government unit. Therefore, a local government unit, or any of its offices, does not have the authority to challenge a decision issued by an appeals board which either repeals or modifies a taxing body ruling of the first instance (Supreme Administrative Court: SA/Wr 990/90). This position was maintained by the Supreme Administrative Court in a 2011 decision stating that as an office of a local government is empowered to ruling in an individual case in the form of an administrative decision, said local government forgoes the right to pursue its interests through administrative or judicial-administrative processes (Supreme Administrative Court: II FSK 2515/10).

Another approach proposed for this matter of discussion entails confirming the standing of a local government based on its legal interest yet excluding its office from participation on the basis of regulations in the Code of Administrative Procedure. This approach has not received and doctrinal support. According to J. P. Tarno, this concept is unacceptable because of the nature of performing public administration and for reasons of doctrine (Tarno, 2006: 26–27). Introducing this arrangement would cause that a majority of cases belonging to the competence of local government offices, would be taken care of by offices of another local government (Tarno, 2006: 26–27). However, B. Adamiak ascertains that current regulations do not have the grounds upon which to exclude a local government office, especially when a case is a subject of administrative procedure and continues to be tied into to legal interests of said self-governing community (Adamiak, 2006: 135–136).

In turn, the position of recognizing the local government challenge as valid presumes a number of points: that said local government unit has legal entity, it can demonstrating its legal interest to enter its challenge, and is an entity of standing to be recognized in a given proceeding. However, an office of a local government unit is not such an entity. The fact that an office of a local government issued an administrative ruling in the first instance does not mean the local government unit forgoes its standing to appear in proceeding in front of an administrative court as a party raising a challenge. The view recognizing that a local government unit has standing to challenge also appears in the case law of Poland's Supreme Court (Supreme Court of the Republic of Poland: III RN 104/00). In a case in 2001, the Supreme Court ruled that an entity entitled to enter a challenge to an administrative court is a local government unit (Supreme Court of the Republic of Poland: III RN 104/00). However a wójt, burmistrz or mayor is not entitled regardless if they are representing their governmental unit to external bodies, or as a body issuing a decision of the first instance Supreme Court of the Republic of Poland: III RN 104/00). Without doubt, an office of a local government does not have its own legal interest in entering a challenge. First, because it represents the local government, therefore it is acting in its interest; and second, in issuing

a ruling in a given case it is acting as an public administrative office on the basis of delegated authority, not as an entity whose legal interest or legal responsibility pertains to ta proceeding (Supreme Court of the Republic of Poland: III RN 104/00). However, in light of Art. 133 of the Tax Code, a local government unit is not a party in an administrative proceeding, and therefore is not entitled to challenge the findings of an appeals board (Etel, Kosikowski, Ruśkowski, 2006: 189–190). Party to a tax proceeding is a taxpayer, payer, collector or their legal representative, or a third person as defined in Art. 110–117 of the Tax Code, who on the basis of their legal interest, demand action of a taxing office whose taxing actions refer to or to whose legal interest the taxing office pertains to (Art. 133, Section 1 of the Tax Code). Literature raises the point that a local government unit, being the 'creditor of taxes due', cannot be a party in tax proceeding as defined in Art. 133 of the Tax Code; however, there is no impact on its right to enter a challenge to an administrative court (Dembczyńska, Pietrasz, 2009: 135). The challenge has universal qualities. The law regarding proceedings before administrative courts, defining process validity before said courts, does not refer to the concept of 'party' as understood in the Code of Administrative Procedure or Tax Code. As a party in judicial-administrative procedural requirements, an entity is defined as having a legal interest in overseeing public administrative activity.

Regarding the opinion that grants local government units standing to challenge, arguments recognize the need to assure judicial safeguards for its independence and when its office(s) issue tax ruling in the first instance. In the event of an unfavorable ruling for a local government by an appeals board, said government loses tax revenue. As structured in Art. 167 of the Constitution, the law system for local government entitlement to revenue is subject to judicial protection, which means that local government units possess the authority to pursue judicial restitution in the case of abuse of its authority to tax revenues. A local government unit should have the standing to assure its tax revenues before proceeding in an administrative court. As a result, neither the legislature nor, all the more, a body of public administration can deprive a local government unit of its tax revenues (Hanusz, Niezgoda, Czerski, 2009: 18). This restraint also pertains to appeals boards.

The local government unit, delegated and constitutionally assured independence, is justified in defending its prerogatives. Conversely, there exists the potential for malfeasance by the local government in the area of taxes (awarding relief in tax obligations, for example) in maximizing budgetary revenues. Therefore the range of justifiable standing to challenge a decision by a local government unit should be strictly established by law. It would favorably influence appeals boards' decision clarity which have to have in mind that their ruling can be challenged not only by a taxpayer, but also by a local government.

5 Judicial Oversight of Tax Rulings in Administrative Court Case Law

Analyzing the practices of administrative courts in the areas of taxes and local charges it remains to be repeated that administrative courts, as well as the Constitutional Tribunal, confirm in their case law that local governments retain financial independence – including taxing authority – which is subject legal protection. With regard to challenges to tax rulings by local governments, administrative courts have issued many opinions which confirm that applying tax laws has its difficulties. As a practical matter this difficulty results from the wide scope of local taxes and varied tax levies depending on external qualities and intended use. It is also affected by applying legal norms from other areas of laws, such as building law or civilian code. Challenges to tax rulings of local appeals boards entered into administrative courts mainly pertain to property taxes and inappropriate application of Tax Code regulations. Considering property taxes, the most frequent challenge occurs in the interpretation of legal concepts. However, when considering the use of the Tax Code regulations, the challenges to tax rulings refer to:[2]

- a lack of active participation in the tax proceedings by one of the parties after no notice of the 7 day response time limit regarding collected evidence,
- not observing the proper validation requirements for the tax ruling (Art. 210, Section 4, of the Tax Code),

[2] On the basis of information of Poland's administrative court activity and information gained from the National Representation of Local Government Boards of Appeal (unofficial translation).

- applying model decisions not adjusted for solutions to individual needs such as lacking factual validation of a ruling,
- a lack of explanation of actual facts in a case and a lack of an office's position in a given case referring to evidence of 'great interest of the taxpayer' and 'public interest' in ruling issued on the basis of Art. 67a of the Tax Code, and
- lack of an indication of what process was used when awarding tax relief to a company in paying off tax debt.

The voivodship administrative courts considered 14,181 challenges in 2016, regarding rulings and provisions issued by local appeals boards, of which 3,243 were reversed by the decisions of the courts;[3] wherein, of the issued rulings, the boards entered 513 cassation appeals. It should be stressed that this data not only refers to tax levy challenges and service charges but all cases belonging to the competence of the appeals boards. However, tax cases are the most numerous group of the challenges brought to the appeals boards. In the years chosen for analysis, there has been a clear tendency of the administrative courts to be inconsistent in their rulings regarding tax issues and service charges. This indicates that taxpayers have been treated variously based on the same regulations. Moreover, in cases pertaining to the same taxpayer owning various parcels of land in different communes, under consistent conditions of fact and law, rulings vary, which obviously influences the financial independence of said local government. These governmental units should not undertake unreasonable risk tied to a poorly defined line of rulings by administrative courts. The consequences of varying administrative court rulings impact on local government units which experiences lowered budget revenues.

6 Conclusion

The analysis of government doctrine, judicial case law and subject literature leads to the supposition that challenge structures for tax rulings of local government appeals boards construct a relatively effective system for judicial review of tax law as applied by local government taxing offices. However, the considerations undertaken in this article show that incomplete

3 On the basis of information of Poland's appeals boards activity for 2016 gained from the National Representation of Local Government Boards of Appeal (unofficial translation).

court regulations regarding protection of local government independence remain to be fully comprehensive. The analysis of administrative court case law indicates that even though the reformed public administration system and track record of administrative courts has been functioning for many years, not all doubts regarding local government independence have been clearly resolved. The issues tied to challenge constructions for rulings of the local government appeals boards continue to require both legislator intervention and further doctrinal examination. Analyzing the valid standing of a local government unit to challenge a ruling, said government should be able to at least appear before a court in the case of a tax ruling. This mechanism will allow a local government realistic protection of its mandate. The issue of granting a local unit challenging status before an administrative court where that local unit's office issued a tax ruling of the first instance has been a doctrinal issue for some time. The view of granting a local unit challenging status supports the need to assure a local government judicial protection in maintaining its independence, especially when one of the local government's offices issued the initial ruling. As a result of disadvantageous rulings by appeals boards, local governments lose significant tax revenues. Accordingly, neither the legislature nor administrative courts can deprive a local government unit of its tax revenues. These local government units should have the opportunity to defend their tax revenues before an administrative court. This would positively influence the caliber of rulings by local government appeals boards which would have to contend with the possibility of challenges to their rulings by taxpayers and local governments. Realistically, this would be a larger group of entities which could raise the number of challenges put before administrative courts, but it may be supposed that the benefits of such a situation would cover the additional costs over time. Nevertheless it appears to be essential to make unified efforts in coordinating viewpoints pertaining to the legal standing of local government units in the area of tax ruling challenges.

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SUBJECTIVE CONDITIONS OF LIABILITY FOR A BREACH OF PUBLIC FINANCE DISCIPLINE IN THE ACTIVITY OF LOCAL GOVERNMENT HEALTHCARE ENTITIES IN POLAND LEGAL STATUS ASSESSMENT AND DE LEGE FERENDA POSTULATES

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Abstract

Liability for the breach of public finance discipline plays a vital role in the practical activity of local government entities. It also covers the area of activity of local government healthcare entities. However, the varied character of the local government healthcare entities, and hence a specific status of people representing them, bears theoretical and practical problems connected with the liability application. The subject matter of the work are subjective conditions for the breach of public finance liability in the scope referring to people conducting activities connected with managing public means in the local government healthcare entities.

Keywords: Local Government Units; Healthcare Entities; Public Finance Discipline.

JEL Classification: K3.

1 Introduction

Meeting collective needs of the community, including the healthcare scope, is in Poland one of the communes' tasks (Act on local government: Art. 7 section 1 point 5). In this scope, local government units were equipped,

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among others, with the possibility of leading healthcare activity by means of healthcare entities.

Pursuant to the provisions of the act of 15 April 2011 on healthcare activity (hereinafter also referred to as h.a.a.), a local government unit may create and lead a healthcare entity in a form of a trading corporation, budget entity or an independent public healthcare unit (hereinafter referred to as SPZOZ) (Act on healthcare activity: Art. 6 section 2).

Leading a healthcare entity needs to be understood as providing healthcare, as well as health promotion and conducting didactic and research tasks in connection with the provided healthcare and health promotion, including the introduction of new medical technologies and treatment methods (Act on healthcare activity: Art. 3 sections 1 and 2).

In practice of the activity of entities conducting healthcare activity, especially in a form of a budget entity or SPZOZ, liability for the breach of public finance discipline is of vital importance. This type of liability is regulated in Poland by the provisions of the act of 17 December 2004 on the liability for the breach of public finance discipline (hereinafter also referred to as p.f.d.a.).

Liability for the breach of public finance discipline is a special kind of the legal liability. Specifics of the liability regime are marked, on the one hand, by the protection subject, which is widely understood public finances economy, and on the other hand, by a certain group of people who are liable. The basic condition of being liable for the breach of public finance discipline is, hence, being part of the group of people who, pursuant to p.f.d.a., may be held liable.

The issue of responsibility for the breach of public finance discipline is presently being discussed also in the context of a more general subject, i.e. the existence of another type of responsibility – legal and financial responsibility. In the financial law science it was noticed that there is a need for the research concerning a model of responsibility of financial law entities (Kryczko, 2000: 37; Salachna, 2008: 84; Czaja-Hliniak, 2009: 124–133).

The objective of the work is to show subjective conditions of liability of people representing local government healthcare entities, including *de lege ferenda* postulates.

The method of exegesis of the legal text and jurisprudence as well as the dogmatic and legal method were used in the work

2 People Held Liable for the Breach of Public Finance Discipline in Local Government Healthcare Entities

Pursuant to binding regulations, people who perform certain tasks, not institutions conducting healthcare activity, are held liable for the breach of public finance discipline (I. Czaja-Hliniak presented a postulate to put under the regime the liability for breaching of public finance discipline (Czaja-Hliniak, 2009: 125). It needs to be noticed that liability for the breach of public finance discipline concerns a varied group of people. The variety is especially visible in the activity of local government healthcare entities of different legal form. One group of people liable for the breach of public finance discipline will include people who do their duties in a healthcare entity which is a unit of the public finances sector, while the other, showed separately, will include the representatives of the healthcare entities conducted in the form of trading corporations.

A local government healthcare entity led in a form of a budget unit or an independent public healthcare unit is – pursuant to the act of 27 August 2009 on public finances (hereinafter referred to as p.f.a.) – a unit of the public finances sector (Art. 9 points 3) and 10). In such case, liable for the breach of public finance discipline are:

- people who are a part of the body creating the budget or financial plan of the unit of the public finances sector or managing the property of the unit, as well as the head of the unit of the public finance sector, and
- the workers of the unit of the public finances sector or other people who were given duties in the unit, by means of or based on a separate act; the duties which not carried out or carried out inappropriately is a breach of public finance discipline (Act on liability for the breach of public finance discipline: Art. 4 section 1 points 1) to 3).

While in case of people representing a local government healthcare entity, led in a form of a trading corporation, the following people are held liable:

- people who are a part of a managing body which is independent from the public finances sector, which was given the public funds to use or manage, or which manages the property of the entity, as well as people who on behalf of an institution independent from the public finances sector, which was given the public funds to use or manage, conduct activities connected with using and managing the funds (Act on liability for the breach of public finance discipline: Art. 4 section 1 point 4).

For both groups together, there is regulated liability for the breach of public finance discipline in the area of managing public funds connected with the realisation of programmes and projects finance from the means of European Union budget or other funds from the non-refundable foreign sources (Act on liability for the breach of public finance discipline: Art. 13). In such case, liable are 1) people obliged or authorised to act on behalf of the institution which was given certain tasks connected with the realisation of the programme, by means of or based on a separate act, based on a contract or agreement 2) people obliged to realise the financial project with the share of EU or foreign funds, who were given public funds to realise the project or who use such funds; as well as people obliged or authorised to act on behalf of the institution obliged to realise the financial project with the share of EU or foreign funds, which was given public funds for the realisation of the project or which uses such funds (Act on liability for the breach of public finance discipline: Art. 4a).

The most often represented group of people liable for a breach of public finance discipline are managers of the local government healthcare entities as the managers of units of the public finances sector.

The provisions of the act on public finances, Labour code or Civil code do not define the notion of ”a manager”. It needs to be assumed the notion of ”a manager of a unit of the public finances sector” refers to people who as one person have the function of the managing body as well as people who are chairmen of the collegial management bodies (Kosikowski, 1998: 307).

In case of a manager of a unit of the public finances sector, the basic rule describing their scope of liability (i.e. responsibilities) is Art. 53 section 1 of p.f.a. It assumes that the manager is responsible for a whole financial management. The objective of this fundamental rule is to specify the scope of duties of a manager of the entity as far as the management of public finances is concerned. Additionally, Art. 46 of the act on healthcare activity states that the manager is held liable for managing a healthcare entity which is not an entrepreneurship.

As the above shows, some people in a local government healthcare entity undergo the regime of liability for the breach of public finance discipline as a result of their position (members of the bodies or entity managers). Nevertheless, within the units of the public finances sector, p.f.d.a. list also a group of people who are liable for the breach of public finance discipline and who are not managers of members of collegial bodies. It does not, however, cover all the employed based on employment contracts or conducting work based on other agreements, but only those who by means of or based on a separate act were given responsibilities in such a unit; and if the responsibilities are not fulfilled or fulfilled inappropriately, they are the acts breaching public finance discipline. Hence the key condition of liability of people from this group is the act of being given certain responsibilities.

Liability for the breach of public finance discipline does not in practice concern social councils working in healthcare entities which are not entrepreneurships. It is an initiating and opinion providing body of the creating subject as well as an advisory body of a manager. As a result, actions undertaken by council members or a council as a whole are not usually connected with actions which may directly become the breach of public finance discipline. The basic tasks of social councils include 1) presenting to the creating subject conclusions and opinions on certain issues, 2) conducting periodic analysis of complaints and applications made by patients, excluding cases undergoing medical supervision; 3) issuing opinions on applications concerning periodical cessation of medical activity; 4) performing other tasks as described in the act and the statute. (Act on healthcare activity: Art. 48 section 2).

3 Entrusting Responsibilities in the Local Government Healthcare Entity Which is a Unit of the Public Finances Sector as an Element of a Subjective Condition of Liability

The notion of ”entrusting” appears in different legal regulations concerning the units of the public finances sector, including budget entities or SPZOZ. However, special attention should be drawn to the accounting act (hereinafter referred to as ac.a.) and p.f.a. In Art. 4 section 5 of ac.a. it is required for the accountancy responsibilities to be entrusted to a person with their agreement, and *acceptance of responsibilities should be stated in writing*. While Art. 53 section 2 of p.f.a. explains that in a situation when the manager of an entity entrusts to other employees of the entity responsibilities within the financial management, *accepting such responsibilities should be confirmed in a document in a form of a separate personal authorisation or indication in the organizational regulations of the entity*. The above undoubtedly shows that the act of entrusting responsibilities should have a form of a written document (authorisation or indication in the organisational regulations), stating the act of accepting responsibilities (liability).

The organisational regulations of a medical entity is an example of an internal deed. Its special importance results from the fact that it describes the basic structure of an entity. Moreover, in the entities of the public finances sector it is – pursuant to Art. 53 section 2 of p.f.a. – one of the forms of entrusting responsibilities within the financial management scope.

In practice, organisational regulations of local government medical entities include the issues concerning performing managing functions in institutions, internal organisation and tasks realised by organisational cells. According to the wording of Art. 24 of the act on medical activity, organisational regulations of an entity conducting healthcare activity shall especially describe 1) company or entity’s name; 2) entity’s objectives and tasks; 3) organisational structure of a healthcare institution; 4) type of healthcare activity and the range of medical services provided; 5) place of providing healthcare services; 5) process flow of providing healthcare services; 7) organisation and tasks of certain organisational units or cells of the healthcare institution as well as the conditions of cooperation of those units or cells; 8) conditions of cooperation with other institutions providing healthcare activity;

9) amount of fees; 10) way of managing organisational units or cells of the healthcare institution.

Taking into consideration the above, it needs to be stated that entrusting responsibilities, which results in inclusion of an employee into a group of people possibly liable for the breach of public finance discipline, has to be done in writing. The document may have a form of a separate (i.e. addressed *ad personam)* authorisation or organisational regulations of an entity, which include appropriate indications concerning entrusted responsibilities. The fact of accepting responsibilities by an employer should result from the act of entrusting (the employee should sign the document). In accordance with the decision of the Budget Supervision Commission of 21 May 2009, entrusting to and accepting such responsibilities by an employee should be confirmed by a document in a form of a separate, personal authorisation or indication in the entity's organizational regulations. Such an action is an act of making an employee aware that he may be disciplinarily liable for incorrectly prepared report as much as the manager of the entity.

4 Using and Managing Public Finances as an Element of a Subjective Condition of Liability of People Representing Local Government Healthcare Entities in a Form of a Limited Liability Company

The effective act on liability for the breach of public finance discipline is a tool which is to ensure the correct management of public finances within – mostly – units of the finances sector (Chojna-Duch, 2004: 86.). However, in accordance with the clear wording of p.f.d.a., it also concerns financial irregularities which may appear in the entities which are not included in the public finances sector, that is e.g. in healthcare entities which are corporations (Robaczyński, Gryska, 2006: 90; Lipiec-Warzecha, 2008: 131–133).

As mentioned above, liability for the breach of public finance discipline concerns people representing a local government healthcare entity in a form of a trading corporation, concerns people who use or manage public finances which are given to such an entity (Act on the liability for the breach of public finance discipline: Art. 4 section 1). This feature – as an element

of a subjective condition of liability – seems to be inappropriate because of theoretical and practical reasons. The first concerns the issue of the possibility of keeping the public character of financial means transferred beyond the public finances sector (Lipiec-Warzecha, 2008: 134; Karlikowska, 2003: 3; Decision of the Budget Supervision Commission of 14 September 2006; Ruling of the Voivodship Administrative Court Warsaw of 05-09-2007). The other is connected with inexact concept which makes it difficult to set conditions for meeting the notion of liability.

The analysis of the catalogue of the acts of breaching public finance discipline shows that most common irregularities in the entities which are not in the public finances sector concern spending money and accounting of the received subsidy (Act on liability for the breach of public finance discipline: Art. 9). The issue of using foreign resources is also of crucial importance. In this case, irregularities, among others, concern resources devoted to the realisation of pre-accession programmes, means gained from structural funds, the Cohesion Fund, means of the ”Guarantee Section” of the European Agricultural Guidance and Guarantee Fund as well as other foreign resources which are non-refundable and which are public finances.

5 Conclusion

The above statements show that the activity of people representing all kinds of healthcare entities created and led by the units of local governments is covered by the regime of liability for the breach of public finance discipline.

This legal state, however, created the need to indicate *de lege ferenda* conclusions concerning liability of the people representing local government healthcare entities. One of the postulates aims at the abolition of liability for the breach of public finance discipline of people representing healthcare entities led in a form of a trading corporation (Ostrowska, 2015: 422; Robaczyński, 2015: 432; Robaczyński, Gryska, 2006: 90; Lipiec-Warzecha, 2008: 134–135; Salachna, 2005: p. 32 and others). The other, at the modification of the approach of the subjective condition. In this area, there is a need to postulate such a change that indicating liable people does not refer to the fact of conducting certain activities on behalf of the entity which does

not belong to the public finance sector, but to the conditions of entrusting certain responsibilities.

Next postulate, which assumes keeping the present subjective conditions of liability, aims at modifying the catalogue of punishments for the breach of public finance discipline. The binding in this scope regulations of p.f.d.a. state that the breach of public finance discipline calls for one of the following punishments: a warning, reprimand, penalty and the ban on conducting any activity connected with managing public finances (Act on liability for the breach of public finance discipline: Art. 31). In order to consequently realise non-disciplinary and general character of liability for the breach of public finance discipline, it would be necessary to consider keeping only a penalty for the breach of public finance discipline, with a wider than before scope of application. Such a solution would allow to deepen the character of liability for the breach of public finance discipline, as a general liability not only connected with the area of the activity of the public finance sector entities.

It would be also necessary to suggest modification of the way in which the responsibilities in public finances sector units are entrusted, by giving up the form of a organisational regulations. The act regulates internal organisation, yet it is not a tool which can individualise employees' duties in an appropriate way.

The cause for concern is liability of the members of collegial bodies, i.e. people who constitute the body which executes the budget or financial plan of a unit of the public finances sector, or which manages the property of such a unit as well as people who constitute a managing body of a unit which is independent from the public finances sector, and which was entrusted with public means to be used or managed, or managing the property of such an entity[2]. Subjective conditions of liability for the breach of public finance discipline would be much more readable if they were connected only with executing a certain function (a unit manager) or with entrusting certain responsibilities.

2 Czaja-Hliniak, I. Odpowiedzialność prawnofinansowa na przykładzie odpowiedzialności za naruszenie dyscypliny finansów publicznych…, p. 127.

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CHALLENGES AND PROBLEMS OF LOCAL GOVERNMENT FINANCES IN THE LIGHT OF THE FRENCH COUR DES COMPTES REPORTS AS A GUIDE FOR THE POLISH LEGISLATURE

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Abstract

This contribution deals with the issues of the local government units finances identified in the reports of the French Cour des Comptes, which is the main jurisdiction responsible for the control of the public finance in the French legal system. The reports analysed in the paper are related mostly to the main problems that appears in France at the financial level of the decentralised administration. The main aim of the contribution is to confirm or disprove the hypothesis that the dematerialisation and technological progress causes a lot of issues also at the local level, and it is necessary to be taken into account by the legislator. The description of the problems and issues of local government units in France by the special financial jurisdiction like *Cour des Comptes* may show the future legal changes and initiatives that should be done in order to preserve the security of decentralised public finances. The remarks made by the *Cour des Comptes* may be also useful not only for Polish legislator but also for the other East and Centre European Union Countries in the process of the development of their public and local finances regulations. The French financial jurisdiction may be an interesting base for further comparative analyses, which may help to avoid and prevent the same problems in the other European countries and especially it may present some solutions which could be adapted by the Polish legal system.

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1 Introduction

The *Cour des Comptes* is in France the main Court of Auditors responsible for the control of the public finance. The position and reputation of this Court is not only related to its legal status but also to its historical roots and tradition (Serrand, 2012: 313). The beginnings of this institution are reaching the 12th century, when the *Chambre des comptes* was created[2]. But the first legal basis for such a financial jurisdiction in France was the law from 1320 made by the king Phillipe V[3]. In the 15th cetury**,** the *Chambre des comptes* was the second-largest institution of the French monarchy that was the main source of royal revenue and ruled on accounts and exercised prosecution, through fines and even corporal punishment. The present name of this institution and its current scope of activity was created by Napoléon Bonaparte in 1807 by a special form of decret[4]. It should be highlighted that from the beginning *Cour des Comptes* was located in very prestigious and important places. At the beginning it was located in *palais d'Orsay* till the conflagration, which took place in 1871. After this date the Court of Auditors was located till 1912 in Palais-Royal, in order to establish definitely his head office in Palais Cambon.

The main characteristic of the *Cour des Comptes* is related to the independence of this institution, which is a guarantee of the objectivity of its reports and judgments. The independence is based on its status as a court, which has been the case since it was founded in 1807, as declared by the Constitutional Council in its decision dated 25 July 2001 in the constitutional bylaw on finance acts concerning its freedom of programming. The above mentioned characteristic was even more reinforced when the *Cour des comptes* became a self-governing unit. According to the French doctrine of financial law, the independence of the institution also arises

2 This Chamber of Accounts was created in 1194 by Philippe II.
3 Originally called as Ordonnance de Vivier-en-Brie.
4 That was called Décret impérial of 28. 9. 1807 sur l'organisation de la Cour des comptes.

from the independence of its members, who are considered as permanent magistrates. (Descheemaeker, 2005: 25)

It is worth emphasising that the Court is composed of seven Chambers and has a General Prosecutor's Office, which is supporting his activity. As for the current organization, the most important role was given to the First president of the Court, accompanied by a general secretary and two assistants. In general, over 700 magistrates and other auditing staff are employed by the head office of the Court. Of course this number of employees is not covering the regional and territorial chambers of accounts that are independent courts, which rule on the accounts of public accountants, examine management and audit the budget operations of regional authorities and their public institutions.

This type of local financial courts exists both in Polish law and in French law. In Poland they are called RIO[5] and are one of the most important guarantees for the respect of the public finance discipline at the local level. The Regional chambers in Poland were established by the Act of 7 October 1992 and by the decree of the Council of Ministers of 9 December 1992[6]. The RIO has also found its legitimacy in the art 171 of the Constitution, where we can find the rule clarifying that the activities of local self-government are subjects to supervision by the Prime Minister and voivodes, and in the area of financial matters, by the regional accounting chambers. It concerns supervision from the point of view of legality and the supervision over the activities of territorial self-government units. (Kosikowski, Salachna, 2012: 275). Initially, in Poland, there were 17 RIOs, and since 2000, after the changes related to administrative reform, there have been 16 of such entities (Niemiec, Niemiec, Sawicka, 2013: 259).

As for the French organization in this field since 2012, there have been 15 regional chambers of accounts in Metropolitan France, supported by 5 regional chambers of accounts in Guadeloupe, Guiana, Martinique, La Réunion and Mayotte, as well as another 5 territorial chambers

5 Originally RIO means Regionalne Izby Obrachunkowe.

6 Originally called as Rozporządzenie Prezesa Rady Ministrów z dnia 9 grudnia 1992 r. w sprawie siedzib i zasięgu terytorialnego regionalnych izb obrachunkowych oraz szczegółowej organizacji izb i trybu postępowania (Dz.U. 1992 nr 94 poz. 463).

of accounts in New Caledonia, French Polynesia, Saint Barthélemy, Saint Martin and Saint Pierre and Miquelon (Clepkens, 2017: 221). Since 1982, when the Regional chambers were created, the cooperation and interaction between them the *Cour des comptes* have been continually strengthened. Part of their work is published in the *Cour des comptes'* annual public report. Another aspect of this relates to the public thematic reports, which are the result of their investigations, usually in liaison with the *Cour des comptes*. (Etien, 2015: 44). That is why the report of the *Cour des comptes* showing the challenges and problems of local government finances is a very important document created not only by the central but also by the local jurisdiction and control entities (Cour des Comptes report, 2017: 5–6)[7].

2 Selected Problems from the Point of View or the Local Collectivities

First of all, it is important to underline that local collectivities in France were organised under the Act of 2 March 1982 on Freedoms and Liberties of Municipalities, Communes, Departments and Regions[8]. By this Act three key territorial collectivities in France were established and described as municipalities *(communes)*, departments *(départements),* and regions *(régions*). Moreover, a local collectivity was defined as a decentralised unit with legal personality and specific competences granted by the state authorities, acting under the administrative authority by issuing decisions reflecting the approval of actions undertaken by bodies functioning within such a collectivity (Monjal, 2013: 449).

It is also important to underline the effect of the implementation of the territorial reform resulting from several legislative texts, including the MAPTAM law (modernisation of regional public action and establishment of metropolitan areas)[9] of 27 January 2014 and the NOTRé law (new territorial

7 The court des comptes report from January 2017 was entitled as raport on Local Direct Tax Management (La Gestion de la fiscalité directe locale – Communication à la Commission des finances, de l'économie générale et du contrôle budgétaire de l'Assemblée nationale).

8 Originally described as Loi *relative aux droits et libertes des communes, des departements et des regions.*

9 Originally described as Loi *relative a la* modernisation de l'action publique territoriale et d'affirmation des métropoles.

organization of the Republic)[10] of 7 August 2015. The number of regions has been reduced, major cities have been assigned a new status and the map of the intermunicipal groupings has been significantly streamlined. However, contrary to the previous assumptions, this reform has not simplified the local institutional architecture. It means that the tangle of local jurisdictions remains a reality even though the general jurisdiction clause has been withdrawn from the departments and regions. While the many administrative tasks initiated as the part of the territorial reform are still underway in the local authorities, the *Cour des comptes* will remain alert to the risk of possible additional expenses associated with a merger of the collaboration between the municipalities and/or communes *(coopération intercommunale)*.

In the report of 2017 the *Cour des comptes* underlines the issue of local direct taxation, particularly sensitive for communities. As a result of decentralization laws, communities have become more autonomous and successive transfers of powers have increased their responsibilities. This process is also visible in the part of public spending given for the local government administration that rose from 8.6% in 1983 to 11.8% in 2014 (Cour des Comptes report, 2017: 15). According to the *Cour des comptes* report, the local collectivities are now all the more attentive to a good management of local direct taxation accompanied to the process of simultaneous reduction of the contributions of the state. In this context the local units should take into account growing vigilance of taxpayers to the weight and fairness of the tax. Finally, the above mentioned changes underlined the problems related to the allocation of resources and to the procedure of local tax payments. It is worth to mention that this procedural issue was also selected as a big challenge by the polish legislator, who had prepared a significant reform of tax procedure in Poland (Etel, 2017: 237).

Globally the revenues of the French local entities have been rising steadily since the beginning of decentralization (+2.8% per year in volume from 1984 to 2014). In 2015, total tax amount transferred for the benefit of all local authorities and their tax-free groups reached 125.13 billion Euros, which was 6.1% of gross domestic product. Also in 2015, local direct taxes reached the very high level – 63.35% of local tax revenues. Their part

10 Originally known as Loi *portant la* nouvelle organisation territoriale de la République.

in the operating revenue of all local authorities and their organizations with own taxation exceeded 40%. The oldest legal forms of the local authorities organizations, are certain entities governed by public law, taking the form of either a public entity *(établissement public*) or a public company *(entreprise public)*. (Wojtyczek, 2003: 101). The *Cour des comptes* also underlined that the part in the operating revenue is varying significantly, according to the categories of local units (42.19% for the municipalities, 70.61% for the groupings of municipalities with own taxation, 31.61% for the departments, 20.97% for the regions) according to the rules of distribution of tax revenues between these categories[11].

Another point that was mentioned, is related to the growing complexity of the local direct taxation. Namely, in the past the local direct taxation was characterized by a relative simplicity. Each category of local government units was financed partially by a part coming from the four major local direct taxes: housing tax *(taxe d'habitation),* property tax on built properties *(taxe foncière sur les propriétés bâties),* property tax on undeveloped properties *(taxe foncière sur les propriétés non bâties)* and business tax *(taxe professionnelle).* Community groups and their organizations were financed not by taxes but by compulsory contributions from their members. However, the current general framework of local taxation, has become more and more complex, especially since the Finance Act of 2010 (Law no. 2009-1673 of 30 December 2009), which reformed the local direct taxation. It abolished the business tax *(taxe professionnelle – TP)* and created, on the one hand, the territorial economic contribution *(contribution économique territoriale – CET),* composed of company land assessment tax *(cotisation foncière des entreprises – CFE)* and the value-added contribution tax *(cotisation sur la valeur ajoutée – CVAE),* and on the other hand, flat-rate taxation on network companies *(l'imposition forfaitaire sur les entreprises de réseau* – IFER). The inherently variable nature of taxes based on economic activity results with a laack of predictability, which affects officials of local authorities, who used to be accustomed to the business tax, and now have to rely on a recipe that progressed steadily under the sole effect of automatic database revaluation.

11 See more on the report of Cour des comptes, Les finances publiques locales, Rapport sur la situation financière et la gestion des collectivités territoriales et de leurs établissements publics. La Documentation française, 10/2016, p. 10.

The groupings and organizations of collectivities (EPCI), initially financed by the transfer of the founds coming from the business tax of the member communes, were able to create a mixed fiscal management mode, by using the model of the optional taxation related to the form of additional contribution to the existing local taxes[12]. This situation encouraged to the creation of self-tax EPCIs in the 1990 s based on articles 77 and 78 of the Finance Act of 2010. This act was related to the new scheme for the financing of local governments and EPCI with own taxation, which is based on a reallocation of taxes, a transfer of tax revenues from the state to local governments by the distribution of new economic taxes between the three levels of local government. According to the *Cour des comptes* report, the main issue in this field is related to several further changes and amendments of law that introduced more complexes legal framework of the interactions between the state and local budgets, notably through multiple system of the offsets.

Despite the introduction of taxes based on economic activity (CVAE and IFER), local government finances, remain based at around 80% on property land taxes. They are linked either to the property (TFB and TFNB), to the use of the properties (housing tax, TH, CFE and tax on commercial surfaces – TASCOM). This is not the specific situation in the French law, because a similar situation can be found in other European countries (Cour des Comptes report, 2017: 125). However, in France this dependence and addiction to the property taxes becomes not only more significant but also more complex and difficult to manage.

Another point is that, due to the development of decentralization, the decline in government allocations and the consequences of the abolition of TP tax, communities tend to give more and more importance and attention to the management of local taxation. In order to maintain the good level of local finances, the territorial units have to benefit from their full tax potential. Because of the preponderance of the land and property component, this objective implies in particular a comprehensive and up-to-date understanding of the cadastral bases, which is a very complicated system. At the same time, given the taxpayers' possible reactions to the increased level of local taxes,

12 See more on Cour des comptes, rapport demandé par la commission des finances, de l'économie générale et du contrôle budgétaire de l'Assemblée nationale en application de l'article 58-2° de la loi organique relative aux lois de finances, from July 2016.

communities prefer to increase their revenues through a more complete and actual data bases than by an increase in rates. It is also important to underline, that each level of local government unit has a specific situation that is related to his position and hierarchy in the process of the decentralized finances. Tax autonomy has a different scope depending on the categories of local government units and is focused mostly on communes and EPCI units. For example, communes (municipalities) vote the rates of the TH, TFB, TFNB and the CFE taxes, while the situation of the EPCI's depends on their status. As the établissements publics (EPCI) can have a different status, the EPCIs with additional taxation vote four additional rates for the same taxes as municipalities; EPCIs with zone taxation can benefit only from the CFE at a rate voted by them within a zone of economic activity; the EPCI with a single professional tax can be based on all the economic taxes (CET, IFER, TASCOM) and vote the rate of the CFE. As for other decentralized territorial units, the departments vote the rate of the NBFL tax and the regions do not vote any tax rate.

Also, an important analysis should be given to the fact that different levels of territorial units receive heterogeneous shares of local direct taxes. In 2015, the taxes levied on households went in majority (76.1%) in the municipal sector (communes) and for the remaining quarter to the departments. The so-called economic taxes, paid by the companies, were distributed at the rate of half (50.4%) to the communal sector, a little less than a third to the departments (30.9%) and the remaining part of 18.7% went to the regions. But from the 1 January 2017, the situation was changed, because CVAE tax collected in the given territory started to be allocated in 26.5% to the municipal block, 50% to the departments and 23.5% to the regions[13]. As a result of the below mentioned regulations, the relative contribution of the different taxes varies according to the local authorities. For example the regions receive only economic taxes (like CVAE), departments benefit mainly from built-property taxes (61.2%) and CVAE (37.57%). As for the municipal block, over 53 milliards of euros from all direct local tax revenues, are coming mostly from the housing tax (40.4%), followed by the property built land tax (33.1%), CFE (13.4%) and CVAE (8.7%).

13 This change was introduced into French law by Art. 89 of the law of finance from 2016.

In consequence, the sensitivity to the evolution of various local direct taxes varies from one category of community to another and it may happen that some legal or economic changes can affect only one type of local collectivity while other can affect all of them but in a different way (Cour des Comptes report, 2017: 18).

In addition, the territorial reform in France, marked by the creation of metropolises, the merging of regions and the development of departmental plans for intercommunal cooperation (SDCI), which intended to serve as a frame of reference for the evolution of the intercommunal map in each territorial unit, was not without consequence on local direct taxation (Mégy, 2017: 99). This remark confirmed by French *Cour des comptes* may be very useful also for the Polish legislator, who is thinking about reorganizing partially the territorial structure in Poland which was created in 1999. (Tarno, 2004: 39)

The intercommunal cooperation (SDCI) have been made mandatory by the law no. 2010-1563 of 16 December 2010 on the reform of local authorities[14]. This system aims to ensure the full coverage of the territory by self-taxing EPCIs and the elimination of territorial enclaves and discontinuities, in order to rationalize the perimeters of own taxation and to reduce the number of intercommunal or mixed unions, in particular by eliminating trade unions, which have become obsolete (Clepkens, 2017: 97). Also, by the Law no. 2015-991 from 7 August 2015 on the new territorial organization of the Republic[15] provided for the implementation of new SDCIs no later than on 31 December 2016, with a minimum population changed from 5 000 to 15 000 inhabitants. The creation of such new SDCIs organizations had very important tax implications and led to a significant increase in the number of consultations with the state services.

The other sensitive movement was related to the creation of new municipalities by merging the existing ones, where the most complex consequences were coming from the rapprochement between municipalities located in the territory of two departments. These changes in the administrative

14 Originally as loi n° 2010-1563 du 16 décembre 2010 de réforme des collectivités territoriales.

15 Originally described as loi n° 2015-991 du 7 août 2015 portant nouvelle organisation territoriale de la République.

organization of local and regional authorities raise new challenges, including the distribution of fiscal resources between these different levels. On the other hand, the above mentioned reform also introduced a significant costs related to the structural changes, and a slight decline of the income of some territorial units. The *Cour des comptes* report also underlines, that structural changes affected the local finances and made them more complicated to manage than before. Also the local authorities do not have sufficient knowledge of the determinants of local taxation and sufficient support related also to the broad and quick access to central tax data (Cour des Comptes report, 2017: 18).

3 Selected Problems from the Point of View of the State

The *Cour des comptes* has published its fifth annual report on the financial position and management of regional authorities, where as usually, there were the problems analysed, not only from the point of view of local authorities but also from the point of view of the whole state of the French Republic. This report, intended for the Parliament and the Government, was produced not only by *Cour des comptes* but also in cooperation with regional courts of audit.

The perspective of the state given in the report is slightly different than the perspective of the local territorial units. It is sufficient to mention, that generally in 2016, the expenditures of local structures decreased by 1.1% while their revenues rose by 0.2%. For the second year in a row, they generated a financial surplus, which reached 4.2 billion Euros after 1.1 billion Euros in 2015. This reflects an improvement in their financial position if we analyze it from the state point of view (Cour des Comptes report, 2017: 19).

The main issue that was determined in the analyzed field by the *Cour des Comptes* were the constant changes in the financial position of the local authorities and lack of stabilization (legal certitude) in this field. Even though their general operating grants declined for the third year in a row and have been down 20% since 2013, the financial position of the three categories of local authorities improved sharply in the fiscal year 2016, with gross savings either stabilizing or improving. The management efforts that were observed from the position of the state have helped to slow (municipalities),

stabilize (departments) or reduce (regions) their operating expenses. Their financial position remains nonetheless precarious and quite disparate even within each category of local authority.

In 2017 the general financial constraints on the local authorities were considered as less severe, due mainly to strong tax revenues and notwithstanding a larger impact from new standards and procedures taking into account the technological and technical evolution. However, the evolution of legal framework related to the introduction of new technologies of communication at the level of local public finances should be continued and expanded. This goal can be achieved through a trio of actions affecting the institutional organization and technical support of local authorities, their management and their relationship with the central government focused mostly on the very fast and secured exchange of information.

As for the legal aspects of technological evolution, it is important to underline that by virtue of the Act of 21 June 2004[16], French law was adapted to this evolution, in particular by creating, under certain conditions, the principle of equivalence of the paper form and electronic record. This law was supplemented by Regulation no. 2005-674 of 16 June 2005[17] on the implementation of certain contractual formalities in electronic mode, providing important information on the conditions of use and the validity of e-mails for evidentiary purposes. This regulation also changed the French Postal and Electronic Communications Code, in which the above-mentioned legal acts introduced, among others, in art L-32 point 1 the definition of electronic communication. Finally, it was understood in the light of this law as any emission, transmission or reception of signs, signals, letters, images or sounds by electromagnetic means. In addition, the term of electronic means was described as any set of transmission and distribution installations or devices in the communications network and, if applicable, also other means guaranteeing electronic communication, including those related to switching and routing. Appropriate amendments to the French Civil

16 Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, J.O. n° 143 du 22 juin 2004 s. 11168.

17 L'ordonnance n° 2005-674 du 16. 05. 2005 relative à l'accomplissement de certaines formalités contractuelles par voie électronique.

Code were also introduced. In particular, it has been clarified that the electronic way can be used to provide contractual terms or information about goods or services[18].

The same legal aspects of electronic evolution were taken into account in Poland mostly by the novelization of the Civil Code of 10 July 2015[19]. This amendment of the Civil Code, introduced a new special form of performing legal transactions – a documentary form. The abovementioned institution intended to contribute to the improvement of legal activities, and its introduction was a response to the needs of the practice. The proposal of new legal definition of the document was first presented in the draft of the First Book of the Civil Code prepared by the Civil Law Codification Commission operating under the direction of prof. Zbigniew Radwański (Kocot, 2016: 7–8). Actually the Polish Civil Code defines a document as a carrier of information that allows to read its contents (Art. 773). The above definition is very wide and allows to include picture, sound or graphics in the document category. It does not matter, on what medium this information will be recorded and with what means (eg smartphone, computer, pen). This new definition was a very significant step in the process of adapting the new technologies by the legal framework, also in the field of public and local finances in Poland. Just to show the range of this amendment, it is sufficient to mention that before this, the definition of the document was given only in the Code of Civil Procedure, that distinguished official documents and private documents. In order to be recognized as any of the types of document, it had to be signed, unless the special rule provided otherwise. The amendment of 2015 not only does not require the document to be signed, but also provides that the content of the document can be stored on a medium other than paper. It is enough that the method saving the information will enable its preservation and further reproduction. Thus, the status of the document may be obtained by simple images, sounds, e-mails, text messages or computer files. The formulation of such a broad definition of the document corresponds to the needs of the practice

18 Additionally, in Art. 1369-2 of the Civil code, the legislator specified that information that is necessary to conclude or perform the contract may be sent by e-mail if the recipient has accepted the use of such a measure.

19 However, this regulation finally came into force the 8 September 2016.

and may be very useful for the development of the modern management of the public and local finances and services.

The main issue from the point of view of the state is to adapt the legal framework to the new technological possibilities[20].The reliability of local public accounts, the quality of the public accounts is a constitutional requirement not only for the local authorities but also for the central government. This is a particular point of concern for the regional and territorial courts during their audits, that are more and more focused on the digitalization of the public finances. If the accounts are not true and fair and the assets and liabilities are not fairly presented, it is difficult to assess the management performance, especially without using the new technical and technological knowledge. The report of *Cour des comptes* cites some possible improvements in this area concentrating mostly on the automatic calculation of the taxes, which may eliminate the risk of human error. However, this automatic calculation may be difficult to introduce if the construction of the taxes will be too complicated and if the calculation of this taxes will require every time the cooperation between the state and local territorial unit.

The main problem in introducing the full digitalization and automatic calculation of local taxes is related to a big importance of exemptions and reliefs in the local taxation. The more tax procedure is dependent and related to the individual situation of the tax payers the more difficult if will be to create an algorithm capable of calculating such a tax. Another point is related to the simplification and digitalization of the tax declarations, which should be compatible with the system responsible for auto-calculation of the given taxes. The special exemptions, exclusions or reliefs should not be a rule but only an exception that can be added manually to the automatically calculated level of the given tax. The legal and technical progress is the main problem for which the *Cour des comptes*, government and local authorities are responsible in the nearest future. It seems that the compatibility between the technical progress and level of informatization and Fin-Tech[21] in the private sector and in the public sector may be the most important factor for ensuring effectiveness of the local public finances.

20 Originally described in France as nouvelles Technologies d'information et de cummunication (NTIC).

21 Considered as innovative methods of conducting transactions associated with value management and to the technologies used and connected with the financial purpose.

4 Conclusion

Challenges and problems of local government finances in the light of the French *Cour des Comptes* reports are mostly related to the process of dematerialization, which is a response for the needs of quick and reliable exchange of information (Okolski, 2008: 575). In connection with the virtualization of economic life and the dissemination of the digital form of recording and transmission of information, marginalization of direct contact between contractors (Malarewicz-Jakubów, 2012: 439), legal regulations in most European countries, deviate from accenting the material carrier towards the appreciation of intangible information. The basis of the analog form of the document was the physical integrity of its carrier, while in relation to digital documents it became the logical integrity of content (Janowski, 2008: 160)

It has to be emphasised that the issues and challenges described in the framework of French law, only with reference to Polish legislation, may give rise to reflections on the content of Polish legislation, but it may also provide an impulse for further, more detailed analysis. The financial innovation, connected to the phenomenon of FinTech, has become a driving force in the transformation of the worldwide financial sector. Technological innovation is not only changing the economy, but also the law and its purpose. Technological changes are opening up both opportunities for financial institutions and serious challenges for the authorities at central end local level. To succeed, in the *Cour des Comptes* opinion, it is necessary to make a correct diagnosis of the current situation, specify the right goal, and then select proper tools to realize it. The government strategy, combined with the action of the local authorities should especially deal with the issue of the complexity of the local taxes, the management of the tax data, and organization of the system of the exchange of tax information between the local government units and the state. It will be also important to orientate the fiscal services into the performance organization, which thanks to the new technologies will allow to decrease the administrative and procedural costs of the tax authorities and tax procedure. (Cour des Comptes report, 2017: 8–9)

Coordinated actions related with legal and technological changes should be done in a way that will ensure a safety level of tax income, especially

at the local level. That is why this issue should be a subject of a long term evaluative strategy, which will provide a legal certitude not only to tax authorities but also for tax payers. The introduction of new technologies will allow the tax procedure and tax management not only to be cheaper, but also faster and more effective than it is today.

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BANK-DEPOSITARY'S LIABILITY TOWARDS THE INVESTMENT FUND PARTICIPANTS FOR THE IMPAIRMENT OF ITS ASSETS

Rafał Mroczkowski[1]

Abstract

Correct meeting of their duties by banks acting as depositaries of investment funds increase the investment security from the point of view of such funds participants, as well as the security of trading on the capital market.

Despite the fact that the general assessment of the depositaries' activity on the Polish capital market is positive, in isolated cases, doubts arise as to the proper fulfilling of their statutory duties. In such cases, the aspect of their liability towards the investment fund participants is analyzed.

In view of the above, the author assumed as the objective of this article the analysis of bases and scope of depositaries' liability towards the investment fund participants in the light of the Polish law for the damages incurred by them resulting from the impairment of investment fund assets.

The research conducted on the pages of this article is to verify the following thesis: The depositary's liability arises as a result of lack of activity required by the law (failure to perform statutory duties) or lack of due diligence justified by the professional and specialist nature of the activity conducted by it to fulfil the tasks entrusted to it. The structure of depositary's duties meant to "ensure an identified status" is not tantamount to accepting liability for the effect and requires maintaining due diligence in the implementation of the statutory and contractual competences. Maintaining due diligence required by the law in the given circumstances allows the depositary to be released from the liability for the damages incurred by the investment fund participants.

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The implementation of the research objective assumed in this article requires the application of legal methods, such as, in particular, general-theoretical approach and the formal-dogmatic approach.

As a result of the conducted analyses, the research thesis that had been put forward was positively verified. The depositary's liability is closely related to maintaining due diligence when performing its statutory and contractual duties. However, assuming the duties are correctly fulfilled, it is not liable for effects related to the impairment of investment fund's assets which are negative to the investment fund participants.

Keywords: Custodian; Bank; Investment Fund; Capital Market.

JEL Classification: G21 Banks; Depositary Institutions; Micro Finance Institutions; Mortgages.

1 Introduction

The last year's 25th anniversary of the investment funds activity in Poland[2] is a good starting point to undertake an analysis on the subject of investments security through investment funds. There is no doubt that both the investments funds essence based on the assumption of risk dispersion, as well as their legal structure that assumes they have a legal personality, at the same time entrusting their management to investment trusts acting in the form of joint-stock companies, contributed to ensuring a high level of investments security with the use of investment funds.

An additional factor that limits the risk connected to loss of assets or their faulty evaluation is to entrust custody over the investment funds assets to banks that act as depositaries. Since, from the point of view of investment funds participants, the participation of the depositary in the collective entity structure constitutes an institutional guarantee of the entrusted monetary funds security. Such guarantee function is fulfilled, in particular, by the high capital requirements for depositaries related to their liability for damages in relation to investment funds participants for the failure to perform or improper performance of their duties.

2 On 28 July 1992, the first ever investment fund was established in Poland. Its name was Pioneer Pierwszy Polski Fundusz Powierniczy [The First Polish Trust Fund Pioneer] (Pekao TFI, 2002: 1).

The depositaries activity assessment based on the effectiveness criterion measured by the degree of implementation of their statutory competences and their impact on the investments security through investment funds is positive. The research conducted by the author lead to the conclusion that, in general, the depositaries correctly fulfil their duties and contribute to the trading security growth on the capital market. However, isolated cases of investment funds liquidations as a result of faulty management leading to significant drop of such funds' assets value[3] force a question to be asked whether in such cases the control and supervision duties were correctly executed by the depositaries and whether they could be liable towards the investment funds participants.

The objective of this article is the analysis of bases and scope of depositaries' liability towards the investment fund participants in the light of the Polish law for the damages incurred by them resulting from the impairment of investment fund assets.

The research conducted within the framework of this analysis is to verify the following thesis: The depositary's liability arises as a result of lack of activity required by the law (failure to perform statutory duties) or lack of due diligence justified by the professional and specialist nature of the activity conducted by it. The structure of depositary's duties meant to "ensure an identified status" is not tantamount to accepting liability for the effect and requires maintaining due diligence in the implementation of the tasks. Maintaining due diligence required by the law in the given circumstances allows the depositary to be released from the liability for the damages incurred by the investment fund participants.

The implementation of the research objective assumed in this article requires the application of legal methods, such as, in particular, general-theoretical approach and the formal-dogmatic approach.

3 On the basis of the decision of 7 October 2014, the Polish Financial Supervision Authority (KNF) withdrew the Inventum Investment Fund's permit for conducting business activity. Because within the statutory period of 3 months since the day the decision was issued i.e. until 7 January 2015, the funds management was not taken over by another trust, on 8 January 2015 their liquidation was opened (KNF, 2014: 1). As a result of impairment of assets of both investment funds their participants incurred significant damages.

2 The Role of the Depositary in Ensuring the Protection of Investment Fund Participants' Interests

The depositary is a bank that performs specialized functions within the framework of collective investing through investment funds. Acting in the interest of such funds participants, it keeps a register of assets and performs other duties statutorily or contractually entrusted to it, in particular, of a control and supervision character. It holds an independent position both in relation to the investment fund, as well as the investment fund company, ensuring the correct performance of its duties. The depositary should be included in the group of entities with a special status of institutions of public trust. Its activity is subordinated to the public interest, which is to ensure the security of trading and observance of the principles of fair trading, and to the significant interest of the individuals, and thus the participants of the investment fund, expressed in the ensuring of investments security (Mroczkowski, 2007: 73).

As is signalled in the literature, entrusting the depositary with the custody over the investment fund assets ensures an additional level of investment fund participant protection. Its involvement limits the risk of loss of investment fund assets items (EAMA, 2002: 4), in particular, their misappropriation by persons having access to them, and also provides proper protection (i.e. physical and legal integrity) and competent management (IOSC, 2015: 3–4). At the same time, the empirical studies prove that depositaries in practice provide insufficient protection against assets evaluation errors. In addition, it is indicated that there is a possibility to increase the real level of investment fund participants protection against this type of risk. However, this requires expanding the scope of control and supervision operations on the basis of a deposit agreement, which in turn leads to the increase of fees for assets safekeeping. As far as the depositaries have the potential possibility to limit the risk of incurring damages by the investment funds participants for the errors in such funds' assets valuation, but the factual competences of depositaries in that scope pursuant to deposit agreements are in practice limited. In consequence this results in low level of protection (EAMA, 2002: 4–6).

The activity of banks – depositaries on the capital market in Poland is regulated by the act of 27 May 2004 on investment funds and management of alternative investment funds (i.e. Dziennik Ustaw of 2018, item 56, as amended), which is harmonized with the provisions of the Directive of the European Parliament and of the Council 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS V; EU Official Journal L 302, p. 32 as amended).

In Polish legislation, excessive capital requirements were applied to the banks performing the depositary function, referring to own funds at the level of at least PLN 100 000 000. Their high level is justified, first of all, by the risk of depositary's liability for damages, referred to in Art. 75 of the i.f.a., towards the fund and its participants, and in consequence, the need to ensure assets of an appropriate value, from which the claims for damages could be satisfied. The capital requirements for depositaries fulfil the guarantee function towards the investment fund participants. They ensure the possibility of effective execution of depositary's liability for damages incurred by the investment fund participants, resulting from the failure or improper performance of its statutory duties (i.f.a., Art. 75/1 in relation to Art. 72).

The legal regulation of the collective investment was based on the principle of separating the management function of TFI from the function of keeping the register of its assets held by the depositary, and on the principle of priority of the investment fund participants over the depositary's interest, expressed *explicite* in Art. 10 of the i.f.a. The principle of the investment fund participants' interest primacy assumes that in case a conflict of interests occurs between the fund participants and TFI or the depositary, the priority should be given to the former through ensuring a proper protection of the assets contributed by the participants. "The boundaries of the participants' interest protection are drawn by the fund investment objective, chosen investment policy and the related risk reduction principles" (Zawadzka, 2007: 112–113).

3 Control and Supervision Duties of the Depositary

3.1 Scope and Nature of Control and Supervision Duties

The scope of the depositary statutory duties is specified in Art. 72 of the i.f.a. On the basis of this provision, they can be classified into four categories:

- exercising custody duties over fund's assets,
- control and supervision operations,
- extraordinary competences connected to withdrawal or expiration of the permit for company's activity or the fund liquidation,
- executing the investment fund orders.

From the point of view of the depositary's liability for damages, of crucial importance will be to determine the character, subject-matter and scope of control and supervision operations indicated in Art. 72 para. 1 subparas 3–8 of the i.f.a. Control and supervision competences of the depositary, due to their objective in the form of investment fund participant's interest protection and trading security, have the nature of public-law duties. Their essence is to "ensure" the compliance of identified fund operations with the criteria indicated in Art. 72 para. 1 subparas. 3–8 and 10 of the i.f.a. (Mroczkowski, 2014: 338). The structure assumed by the legislator based on the term "to ensure" means not only the order for the depositary to undertake certain control and supervision operations identified in the content of the aforementioned provisions, but also to exercise due diligence when performing them. Further analysis on the basis of Art. 75 para. 1 of the i.f.a. leads to the conclusion that the depositary is liable for damages that arose as a result of its failure to fulfil its statutory duties, including those based on the "to ensure" construct. Its liability is, therefore, so far-reaching that it is updated in the situation when the legal or factual status indicated in the content of Art. 72 para. 1 subparas. 3–8 of the i.f.a. is not achieved, and at the same time, the depositary shall not evidence due diligence justified by the professional character of the operations undertaken by it.

The determination of the type of control exercised by the depositary requires the analysis of Art. 72 para. 3 of the i.f.a. This provision has been defectively worded and its linguistic interpretation may lead to misleading conclusions. Since, as far as the hypothesis points to the fund operations,

which from the point of view of the supervisor has already taken place and are subjected by them to *ex post* assessment, but when it comes to the order, there is an instruction formulated for the depositary to supervise the compliance of those operations with the law and the fund's articles of association. However, it is impossible to make any operations that have already been performed comply with any of the criterion which they had not met at the time of their performance. It should be presumed that the legislator's intention was to impose on the depositary the duty to supervise the undertaking of actions leading to correct the "status created as a result of operations performed by the fund by bringing it to compliance with the law", possibly, also undertaking steps to counteract such violations in the future (Michalski, 1999: 324). The expression "at least" in the context of the identified control and supervision operations indicates that the depositary is ordered to at least perform the duty of a follow-up audit, which does not exclude the possibility of conducting a prior audit (before specified investment operations are conducted) or factual audit (during the execution of investment decisions) in justified cases. However, a clear cut boundary of the supervision intervention is determined by the division of company's functions as a fund management body and the depositary. The latter should carry out its duties in a manner that does not infringe the legally specified division of competences between those two entities (Dyl, 1998: 7; Dyl, 2001: 107). It cannot, therefore, interfere with the investment decisions made by TFI or the company managing the assets, but it has the duty to constantly control over such operations, inform about the detected irregularities and supervise the actions leading to removal of their negative effects and counteracting them in the future.

The control and supervision function of the depositary is executed through constant (i.e. current and systematic) control of factual and legal operations carried out by the fund. Its effective execution, since there is no statutory authorization in the scope of entrance to premises and view of documentation and data carriers, requires the depositary to guarantee themselves such authorizations in the agreement on carrying out the depositary's functions.

Despite the wide subjective scope of the control exercised by the depositary, it has not been granted any statutory powers to use supervision means

sensu stricto, which does not exclude the possibility to guarantee them within the agreement on the performance of depositary's duties, and also the application of the extra-statutory, so-called "soft" means of influence on TFI or a management company. Thus, lack of statutory competences in the scope of execution of supervisory means, does not prejudge about the lack of possibility for the depositary to effectively act in case irregularities in the fund's activity are detected. Irrespective of the above identified possibilities, the depositary can use two means that initiate proceedings before competent authorities in the form of:

- a civil court action on behalf of the fund participants against the company or management company (i.f.a., Art. 72a) and
- notifying the Supervision Authority of cases of the fund violating the law or improper consideration of the fund participants' interest (i.f.a., Art. 231).

3.2 The Agreement on Performing the Depositary Functions as the Source of Control and Supervision Duties

In order to ensure the proper performance of depositary's statutory duties, the agreement with the investment fund can and should provide for the depositary's extra-statutory duties, in particular the control and supervision duties, and also identify the manner of performing such duties (Art. 74, para. 1 of the i.f.a.). In the current wording of the cited provisions, it is indicated that the agreement specifies also the rules for information exchange between the investment fund and the depositary, necessary for the depositary to perform its duties. However, also in the previous legal state, it was assumed in the doctrine that the parties concluding the agreement on keeping the register of assets should strive to determine the contractual relations, which on the one hand would allow the depositary to perform its duties, in particular, those control and supervision ones, and on the other hand, would not violate the division of competences between it and TFI specified in the act (Dyl, 1998: 6; Chłopecki, 2003: 190). It is postulated in the literature that the agreement – on the depositary's duties – contained not only the *naturalia negotii* and *accidentialia negotii*, but also provided for the forms of statutory duties performance, indicated in Art. 72 para. 1 of the i.f.a. (Mroczkowski, 2014: 345).

This means that the depositary as an entity providing professional deposit services on the financial market, should ensure in the agreement content such a scope of its competences and control and supervision procedures and the correlated information duties of the investment fund so that – acting in the interest of the investment fund participants – it could execute the objective, for which it was employed i.e. ensure security of the deposited assets. It is the depositary's obligation to formulate the agreement's content in such a way so that during its execution it had the control and supervision competences, procedures and instruments adequate to the scope of statutory tasks. The depositary cannot justify itself by the lack of sufficient control and supervision competences or instruments for their effective performance within the agreement with the fund. The responsibility for such faulty formulation of the agreement is borne in full by the depositary as the financial institution providing professional depositary services (Art. 9 para. 2 of the i.f.a.).

3.3 Duties in the Scope of Control of the Investment Activity of the Investment Fund

Pursuant to Art. 72 para. 1 subpara. 8 of the i.f.a, the depositaries duties under the deposit agreement include ensuring that the investment fund income was used in compliance with legal provisions and the investment fund's articles of association. Analysing the statutory bases for the investment activity of the fund, it should be pointed out that the provisions of the i.f.a. regulated in detail the principles of OIF investment policy in the scope of allowable deposits and investment limitations.

The selection of specified financial instruments to the OFI portfolio should take place with the application of limitations provided for in the laws and the articles of association. As for the former, it should be indicated that the provisions specify their closed catalogue of securities and other instruments, in which OFI can invest its assets. Additionally, the OFI freedom in the scope of conducting the investment policy is limited by the subjective and subjective-objective bans referring to the investment activity. The objective of such regulations is to explicitly exclude from the investment funds investment spectrum of the transactions that could result in excessive investment risk (subjective bans), as well as, to limit the freedom to contract

them with regard to conclusion of agreements, the subject-matter of which are the property rights indicated in the act, with the entities specified therein (subjective and objective bans) and which could give rise to a conflict of interest (Borowski, 2014: 430). Such investment limitations are provided for in Art. 107 of the i.f.a. This provision provides, among others, a relative ban on investing the fund's assets in securities and receivables of the company that is the body of the fund or management company, which manages that company and conducts its affairs, the affairs of its shareholders and the entities which are the parent undertakings or subsidiaries to that company or the management company or their shareholders. The importance of that ban is significant in the face of the catalogue of legal actions contained in Art. 106 para. 1, which – despite established contrary to the Act – were considered valid by the legislator, it should be assumed that legal actions carried out in breach of limitations specified in Art. 107 are invalid (the Supreme Administrative Court (NSA): II GSK 756/09/2012).

Moreover, the method of deposits selection should fulfil the statutory criteria; their acquisition is in compliance with the investment objectives and investment policy of the fund, and the resultant investment risk is adequately included in the fund's investment risk management process (i.f.a., Art. 93).

Here it is worth mentioning the above mentioned principle of division of depositary's and TFI functions. The duties connected to the management of fund assets, in compliance with Art. 4 of the i.f.a., rest on the entity managing the TFI fund, which performs them independently of the depositary (Art. 10 of the i.f.a.). Whereas, in accordance with Art. 9 para. 1 in relation to Art. 72 para. 1 subpara. 8 of the i.f.a. the depositary's duties include exercising control over the correctness of the use of fund's income. Because the depositary's control and supervision operations cannot interfere too deeply with the fund's investment activity, the provision that establishes this duty should be interpreted that the liability for the investment decisions is borne by the company, and the depositary is liable for failure to exercise due diligence when controlling those decisions (Michalski, 1999: 327).

As part of the consideration concerning the scope of depositary's control duties, the meaning of the concept of "fund's income" should be established. There are the positive results of the depositary activity that constitute

the difference between the revenues from the sale of securities and other deposits and the costs of their acquisition, and also the gained interest, dividends and other income. Thus, a question arises whether the depositary's control competences scope is limited only to the manner of using income, not including the fund's assets obtained from the means coming from the investment fund participants? With the current legal status, the answer is unequivocally negative. This is determined by the content of Art. 72 para. 1 subpara. 10 of the i.f.a. which expands the scope of depositary's control duties of the verification of the compliance of the investment fund's activities with the laws regulating the activity of the investment fund or the provisions of the articles of association in a scope other than that specified in subparagraphs 5–8 and taking into account the participants' interest. However, even in the previous legal state[4] an expanded interpretation should have been used of Art. 72 para. 1 subpara. 5 of the i.f.a. It is *prima facie* worth indicating that there are no arguments in favour of granting depositaries control competences exclusively with regard to fund's income and not with regard to assets purchased from means coming from the fund participants. This would be in conflict with the statutory objectives of the investment fund supervision, and in particular, with ensuring the investments security. There are also no economic arguments for subjecting the investments income to more stringent legal protection regime than the means intended by the investment fund participants for investments. The main investor's objective, finding its expression at least in the content of § 8 of the Fund's Articles of Association, is the protection of investment value. So if the level of means protection is to be differentiated, the primacy should be given to investment protection. Because, the loss of part of the invested capital is for the investor more painful than the loss of even entire income from the investment. The broad interpretation of Art. 72 para. 1 subpara 8 of the i.f.a. is supported also by the practical arguments. Income achieved by the investment fund increases its assets. After several years of the fund's activity and multiple reinvesting, it is impossible to determine which securities in particular were purchased from the means obtained from the fund participants, and which of the generated income. Therefore, it results

4 I.e. before adding to Art. 72, para. 1, subpara 10.

clearly, both from the systemic, as well as functional analysis, that both categories of income should be covered by a uniform protection regime, and the depositary's control and supervision competences extend to the correctness of the use of all investment fund assets in compliance with the rules specified in the provisions of law and the Articles of Association.

The control over the manner the fund's income (assets) are used included in the depositary's scope of duties, should be carried out in the context of the objectives, for which, in accordance to the provisions of the act and the articles of association, the investment fund income (assets) can be used. They should be used mainly for investments, thus, for acquiring new assets items by the fund. Bearing in mind the criteria for depositary's supervision, it should be assumed that the depositary should control whether the fund investments are made into deposits allowable for a given type of fund by law and the articles of association, and also whether the investment limitations are observed (Mroczkowski, 2014: 340–342).

In order to ensure proper performance of such duties, the depositary should secure in the Deposit agreement the appropriate rights, procedures and instruments and the corresponding fund's duties. Therefore, this agreement should, in particular, impose on the fund represented by TFI the following duties:

- maintaining and updating the list of issuers, whose securities are covered by an investment ban specified in Art. 107 para. 2 subpara. 1 of the i.f.a.,
- providing the depositary with that list and informing them about the changes in the list of entities covered by the investment ban,
- informing the depositary about any cases of investments into securities or receivables indicated in Art. 107 para. 2 subpara 1 of the i.f.a. with the statement of occurrence of any prerequisites specified in para. 5 of the aforementioned provision that exclude the investment ban.

3.4 Depositary's Duties Related to Fund's Assets Valuation

Despite the valuation of assets is one of the fund's tasks (Art. 8 of the i.f.a.), executed by TFI pursuant to Art. 72 para. 1 subpara. 7) of the i.f.a., the legislator has imposed on the depositary an obligation to ensure that

the investment fund assets net value and the value of the unit of participation was calculated in compliance with the provisions of law and the investment fund articles of association. In order to fulfil this obligation, the depositary should undertake contractually to maintain the fund documentation in the scope necessary for independent determination of assets net value and net assets per unit of participation, and the fund, in turn, should oblige itself to provide the missing information, in particular with regard to the number of units of participation on the day of valuation. Only after both entities have made their independent valuations of fund assets, the obtained results should be compared. In case discrepancies are found in the independently established assets value, the depositary is obliged to inform the investment fund about this. Next, both interested entities should determine the causes of the situation, specify the correct fund's assets value and undertake actions to counteract such events in the future (Pochmara, 2003: 120). When fulfilling the duty of parallel valuation, the depositary should apply the above mentioned accounting principles and the models and methods applied by the fund, and in particular should:

- valuate the fund's assets according to the reliably estimated fair value,
- take into account the assets impairment during valuation.

Pursuant to § 23 para. 2 of the r.i.f.a., the fund's assets are valuated, and the fund's liabilities determined according to the reliably estimated fair value, subject to § 25 para. 1 subpara 1 and § 26–28 of this regulation. The fair value is understood as the value referred to in Art. 28 para. 6 of the accounting act (§ 2 subpara 20 of the r.i.f.a.). In compliance with the aforementioned provision, the fair value is considered to be the amount for which a given assets item could be exchanged, and the liability settled according to the market transaction conditions, between the interested and the knowledgeable, unrelated parties. The fair value of financial instruments traded on the active market, is constituted by the market price less the costs related to the conducting of transactions, if their amount was significant. The market price of financial assets possessed by the entity and the financial liabilities, which the entity intends to incur, is constituted by the current offer for purchase on the market, whereas, the market price of financial assets, which the entity intends to acquire and the incurred financial liabilities is constituted

by the current offer for sale on the market. Value of items not quoted on the active market (§ 25 par. 1 subpara. 1 of the r.i.f.a.):

- debt securities, in particular bonds, is determined according to the adjusted purchase price, estimated with the application of effective interest rate, however, the effect of such deposit items valuation is included, respectively, in the interest income or fund interest costs;
- other deposits' items is determined according to the fair value fulfilling the reliability requirements specified in § 30 of the r.i.f.a.

Pursuant to Art. 28 par. 8a of the a.a., the adjusted purchase price of financial assets and financial liabilities is the purchase price (value), at which the item of financial assets or financial liabilities was first introduced in the accounting books, less the payments of nominal value, adequately adjusted of the cumulative discounted amount of the difference between the item initial value and its value at maturity, calculated with the application of effective interest rate, and also reduced of the revaluation adjustments. Such adjustments are made, in particular, in case of assets impairment in the understanding of Art. 28 para. 7 of the a.a. Pursuant to the aforementioned provision, the assets impairment takes place when there is high likelihood that the assets item controlled by the entity will not bring the economic benefits anticipated in significant part or in full in the future. In case of corporate bonds, such benefits are the future interest and the return of nominal value as a result of bonds redemption. The assets impairment justifies the reevaluation adjustments that bring the assets item value resulting from the accounting books to the net sale price, and in case there is none – to the fair value specified in another way. Bearing in mind the above, the depositary's duties include ensuring that the Fund carries reevaluation adjustments of the possessed assets, including bonds, in case of assets impairment, i.e. when there is high likelihood that the assets item controlled by the fund will not bring the economic benefits anticipated in significant part or in full in the future.

Additionally, it should be pointed out that the aforementioned provision § 30 of the r.i.f.a. imposes on TFI, which manages the fund, that it assumed appropriate models and methods of fund's deposits valuation, and next, agreed them with the fund's depositary. Therefore, the depositary's duties

include the control over the compliance of deposits valuation models and methods, referred to in § 30 para. 2 of the r.i.f.a.

When carrying out its duties, the depositary should use the information and data provided by the fund, in particular those concerning the assessment of creditworthiness of financial instruments issuers. The depositary failure to perform its control and supervision duties identified in Art. 72 para. 1 subpara. 4 of the i.f.a. or § 30 para. 2 of the r.i.f.a., constitutes the prerequisite for its liability pursuant to Art. 75 of the i.f.a.

As has been evidenced above, the depositary as an entity providing professional deposit services, should ensure in the agreement content such a scope of its competences and control and supervision procedures and the correlated information duties of the investment fund so as to ensure security of the deposited assets. The depositary cannot justify itself by the lack of sufficient control and supervision competences or instruments for their effective performance within the agreement with the fund.

3.5 Duties in the Scope of Initiating Administrative Supervision and Judicial Review

There is no doubt that in the light of Art. 72a of the i.f.a. and Art. 231 of the i.f.a., the depositary has the duty to constantly and continuously verify whether in the course of fund management or its representation there are no cases of non-performance or improper performance of TFI or the management company duties to the detriment of the fund's participants. In case such information is obtained, the depositary, apart from the operations directed towards TFI, is obliged to initiate:

- a civil court action on behalf of the fund participants against the association or the management company and
- administrative proceedings through notifying the Supervision Authority of cases of the fund violating the law or improper consideration of the fund participants' interest.

Pursuant to Art. 72a of the i.f.a. the depositary is obliged to bring an action against the company for the damages caused by non-performance or improper performance of duties in the scope of fund management and its representation, for the benefit of the fund participants. However, in case

the investment fund is managed and its affairs are conducted by a management company or a management body from the EU - against that entity. It is important that the depositary brings an action exclusively on the request of a participant or participants of the investment fund. If the depositary finds there are no grounds for bringing an action, it is obliged to notify the participant about this, no later than within three weeks from the day the request is submitted by the participant.

Pursuant to the previous wording of Art. 231 of the i.f.a., the depositary was obliged to promptly notify the Authority that the fund's activity violates the law or does not properly take into account the fund participants interest. Such information should have been submitted to the Authority in accordance with a procedure specified in provisions pursuant to Art. 55 para. 1 of the act on capital market supervision.

In the light of the aforementioned provisions, undertaking the above mentioned actions intended to secure the legal and economic interest of the investment fund participant is not only the depositary's right, but also an obligation (Mroczkowski, 2014: 342).

Failure to fulfil such obligations by the depositary is directly detrimental to the investment fund participants' interest, limiting the possibility:

- of the investment fund participants in the scope of effective pursuing and enforcement of claims, in case the TFI assets, and in particular its funds, allow the covering of such claims.
- Of the KNF in the scope of effective performance of the administrative supervision and interventions with the help of supervision instruments used in the initial phase of the violation of provisions of law and investment fund articles of association, when the scope of possible damages incurred by the fund participants is still limited.

4 The Bases and Scope of Depositary's Liability Towards Investment Fund Participants

4.1 Positive and Negative Prerequisites of the Depositary's Liability

The connection of the provision of Art. 75 of the i.f.a. that constitutes the basis for the depositary's liability for damages and Art. 71 para. 2 subpara. 1

of the i.f.a. that specifies the capital requirements for the depositary, leads to the conclusion that the depositary's liability towards the investment fund participants is of guarantee nature. Its objective is to secure the possibility of compensating the damage to the investment fund participants assets as a result of fund operation with the violation of provisions of the law and investment fund articles of association, without due diligence in performing the control and supervision duties by the depositary.

Since pursuant to Art. 75 of the i.f.a., the prerequisite of the depositary's liability is the non-performance or improper performance of its statutory duties specified in Art. 72 para. 1 and Art. 72a of the i.f.a. It is, therefore, related to the lack of activity required by the law (act of omission) or lack of due diligence justified by the professional and specialist nature of the activity conducted by them. As is underlined in the doctrine, the structure of duties meant "to ensure" is not tantamount to accepting liability for the effect and requires maintaining due diligence in the implementation of the tasks. Since the prerequisite for the depositary's liability, both in the administrative, as well as civil law terms, is the non-performance or improper performance of its duties (Mroczkowski, 2014: 346).

The depositary may be, therefore, released from the liability if it evidences that despite the condition determined in Art. 72 paras. 1 and 5 of the i.f.a. was not achieved, it had undertaken every actions required by the law and the circumstance of a particular case to secure the investment fund participants interest, and in particular:

- secured within the content of the agreement on the performance of depositary's duties adequate control competences and correlated information obligations of the fund, necessary for the proper execution of control,
- in time detected irregularities in the course of control operations,
- promptly notified TFI about the existing irregularities,
- promptly fulfilled the informational obligation towards KNF and cooperated with the supervisor on the control and supervision activities,
- supervised the restoration of the factual status to the status of compliance with the provisions of law and investment fund's articles of association,

- in case of a damage incurred by the investment fund participants, brought a civil action against TFI.

Failure to perform any of the above mentioned actions, especially, if this prompted the occurrence of the damage or enlarged it, prejudges the lack of due diligence in performing the depositary' duties and justifies its liability for damages towards the investment fund participants. Moreover, it should be indicated that in accordance with the distribution of the burden of proof specified in Art. 6 c.c., the burden of proof for circumstances justifying the depositary's exculpation of liability is borne by the depositary itself. Failure by the depositary to provide evidence of due performance of its statutory duties has negative procedural consequences for it, including recognition of the legitimacy of the compensation claim.

It should be pointed out that pursuant to Art. 9 para. 2 of the i.f.a., the depositary as a professional financial institution, is obliged when performing its duties to act in a diligent manner, observing the highest diligence resulting from the professional nature of the conducted activity, as well as in accordance with the principles of fair trading. These are the statutory criteria that increase the level of diligence, as a criterion for assessing the depositary's activity correctness.

4.2 Scope and Type of Depositary's Liability

The scope of depositary's liability was determined broadly, and at the same time, symmetrically to the degree of public trust that the depositary was endowed with in relation to the duties performed by it. Since, it is responsible for any damages to the investment fund assets, and indirectly through the net assets per unit of participation – to the assets of this fund participants. The depositary's liability cannot be excluded or limited in the agreement on keeping the fund's assets register.

The depositary's civil law liability is of dual nature. With reference to the fund it takes on the form of a contractual liability (*ex contracto*) pursuant to Art. 471 of the c.c., whereas, towards its participants – the delictual liability (*ex delicto*) pursuant to Art. 415 of th c.c. (Michalski, 1999: 330–332; a dissimilar opinion is expressed by Chłopecki, 1994: 30). Such nature of the depositary's liability is *explicite* indicated in Art. 34 of the UCITS IV directive,

pursuant to which the depositary is liable, under the national law of the member state of the investment company (investment fund), towards the investment company and the unit holders, for any losses incurred by them as a result of unjustified non-performance of its duties or their improper performance.

5 Conclusion

Ratio legis of entrusting to the bank performing the function of a depositary the duties related to safe-keeping of assets of an investment fund, keeping a register and monitoring the cash flow within the framework of collective investment is to ensure the safety of the assets entrusted to the investment fund by its participants. The statutory catalogue of the depositary's duties specified in Art. 72 of the i.f.a. Describes the minimal scope of the control and supervision competences which ensure the realization of the aim indicated above. Nevertheless, it is crucial to include in the Deposit Agreement the extended, relative to the model, statutory catalogue of the control means and procedures of the depositary, as well as the related informational duties of the investment fund. (i.f.a., Art. 74). It should be noted that the effectiveness of the control and supervision duties of the depositary is dependent on the correct construction of the said agreement. In addition, it is the responsibility of the bank performing the function to ensure that the rights to control and access the appropriate information and documents of the investment fund are included in the agreement.

The described here analysis of the depositaries' liability to the participants of investment funds due to the damages resulting from the impairment of the assets of the investment fund showed that the initial research postulate was true.

It is undeniable that non-performance or improper performance of the depositary's control and supervision duties within the scope of control of the investment activity of the IF, valuation of its assets, as well as duties related to initiation of the administrative supervision or judicial review are the reasons for the depositary's liability in the mode defined in Art. 75 of the i.f.a. What is more, the assessment of the correctness of the performance of the depositary's duties should be carried out using an objective measure

which is the highest level of the diligence and care resulting from the character of conducted activity (i.f.a., Art. 9 para. 2).

Simultaneously, it must be stated that the construction of the depositary's duties meant to ensure an identified status, e.g. a proper valuation of the assets is not tantamount to accepting liability for the effect and requires maintaining due diligence in the implementation of the tasks. Consequently, maintaining due diligence required by the law in the given circumstances allows the depositary to be released from the liability for the damages incurred by the investment fund participants. This means that assuming the duties, both statutory and contractual, are correctly fulfilled, it is not liable for effects related to the impairment of investment fund's assets which are negative to the investment fund participants, regardless whether it was caused by the market factors or due to the mistakes in management of the investment fund.

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List of abbreviations

i.f.a. – the Act of 27 August 2004 On Investment Funds And Alternative Investment Fund Management (i.e. Dziennik Ustaw of 2018, item 56 as amended) in the wording applicable within the period in which the damage covered by the Principal's claim occurred (January 2010–March 2013).

c.c. – the Act of 23 April 1964 the Civil Code (i.e. Dziennik Ustaw of 2017, item 459 as amended)

r.i.f.a. – the Regulation of the Minister of Finance of 24 December 2007 on the special principles of investment funds accounting (Dziennik Ustaw of 2007, item 1859)

a.a. – the Accounting Act of 29 September 1994 (i.e. Dziennik Ustaw of 2017, item 2342 as amended).

UCITS V directive – the Directive of the European Parliament and of the Council 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (EU Official Journal L 302 of 17 November 2009, p. 32, as amended)

IF – Investment Fund

SOIF – Specialized Open-end Investment Fund

TFI – Investment Funds Association

Deposit Agreement – agreement on performing depositary's duties, referred to in Art. 71 of the i.f.a.

FINANCING OF ELECTIONS THROUGH REGIONAL SELF-GOVERNING UNITS

Nikol Nevečeřalová [1], *Tereza Čejková* [2]

Abstract

In this paper, the authors will focus on the way in which are financed elections organizes by municipal units in the Czech Republic. Given that there are many legal provisions that are relevant to the financing of elections. By deductive method we will analyse which expenditure the election organizer is entitled to be covered from the state budget. The paper attempts to confirm or refute the hypothesis whether there are any relevant criteria that individual expenditures incurred in connection with the elections must be met in order to be covered by a subsidy from state budget or not, as its main aim.

Keywords: Financing of Elections; Administrative Bodies; State Budget.

JEL Classification: H2, H5, H6, H7.

1 Introduction

Organizing elections to any of the state institutions is a very costly matter that requires detailed legal regulation. This topic includes a wide range of legal regulations and institutes. Since the general interest in their smooth course is obvious, their funding is an important component of regulation. Although there has been no major crack in the legal regulation in the last couple of years, the way to achieve clarity and clear division of competences was not easy. In this paper, the authors will analyse selected case law of the Supreme Administrative Court of the Czech Republic, which dealt with issues of financing the elections. There will be analysed relevant legislation

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as well as essential tasks of administrative bodies, especially what expenditures and under what conditions can be covered by the state budget.

Budgetary law is one of the most important subsections of financial law. The main aim of budgetary law is regulation of relationships between recipients, who have right to apply for a financial contribution from state budget, rules about redistribution and how to use financial resources. These funds are used in connection with the principle of economy and purposefulness of goods, which is needed especially to ensure the existence of the state and its apparatus. These funds are obtained from public budgets.

The state budget is a policy document that has the task of allocating the fiscal means obtained to meet the objectives set by the state policy. (Steiss, Cyprian Nwagwu, 2001)

One of the expenditures with which the state's budgetary policy must calculate election expenditures. The problems arise as to the assessment of which expenditures can be considered as State budget expenditures.

Besides analysing the legal regulation and selected case law, a comparative method will be used to create a review of the competences of some administrative bodies, and the synthesis of the conclusions will attempt to confirm or refute the hypothesis set out in the annotation of this contribution.

2 Financing of Parliamentary Elections

As part of elections to the Parliament of the Czech Republic, to regional and municipal councils, individual units organizing the elections have right to apply for a financial contribution from state budget. Such contribution is intended to cover expenditures necessarily incurred during the elections. These expenditures are expended to satisfy and settle obligations imposed by relevant laws, ie the Act on Elections to the Parliament of the Czech Republic, the Act on Elections to Municipal Councils, the Act on Elections to Councils of the Regions. In order to be the expenditures related to the election reasonably incurred costs, ie they shall cumulatively fulfil the conditions of necessity and proportionality.

In view of the assessment of what expenditures covered by the state budget will have to be spent on elections, we can find its regulation in the electoral laws, ie § 84 of Act no. 247/1995 Coll., On Elections to the Parliament

of the Czech Republic, in § 63 of the Constitution. C. 130/2000 Coll., On elections to the regional council and in § 69 of Act no. 491/2001 Coll., On elections to municipal council, § 66 of Act no. 62/2003 Coll., On elections to the European Parliament. Although individual provisions are characterized by certain differences, they all conjoin the fact that these expenditures are covered by the state budget.

The regulation of the financing of elections to the municipal council, regions and the Parliament of the Czech Republic is covered by the Ministry of Finance directive 124/1354/2002[3] (here and after "MF Directive"), which contains an exhaustive list of expenditures covered by the state budget.[4]

This directive has been issued by the Ministry of Finance as an internal regulation, it can bind subordinated bodies in hierarchical order to ensuring and fulfilling their tasks and obligations. (Boguszak, Čapek, 1997: 74) Their competence to issue such a regulation results from § 24 of the Act on the Establishment of Ministries and Other Central Authorities of the Czech Government. However, the Ministry of Finance, as an internal regulation, will not be legally binding for courts. This conclusion results from the principle of independence of the judiciary power.[5]

2.1 Substantially Decision of the Supreme Administrative Court, f.l. 5 Afs 43/2013 of 29 November 2013[6] and General Principles Entitled To The Subsidy From The State Budget

A municipality as a plaintiff (here and after "plaintiff") claimed reimbursement of costs of the elections, which were not included in the exhaustive list of the MF Directive, but the plaintiff was convinced that the costs were spent effectively.

This decision in question was concerned with the assessment of which costs are or are not necessary required to organize the elections according to the electoral laws, so which expenditures are covered by the state budget.

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3 See the Ministry of Finance Directive of 12 February 2002 no. 124/1354/2002 regulating the procedure of municipalities, regions and district authorities in financing elections to the municipal councils, regions and the Parliament of the Czech Republic.

4 See Art. 1 par. 3 above mentioned Directive of the Ministry of Finance.

5 Cf. Article 82 of the Constitution of the Czech Republic.

6 From a database of the Supreme Administrative Court. Available at: http://www.sbirka.nssoud.cz

The expenditures claimed by the plaintiff were incurred in connection with the elections to the Chamber of Deputies and included the costs such as press or a cork notice boards.

The press presented information on the holding of the elections and, at the same time, the ballot papers, was posted on cork bulletin boards. By this means were met legal obligations to place relevant electoral information on a publicly accessible place.

In its assessment, the Regional Court stated that the expenditures are expended effectively, in particular with regard to citizens' awareness, but these are expenses not mentioned in the MF Directive and, as a result, they are not entitled to reimbursement.

The matter was dealt by the Regional court with stating that the MF Directive is primarily binding to regional authorities which, in the exercise of delegated competence, which shall provide subsidies to municipal budgets.[7] In its content, the directive specifies the procedure of municipalities, regions and district authorities in financing elections with objectives to be economically managed by funds of the state budget. The Region is the recipient of a subsidy from the state budget from which the costs incurred must be paid, so the municipality, by exercising the delegated power, has the right to claim the expenses incurred in the exercise of the election.

In decision of The Regional Court, it has concluded that it is possible to cover by the state budget only the expenditures mentioned in the MF Directive and to reimburse the costs incurred by the state budget in connection with the organization of the elections.

The Supreme Administrative Court found the conclusion of the Regional Court to be too formalistic, because of the problem of correct assessment of the matter. In order to avoid other misconceptions, it has created (so-called) general criteria. *"The expenditure is connected with fulfilment of the obligation imposed by the respective electoral law on the administrative authorities and electoral bodies in connection with the elections. Another criterion is the necessity of such expenditures and their adequacy (in terms of price), ie the criteria that monitor the economic*

7 Cf. Art. 19 (2) of Act no. 218/2000 Coll., On Budgetary Rules and on Amendments to Certain Related Acts (Budgetary Rules) with Section 30 b) of Act no. 129/2000 Coll., on Regions.

performance of the administrative authorities and the electoral authorities."[8] If these general criteria are met, the cost is entitlement to subsidy from the state budget.

2.2 Evaluation

This decision brought out an extension of the list of costs related to the technical and administrative organization of the elections. Above all, the Supreme Administrative Court set the main rules that must be met by the expenditures associated with performance and provision of elections by the municipal units in order to be eligible for cover from the state budget.[9]

The result should be prevention of situations, when a Regional Court made too formalistic interpretation of the MF Directive. The Supreme Administrative Court responded to this formalistic approach by creating general principles.

It has also been clarified that it is the task of the Ministry of the Interior to ensure the organization and fulfilment of tasks in the hierarchy of administrative bodies, a relevant internal regulation of the Ministry of Finance will also be binding to specific municipal units, if stipulated by the law.

3 Financing of Elections to the European Parliament

This chapter will focus on the financing of elections to the European Parliament. These are regularly organized by the municipalities, on which is imposed number of obligations in this respect by the Law on elections to the European Parliament.[10] This law also stipulates that the organization of elections is realization of the public administration, it shall thus be paid from the state budget in the form of a special subsidy within the meaning

8 See Decision of the Supreme Administrative Court, f.l. 5 Afs 43/2013 of 29 November 2013. Available at: http://www.sbirka.nssoud.cz

9 At the same time, it should be emphasized that, according to § 66 of the European Parliament Elections, the funds from the state budget of territorial self-governing units must fully cover the expenses connected with the election. On Municipalities and Section 29 (2) 129/2000 Coll., On the Regions according to which municipalities and regions are provided from the state budget for the performance of delegated tasks only a contribution which does not have to cover completely the costs related to the performance of the delegated activity compare the Finding of the Constitutional Judgment from 5. 2. 2003, file no. PI. ÚS 34/02, no. 53/2003 Coll.).

10 Cf. Act no. 62/2003 Coll., On Elections to the European Parliament, as amended.

of § 3 letter a) of Act no. 218/2000 Coll., on Budgetary Rules, as amended. However, the process of raising funds itself was clarified only eight years after the effectiveness of this Law.

3.1 Conditions of Use or Not of the Administrative Procedure Code

The legislation did not specify when and how the municipalities, as the organizers of the elections, asked for a subsidy to be paid to them until 2013. Its clarification was brought out by the decision of the Supreme Administrative Court, f.l. 5 Ans 7/2011 of 29 November 2012.[11] The problem arose during the second European Parliament elections that took place in the Czech Republic. In 2010, a municipality as a plaintiff (here and after 'the plaintiff') filed a lawsuit against the Regional Office (here and after 'the defendant') for rejecting required reimbursement of the costs incurred to the plaintiff in fulfilling its electoral duties. The plaintiff claimed that he was entitled to the reimbursement of amount spent to meet the statutory duty of the Mayor of the plaintiff to disclose important information on the conduct of elections by usual means,[12] in this case the local press. The defendant did not accept these costs without having issued a decision under the Administrative Procedure Code.[13]

The Regional Court stated that, in the case of granting of subsidies to territorial self-governing units, it is necessary to submit an application to the respective grant provider. In this case, the Ministry of the Interior first submitted the application to the Ministry of Finance, and then the subsidies were provided through Reginal Offices. The Court thus came to the conclusion that the provider of the grant in question is the Ministry of Finance, not the defendant. The Court also took the view that, according to Article 14 (4) of the Law on Budgetary Provisions, the Administrative Procedure Code was not applicable to the decision to grant a subsidy, therefore the defendant did not fail to issue a decision because he was not entitled to decide on the matter.

11 See Decision of the Supreme Administrative Court, f.l. 5 Ans 7/2011 of 29 November 2012. Available at: http://www.sbirka.nssoud.cz

12 Cf. Section 16, Para. a) of Act no. 62/2003 Coll., on Elections to the European Parliament, as amended.

13 Cf. Act no. 500/2004 Coll., The Administrative Code, as amended.

In the cassation complaint, the plaintiff put forward the proposition that he had a public-subjective right to be provided a special subsidy, so this is merely about the amount of the subsidy. State decision making on the payment of such expenses thus affects the plaintiffs' property rights, property rights and the right to self-government.[14] According to Article 36 (2) of the Charter of Fundamental Rights and Freedoms, the decision on these rights cannot be excluded from judicial review. He refused the procedure under § 14 of the Budgetary Rules, as this provision does not correspond to the fact that the Ministry of the Interior has requested the grant of the subsidy, although it is not the beneficiary itself. In addition, the Ministry of Finance, as the provider, determined amount of the subsidy only to individual regions, not to municipalities. The Ministry of Finance transferred subsidies to municipalities to the defendant (the Regional Office), who decided to allocate subsidies to municipal budgets. The Administrative Procedure Code is to be applied to the procedure, and a proper administrative decision about rejecting to grant the subsidy to the plaintiff shall be issued.

3.2 The Court's Assessment

The Supreme Administrative Court submitted that the matter of financing the expenses of election organizers is utterly inadequately regulated by the legislation when the only relevant provisions of the European Parliament Election Law stipulate that such costs are paid from the state budget. It therefore considers that all administrative expenditure incurred in connection with the elections should be compensated in its entirety. Although no compensation mechanism is determined by law, it is clear from the nature of the case that, although these are not covered by the state budget directly, they are included in its expenditure and must be provided on an intermediary basis. This right corresponds to the obligation of the state authorities to provide subsidies to budgets of territorial self-governing units corresponding to the reasonably incurred costs.

The grant itself is preceded by an assessment of the legitimacy of the claimed claim. Public-administration review was carried out by the defendant,

14 Cf. Art. 11 of the Charter of Fundamental Rights and Freedoms, Article 101 (3) and Articles 8 and 100 (1) of the Constitution of the Czech Republic.

on the basis of which he concluded that a part of the claimed claim is not justified and thus did not pay that amount to the plaintiff. The defendant's conduct thus fulfils the signs of authoritative decision-making on public subjective law, ie public-law relationship was settled.

The Supreme Court also dealt with question of the defendant's jurisdiction to adjudicate on the matter. While it is true that the subsidy provider is the Ministry of Finance, it does not decide on its amount for concrete municipalities. The scope of the subsidy provider was in fact transferred to the defendant and the defendant has in fact decided on the allocation and the provided amount. He also commented on the provision of Article 14 (4) (now 14q) of the Law on Budgetary Rules pointed by the defendant, which in this context only applies to cases of positive decision by the Authority.[15] The Court sets out three criteria that must be met for the application of the Code of Administrative Procedure, it must be:

- the procedure of the administrative body,
- in the area of public administration,
- the purpose of which is, in a particular case, to set, change or abolish the rights and obligations of a particular person or to claim, in a particular case, that such a person has a right or a duty.[16]

In view of the above, it is clear that the case meets those conditions and the defendant thus acted in breach of the Administrative Procedure Code by failing to issue a proper decision to reject the plaintiffs' request for the subsidy.

3.3 Merits of the Decision

This decision of the Supreme Administrative Court is significant in two directions – it has clarified the mechanism of providing subsidies to municipalities for holding elections, and also has included this process in the area of decision making of an authoritative administrative body according to the Code of Administrative Procedure.

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15 Cf. Excerpt from the text of the cited decision: "*If a provider admits a request for a grant or repayable financial assistance, he or she shall make a written decision," and that is not the case*", the general rules on administrative proceedings are excluded and its judicial review is excluded.

16 Cf. eg the judgment of the Supreme Administrative Court of 19 August 2010, ref. 2 As 52/2010-59, no. 2133/2010 Coll. Supreme Administrative Court.

Subsidies are understood as funds of the state budget, state financial assets or the National Fund provided to legal or natural persons for an intended purpose.[17] It also follows from this law that the granting of subsidy must be requested, but it is not essential whether the grant is to be provided beforehand in the form of an advance or ex post after the final statement of expenditure.

To the future there is no doubt that the territorial self-governing units have the right to full reimbursement of the costs incurred in connection with the activities of their electoral bodies and the fulfilment of their duties from the state budget, and the provision of such compensation is decided by the supreme administrative authority in delegated competence. In this activity, the superior administrative authority has the rights and obligations under the Administrative Procedure Code – in this case, to issue a proper decision to refuse to grant a subsidy against which the applicant could effectively defend himself.

4 Conclusion

It can be concluded that financing from state budgets is the common denominator of all elections taking place in the Czech Republic. The regulation of provision of these funds is affected by a variety of influences of social and technological developments (lowering the cost of publishing official information on the Internet, evaluating results and producing statistics using computer programs, etc.), thus changing the form and amount of the cost of organizing the elections is expectable. There is no real possibility of compiling an exhaustive list of relevant items in the bill of costs, but the current legislation makes it possible to identify these items relatively easily.

The authors believe that the two decisions that were analysed are essential in the matter, when it significantly added to the existing legislation on the financing of elections organized by municipal units by important institutes. Although the case law is not considered as a source of law under the conditions of the Czech legal order, its role as an interpreter is unquestionable, which has been manifested in these two specific cases. The hypothesis set

17 Cf. the legal definition set out in Section 3 (1) a) of Act no. 218/2000 Coll., on Budgetary Rules, as amended.

out in the introduction of this contribution – the existence of solid criteria and basic conditions for entitlement to a subsidy or compensation for the organization of elections from the state budget for concrete expenditures – can be confirmed with the fact that it is not the law which determines these criteria, however, it is clear from the practice of the administrative authorities and the courts that they exist and are generally considered valid, and now are "*black on white*" due to these decisions.

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LOCAL GOVERNMENT UNIT AS A BENEFICIARY OF A DESIGNATED SUBSIDY FOR MAINTENANCE OR RESTORATION WORK AT A BUILDING ENTERED IN THE NATIONAL TREASURE LIST

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Abstract

The aim of the paper is to confirm the hypothesis that a justified need exists to provide additional financial support in the form of designated subsidy to the local government units (LGUs) undertaking the realization of specific tasks in the field of monument care and protection. As the owners or holders of movable monuments, LGUs are obliged to provide realization of the maintenance and restoration works at the monuments entered in the National Treasure List.

The applied scientific methods (legal doctrine and empirical) have led to the conclusion that among the potential beneficiaries of the designated subsidy (individuals, LGUs and other organizational units), the LGUs are best prepared, in terms of organization, functioning and finances, to realize the works at monuments entered in the National Treasure List.

The paper presents the rules and procedures of granting the designated subsidy to LGUs. Protection of the monuments of particular importance for national heritage is financed in the same manner. The subsidies are granted, following verification of the submitted application, by the competent minister of culture and national heritage protection from the funds planned in the state budget. The grounds for granting the subsidy is a contract concluded between the minister and a local government unit.

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The designated nature of the subsidy allows for full control of the process of its use by the beneficiary.

Keywords: Designated Subsidy; Movable Monument; The National Treasure List; Local Government.

JEL Classification: H2, H71.

1 Introduction

As a result of the amendment of the Act of 23 July 2003 on the Protection and Care of Monuments (hereinafter referred to as PCMA), introduced on 25 November 2016 (Act on the Amendment of the Protection and Care of Monuments Act and Act on Museums), a new form of monument protection named National Treasure List (hereinafter: the List) was introduced in order to increase protection of the most valuable movable monuments. The system of financing the care and protection of monuments has also been supplemented with a new designated subsidy for maintenance and renovation works at the monuments entered in the List. So far, the designated subsidies granted from the state budget for such works and for construction works at monuments entered in the register of monuments were purely of discretional nature. The bodies granting the subsidies are – among others – the proper minister for culture national heritage protection and Voivodeship Conservators of Monuments. Such subsidy is granted either by means of pre-financing the planned actions or refunding the expenses borne. The designated subsidy for the maintenance and restoration works at the monuments entered on the List was supposed to be obligatory, i.e. the authorising party would not have the right to refuse granting the subsidy if the application was filed correctly. The amount of the subsidy could be equivalent to as much as 100% value of the expenditure incurred on these works (print no. 3112), however financing the expenditure in full has not become a common practice. These actions were complemented on 1 January 2018 (Act of 22 June 2017) by the creation of the National Monument Protection Fund (NMPF) which may be used for granting financial support to monument owners, including the ones entered on the Treasure List (print no. 1403-A).

Protection and care of the monuments lies within the scope of duties of a local municipal, poviat or voivodeship government. The aim of this paper is to review and evaluate, based on the applicable law and judicial decisions, the regulations on the access to designated subsidy for maintenance and restoration works at monuments entered in the National Treasure List by local government units (LGUs). This type of LGU's tasks is contained in the wider category of their own tasks, such as care and protection of monuments. The maintenance and restoration works at the monuments entered in the National Treasure List have been identified in the material (the List), financial (designated subsidy and NMPF) and administrative (the proper minister for culture and national heritage is the authorizing officer and the donor is the minister competent for culture and protection of national heritage) aspect.

The criteria to identify the tasks which can be financed with participation of such designated subsidies were specified using lawmaking and empirical method. The verified hypothesis is that the LGUs are best prepared, in terms of organization, functioning and finances, potential beneficiaries of the designated subsidy (individuals, LGUs and other organizational units) to realize the works at monuments entered in the National Treasure List. Shall the designated subsidy allow to finance expenditure only partially, the LGU is able to implement the funds coming from other sources (e.g. own income or returnable revenue in the form of loans, credits and issue of bonds).

The solutions adopted in the amended Act on the Monument Protection and Care constitute one of the forms of pursuing the objectives regarding institutional basis for realization of the state policy in the area of environment protection defined in the National Programme of Monument Care and Protection (adopted by the resolutions on "The national programme of monument care and protection"). The Programme was implemented by the following national cultural institutions: National Heritage Institute, National Institute of Museology and Collections Protection, National Maritime Museum in Gdańsk. In 2014–2017, the investment designated for realization of this programme was PLN 26,668,205 – including PLN 26,037,205 from state budget, PLN 6,000 from LGU budgets and PLN 625,000 from other sources.

2 The National Treasure List

Pursuant to Article 7 and 14a Protection and Care of Monuments Act, an entry on the List is one of the forms of monument protection and applies only to movable monuments of special value to cultural heritage, included in the statutory category (e.g. archaeological monuments older than 100 years, constituting part of archaeological collection or obtained as a result of archaeological works or accidental discoveries; elements constituting integral part of architectural monuments, interior décor, memorials, statues, arts and crafts older than 100 years; paintings made manually using any technique or material, older than 50 years, of value exceeding EUR 150,000 and not belonging to their authors). The List is kept by the minister competent for culture and protection of national heritage. The entry or removal from the List is made pursuant to the decision of the minister, issued *ex officio* or at the request of the owner of a movable monument (Dobosz, 2013; 199 et al.). The Regulation on the List of National Treasures [*Rozporządzenie w sprawie Listy Skarbów Dziedzictwa*] lays down the details of the method of maintaining the List. The List is kept in a computer system available in the Public Information Bulletin on the website of the minister competent for culture and protection of national heritage.

From the day of instigating the proceedings regarding the monument on the List until the day the decision becomes final, it is forbidden to conduct maintenance or restoration works or commence other actions which could lead to damaging its substance or changing its appearance. This ban refers neither to monuments entered in the register of monuments or museum inventory, nor the ones constituting the national library collection. Pursuant to the provisions of Article 28 PCMA, the owner or holder of a monument entered in the List is obliged to notify the minister competent for culture and protection of national heritage about certain events: damage, destruction, loss, theft of a monument or any other threat to the monument (immediately after receiving information about the event); change of location where the movable monument is stored or change of the legal status of the document (within one month from the day such change has occurred).

3 The Scope of Designated Subsidy for the Works at Monuments Entered in the National Treasure List

The nature and type of designated subsidies was specified in the Public Finances Act of 2009 (Public Finances Act, Article 127). On of the categories of designated subsidies are statutory tasks (Ofiarski, Ofiarska, 2010: 285). The provisions of separate acts specify in detail the tasks whose realisation may be financed or subsidized in the form of designated subsidy, as well as the manner of granting, transferring or clearing the funds in such form. It is emphasized in the legal doctrine that the designated subsidy should only be transferred from one donor and one source of funding in order to avoid the risk of double taxation and increase the efficiency of the control of the use of subsidies (Chojna-Duch, 2017: 81). The aforementioned standards are applied regarding designated subsidy for maintenance and restoration works at the monuments entered in the List.

The designated nature of this subsidy is emphasized by referring to the following concepts specified in the provisions of the Protection and Care of Monuments Act: "maintenance works" and "restoration works". Pursuant to Article 3 point 6 PCMA, maintenance works are aimed at securing and fixing the substance of the monument, halting the process of its destruction, as well as making a documentation of this process. According to Article 3 point 7 thereof, restoration works are the actions aimed at enhancing the artistic and aesthetic values of the monument, including, if need be, complementing or recreating its part and keeping record of these actions. The jurisdiction emphasises the restorative and technical nature of such works (Voivodeship Administrative Court in Bydgoszcz I SA/Bd 1174/14), aiming at restoring the original state of the monument (Voivodeship Administrative Court in Gliwice: III SA/GI 58/15).

Article 36 section 1a PCMA sets forth that it is allowed to conduct maintenance works, restoration works and maintenance research at the building entered in the List on the basis of a permission granted by the minister competent for culture and protection of national heritage. The contents of Article 73 PCMA indicates that the discussed designated subsidy may not cover maintenance works, which – according to Article 3 point 9 of the said Act – are the actions aimed at recognition of the history and functions

of the monument, establishing what materials and technologies were used to make it, assessing the state of preservation of this monument and preparing a diagnosis, project and programme of maintenance works and, if necessary, restoration works. Excluding the possibility to finance maintenance works from the designated subsidy should receive negative evaluation. Conducting such research is *condicio sine qua non* for establishing a proper scope and course of maintenance and restoration works. This means it is necessary for the entity applying for the designated subsidy to finance the maintenance works from own funds. Lack of access to the source of funding for such expenses may practically mean lack of opportunity to prepare application for designated subsidy for the realization of works at the monument entered in the List.

It should be noted that the regulations regarding the discussed subsidy are not fully consistent between Article 73, Article 76 section 1 point 3 and Article 77 PCMA. Article 77 of the said Act contains a close catalogue of the so-called necessary expenditure for maintenance, restoration and construction works which can be financed in the form of a subsidy. The expenditure for the maintenance works – among others – have been specified in this catalogue. Following the comparison of the scope of works comprising "maintenance research" and "construction works" within the meaning of the provisions of the Construction Law referred to in Article 3 point 8 PCMA, it may be concluded that the expenditure for maintenance research will be linked to maintenance and restoration works conducted at movable and immovable monuments, as well as to the construction works characteristic only for immovable monuments. Pursuant to the provisions of construction law (Construction Law, Article 3 point 6 and 7), "construction works" are defined as construction (execution of the structure at specified location, as well as restoration, extension, elevation of the structure), as well as the works consisting in reconstruction, renovation or dismantling the structure). Construction works do not include maintenance services (works). (Szostak, 2010: 7). National Treasure List includes only movable monuments and the designated subsidy for financing the maintenance and renovation works at them may not include the necessary costs of maintenance research. The indicated inconsistency regarding the regulations should

be removed by the legislator as part of the amendment of Article 73 and 76 section 1 point 3 PCMA by adding a phrase "maintenance research". This provision should explicitly provide for the possibility for funding, in the form of designated subsidy, "the maintenance or restoration works or maintenance research at the monument entered in the National Treasure List".

4 The Scope of Designated Subsidy for the Works at the Monuments Entered in the National Treasure List

Pursuant to Article 73 PCMA, the individuals, LGUs and other organizational units (the ones from outside public sector included) may apply for designated subsidy. Local government units have been specified as potential beneficiaries of the subsidy in the aforementioned provision, thus including municipalities, poviats or voivodeships. The phrase "local government unit" should be understood in a manner adopted for the territorial division of the state as the Protection and Care for Monuments Act does not contain the provision based on Article 4 section 2 Public Finance Act, pursuant to which the provisions of the said Act regarding LGUs apply accordingly to metropolitan unions or the unions of communes and poviats. This means such unions are not entitled to receive designated subsidies for maintenance or restoration works at the monument entered in the List. The right to apply for such subsidy results from the provisions of the Protection and Care for Monuments Act and its scope is not affected by the fact that in the absence of specific provisions therein, the provisions of Public Finance Act shall apply to the designated subsidy.

Designated subsidy granted to LGUs is of intrasectoral nature, as it is a form of a fund transfer within the public finance sector, i.e. from the state budget to the budget of the relevant LGU. Should such a subsidy be granted to an individual or organizational unit outside public sector (e.g. foundation, association), it would be of extrasectorial nature (Ostrowska, 2014: 114).

The LGU authorised to apply for designated subsidy is the owner or holder of the monument entered in the List. The statutory regulation, specified in Article 74 section 2 PCMA, is granting the funds for maintenance or restoration works at the building entered in the List. Thus, the phrase "subsidy" only means partial funding of such works (Karlikowska,

2010: 337). This conclusion is not affected by the provisions of Article 78 section 5 PCMA, pursuant to which the said subsidy is granted at the requested amount up to 100% expenditure necessary to execute maintenance and restoration works. Reimbursement of "up to 100% expenditure" does not prejudge that in each case the party applying for subsidy shall receive the amount constituting the equivalent of total expenditure necessary to execute the works. It is only a method of assessing the maximum amount of the subsidy. Should the intentions of the legislator have been different, the phrase "in the amount of 100% expenditure" or "expenditure equivalent" would have been used.

The interpretation indicating the possibility of granting a designated subsidy in the amount lower than requested and lower than the amount of necessary expenditure for works at the building entered in the list is also substantiated by the provisions of Article 80 PCMA containing the guidelines for the competent minister of culture and national heritage protection on issuing the regulation on specific conditions and manner of granting the subsidy. The guidelines contain legislator's indications for it being "necessary to specify the period which has to lapse before it is possible to grant another designated subsidy for financing the works at the same monument". This means the particular stages of maintenance and restoration works at the same movable monument entered in the List may be realized in the form of subsequent designated subsidies.

Designated subsidies are granted from the state budget and the authorising officer for this part is the competent minister of culture and national heritage protection. Thus, specifying the aim of the of the granted subsidy and its origin refers to the general definition of the subsidy formulated in the provisions of Public Finance Act (Czarnecki, 2010: 144).

Designated subsidy is used for funding the so-called necessary expenditure for the execution of maintenance or renovation works at the monument entered in the List, calculated based on the estimate approved by the aforementioned minister. The subsidy is granted in the form of pre-financing of the planned works, as specified in the wording of Article 76 section 1 point 3 PCMA: "which are conducted in the year of submitting the application for granting the subsidy by the applicant or the year following

such application". The above excludes opportunity to refund, in the form of designated subsidy, the works executed prior to submitting the application for designated subsidy, regardless if the payment has already been made for the works carried out at the monument or if the applicant has intended to pay for such works with the funds obtained from the designated subsidy.

Pursuant to delegation formulated in Article 80 PCMA, specific conditions and form of granting the donation have been specified by an ordinance (the ordinance on designated subsidy for maintenance or restoration works at the building entered in the National Treasure List and maintenance, restoration and construction works at the monument entered in the register of monuments). Pursuant to statutory guidelines, at least one call for applications for granting the subsidy should be organised each year, with comprehensive assessment of actions for the execution of which the subsidy is to be granted, as well as ensuring that the public funds are spent in an appropriate and rational manner. The designated subsidy is made at the request of the LGU being the owner or holder of the monument entered in the Listsubmitted to the competent minister of culture and national heritage protection. The subsequent designated subsidy for maintenance or restoration works at the same monument entered in the List covering the works the previous subsidy was granted for, may be granted no sooner than 10 years since the end of the year in which the previous subsidy was granted.

By way of an ordinance, two dates were set for the call for applications for the subsidy: until 31 March and until 31 October. In each case, the application for subsidy should include the works which are yet to be commenced. The application for subsidy should include, among others: name, registered office and address of the owner or holder of the monument entered in the List; type of works to be conducted at the monument; specifying the amount of the designated subsidy the applicant is applying for; the schedule of works to be conducted at the monument; applicant's representation on having material and human resources ensuring proper servicing of works at the monument; the estimate of the total cost of works at the building.

In specific situations, the application for the subsidy may be submitted without meeting these dates. Such specific situation may be the necessity to execute the works at the monument due to it being damaged as a result

of the following: fire, explosion, earthquake, strong wind, intense precipitation, landslide, flooding, construction disaster or other sudden event of a similar character which occurred 6 months before submitting the application. In such case, the designated subsidy may be granted even before the lapse of 10 years since the end of the year in which the previous donation was granted.

Once the application has been approved, a contract is concluded between the donor and the beneficiary for granting designated subsidy for the works at the monument entered in the List, containing specifically: indication of the parties and time and place of concluding the contract; the scope of the works planned and the estimated date of their execution; the amount of the granted designated subsidy and the date and form of payment; the date of implementation of the designated subsidy no later than 31 December of the given financial year; the form of audit of the execution of the contract for granting the designated subsidy; the date and form of clearing the granted designated subsidy; the day of returning the unused part of the designated subsidy no later than 15 days from the date of completing the works specified in the agreement; the conditions for termination of the agreement. In this case, the obligation to use an agreement as a legal form of granting the subsidy is a direct outcome of Article 75 PCMA, pursuant to which the minister competent for culture and national heritage protection may grant subsidies to individuals or units mentioned in Art. 73 of this Act, on the grounds of the contract concluded with such individuals or entities The legal nature of the contract for granting the designated subsidy has not been explicitly evaluated in the doctrine (Stupienko, 2014: 429–448; Ofiarska, Ofiarski, 2013: 56–62). Its mixed nature, i.e. administrative-legal or civil-legal status, is usually pointed out (Borodo, 2014: 119). It should be noted that under such contract, public funds are allocated for the public task with at least one party to the contract (donor) being a public law entity, whereas in practice also the other party to the contract (the beneficiary) is a public law entity. The jurisdiction emphasises that the proceedings preceding concluding the contract for granting subsidy pursuant to Article 75 PCMA do not constitute a stage of administrative proceedings which close with administrative decision (Supreme Administrative Court: II GSK 210/07). However, the fact

that such proceedings concerning the selection of beneficiaries do not end with an administrative decision does not prove that it ceases to be an act of public administration (Supreme Administrative Court: II GSK 3439/15).

Transfer of funds within the designated subsidy takes place on dates which provide financing the obligations resulting from carrying out work at the monument entered on the List. The quoted provision of the Regulation does not prejudge whether the amount of the designated subsidy should be transferred to the beneficiary on a one-off basis or in parts, i.e. according to the schedule of maintenance and restoration works, which are to be implemented at the monument. The donor (minister) exercises control over the use of funds transferred in the form of a designated subsidy. The beneficiary is obliged to provide the body which has granted the subsidy with: certified copies of invoices or receipts for the works carried out at the monument entered on the List, cost estimate for the works carried out, subcontractor's photographic documentation of the monument. The above documents should be handed within 30 days from the day of carrying works at the monument specified in the contract for granting a designated subsidy.

It should be emphasized that since 2018, apart from the designated subsidies discussed (granted from the part of the state budget at disposal of the minister competent for culture and protection of national heritage), the necessary expenditures for conservation or restoration works on the monument included on the NMPF List can be co-financed. It is a state designated fund at disposal of the minister competent for culture and protection of national heritage. The fund is created from administrative pecuniary fines imposed for breaching the provisions of the Protection of and Care of Monuments Fund. According to the Budget Act for 2018, the revenues from this fund have been planned in the amount of PLN 16,820,000. A part of the fund's resources is also intended for co-financing conservation, restoration or construction works at the other monuments entered into the register (i.e. monuments not included on the List).

5 Conclusion

The aims and hypothesis formulated in the introduction have been confirmed in the course of the analysis of the existing legislation,

the doctrine and the jurisprudence of the courts. Distinguishing a specific category of movable monuments in the administrative (the List) and financial (additional subsidies and the possibility of co-financing from NMPF) aspect shall be given positive evaluation in general. From the point of view of the LGUs as the entities responsible for the implementation of their own tasks in the field of monument protection and care, new procedures and new sources of financing these tasks have been introduced. This allows LGUs to combine own funds with the funds from the state budget and the state designated subsidy, which results in more effective protection and care of monuments.

Taking into account many years of the LGUs' previous experience in the field of protection and care for monuments, it can be stated that they are the best prepared entities to apply for funds designated for implementation of conservation and restoration works on monuments included in the National Treasure List. In particular, the existing office facilities and organizational structures (local government administration officers specialized in the implementation of such tasks and the functioning self-governing cultural institutions) should be decisive in this respect.

Implementation of such separate source of financing the conservation and restoration works by the LGUs makes it possible to include them in the process of protection of movable monuments of special value for cultural heritage, especially given the fact that the local cultural institutions (mainly libraries and museums) do not have sufficient financial resources to perform such works in relation to the old prints, sculptures, statues, books, graphics, maps, photographs or means of transport collected by these institutions.

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FINANCE AND FINANCIAL LAW. RELATIONSHIPS AND DEPENDENCIES

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Abstract

The article discusses relationships between finance and financial law. It presents evaluation of effects that are both positive and negative, desirable and undesirable, created at the interface between finance and financial law. They are a result of both independence (distinctiveness) of each of these scientific disciplines as well as of very close relationships and dependencies. The conclusions present reasons for this and possibilities of introducing changes.

Keywords: Interdisciplinary Science; Finance; Financial Law; Relationships and Dependencies of Financial Sciences.

JEL Classification: A12, B41, K49.

1 Introduction

Contemporarily, it is possible to observe on the one hand a phenomenon of diversification and isolation of particular sciences in the framework of taxonomy of scientific areas, fields and disciplines accepted in Poland as well as according to OECD scientific fields and discipline classification, and on the other hand to observe a growing need for cooperation to achieve some benefits in scientific co-operation. The process of deeper and deeper science division seems an inevitable phenomenon, for alone reason of growing knowledge progress, broader and more detailed research which in the framework of the existing sciences makes their full presentation impossible and thereby their effective use, either. However, it is also possible to indicate some other phenomena, unfavourable from the point of view of science development, like containment of some sciences and their 'appropriation' by a quite small group of scientists.

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Undoubtedly, the basic purpose of a science is seeking the truth, pure knowledge and because of this, even most detailed divisions cannot be an obstacle in the path of the purpose accomplishment.

At the same time, it is possible to observe a phenomenon of embracing a given area of knowledge by some sciences of various scientific disciplines or fields.

This also concerns the knowledge area for which money is a discriminant. Pecuniary phenomena and processes are a domain of the scientific discipline such as finance which fits in the economic sciences area and in legal sciences as well. In the second case, it covers this part of law which is called financial law, a broadly understood term, together with its detailed division.

The purpose of this deliberation is to investigate the relationships and the dependencies that occur between the scientific discipline of finance and financial law. Such dependencies and relationships are indisputable and strangely enough, if they did not exist. From practical point of view their evaluation is important as for the effects it causes. The effects can be both positive (you may even call them desirable effects) and negative ones (undesirable ones). The purpose of this deliberation is to organise the knowledge concerning the interface between finance and financial law in the context of the dependencies and the relationships indicated earlier and to determine reasons for this and finally to determine some possibilities of introducing changes.

Because of the issue complexity, formulation of a research hypothesis would be very difficult because it is possible to verify it. The analysis area is too broad and, which has already been stated, is weakly recognised. Apart from this, it is the interface of two sciences using different research methods, conceptual systems and tools. That is why, it is more purposeful to conduct systemization of the investigated issues, which are important for both the sciences and which in future should be the area of more detailed research in the interest of both finance and financial law.

Undoubtedly, the deliberation should be started from the explanation of concepts of both the sciences and from indication of their distinctiveness.

2 Methodological Essentials of Science Division

The starting point of the deliberation concerning creation of various scientific disciplines is an assertion about the science unity (Semkow, Żurawicki, 1977: 27) The consequence of this is taking for granted that there is a universal language of the science which means that all scientific terms are logically inter-related. While, diversification of science and creation of individual disciplines are a process whose fundamentals have been influenced by various circumstances. On the one hand, they result from the growing knowledge whose control is becoming very difficult for individual researchers. On the other hand, development of a scientific thought demands not only a description but also an investigation into its process of implementation into practice, and in consequence it demands formulation of generalities and creation of scientific theories based on this.

Making attempts to refute some assertions at a given time is linked with their rejection in case of falsification. According to K. R. Popper, criteria of the refutal must be established (Popper, 2002: 39). The science development causes the way of its practice to be based on various principles (Semkow, Żurawicki, 1977: 42). One of them is the principle that the research subject is taken as the whole treating it as the system containing individual elements remaining in inter-relations. Recognition of these relations constitutes a base for some theoretical expressions describing some regularities which reflect co-existence of phenomena and their properties. "... *the science constitutes the unity of knowledge and methods of obtaining it, the unity of research processes and their psychical producers*" (Semkow, Żurawicki, 1977: 51) and on "... *the science is a collection of assertions historically built up and constantly developing, driving at acquisition of intellectual and practical power over things and phenomena basing on explanatory principles* ..." (Semkow, Żurawicki, 1977: 52).

Scientific research focuses on an analysis of phenomena. The variety of the phenomena requires adjustment of some appropriate methods to get to know them. It leads to drawing lines which separate scopes of the investigated phenomena in consequence to conducting science classification (Flejterski, 2006: 104). The criteria for making such divisions are various. One of them is a methodological criterion. Applying the criterion, an emphasis is placed on relationship of methods. This requires, when separating any

field of science, determination of the purpose that is to be accomplished and selection of a proper research procedure.

To be able to make from an isolated area of the science a given discipline, the discipline must have an established research subject and methods, must use an established conceptual system and satisfy some social needs for research findings.

"*Beside quickly progressing diversification of scientific issues and applied methods, proliferation of separate scientific disciplines is a significant quality of the modern science*" (Flejterski, 2006: 31). Despite this, knowledge constitutes the whole and irrespectively of its division, it requires connection of its various disciplines, which leads to a necessity of cooperation between researchers representing various scientific areas.

However, in each case the purpose of all the scientific disciplines is recognition of phenomena and then formulation of theories indicating their repeatability in the same conditions (Semkow, Żurawicki, 1977: 125).

3 The Subject of the Science about Finance and Financial Law

Finance as a scientific discipline isolated at the end of the 19th century (Flejterski, 2006: 51). Its research scope was getting broader as the time was passing and especially as the research was becoming deeper and led to creation of such sub-fields as public finance, banking, insurance and corporate finance. The bond of the mentioned sub-fields or the criterion for separation of finance as the whole was their concentration on economic relations, based on money and connected with some processes of exchange and division of the social product. In these conditions undoubtedly 'The subject of interest to finance as a science is mainly movement of money and its creation in the banking system, circulation between various economic entities and their groups and 'settlement' in a form of savings and reserves (Fedorowicz, 1991: 8). On the one hand, the mentioned processes relate to accomplishment of some targets and on the other hand, they set research areas and lead to explanations of the contents of this part of the economic phenomena which occur with the aid of money. "*The task of finance is to adjust financial resources that particular categories of business entities have at their disposal to their ...*

participation in material resources of the social product and the national income" (Bolland, 1979: 6). The finance target so determined has two dimensions: practical and theoretical. The first one – practical is directed to all the entities that run financial economy for which adjustment of streams of things (goods) and funds is the directive. In the theoretical dimension "... *the finance as the science investigates and explains the economic contents ... of pecuniary phenomena and processes i.e. the relations between a flow of money streams and distribution of its resources, and a flow and distribution of resources of goods, material and non-material services and human labour*" (Bolland, 1979: 10). It means a classic approach to the financial science. More generally, finance is linked with creation and movement of money, with resources existing in real terms, with drawing on them and making them available in future. (Ostaszewski, 2007: 16) The most important element pointing to the subject of the financial science is linking money flows both on the side of its collection and on the side of its expenditure with the purposes these processes should serve (Szczęsny. 2009: 13). Such a presentation is connected with the fundamental assertion concerning functional aspects of the science and with the indication that it provides "… *the economy and the financial policy with some knowledge about efficient use of money when managing the national economy* …" (Bolland, 1979: 10)

Works of the science about finance should constitute a base for a given financial policy model which encompasses many areas dealt with by various institutions using various tools and financial methods. The most important issue in these proceedings is that there is here "… *making a choice of both the targets to be accomplished because of the financial economy as well as ways or methods to accomplish them. The contents of the financial policy depends on the entity which runs the financial economy*" (Fedorowicz, 1991: 10). The policy of the state, self-government, corporation or a bank will be different. The differences come from a variety of pecuniary phenomena they refer to. Another procedure is required for a regulation of income and expenditure which are equivalent i.e. such ones whose expenditure relates to a given performance and the situation is different when income and expenditure are non-equivalent which means that income and expense are not related to consideration. Such a variety of the phenomena, which are the subject of the science about finance requires some interdisciplinary links not only with economic

sciences but also, as Z. Fedorowicz, (Fedorowicz, 1991: 7) has noticed, mainly with law. Such an approach results from the essentials of methodology of sciences. Hence, "*within centuries many ways of reasoning have developed being attributed to a given scientific discipline. They have always been accompanied by their interpermeating from one field into another*" (Drwiłło, 2011: 45). It was formally expressed in 1975 when in Poland the subject of finance and financial law was introduced into the syllabus of law studies. Most frequently, however, relations between the finance and the financial law are indicated when referring to public finance and, in this light, it is claimed that "*Most western specialists underline … that nowadays problems of public finance are a conglomeration of legal, economic and political phenomena. That is why, bringing research to economic aspects cannot give a complete and at the same time a correct view of the reality*" (Kosikowski, Ruśkowski, 2003: 128). P. M. Gaudemet i J. Molinier were precursors of this stance (Gaudemet, Molinier, 2000: 17). Public finance was the discipline in which in investigations it was sought to balance economic and legal aspects (Kosikowski, Ruśkowski, 2003: 129). The problem connected with this issue comes down to unambiguity and precision of legal provisions constituting a framework for efficient use of financial resources. In literature (Dębowska-Romanowska, 2005: 78), some imperfections of financial law are indicated: excessive casuistry of provisions, their excessive detailedness and great frequency of changes. Imperfections of the law have broad consequences for possibilities of running the rational financial economy which requires stability and a perspective for its development. In these terms disciplining the legislative body is imperative (Dębowska-Romanowska, 2005: 83). According to T. Dębowska-Romanowska, the problem comes down to such a situation that decisions of the parliament, as a representative body, are expressed in passed legal statutes which reflect a political structure of the Sejm and the Senate *[chambers of Poland's parliament]*. In such a situation, it is necessary to agree with the statement that the most dangerous issue is semblance of legal regulations and abuse of power by the representative body (Dębowska-Romanowska, 2005: 87, 89). The critical remarks addressed to financial law, despite having a justification not arousing any doubts, cannot be fully eliminated. The required generality of legal provisions causes a necessity of their interpretation. There are many possibilities

in this range. B. Brzeziński (Brzeziński, 2005: 57, 59, 65, 66) indicates that one of them is intentionalism. It focuses on seeking a role of the legislative body which means on finding out what intentions of the legislators were in the process of drafting a specific legal provision. Using this method, it is possible to seek information which was used by the legislators. These could be, for example, reports on parliamentary debates. Not going into details of various forms of intentionalism in the law interpretation it is worth adding that a kind of indicator to understand intentions can be, for example amendments introduced into a bill or a statute which can indicate the legislators' preferences referred to a part of the statute.

The signalised way of interpreting law is critically evaluated. B. Brzeziński gives as an example of interpretation made by the US Congress. "*In this case the source of information are speeches of congressmen delivered during works on a new statute … or on bills of amendments to the binding statute … In practice, no importance is attached to it and courts usually refuse recognition of its significance*" (Brzeziński, 2005: 59). It mainly concerns difficulties in finding out motives of the legislators and that this why, this approach is not now broadly applied. In this place another method is introduced which is called 'new textualism' (Brzeziński, 2005: 65) directed to interpretation of provisions objectives and concentrated on the statutory contents.

A choice of a given procedure when interpreting the financial law is of importance because it causes either rigidity or flexibility of possibilities of money management, which especially concerns funds assigned to pursue public purposes. Then, how to treat the financial law: functionally or instrumentally? E. Chojna-Duch raises the issue that "*In the theory of law for many years there have been discussions on instrumentalization of law including discussions on a manipulative character of enactment in the practice of public law, and even on progressing destruction of prescriptivism in Poland*" (Chojna-Duch, 2005: 67). In the context, an important element in the process of creating law is such its form that there should be no necessity to change it frequently. It results from the fact that frequently introducing amendments leads to a chaos in the legal system. In the case, there is no improvement in the quality of the law, but it leads to the situation that the law has a seeming character (Chojna-Duch, 2005: 70).

Defects of the financial law do not eliminate its creative role. The following assertion expressly indicates it: "… *with some simplification we assume, that we may start talking about public finance when the norms regulating principles of the state's appropriation of private income in the social interest appear and then when so obtained resources are transferred back into hands of individuals, but usually different ones*" (Kosikowski, Ruśkowski, 2003: 46) Undoubtedly, in case of isolating public finance from the science about finance, the appropriate legal provisions establishing public ownership and securing funds assigned to pursue public tasks have played a creative role.

The basic problem comes down to the question whether the financial law and finance as scientific disciplines may be considered without taking into account their internal divisions. A. Drwiłło (Drwiłło, 2011: 237, 273, 310, 389, 554) treats separately: banking law, customs law, budget law, including tax law and the law of the territorial self-government. While in the science of finance broader sub-disciplines are applied and the following are isolated: banking system, public finance system, insurance financial system (Owsiak, 2015: 248–273) and corporate finance or business finance. Also, more detailed divisions are made which are closer to the system presented by lawyers. A question arises here if links between finance and financial law may be treated globally without considering their internal divisions? It seems that there are no obstacles to this approach. The raised issue of internal diversification of financial law and finance aimed at drawing attention to their broad extent and a necessity to link individual sub-disciplines of finance with sub-disciplines of financial law, which formally regulate the financial economy in individual areas.

At the same time, it cannot be forgotten that the financial law is a part of the law and finance is a part of the economics which causes diversification of the research subject based on an analysis of norms of financial law and an economic account in the science of finance.

4 Relations between Legal and Economic Aspects of Finance

Relationships between legal and economic aspects of finance are based on a few rudiments. They are following:

- obligatory relating an economic account to the binding law provisions;

- synchronisation of legal provisions with the essence of the regulated financial phenomena;
- legal provisions determine a way of running the financial economy;
- legally securing financial resources to run the financial economy;
- lack of a principle that legal provisions must precede activities connected with collection of financial resources for a given purpose;
- a possibility of interpreting financial law provisions opens up an opportunity for flexibility of managing the financial economy of particular entities;
- creation of financial law provisions requires an economic analysis of the regulated phenomena;
- a necessity to precede a development of the contents of a legal act by an analysis of financial effects which are caused by implementation of a specific law.
- amendments to the financial law require their justification to be made public.

Each of the mentioned points needs a comment.

Firstly, running every business activity causes engagement of financial resources. However, to be sure of effects, an economic account must be calculated, whose nature is in comparison of expenses and profits anticipated for a given venture. Such an account cannot be calculated in any way, it must follow legal norms which e.g. determine what may be treated as an expense.

Secondly, it is important that the legislators be aware when drafting a specific provision what specificity of the financial phenomenon is being subject to legal regulation.

Thirdly, the financial economy of each entity cannot be run in any way. This is regulated by some legal provisions which are in force and influence the procedure. It concerns both the income side and the expense one and it is diverse depending on the type of an activity and the fact whether it is material sphere or the non-material one.

Fourthly, collection or raise of funds to run a given business must be secured in a form of some legal provisions. For example, a school is financed from public funds, which are transferred from the budget of the territorial

self-government unit, (partially, the funds come from the so-called education subsidy).

Fifthly, raise of funds e.g. in a form of capital is possible irrespectively whether an appropriate law regulating it exists or not.

Sixthly, a general character of legal provisions makes that they do not consider individual situations which they regulate. In such conditions, there is a need for interpretation of provisions. This has advantages because it makes possible to manage finance of specific entities in a diverse way. This has also disadvantages, because it makes law avoidance or evasion possible.

Seventhly, financial law provisions must have justification resulting from an analysis of the specificity of the financial phenomenon, which they regulate. In this case, both legal and economic knowledge is necessary.

Eighthly, a legal act should not only consider the nature of the regulated phenomenon but should also anticipate financial effects which will occur after its implementation.

Ninthly, it is important in the process of introducing amendments to the law connected with a financial activity of any entities to publish causes or reasons, for which this is done and to announce them to citizens.

The relations linking finance and financial law mentioned above will develop if some conditions are met while depending on:

- increase in unambiguity of financial law provisions which allows running rational financial economy;
- getting to know the financial phenomenon before announcing the text of the law provisions regulating it;
- finding financial effects connected with the introduced amendments to the financial law;
- limiting partial amendments to the financial law, which influences coherence of the financial system;
- participation of financiers in the discussion on amendments to the financial law;
- a possibility of joint research into financial phenomena considering their economic and legal aspects;
- creation of the joint conceptual system to use in investigations and to formulate generalities resulting from them;

5 Conclusion

It requires:

The above deliberation leads to a conclusion that formally isolated scientific disciplines as: finance and financial law, related appropriately to such areas of knowledge as economy and law cannot be separated. This is required by their subject of interest i.e. money management. It causes a need for co-operation between financiers and financial lawyers in the following areas:

- cooperation in a broader extent than now;
- joint investigations;
- preparation of a student text-book presenting interdisciplinary approach to financial phenomena;
- participation of financiers in discussions on bills of amendments to the financial law thorough analyses of economic effects of the suggested changes.

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THE RULES FOR THE IMPLEMENTATION OF THE BUDGET OF EUROPEAN FUNDS IN POLAND

Tomasz Sowiński[1]

Abstract

The Public Finance Act of 2009 included brief but comprehensive and practical regulations regarding the implementation of the European funds budget in Poland.

Various institutions related to the implementation of the European funds budget and procedures related to the implementation thereof have been defined and described therein. These include, for example, expenditure, payments, payment processing, payment orders, collection and settlement of advances, rules for incurring liabilities, supervision, control, implementation of programs and projects financed with European funds, applications for the grant or disposal thereof, etc.

It also specified the rights and obligations of individual entities implementing, participating or beneficiaries using European funds. The competency system of individual central public administration authorities in the scope of determining the rules of applying for European funds, awarding them, implementing, accounting and supervising all these procedures was also defined.

Keywords: Budget Systems; National Budget; Financial Law; Economic Integration; EU.

JEL Classification: H61, F360.

1 Introduction

In Polish legislation, regulations regarding the implementation of the European funds budget were comprehensively (though modestly) developed

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in the Public Finance Act of 2009 [hereafter – PFA]. The rules are of practical and even "technical" nature. Various institutions related to the implementation of the European funds budget and procedures related to the implementation thereof have been defined and described therein. These include, for example, expenditure, payments, payment processing, payment orders, collection and settlement of advances, rules for incurring liabilities, supervision, control, implementation of programs and projects financed with European funds, applications for the grant or disposal thereof, etc. The content of the chapter is complemented by the presentation of the rights and responsibilities of individual implementing entities, participants or beneficiaries using European funds.

Unfortunately, the legislator retained a very short period of *vacatio legis*, as for the scope of fairly thorough changes introduced in the public finance system, it was necessary to pass and announce the texts of both normative acts in advance[2], in order to enable proper and timely preparation of budgets of local government units and the state budget (Glumińska-Pawlic, 2010: 907). However, in retrospect, it may only be concluded that the problems caused by this are already behind us.

The competency system of individual central public administration authorities in the scope of determining the rules of applying for European funds, awarding them, implementing, accounting and supervising all these procedures was also defined.

2 European Funds – an Attempt of Definition

Unfortunately, the notion of "European funds" has not been applied very precisely, which undoubtedly requires some explanation. The first association suggests that it is about funds from the European Union. "European" is, however, a broader concept than "EU", which in turn suggests that we can also deal with funds from outside the EU, and this goes beyond the suggested conceptual scope of the "European funds" (Sowiński, 2014: 432).

2 Act of 27 August 2009 on public finance, Dziennik Ustaw no. 157, item 1240 (as amended), and the Act of 27 August 2009, Provisions introducing the Act on Public Finance, Dziennik Ustaw no. 157, item 1241 amending Dziennik Ustaw of 2009 no. 219, item 1706.

What funds are therefore referred to in Chapter 6 of the UFP "Implementing the budget of European funds"? The explanation is given in Art. 2 of the PFA in the content of which, in point 5, we find that "*whenever the law refers to European funds – it means the funds referred to in Art. 5 para. 3 points 1, 2 and 4.*" Pursuant to Art. 2 of the PFA, it does not explain but it refers to the content of the part of Art. 5, specifically to the paragraph 3, points 1,2 and 4, the content of which includes the definition of "European Funds"[3], which are:

- resources from the Structural Funds, the Cohesion Fund [CF] and the European Fisheries Fund [EFF][4],
- non-recoverable funds from the assistance provided by Member States of the European Free Trade Agreement (EFTA)[5], The Norwegian Financial Mechanism 2009–2014, the Financial Mechanism of the European Economic Area 2009–2014, Swiss-Polish Cooperation Program[6];
- subpara. 3 is omitted in Art. 2,
- funds for the implementation of the Common Agricultural Policy [CAP]: a) the European Agricultural Guidance and Guarantee Fund "Guarantee Section", (b) the European Agricultural Guarantee Fund [EAGF] for expenditure[7], (c) the European Agricultural Fund for Rural Development [EAFRD];

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3 Art. 5 para. 3 of the PFA determines the content of the paragraph by enumerative definition of para. 1 subpara. 2 of this article, which in turn defines the content of the concept of public funds, indicating that public funds also include funds from the European Union budget and non-recoverable funds from the European Free Trade Agreement (EFTA) Member States.

4 With the exception of the funds referred to in subpara. 5 points a and b of the quoted Article in the PFA.

5 With the exception of the funds referred to in subpara. 5 points c and d.

6 The rules for the implementation of the so-called Swiss funds are regulated in the Framework Agreement concluded by the Government of the Republic of Poland and the Swiss Federal Council: implementation of the Swiss-Polish Cooperation Program to reduce socio-economic disparities within the enlarged European Union. The agreement was concluded in Brno on 20 December 2007, M.P. of 2008 no. 75, item 672.

7 Referred to in:
- Art. 3 para. 1 of the Council Regulation (EC) no. 1290/2005 of 21 June 2005 on the financing of the Common Agricultural Policy (Official Journal of the EU L 209 of 11. 8. 2005, p. 1),
- Art. 3 para. 2 of the Council Regulation (EC) no. 1290/2005 of 21 June 2005 on the financing of the Common Agricultural Policy.

Notwithstanding the above-mentioned quite a long list, the Council of Ministers may determine, by way of a Regulation, other public funds, and the date by which these funds should be expended, taking into account their origin, destination and their beneficiaries.

3 The Rules for Making Expenses from the Budget of European Funds

The rules for making expenditures from the European funds budget are set out in Art. 184 of the PFA. The legislator divided these funds into two groups, recommending separate procedures for spending each of them.

In the case of funds related to the implementation of programs and projects financed from funds from the European Union budget, non-recoverable funds from the aid granted by the European Free Trade Agreement (EFTA) Member States, as well as other funds from non-refundable foreign sources, observation of compliance with the procedures specified in the content of international agreements or "other" procedures applicable to their use is indicated. These can be understood both as EU law and national law[8]. The latter are mainly used when spending funds for the implementation of the Norwegian Financial Mechanism and the Financial Mechanism of the European Economic Area, as well as funds allocated for the implementation of programs financed from these funds, and in particular the accounting principles set out for subsidies from the state budget are applied respectively. At the same time, these rules apply to both – the above mentioned funds and the contribution of national resources to programs financed with the participation of European funds, which in turn, pursuant to Art. 127 para. 2 of the uopf are also subsidies.

Expenditures made during the implementation of the European funds budget are treated as payments and the expenditure classification rules apply to them.

8 These include, above all: Council Regulation (EC) no. 1466/97 of 7 July 1997 on the strengthening of budgetary positions supervision and supervision and coordination of economic policies (Official Journal of the EC L 209 of 02.08.1997, p. 1; Official Journal of the EU Polish special edition, ch. 10, vol. 1, p. 84, as amended) and in the case of national law the acts: on public finance, on liability for violation of public finance discipline, the law on public procurement and on the principles of conducting development policy.

The content of the standard contained in Art. 186 of the PFA, specifies the purposes for which funds are allocated: from the general budget of the European Union, from EFTA Member States and other non-returnable foreign funds. It should be noted that this regulation does not apply only to European funds, but is broader in nature. It presents the expenditure targets of virtually all non-returnable foreign funds (Salachna, Tyniewicki, 2010: 573).

Directions of expenditure allocation for the implementation of programs and projects financed with the participation of funds from the budget of the European Union and non-recoverable funds from assistance provided by EFTA Member States and other funds from non-refundable foreign sources, the legislator defines through an enumerative calculation of tasks and objectives in Art. 186 of the PFA.

4 Handling of Payments within the Framework of Programs Financed with the Participation of European Funds

Pursuant to Art. 187 of the PFA, the Minister of Finance is indicated as the entity responsible for handling payments under programs financed with the participation of European funds, who, when handling payments, transfers funds from the European funds budget to Bank Gospodarstwa Krajowego [hereinafter – BGK][9].

BGK is the payer of European funds for programs financed with their participation. Payments to beneficiaries are made on the basis of a total of two documents:

- payment orders issued by an institution with which the beneficiary concluded a contract for co-financing the project,
- written consent of the administrator of the budgetary part to make payments.

The consent for making payments may also be issued by the institution with which the beneficiary concluded a contract for co-financing the project, if it has a written authorization from the administrator of the budgetary part to which it has a statutory entitlement for such an institution.

9 See also Art. 192.

This also applies to the voivodship board in a situation where it is the entity issuing the payment order. This is a special case when the authority managing, intermediary or implementing the project is the voivodship management or an institution authorized by it. In this case, the payment order is issued by the voivodship board.

Payments may be made to the account of the beneficiary, an entity authorized by the beneficiary or contractor.

The procedure described above also applies to the decision. The content of the provision contained in paragraph 1[10] applies mutatis mutandis to the decisions referred to in:

- Art. 5 subpara. 9 of the Act on the principles of conducting development policy regarding co-financing of the project, undertaking, implemented as part of the operational program, for the benefit of the beneficiary or the institution managing, intermediary or implementing the project on its behalf, on the basis of an agreement concluded with it;
- Art. 9 subpara. 4 point a of the Act of 3 April 2009 on supporting the sustainable development of the fisheries sector with the participation of the European Fisheries Fund, under an operational program in which aid was granted on the basis of this decision – in the case of funds referred to in Art. 3 subpara. 1 points a and b and point e concerning the first priority axis – the funds for the adaptation of the fishing fleet – including funds for: (a) public aid for permanent cessation of fishing activities, under which operations may be carried out to the extent specified in Art. 23 sec. 1 of Regulation no. 1198/2006[11], (b) public aid for temporary cessation of fishing activities, under which operations may be carried out in the scope specified in Art. 24 sec. 1 of Regulation no. 1198/2006[12], (c) socio-economic compensation for the purpose of managing the national fishing fleet, under which operations may be carried out in the scope specified in Art. 27 paras. 1 and 2 of Regulation no. 1198/2006[13].

10 Art. 188 of the PFA.

11 Council Regulation (EC) no. 1198/2006 of 27 July 2006 on the European Fisheries Fund.

12 Ibid.

13 Ibid.

Aid granted on the basis of a decision – in the case of funds concerning the first priority axis – funds for the adaptation of the fishing fleet, covers the scope defined in Art. 27 sec. 1 points d and e and in paragraph 2 of Regulation no. 1198/2006, concerning socio-economic compensation for the management of the Community fishing fleet. As part of this compensation:

- the EFF may contribute to the financing of socio-economic measures proposed by Member States to fishermen affected by changes in fisheries, which include:
  - early departure from the fishing sector, including early retirement;
  - non-renewable compensation to fishermen who have worked as fishermen on board of a vessel for at least twelve months, provided that the fishing vessel on which they were employed has been subject to permanent cessation of fishing activities within the meaning of Art. 23. This compensation is subject to a proportionate refund if the beneficiaries return to work as fishermen in less than one year from payment of the compensation. L 223/14 EN Official Journal of the European Union 15. 8. 2006 2) The EFF may contribute to the financing of individual premiums for fishermen under 40 years old who prove that they have worked as fishermen for at least five years or have adequate training and who acquire for the first time partial or full ownership of a fishing vessel with marine fishing equipment and a total length of less than 24 m, the age of which is between 5 and 30 years.

5 Procedures for the Payment of European Funds

The Minister of Finance, in view of the efficiency of payment execution and ensuring effective control over the funds transferred to BGK, has specified in detail in a regulation the payment procedures. According to the statutory delegation, he did this together with the ministers competent for regional and fisheries development[14].

If the payment application is positively verified by the institution with which the beneficiary has concluded the project financing agreement, and in special

14 Regulation of the Minister of Finance of 17 December 2009 regarding payments under programs financed with the participation of European funds and provision of information on payments, Dziennik Ustaw no. 220, item 1726.

cases described earlier by the voivodship board, the payment order may refer to the amount of eligible expenses.

Qualified expenditures are those that meet the criteria set out in the Act on the principles of development policy, and in the case of a program financed with EFF funds – pursuant to the Act of 3 April 2009 on supporting sustainable development of the fisheries sector with the participation of the EFF.

The institution with which the beneficiary has concluded a agreement for co-financing the project, and in special cases, previously described by the voivodship board, may issue an order for advance payment for the beneficiary before the beneficiary submits the application for payment. This may be the case if such a procedure was provided for in the grant agreement or in the decision awarding the funding.

Failure to submit a payment application for a specified amount or within a specified period results in the accrual of interest, from funds remaining to be settled, transferred as an advance payment. Interest is calculated from the date of transfer of funds to the date of submission of the payment application, as for tax arrears, respectively.

There are three forms of payment: advance, advance-reimbursement and reimbursement (Borodo, 2014: 295).

Conditions and procedure for granting and accounting for advances, as well as deadlines for submitting payment applications and their scope, taking into account the types of beneficiaries and the method of implementing the activities under the program financed with the participation of European funds were defined in the Ordinance of the Minister of Regional Development of 18 December 2009, on the conditions and procedure for granting and accounting for advances and the scope and dates of applications for payment under programs financed with the participation of European funds, Laws no. 233, item 1786.

The legislator obliged Public Finance Sector Entities [hereinafter – PFSE], which are beneficiaries of a project financed from European funds, in the content of Art. 190 of the PFA, so that each expenditure eligible by the PFSE was included in the application for payment and forwarded to the competent institution within 3 months from the day it is incurred.

On the other hand, the institution with which the beneficiary concluded the contract for co-financing the project, transfers to the holder of the budgetary part or to the voivodship board, by the 5th day of each month, collective schedules of expenses resulting from signed contracts[15]. These rules are applicable respectively in the case of programs financed with the participation of European funds, including the EDF, whereby financing takes place by means of issued decisions.

It should be noted that there is a considerable detail in the implementation of the European funds budget. Expenditures made as part of payments are classified by division into sections, units, chapters and paragraphs of expenditure classification (Ofiarski, 2010: 227).

The regulations in question fulfil the information function of public finances, aiming at proper planning of expenditure schedule in the scope of internal (domestic) co-financing, in the form of targeted subsidies, programs (tasks) implemented by (for) the beneficiary, from the administrator of the budgetary part or the voivodship board (Sowinski, 2014: 438).

6 Cooperation between Ministers in Procedures Concerning the Disposal of Funds from the European Funds Budget

Mutual relations between ministers most often appearing in procedures concerning the disposal of funds from the European fund budget was determined by the legislator in Art. 192 of the PFA, in order to improve cooperation and the way of informing about important issues regarding payment forecasts under programs financed with the participation of European funds. This also includes the procedures for relations with BGK, the ministers, funds holders and other entities appearing in the procedures concerning programs financed with the participation of European funds, as well as the competences and tasks of BGK in this respect. Ministers competent for: regional development, as well as fisheries (in relation to the program financed from the EDF resources), as well as for rural development

[15] These are the agreements mentioned in Art. 191 para. 1 of the Agreement, referred to in Art. 5 subpara. 9 of the act on the principles of conducting development policy or in Art. 9 subpara. 4 points of the Act of 3 April 2009 on supporting the sustainable development of the fisheries sector with the participation of the European Fisheries Fund.

and for agricultural markets (in relation to funds for the implementation of the Common Agricultural Policy: European Agricultural Guidance and Guarantee Fund "Guarantee Section", EAGF for expenditure related to the financing of the common agricultural policy[16], EAFRD), are required to submit by the 15th day of the month preceding a given quarter to the Minister of Finance the quarterly forecasts of payments under programs financed with the participation of European funds.

On the other hand, the Minister of Finance informs the ministers competent for the matters of regional development and fisheries about the amount of funds disbursed by BGK to beneficiaries under the programs financed with European funds, by the 15th day of the month following the month in which the payment was made. This does not apply to ministers competent for rural development and for agricultural market affairs.

The Minister of Finance transfers funds for payments to beneficiaries in the accounts at BGK, and in the case of Common Agricultural Policy – to paying agencies (Agricultural Development Agency and Agency for Development and Modernization of Agriculture), whereby the total amount of these funds cannot be higher than the total limit of the expenditure for programs financed with the participation of European funds, specified in the budget of European funds.

7 Settlements of Programs with the Participation of European Funds

The legislator has determined[17] that in the settlement procedures of programs with the participation of European funds, the payer who is obliged to make payments to the beneficiaries of programs financed with the participation of European funds is BGK. Only the funds for financing the Common Agricultural Policy, are transferred by the Minister of Finance directly to the above-mentioned payment agencies. The Agricultural Development Agency and the Agency for Development and Modernization of Agriculture are

16 Referred to in Art. 3 para. 1 of Council Regulation (EC) no. 1290/2005 of 21 June 2005 on the financing of the Common Agricultural Policy (Official Journal of the EU L 209 of 11.08.2005, page 1), and in Art. 3 para. 2 of the Council Regulation (EC) no. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy.

17 Art. 192, paras. 2, 3 and 4 of the PFA.

payers in the CAP programs and they are obliged to make payments to the beneficiaries of programs financed with the participation of European funds in the Common Agricultural Policy.

BGK can handle payments for co-financing the implementation of programs and projects financed with the participation of European funds, under an agreement with the competent administrator of the budgetary part, which may also order BGK to make these payments by transferring funds to an account maintained by BGK. Thus, BGK can be a payer of both the part from the budget of European funds and the 'national contribution' to the program, and therefore provide full service to the beneficiaries. This also applies to regional operational programs, respectively.

It is significant that BGK receives both funds from the European funds budget, as well as from the 'national contribution' in the form of a targeted subsidy and in this form – a targeted subsidy, it transfers these funds to the beneficiaries.

8 Principles of Incurring Liabilities and Transferring Funds by Entities Implementing the Program Financed with the Participation of European Funds

The legislator has defined the rules on which entities implementing a program financed with the participation of European funds may incur liabilities. It can even be said that the content of the provisions contained in Art. 193 of the PFA, constitutes a kind of authorization, and even it could be considered as a legal basis for incurring these obligations.

Entities authorized to incur liabilities are the 'entities implementing the program financed with the participation of European funds', which can include both beneficiaries, entities authorized by them, as executing, as intermediary or implementing entities. However, also managing authorities can be included therein, pursuant to the content of paragraph 4. The latter may also submit applications for incurring liabilities even exceeding the total amount of program expenditure. Consent on the application is granted by the minister competent for regional development, in agreement with the Minister of Finance, and if the consent is given, he is obliged to inform the Council of Ministers thereof.

Liabilities may not exceed the sum of expenditure limits resulting from the co-financing decisions or from contracts with beneficiaries, programs financed with European funds, up to the total amount of expenditure specified for the entire program, taking into account multiannual commitments and expenditure limits, in subsequent years of implementation of financed programs with the participation of European funds.

In the event of a threat of implementation of the budget revenue plan for the execution of programs financed from European funds, specified in the budget act, at the request of the Minister of Finance with the opinion of the minister competent for regional development, the Council of Ministers may decide to suspend the obligations under the program.

In Art. 194 of the PFA, the legislator has defined the rules for transferring funds between parts and sections of the state budget within the expenditure allocated to the implementation of programs financed with the participation of European funds. It should be remembered that the general rules for making transfers of expenses between chapters and paragraphs of classification of expenditures within a given part and section of the state budget are set out in Art. 171 of the PFA and, in part, the content of the discussed article is consistent with them when the transfers are made within the frameworks of the part and division of the budget classification. However, at the request of the minister competent for regional development, opinioned by the competent administrator of the budget section, who may also submit such an application to this minister, the Minister of Finance may transfer between the parts and sections of the state budget the expenditure for the implementation of financed programs with the participation of European funds. However, this does not change the purpose for which the funds transferred are intended, as pursuant to Art. 204 of the PFA they are intended 'solely for purposes defined in an international agreement, separate regulations or the granting entity's declarations.'

In the event of disagreement between the minister responsible for regional development and the competent administrator of the budget section, the minister informs the Council of Ministers immediately of the reasons for submitting the application which received a negative opinion of the administrator of the budgetary part. It may repeal the decision of the Minister

of Finance to transfer funds within 30 days from the date of notification of the decision.

The transfer of funds is definitely easier between programs financed with European funds as parts and departments, because it is performed by the competent disposer of the budget part of the classification of expenditure, with the consent of the minister responsible for regional development (Sowiński, 2014: 442).

However, the described procedures do not apply to the EDF and funds for the implementation of the CAP of the European Agricultural Guidance and Guarantee Fund "Guarantee Section" and FRGR for expenditure referred to in Art. 3 paras. 1 and 2 of Council Regulation (EC) no. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy[18] and EAFRD.

They are applied respectively and so the competent disposer of the budgetary part may make transfers within the part and the classification of expenditures with the participation of the above funds individually, while the transfer of these funds between parts of the transfer is made by the Minister of Finance at the request of the minister responsible for rural development or the minister responsible for agricultural market affairs.

Delegation for the exercise of supervision and control over the implementation of programs financed with the participation of European funds is held by the minister competent for regional development, while in the case of EDF, the resources and funds for the implementation of the CAP of the European Agricultural Guidance and Guarantee Fund and the EAGF for expenditure referred to in Art. 3 paras. 1 and 2 of Council Regulation (EC) no. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy[19] and EAFRD, supervision and control are exercised by the minister responsible for rural development, the minister competent for agricultural markets and the minister responsible for fisheries.

18 Official Journal of the EU L 209 of 11.08.2005.

19 Ibid.

9 Conclusion

It was a good thing that the Public Finance Act of 2009 included comprehensively developed provisions regarding the implementation of the European funds budget. It is good that these regulations are practical, or even 'technical', and are concise, not providing a breeding ground for conflicts and interpretation problems.

Defining and describing institutions related to the implementation of the European funds budget make this issue clear and allow avoiding many unnecessary conflicts of competence, which undoubtedly serve the procedures indicated by the legislator, related to their implementation.

As one can see, even after the jurisprudence of recent years, this cannot be avoided, but one can at least try to minimize it and at least in part, it was accomplished.

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PART 2:
LOCAL GOVERNMENT REVENUES

DOCHODY JEDNOSTEK SAMORZĄDU TERYTORIALNEGO

INDEPENDENT SOURCES OF LOCAL BUDGETS' OWN REVENUES

Yulia Gorosh[1], *Elena Kireeva*[2]

Abstract

In the given article the authors analyse the revenues of local authorities' budgets (local budgets) and the sources of their formation. The given analysis is carried out with the aim of considering and offering alternative instruments that may allow the formation of extra local budgets. The authors suggest that non-recurrent payments (citizens' self-assessment funds) should be considered as an alternative instrument allowing one to form extra special-purpose revenues for local budgets of the lowest level of the budgetary system. The authors analyse the legal nature of these payments, the mechanism of their legal regulation, as well as the factors that restrict the attraction of self-assessment funds to local budgets. The authors used inductive methods and carried out the analysis based on the examples from the Russian Federation.

Keywords: Local Budgets' Own Revenues; Local Budgets' Expenditure; Sources of Local Budgets' Revenues; Citizens' Self-Assessment Funds; Instrument of Local Budgets' Revenues; Taxes and Levies.

JEL Classification: K34, K40.

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1 Introduction

The goal of the given article is to make an attempt at offering some additional instrument for the development of local budgets' own revenues. According to the authors, the extension of local budgets' own sources of revenues will allow them to realize the principle of budget balance and autonomy. The authors suggest that citizens' non-recurrent payments (self-assessment funds) should be considered as an alternative instrument allowing one to form extra special-purpose revenues for local budgets of the lowest level of the budgetary system. Using the example of the Russian Federation the authors analyse the legal nature of the given payments and the mechanism of their legal regulation. The authors point out the existing issues with the legal qualification of this kind of payments (a tax, a levy or a civil payment). Based on their own analysis and taking into account other authors' opinion (Karaseva, 2004: 50), the authors of the article make a conclusion that citizens' self-assessment funds (non-recurrent payments) can be qualified as local (special-purpose) taxes. Of all the factors that limit the attraction of citizens' self-assessment funds to local budgets the authors speak of financial and legal ones. A conclusion is made that citizens' non-recurrent payments (self-assessment funds) are an extra source of local budgets' revenues. However the amount of self-assessment funds can't (and shouldn't) become the predominant source of local budgets' revenues. The main application of the residents' self-assessment funds is financing a particular issue of local value, dealing with which is of urgent and significant character for the residents and has a considerable impact on the population's living conditions. The key advantage of self-assessment – provided it is the residents' initiative – is their involvement in the solution of the most urgent local problems and practical participation in self-government, i.e. it is a means of increasing the activity of the population of a particular territory.

2 Citizens' Self-Assessment (Non-Recurrent Payments) as an Extra Source of Local Budgets' Own Funds

The fundamental legal act regulating social relations in the sphere of self-government in the Russian Federation is the Federal Act of 6 October 2003 no. 131-FZ "Concerning the general principles of local self-government organization in the Russian Federation" (hereinafter referred to as Act no. 131-FZ) (Federal Act no. 131-FZ of 6 October 2003).

In accordance with article 10 of Act no. 131−FZ local self-government in the whole territory of the Russian Federation is carried out at the following territorial levels: residential locations, rural settlements, municipal districts, city districts and intra-city territories of federal cities.

According to the information from the Ministry of Justice of Russia on the territorial organization of local government as of 1 May 2017 there are 22,136 municipalities in the Russian Federation, including: 1,765 municipal areas; 1,555 city settlements; 17,944 rural settlements; 583 city districts; 3 city districts with intra-city division (Makhachkala, Samara, Chelyabinsk); 19 intra-city territories in city districts; 267 intra-city municipalities inside the federal cities (Moscow, Saint Petersburg, Sebastopol).[3]

The vast majority of residential locations and rural settlements, the number of which obviously predominates in the territorial structure of local self-government, has insignificant tax potential.

This is confirmed by the data from the Ministry of Finance of Russia,[4] according to which in 2016 the distribution of *tax revenues across the kinds of municipal units* is characterized by the following parameters: city districts accumulate 55.9% (589.4 billion RUR) of tax revenues; municipal areas account for 28.8% (303.1 billion RUR); residential areas accumulate 6.9%

3 The information and analytical materials on the development of the system of local self-government in the Russian Federation in 2016 – early 2017 are provided by the Ministry of Justice of Russia.

4 The information on monitoring local budgets implementation and intra-budgetary relations in the constituents of the Russian Federation at the regional and municipal levels in 2016 is provided by the Ministry of Finance of the Russian Federation. At the moment the given article was prepared the data for 2017 had not yet been published.

(73.3 billion RUR); the budgets of rural settlements accumulate 6.8% (71.7 billion RUR), and intra-city municipal units make 1.5% (16.1 billion RUR).

Besides, *non-tax revenues are distributed across municipal units unevenly, too.* The main volume of non-tax revenues (62.8%) was received by the budgets of city areas; the share of non-tax revenue in municipal districts makes 28.4%; city settlements make 6.2%; and rural settlements make 2.6%.

Compared to 2015, in 2016 local budget revenues from local taxes decreased by 2.2%, and so did their share in local budgets tax revenues, which decreased from 19.0% to 17.6%.

At the same time there is another interesting parameter, which characterizes the direct dependence of local budgets' revenues on the federal level. According to the data provided by the Ministry of Finance of Russia, in 2016 the total volume of tax revenues – the targets for which are set at the federal level – is estimated at 88.9% of the total amount of local budgets' tax revenues.

The given data confirm the fact that nowadays for the majority of local budgets of lower level of the Russian budgetary system, particularly the budgets of settlements, it is very difficult to form their own, independent sources of revenues necessary to deal with local tasks, to provide autonomy and balance of local budgets.

The fact that municipal budgets do not have any significant sources of revenue of their own, which could guarantee financing the solution of particular local problems, makes them look for other mechanisms allowing them to mobilize the given funds.

In particular one of such instruments is the possibility to accumulate a specific source of funds in the local units budgets that is characteristic only of local budgets, i.e. *citizens' self-assessment funds (non-recurrent payments).*

Self-assessment is a form of citizens' voluntary monetary participation in the events of local value related to socio-cultural development and improvement.

The possibility to introduce self-assessment payments for citizens is enshrined in article 41 of the Budgetary Code of Russia of 31. 7. 1998 no. 145-FZ (Federal Act no. 145-FZ of 31 July 1998), in point 1 part 1 article 55 and article 56 of Federal Act no. 131-FZ.

According to article 56 of Act no. 131-FZ by self-assessment funds one means non-recurrent payments made in order to deal with particular issues of local value. It emphasizes the special-purpose character of the given payments, which implies their reflection in local budgets as separate from other revenue and expenditure items. Self-assessment funds can be introduced and used to deal with the issues related to municipal units' landscaping and greening, collection and removal of rubbish and waste, improvement of places of public entertainment and recreation; protection and preservation of cultural heritage of local value; power, gas, water and heat supply; fuel supply; roads and bridges construction and maintenance and other issues of local value stipulated in articles 14–16 Act no. 131-FZ.

The amount of the given payments is established in absolute value equal for all the residents of the municipal unit. Preferences in the form of lower amount of the payment may be stipulated. Such welfare beneficiaries may include elderly citizens, disabled, veterans of war and labour, low-income citizens. Their number may not exceed 30% of the total amount of residents of a municipal unit.

The decision to introduce and use the given payments should be made at a local referendum (citizens' meeting). All of the residents living in the territory of a particular municipal unit and having the electoral right can take part in the local referendum based on the direct, equal and universal declaration of will by secret ballot. Citizens' meeting for dealing with local issues is held in the settlements where the number of residents with the electoral right is no more than 100. The goal, the terms of payments and usage of the citizens' self-assessment funds, as well as the control over their payment and usage and the responsibility for their untimely receipt by the local budgets and non-payment should be determined at the local referendum (citizens' meeting).

Table 1: Let us consider the dynamics of self-assessment funds revenues to the local budgets[5]

Constituent of the Russian Federation	Amount of self-assessment funds, million RUR (percentage share)		
	2014	2015	2016
Overall in the Russian Federation			100%
1. In absolute terms	114.3 million RUR	156.2 million RUR	213.6 million RUR
2. Percentage share			100%
Republic of Tatarstan	70.3%	78.3%	85.9%
Kirov region	5.9%	7.3%	3.4%
Republic of Bashkortostan	3.4%	1.2%	1.3%
Lipetsk region	2.5%	2.4%	1.3%
Kaluga region			1.2%
Perm region	4.4%	2.0%	1.1%
Republic of North Ossetia-Alania		1.2%	0.7%
Republic of Tuva			0.6%
Rostov region		0.8%	0.5%
Baikal region			0.5%

One should note the increase of self-assessment funds receipts by local budgets. In 2016 the amount of the given funds increased by 36.7% compared to 2015 and amounted to 213.6 million roubles (compared to 2013 the amount of self-assessment funds increased by 8.3 times).

The geography of self-assessment introduction includes 35 regions.

Based on the information provided by the regions in 2016 citizens' self-assessment was introduced in 1,567 municipal units, which makes 7.0% of the total number of municipal units (in 2015 there were 38 regions, 1,571 municipal units).

The largest receipts of self-assessment funds in 2016 (96.5%) were in 10 constituents of the Russian Federation (see Table 1 above).

5 The information on the results of monitoring local budgets implementation and intra-budgetary relations in the constituents of the Russian Federation at the regional and municipal levels for 2010–2015, 2016.

The largest receipts of self-assessment funds in 2014, 2015 and 2016 were in Tatarstan.

To activate self-assessment in the given constituents of the Russian Federation they applied co-financing from the regional budgets.

For example, in accordance with the decision of the Government of the Republic of Tatarstan made in 2013, citizens' self-assessment funds are co-financed from the republican budget in 1:4 proportion. 658 municipal units of Tatarstan in 2014 made decisions to introduce self-assessment. The total amount of the collected funds made about 80 million roubles, and correspondingly over 300 million roubles were transferred from the republican budget to the settlements. Over 40% of the given settlements made a decision to use the self-assessment funds to finance roads repairs and maintenance in the territory of their settlements, including bridges.

Similarly, in Kirov region they used the mechanism of co-financing the funds received as a result of citizens' self-assessment. The methodology of transfers' distribution is aimed at activating the work of local self-government bodies on the introduction of citizens' self-assessment.

According to the applied methodology the right to receive a transfer belongs to the residential areas and rural settlement that made a decision to use citizens' self-assessment at the local referendum (citizens' meeting). The amount of an intergovernmental transfer for the residential area is determined by the following formula: $It = SA \times 1,5$,

- where It is the amount of an intergovernmental transfer to a residential area;
- SA – the amount of citizens' self-assessment funds received by the budget of the residential area in the fiscal year in accordance with the decision made at the local referendum to introduce citizens' self-assessment.

Thus, 1.5 roubles are transferred per each rouble that is expected to be received by the budget of a settlement. Based on the data on Kirov region provided by the Ministry of Finance in 2015 9.3 million roubles of intergovernmental transfers were directed to co-finance self-assessment.

The practice of distributing transfers with the aim of stimulating residents' self-assessment seems dubious. The fact that extra sources of revenues for the settlements' budgets are searched for is positive. However, self-assessment is essentially a financing mechanism that must be initiated by citizens, as it is the citizens who should be interested in financing particular spending with the help of extra funds. In case citizens' self-assessment is co-financed, the initiative is not the residents', but the representative bodies of local self-government.

3 Legal Nature of Self-Assessment

The legal nature of citizens' self-assessment has not yet been determined in the legislation clearly, and neither has the question of its tax or non-tax nature been answered. On the one hand, the non-tax nature of the given payments is determined in the provisions of article 41 of the Budgetary Code, where they are classified as local budgets' non-tax revenues. In article 56 of Act no. 131-FZ it is not pointed out directly that citizens are obliged to pay the self-assessment funds. On the other hand, the decision made at the local referendum (citizens' meeting) is binding for the territory of a municipal unit (settlement) and does not need to be affirmed by any state authorities, their officials or local self-government bodies (part 8 Article 22 and part 7 article 25 of Act no. 131-FZ). So if citizens make a decision to introduce self-assessment at the local referendum (citizens' meeting), then the payments to the local budget must be of obligatory (public) character for the population of the given municipal unit. Due to this fact citizens' self-assessment funds may not be qualified as public (i.e. dispositive by nature) relations.

Besides one should take into account the fact that according to article 57 of the Constitution of the Russian Federation every citizen must pay legally established taxes and levies.

The Constitution does not oblige citizens to pay any other obligatory payments of tax character.

According to article 8 of the Russian Tax Code of 31 July 1998 no. 146-FZ (as amended) (Federal Act no. 146-FZ of 31 July 1998) by 'levy' one means an obligatory contribution collected from organizations and physical persons, making which is one of the conditions under which state authorities, local

self-government authorities and other bodies and officials take legally significant actions towards the payers, including the provision of certain rights or granting permissions (licenses). Frome the viewpoint of legislation, citizens' self-assessment funds can hardly be referred to as levies, as the goal of their establishment is dealing with particular local issues. That is the basis for charging self-assessment funds is public goals, and not legally significant individualized state bodies and officials' actions.

In accordance with part 1 article 8 of the Russian Tax Code the tax is understood as a compulsory and individually non-refundable payment which is collected from organizations and physical persons by means of alienation of monetary resources which belong to them on the basis of the right of ownership, economic jurisdiction or operational management for the purpose of financing the activities of the State and (or) municipalities.

Thus, one could consider citizens' self-assessment funds as having a tax nature, as their attributes are mainly those of a tax as indicated in article 8 of the Russian Tax Code (individually non-refundable, alienation of monetary resources which belong to organizations or physical persons on the basis of the right of ownership, economic jurisdiction or operational management, financing the activity of the state and (or) municipalities).

At the same time in accordance with part 5 or Article 3 and part 6 or Article 12 of the Russian Tax Code, no one may be charged with an obligation to pay taxes and levies or other contributions and payments which have the attributes of taxes and levies as established by this Code other than those which are provided for by this Code or which have been established in a manner other than that which is prescribed by this Code. At the same time, according to the Russian Tax Code, a tax shall be considered to have been established only if the elements of tax assessment have been defined (Article 17).

In Professor M. V. Karaseva's opinion (Karaseva, 2004: 50) the institute of citizens' self-assessment (non-recurrent payments) in municipalities needs to be qualified as taxes, which implies the need to make relevant changes to the acts of municipal legislation and the to the tax and levy legislation. They should be the changes that would allow one to identify clearly the legal nature of citizens' self-assessment by qualifying them as local

taxes (and probably indicating the fact that they are special-purpose taxes); to define the object of taxation and the procedure for the calculation of the tax base, the limits of the tax rate, as well as establish the limits related to the frequency and volume of the given tax within a calendar (fiscal) year.

Taking into account all of the mentioned above, the authors of the given article tend to think that by nature citizens' self-assessment funds (non-recurrent payments) are fiscal levies designated to deal with local issues, and it is necessary to qualify them as local (special purpose) taxes.

4 Factors Restricting the Attraction of Citizens' Self-Assessment Funds

- All the issues related to the introduction and usage of citizens' self-assessment funds are to be determined at a local referendum (citizens' meeting). All the citizens living in a particular municipal unit and having the electoral right can take part in the local referendum based on the direct, equal and universal declaration of will by secret ballot. Citizens' meeting is organized for the settlements with the number of residents with the electoral right under 100. If the number of residents having electoral rights is over 100, the goal, order and terms of payment and usage of citizens' self-assessment funds, as well as control of their payment and responsibility for untimely payment or non-payment to the local budgets are to be determined at a local referendum.

  However, a referendum is an expensive event, which is almost impossible to afford under the conditions of local budgets' deficit. Besides, a local referendum can be held only in the whole territory of a municipal unit, therefore introduction of self-assessment for the majority of large municipalities will be economically unviable. The local referendum (citizens' meeting) may envisage not only one-time, but gradual payments for the citizens, as well as the terms of gradual payment of corresponding funds to local budgets. At the same time, in accordance with the current legislation, self-assessment funds are one-time payments. It means that only one payment can be introduced at the local referendum (citizens' meeting) in order to deal with a particular issue of local value, and not recurrent payments within a certain period of time.

- No special requirements are enshrined in Act no. 131-FZ or the Budget Code of the Russian Federation regarding the economic justification for the introduction of one-time payments for the citizens in the territory of a municipal unit or regarding the limits of their size. In case the given payments are introduced, the demand to make them will apply to the citizens who did not take part in the local referendum (citizens' meeting), to the underage children, as well as the residents who voted against this decision. The responsibility to make the given payments will also apply to the residents of municipal units that generally do not mind introducing them, but don't agree with their amount or usage procedure.
- The level of budgetary capacity in municipal units varies considerably. At the same time the federal legislation does not contain any restrictive mechanisms regarding the procedure of defining the object of one-time payments charged as self-assessment funds, or the marginal rate or size of the given payments, the frequency of these payments over a certain period of time. So the situation when the amount of the one-time payment is quite acceptable for some and almost impossible for other citizens is quite probable.

To extend the sphere of attraction of citizens' self-assessment funds one might suggest that the decision to introduce self-assessment should not be made at a referendum, but at public hearing in the course of local budget's adoption. Considering the fact that federal law does not define the minimal number of citizens that may take part in the hearings, the decision to introduce self-assessment made at them may be of discriminative character for the vast majority of the population of municipal units, i.e. it is quite likely that the vast majority of municipal units' residents who did not take part in the hearings will have to comply with the decision made by the minority. If this is enshrined legally, the sense of self-assessment will be lost. It seems right to replace citizens' self-assessment with voluntary contributions (donations). The legal aspects of the institute of voluntary contributions, their procedure and terms of making and using them are regulated by Article 582 of the Civil Code of Russia of 30 November 1994 №51- FZ (as amended) (Federal Act no. 51-FZ of 30 November 1994). The key attributes of a donation are special-purpose use, common goal, and voluntary basis. One can donate various properties,

including money and goods. Thus, in order to avoid the need to hold a referendum (citizens' meeting), local representative bodies may stipulate the possibility to make donations for the citizens in the decisions on the local budget in order to deal with particular issues of local value. These donations can be made on a voluntary basis exclusively. Besides, citizens of municipal units can conclude contracts of civil character with the organizations that provide community services for a fee. In this case it is not necessary to transfer citizens' payments to local budgets for their further usage by the local government bodies. But local authorities may provide assistance to the citizens in the selection of the given organizations and concluding relevant contracts with them, as well as coordinate their execution of the given contracts via the mechanisms of public-private partnership.

5 Conclusion

Citizens' non-recurrent payments (self-assessment) are an extra source of local budgets' revenues. However, the amount of the funds received from self-assessment, can't (and shouldn't) become the predominant source of local budgets' revenues. The key designation of citizens' self-assessment is financing a particular issue that is urgent and significant in the residents' opinion and has a considerable impact on the population's living conditions.

Another advantage of self-assessment – in case it is initiated by the residents – is their involvement in the solution of the most urgent issues and actual participation in self-government, i.e. it is a means of raising civil activity of the population in a particular area.

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RISK IN THE INVESTMENT ACTIVITY OF LOCAL-GOVERNMENT UNITS IN POLAND

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Abstract

The aim of this article is to demonstrate the dependencies that exist between the conduct of effective investment activity and risk management in units of local government. The discussion relates to public entities, since this sector is marked by a large number of investments, often simultaneous ones, by discipline in spending financial resources, and also by a legally imposed duty to implement managerial control, including processes of risk management. Furthermore, investments in this sector are often co-financed from external funds, deriving from European Union structural funds, which offers an opportunity to conduct a greater number of more modern investments; however, this generates additional risk connected with obtaining and spending these funds.

Keywords: Risk; Investment; Local Government; Management.

JEL Classification: G32.

1 Introduction

Every unit that operates in the economy must develop in order to fulfill its role efficiently. The best tool and determinant of effective development is investment activity. However, such activity entails the necessity of changes, the improvement of current realities, and, thus, brings with it risk. It is necessary to consider what threatens the success of our investment, to what degree it can affect the investment, and how we can avoid the negative effects such risk becoming actual, etc. But is risk measurable? Can we create a model, something like a set of instructions, for how to behave vis-à-vis such a sensitive element of our activities? These considerations

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become even more complicated when the entity of which we are speaking are units in public sector finances. These units are based on detailed legislation; they are bureaucratized to a high degree; and they conduct investment activity according to priorities that are different from those of private businesses and firms.

The aim of this article is to demonstrate the dependencies that exist between the conduct of effective investment activity and risk management in units of local government. The discussion relates to public entities, since this sector is marked by a large number of investments, often simultaneous ones, by discipline in spending financial resources, and also by a legally imposed duty to carry out managerial control, including processes of risk management. Furthermore, investments in this sector are often co-financed from external funds, deriving from European Union structural funds, which offers an opportunity to conduct a greater number of more modern investments; however, this generates additional risk connected with obtaining and spending these funds.

The following discussion focuses on the relations of investment to risk for local governments that also avail themselves of financing out of European Union funds. The relations are described that exist between these two components, and also the influence they have on each other. Further, ways of limiting risk in investment activities are presented. It is, thus, possible to make practical use of the information this article contains, with the aim of minimalizing risk and its potential effects within this type of investment.

2 Risk in Local-Government Investment Activity

The presence of risk is an inseparable element of the activities of all economic entities, including local-government units. Risk is a complex term with many meanings and many aspects, which makes it particularly difficult to define it precisely (Jastrzębska, 2014: 30). The following features that describe risk can be identified (Olejniczak, 2009: 15–16):

- objective existence, that is the presence of risk in an entity's activities;
- quantifiability, which means that it is possible to measure the probability of the emergence of risk;

- symmetry, that is the perception of risk as both a negative threat and a positive opportunity;
- its influence on the activity of a given entity.

From the point of view of a unit of local government – and also from that of its financial activity – it must be pointed out that it is possible to understand risk (Jajuga, 2007: 13):

- negatively (as a threat indicating the possibility of not achieving an expected effect);
- neutrally (as a threat, but also simultaneously an opportunity; the possibility of achieving an effect that will differ from the one expected).

In relation to the above, all entities perceive risk as a threat that points to the possibility of not achieving settled aims, and they then undertake actions that aim to reduce risk. However, simultaneously, there is an awareness of the positive role of risk, one that makes it possible to attain greater benefits, if activities that entail risk are undertaken.

Thus, risk must be understood as the possibility of the occurrence of a positive event, but also of a negative one that may influence the realization of intended aims. Risk occurs in all kinds of activities and is present at every stage of the process of realizing tasks (Dylewski, Filipiak, 2013: 29). The formulation of risk should equally comprise the cause of the effect and its effect on the aim, that is the cause and potential effect. Thus, risk is measured by its influence (that is, the level of importance of the risk), in other words, by its possible effects and by the likelihood of their occurrence. This gauge makes it possible to evaluate and hierarchize risk in particular spheres of the operations of an organization.

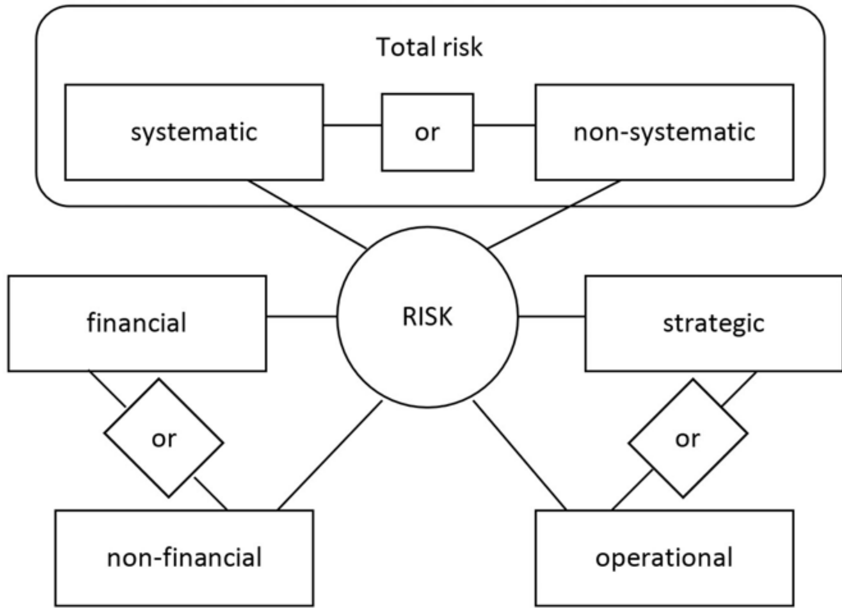
Both the character and the scale of risk present in the activities of local-government units is a result of the special features of the public-finance sector, and also the unique nature of local governments as entities within this sector. This is also why in these units risk is mainly seen negatively; that is, it is linked to losses and additional costs that are a result of some event, etc., which hinder the achievement of intended aims and the accomplishment of tasks. In local governments, a reluctance to undertake

risk is perceptible, or, indeed, a conviction of the limited influence of risk on the activity of local-government units. What is more, as a result of the limited term of office of a local-government authority, a short-term time-frame is usually adopted in decision-making processes. In addition, evaluation of activities undertaken is no easy task, since no precise criteria have been developed to evaluate local-government activities. Besides that, financial policy and conduct are specific for local-government units, and – connected with this – so is financial decision making, because of substantial legal regulation in this field. There are also greater limitations in the conduct of personnel policies; also the scope of supervision of the activities of units in the public financial sector is more significant (Jastrzębska, 2014: 32).

In its activities, every local government is obliged to take the emergence of risk into consideration. Units of local government should give particular attention to the sources of threats (risk) in their activities, since the emergence of any substantial threat has a negative impact on the accomplishment of tasks and the achievement of aims, both current and long-term ones. A consciousness of the possibility of risk is not in itself sufficient. Action and knowledge of how to cope in a situation of threat are also necessary. It is also necessary to consider the possibility of covering the costs of insuring against risk. It also worth underlining that negative consequences do not have to have only a financial dimension; there can also be consequences social, political, or economic terms (Dylewski, Filipiak, 2013: p. 33). In the activities of local government units, it is centrally important to identify all events the results of which may be negative, and also to plan actions that will reduce the chances of their occurring and will combat the negative consequences of such events (Poniatowicz, 2005: 127–128).

A tally of kinds of likely risks in the activities of local-government units is very extensive and complex, just as the scope of local-government activities is. However different kinds of risk have a variable force of effect. Individual threats can be divided according to different criteria. Figure 1 presents a general division of risks.

Figure 1: The division of risk according to general criteria



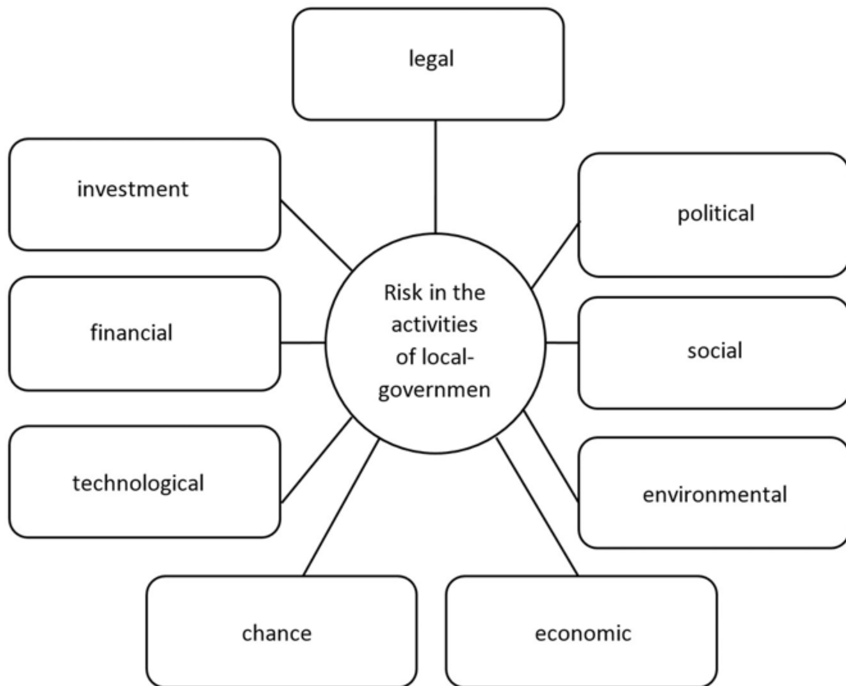
Source: Author's own figure, based on Gwizdała, 2011: 29–41

The above classification entails a division into strategic and operational risk. The emergence of strategic risk is independent of a local government. Units of local government are in no position to control the existence of such risk, since it is dependent on external forces; however, local-government units can act with the aim of limiting this risk. Operational risk, however, relates to the basic activities of local governments, those connected with the provision of community or social services. The sources of this kind of risk are, for example, plans and strategies, information systems, the character of the activity undertaken, limitation of resources, etc. (Jastrzębska, 2014: 39)

The consequences of the emergence of risk may be financial, causing a worsening of the local government's financial situation, or non-financial. These may influence, for example, a loss of attractiveness on the part of the local authority in the eyes of inhabitants, business people, or investors. On the basis of this criterion, risk can be divided into financial and non-financial risks (Wojtasik-Terech, 2010: 22–30).

If the above divisions of risk are taken into consideration, it is possible to indicate the most important kinds of such risk that appear in the activities of local-government units. Separate risks are set out in figure 2.

Figure 2: Separate risks in the activities of local-government units



Source: Author's own figure, based on Jastrzębska, 2014: 39–46

Investment risk – the subject of this article – is directly linked to taking wrong decisions, the growth of investment costs, overcapitalization, delays in completing investment projects, and lack of financial cover for completed undertakings. Investments realized by local-government units are technical instruments making balanced development dynamic, because their implementation influences, inter alia, the state of the natural environment, the quality of life of inhabitants, or economic development. At all phases of the investment process implemented by local governments, a differentiated risk is observable, the emergence of which may be in connection

with the investment process undertaken, and may relate to different phases of that process. Table 1 presents the differentiation of particular risks according to a division into phases of the implementation of the investment process.

Table 1: Risk in phases of the investment process

Project phase	Risk
Preparatory phase	technological
	credit
	tender
Construction phase	overcapitalization
	time
	political
	legal
	force majeure
	efficiency
	environmental
Use phase	overcapitalization
	efficiency
	political
	legal
	accidents
	financial (liquidity, inappropriate choice of sources of financing, lack of ability to raise financial resources)

Source: Author’s own table

At each of the separate phases, there is a possibility that risks of varying kinds will appear. It is worth emphasizing that market risk also has a substantial influence on implementing investment aims; market risk includes, for example, the risk of price changes, the emergence and development of other projects, inaccurate estimation of demand, or a lack of possibility of implementing an investment.

It is also necessary to pay attention to an emerging risk to the project (tactical risk), and, thus, one connected with the process of change or the

development program. This relates to the implementation of, inter alia, new investment undertakings, in which these activities are performed only once and exceptionally. The risk is connected with the success of realizing projects. It results from the scale of the appropriateness of assumptions, both technical and economic-financial ones, of the project, and it is connected with (Dylewski, 2006: 283–286):

- the realization and evaluation of projects;
- the financing of projects from returnable sources of financing;
- the procedure of public competitive tendering (mistakes in tendering procedures, which may invalidate the process, and as a result of which there may be a delay in implementing the investment and financial problems);
- obtaining and also exploiting EU funds (the risk of not receiving funds – lack of positive evaluation of the application submitted for financing; the risk of not observing European Union procedures, relating to the management of projects by local governments, for example, the matter of the beneficiary's own contribution, or the issue of bridging finance and non-qualified costs);
- public-private partnership (risk related to the choice of a private partner, and to the division of risk within a signed contract).

One can note that the above risks relate to every phase of the completion of a project; this is connected with the different stages of realizing particular investments. The most frequently recurring potential risk is the submission of tenders that are higher than the planned budget, and the consequence of this – the prolongation of the tender procedure.

Local-government units can behave in different ways toward an identified risk. Four kinds of reaction can be distinguished (Olejniczak, 2009: 21):

- acceptance (toleration) of risk – implementing the task with full consciousness of the risk; the ability to combat the risk is limited, or there is a possibility that the cost of putting an end to the risk would exceed potential benefits; active and passive toleration of risk are to be distinguished – in a passive approach, risk is accepted in that form in which it emerges, and no actions are undertaken that could combat it; however, in an active approach, besides acceptance of the risk, a plan is formed for the eventuality of its occurrence;

- avoiding risk – the elimination of the causes of the emerging risk, or the factors causing it; this means taking no risky actions, looking for other solutions to make it possible to realize the task at a lower level of risk; the local-government unit aims completely to dispose of the likelihood of risk, before an event connected with this can occur;
- reduction (prevention) of risk – the creation and implementation of plans of action that aim to combat the occurrence of negative events or to reduce the likelihood of their occurrence; these actions can lead to the removal of risk, or to maintaining it at an acceptable level;
- transfer of risk – the transfer of risk to another entity, which, thus, bears responsibility for the consequences of the risk, for example, to an insurer (through an insurance policy with an insurance firm), or to a private partner (through contractual risk insurance in investments within a public-private partnership, leasing, derivative instruments, warranties and guarantees, etc.)

Undertaking one of the above actions should be the result of gauging the level of risk that emerges within a given investment, and also of a designation and adoption of actions that aim to adapt the size of the incurred risk to a level that is acceptable to the given unit of local government (Jajuga, 2007: 14).

3 Conclusion

A summary of the above discussion indicates that the issue of risk management in local-government units will become more significant and, in principle, has become an obligatory element of the process of management in investment activities. This has occurred, inter alia, because of the share of European Union structural funds in financing investments. Considerations of risk in undertakings realized by local government should employ methods of identifying pessimistic variants, which take account of all possible negative situations linked to investments. All this leads to adopting measures that aim to minimalize and limit risk. Further, this forms a departure point for defining alternate scenarios if a situation with negative consequences of risk arises. These matters also include the problem of liability, both civil and social, for carrying out investment on the part of the management of given unit. All this means that risk management is no longer a matter of choice, but of necessity. Nor should it be forgotten that, to a large extent, investments

are realized from funds received from society in the form of taxes and payments. Thus, besides its financial consequences, the failure of an investment brings down an avalanche of criticism on the authorities' heads.

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RECEIVABLES ADMINISTRATED BY MUNICIPALITIES IN THE CZECH REPUBLIC

Michal Kozieł[1]

Abstract

Municipalities as the subjects of public law act in private-law relationships as the equal subjects. They can work with both payables and receivables. This paper deals with municipalities' options being offered by the law as it comes to administration and enforcement of receivables from their debtors; those receivables create a big part of municipalities' properties. However, municipalities are bounded by the rules of purposeful and economic management of their properties, which are marked as the public properties. The stress will be also put on the specifics of municipalities' position in this private-law relationship mainly as municipalities' decision-making related to given legal relationships is concern. The main aim of the paper is to prove or disprove the hypothesis that municipalities (under conditions given by the law) can release the debtors from their debts and, at the same time, offer a solution to municipality body and the way how to act in such cases. The aim of this paper will be achieved by the use of analysis, comparison and deduction methods.

Keywords: Financial Law; Municipalities; Receivables; the Czech Republic; Debt.

JEL Classification: K10, K30, E60, E62, H87.

1 Introduction

Debts always were, are and will be the part of our culture. Whether those are public or private-law ones, they always have fundamental impact on creditor's property. If we would not consider the public debt, which is rather

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reported as the total amount of payables of public sector subjects, in case of private-law debt, each receivable is counted separately. In those relationships, the subjects of public sector act in accordance with an equality rule and cannot apply their authoritative position as the public authority representative. The public properties seem to be owned by the state but it is the other way around. Huge part of the properties is owned by other subjects of public sector, which possess of separate legal subjectivity. Among those subjects are e.g. state-funded institutions, public researching institutions, public universities, medical insurances, local self-governing units etc.

When managing the properties, all those subjects have to follow the special rules when it is a public financial activity. (Mrkývka, 2012: 61) The basic rule says that the property has to be managed purposefully and economically. The author of this paper will deal only with municipalities' properties and receivables. Municipalities though are the big part of public law and their bodies' members are often people not knowing the law or economics; however, they have to manage the properties with the care of good manager not having idea what it means. The big amount of municipalities' properties are represented by receivables; these properties though have to be managed in proper way and said debts have to be executed as much as they can. Options of municipalities as it comes to this field as well as the difficulties are discussed in the following chapters. The main aim of the paper is to prove or disprove the hypothesis that municipalities (under conditions given by the law) can release the debtors from their debts and, at the same time, offer a solution to municipality body and the way how to act in such cases. The aim of this paper will be achieved by the use of analysis, comparison and deduction methods.

2 Municipalities Position as the Subject of Relationships

As known generally, the state is not the only representative of public authority in the Czech Republic. Many other subjects can be taken into consideration more or less connected with tasks fulfillment in public administration or public authority being given them by public administration. (Kozieł, 2015: 89–90) Among the subjects of clearly public character, local self-governments can be thought. By the Article 99 of the Constitution of the Czech Republic,

the Czech Republic is divided into municipalities, which are the basic local self-governing units and regions being higher self-governing units. Each of those units can be characterized by several attributes:

- it has to be self-governing citizens community,
- this community creates territorial unit,
- territorial unit is delimited by given territory border,
- it is a public-law corporation,
- it possesses of own property,
- it acts in legal relationships on behalf of its name and holds responsibility resulting from those relationships,
- when fulfilling the tasks, it protects public interest.

Municipalities and regions stand in dual position. On one hand, they represent the public authority protecting public interest, developing the given area and using the tools to do so. On the other hand, taking such fact into consideration that local self-governments are authorized to manage the properties, which have been put them in trust or they obtained them in other way, those local governments enter legal relationships of private-law character. In such case, they act as typical legal person and in relationship with trade partner, tenants, contractor etc. stands in position of equal subject, which is not put above neither in any other way favoured against other subjects being not the holders of public authority.

For the purposes of this article, the author will further deal only with municipalities as the fundamental local self-governing units related to their power to manage the properties. By Legal dictionary, the property can be defined as *the set of property values (things, receivables, other rights and values, which can be priced by money) belonging to particular subject* (Hendrych, 2009: 823). Thus, things of either material or non-material character are not the only part of property but receivables as well, currently creating significant part of property structure of most subjects. In case of local self-governing units, it is the same case.

3 Definition of Receivables

The fundamental term being used in this article, the receivable is. The receivable can be defined as *the right of creditor to ask the debtor to pay him*

a particular property value (Hendrych, 2009: 1038). This right is radically based on the claim thus the option to force its fulfillment by the state power. In accordance with § 496 par. 2 and § 498 par. 2 of the Act no. 89/2012 Coll., the receivables can be filed among intangibles. Because it is considered the thing by the law, its accessories are also determined. Concretely by § 513 of the Act no. 89/2012 Coll., interests, interests on late payments and costs related to their execution are considered the accessories. (Civil Code, Art. 513) Among the costs related to the receivable's accessories are those: costs of the proceedings, costs of legal representation in the frame of the proceedings, costs of execution, and costs of legal representation in the frame of the execution.

In case, the receivable's accessory has already existed and the debtor is willing to pay his debts, then in accordance with § 1932 par. 1 of the Act 89/2012 Coll., Civil Code, costs having been already determined, costs of late payment interests, interests and security are deducted from the debt at first unless the debtor would express his different will. (Civil Code, Art. 1932/1) This rule has to be paid attention mainly if the debtor wants to pay just partially because such situation influences an existence and amount of the debt itself. If e.g. the security would be 1 500 CZK and its accessories would be 500 CZK and the debtor would pay 1500 CZK, this amount would be taken to pay accessories in full and 1 000 CZK would be taken to pay the security. The rest of the security, i.e. 500 CZK still remains if the debtor would not pay it. As time would go on, the total debt would grow because receivable accessories would be continually added (typically interests of late payment calculated out of the rest of security since the day of last payment made by the debtor).

To make it clear, the creditor is the person authorized to request the debt fulfillment paid by the debtor. The debtor is the person being obligated to pay the debts to the creditor thus fulfillment is meant agreed or resulted from the law. On both sides, more individuals can take part.

The question of receivable limitation is of a separate topic. Limitation is possible to be determined as a legal consequence caused by a vain lapse of time, during which the subjective law of creditor could be executed in front of authorities of law protection (mainly in front of court) and which passes

without this law being realized. (Lavický, 2014: 2166) Period of limitation is thus period, after which the subjective law is weakened and lasts generally 3 years. (Civil Code, Art. 629/1) In case the creditor disposes of legitimate decision, limitation period lasts 10 years since the day this decision should have been executed. (Civil Code, Art. 640) In case of long-term passiveness of the creditor, the debtor stands in advantageous position because he can apply a simple claim of limitation. If the debtor would fulfill his debts without the limitation claim, he cannot ask the creditor to give him such fulfilment back.

4 Options of Creditors Rights' Enforcement in the Czech Republic

In the Czech Republic, creditors have the only one option how to enforce their rights towards debtors. If the special legal regulation does not exist (as it is in case of disputes solving by the Czech Telecommunication Office[2] or Financial Arbiter[3]), then the creditors can submit their claim to the court and in such case the Act no. 99/1963 Coll., Civil Procedure Rules as amended are concern (further Civil Procedure Rules). There are particular specifics, of course. Typical lawsuit can be filed to fulfill the debts by debtor or faster way can be chosen – to make a motion to have payment order or electronic payment order issued. Considering the second case, there is one specific that the debtor often does not know the lawsuit has been started unless he receives the said payment order. To balance this disadvantage, the law constructs protection mean – a protest – which does not have to contain statements and recommendations for proves. Activity shown on the side of a defendant is enough. In such case, procedure is transferred to the standard procedure of legal action and the entire issue starts de facto from the beginning.

Before court procedure itself, it is recommended to send pre-prosecutor invitation to the debtor by § 142a of Civil Procedure Rules. It is kind of last call before the creditor files a lawsuit and thus receivable accessories would increase in shape of procedure costs. At the same time, it is necessary

2 See the Act no. 127/2005 Coll., on electronic communication and on the change of some related acts as amended.

3 See the Act no. 229/2002 Coll., on financial arbiter as amended.

condition for the creditor in order to have him be paid the costs. The pre-prosecutor invitation has to be delivered to the debtor at least 7 days before the lawsuit is filed. (Svoboda, 2017: 606) Court procedure is being begun based on motion, which is also called the legal action. The legal action has to involve general and special elements given by the law mainly description of decisive facts, proves as well as a petit i.e. what the complainant demands. Necessary condition to begin the lawsuit, court fee is to be paid by present tariff of court fees.

Procedure of the legal action finishes by the court decision, against which an appeal can be filed. In § 202, the Civil Procedure Rules strictly determines, in what cases the appeal cannot be filed. One of those cases, the municipalities often face (considering the composition of debtors), the rule is that the appeal cannot be filed against the court decision issued in such procedure, the subject of which the amount not exceeding 10 000 CZK (i.e. 400 EUR) has been, not taking into account the receivables accessories. (Civil Procedure Rules, Art. 202/2) Those cases are called petty cases, the main purpose of which is to achieve as fastest legitimate judgment. At the same time, it is assumed that at those judgments (which are excluded from the court review except the review made by Constitutional Court of the Czech Republic) if any mistake is made, a property sphere of the debtor would not be badly affected.

As generally known, submitting the appeal brings two basic effects namely devolutive one (decision on appeal is transferred to the appeal court) and suspensive one (by the appeal submitting the legal validity is postponed until the appeal court decides). Those effects have fundamental significance for the creditors. In case the court of first instance allowed an appeal, then appeal submitted by the debtor means that final judgment is put aside for several months or even years. For example, if the creditor filed lawsuit on the amount of 100 000 CZK, two or three court procedures were issued and the debtor tried to avoid these procedures (however in accordance with the law), then the judgment of first instance court can be pronounced even after two years. Once the creditor achieved a justice and held up the judgment saying that he were right and the debtor really owed him the said amount, the debtor filed the appeal and the whole thing will be postponed within

time. Possible costs of procedures and late payment interests are considered nothing if the debtor heads towards his business termination (speaking about legal person); final and enforceable judgment means nothing because there is nothing to take from.

After situation mentioned above, the creditor is entitled to address a distrainor. The distrainor can use his rights given him by the law to enforce the receivable from the debtor including its accessories (increased but not only costs of court procedures but costs of distress procedure as well). There are several ways to issue the distress:

- distress by deduction from wage and other incomes,
- distress by commanding the receivable,
- distress by payment order from bank account,
- distress by the sale of tangibles and intangibles,
- distress by creation of distress lien etc.

Besides above mentioned, there can occur other situations when enforcing the debts. In case, the debtor is already going through other distress procedure and his intangibles are being sold, current receivable can be filed into auction. If the creditor does not dispose of receivable security, he will not be paid off out of auction because from obtained finances, preferred and secured receivables will be satisfied the first.

Municipalities as public-law corporations can enforce the receivables by the Act no. 280/2009 Coll., tax rules as amended in the position of tax administrator, who tries to enforce arrears by tax distress or court distress.

Another issue occurs in case the debtor (natural person) deceased. In such case, the receivable has to be filed into inheritance proceedings in order to have the receivable paid off.

The third option being recently often used in the Czech Republic, bankruptcy petition is filed at the debtor, who is going down to the bankruptcy. The debtor is going down to the bankruptcy if there are more creditors, financial payables lasting more than 30 days after due date and he is not able to fulfill those. If there is bankruptcy procedure begun and bankruptcy is confirmed the only way for creditor to receive his receivables at least partially is to register them to bankruptcy procedure. The receivable is assessed

by the trustee in bankruptcy and if he does not deny it, it is involved to the receivables list; those will be satisfied within the bankruptcy procedure. Not taking into account the status of the receivable (whether the creditor holds distress title or he only submitted pre-legal action invitation), bankruptcy confirmation means that if the creditor applies for receivable late, this receivable will be excluded from possible satisfaction. (Act on Bankruptcy, Art. 173/1) It has to be said though that the rate of receivables satisfaction within bankruptcy procedure achieves minimum values – just units of percent out of original receivable value.

All above said situations demands the creditor to be active, to monitor publically accessible registers and file his receivables. If he would not file the receivable in the term given by the law (depending on procedure type terms can differ), then he cannot make excuses he did not know about debtor's decease. The creditor can use a help of professionals (e.g. advocate) when managing his receivables because it does not often pay to invest not small finances to monitor his debtors if there is not many of them.

One fundamental conclusion results from above mentioned namely even the distress title exists the creditor has not won yet. If the debtor does not have any property, even ten distress titles are considered nothing because there is nothing to take; he very likely owes other creditors, too. In such cases, economic side of creditors acting has to be taken into consideration. Each step during receivables enforcing is related to more costs for the creditor; if he knows the debtor does not dispose of any property, the creditor should consider to write off such receivable and not to spend further costs.

5 Municipalities' Tasks Related to Receivables

As said above, municipalities can also stand as the creditors. It results from the fact that municipalities own properties, which is used by somebody else against payment or they stand as tax administrator and collect local taxes (Radvan, 2017: 340–348) or administration fees. The basic principles of properties management can be found in the Act no. 128/2000 Coll., on municipalities as amended and in the Act no. 250/2000 Coll., on budgetary rules of territories' budgets as amended. The difference between the municipality and typical creditor is that the municipality is public-law

corporation and as such is obligated to use its properties purposefully and economically in accordance with its interests and tasks based on determined authority (Act on Municipalities, Art. 38/1). In other words, municipality has to manage its property with the care of good manager and each property management should be always justified. (Kopecký, 2017: 96–105)

If only receivables managed by the municipalities would be concern, then the rule of § 38 par. 6 and 7 of the act on municipalities would be applied. It says that the municipality is obligated to protect its properties against non-authorized involvements and to apply the right to damage compensation and return of unjust enrichment. In addition, the municipality is obligated to monitor continuously whether the debtors pay off their payables in time and to guarantee that those payables will not be time-barred or the rights resulting from them would not cease to exist. (Act on Municipalities, Art. 38/6-7) In purpose to enforce the debts, the municipality is obligated to use all legal tools to do so. (Řezníček, 2017)

The part of purposeful and economic property management an ability of municipality is to review whether the given receivable is collectable or not. In case municipality bodies come to conclusion that particular receivable is not collectable then they can consider its excuse. In case the receivable is higher than 20.000 CZK, the excuse has to be agreed by municipality board in accordance with § 85 of the act on municipalities. If the receivable is of lower value, municipal council or mayor can make decision unless the municipality board has determined otherwise.

When the time-barre is concern, this topic has to be assess very sensitively. The municipality should dispose of enough educated staff, which would be able manage receivable portfolio in proper way (including monitoring of time-barred periods). If there is not such staff, there is the option to authorize an external subject (e.g. advocate). In case the law would not be applied within determined period and would lead to its time-barre without any reason, the municipality does not act economically and in breach of the law. This way, budgetary discipline is violated with its consequences i.e. concrete people can be prosecuted in financial-legal or criminal way. (Kozieł, 2016: 492)

6 Conclusion

Based on above mentioned, such conclusion can be made that municipalities as well as any other creditor dispose of legal options to enforce receivables. Municipality is special, it is public-law corporation managing public properties and administrating receivables thus it has to follow stricter rules. In many cases, municipalities have to assess very sensitively, whether enforcement of receivables of low nominal value would be purposeful comparing the costs spent on it as well as the fact that the receivable would be uncollectable.

In this case, municipality bodies are recommended to obtain the assessment of independent subject (e.g. expert or advocate) when deciding on debt excuse or whether they leave given receivable to become time-barred targetedly. They should know whether either way would be economic and purposeful in order to avoid criminal sanction against concrete people or municipality as such. Often though, activities led by good intension can work to the individuals' disadvantage (those who made decisions) by e.g. political opposition, office successors, who wants to distance themselves from previous crew etc. In other cases, it is recommend continuing in receivables enforcement even not purposeful at first sight. There is always little chance to enforce at least the part of them. Municipalities should use the preventive means and consider the security of the future receivable.

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PARTICIPATION OF CITIZENS IN THE FINANCIAL ACTIVITIES OF MUNICIPALITIES: THE EXPERIENCE OF RUSSIA AND OTHER COUNTRIES

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Abstract

At present, it becomes necessary in Russia to use new legal instruments for building financial and legal relations by activating the population in addressing issues of local importance and in implementing public control in the financial sphere. In Russia, there is a number of legislatively fixed forms of citizens' participation in the financial activities of municipalities. The Institute of Public Hearings is the only mandatory tool that allows citizens to participate in the budget process at the local level. Legislatively fixed and a form such as the means of self-taxation of citizens. Other forms of citizens' participation in addressing issues of local importance are also used: proactive budgeting, participatory budgeting, the people's budget, and programs to support local initiatives. Most of them are in the stage of formation and are not normatively fixed at the federal level. With the help of the system method, methods of analysis, comparative jurisprudence, the features and advantages of each of the forms of citizen participation in the financial activities of municipal entities are disclosed and proposals are made to improve their use in Russian practice

Keywords: Budget; Financial Activities; the Budget Process; Public Hearings; Means of Self-Taxation; Local Government; Municipality; Participatory Budgeting; Public Control; Russia.

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1 Introduction

One of the basic principles of financial law formulated by Professor N.I. Khimicheva, is the principle of participation of Russian citizens in the financial activities of the state and local governments, as well as in implementation of its control (Financial Law: Textbook, 2012).

The proximity of local self-government to the population assumes maximum involvement of the population in solving local issues, while, as noted in the report of the Ministry of Finance of the Russian Federation on the main directions of increasing the efficiency of budget expenditures in the constituent entities of the Russian Federation in 2016, many subjects of the Russian Federation note the problem of low level of interest and involvement of citizens in the budget process. In literature it is noted that "*the deterrent for the manifestation of the essence of local self-government is that both the population and the authorities elected do not have sufficient economic opportunities to solve their own local issues*," and local self-government "*is much closer to the state than to civil society*" (Selyukov, 2003).

Russian citizens fulfill their powers to participate in the affairs of the state and local self-government through participation in solving financial issues at local level, i.e. through participation in the implementation of financial activities of municipalities. The financial activity of municipalities, being in an united interconnection with the financial activities of the state and being its continuation in the structure of public and legal entities, nevertheless has some peculiarities. Financial activity of municipal entities is carried out mainly by local self-government bodies. In some cases, provided for by law, other entities may be subjects performing financial activities at the municipal level. In the first place they include population and citizens, who were given the right to make decisions on issues of local importance in some cases.

Local self-government is as close to the population as possible, and the inhabitants of a municipal formation can influence the decision-making of local authorities. It is possible to single out various types of such participation, for example, classify by subject composition (Mironova, 2018): Various types of such participation can be singled out, for example classified by subject composition:

- participation of citizens of the Russian Federation;
- population's participation (this category may be narrowed, e.g. rural population);

- participation of residents;
- participation of civil society;
- participation of other special subjects (for example, owners of land plots).

Despite the large number of cases when citizens participation or citizens opinions are mandatory, in practice these procedures often take place formally, and citizens do not exert any real influence on the decision-making process of local government bodies of the municipality.

Currently, various forms of citizens' participation in addressing issues of local importance are used in Russia: proactive budgeting, participatory budgeting, people's budge and programs to support local initiatives. Most of them are in the stage of formation and are not fixed at federal level. The program of support to local initiatives, which began to operate in Russia in 2007 with the support of the World Bank, is the most developed in practice and used the longest of them. Each of these forms has its own peculiarities and in some cases differs from the applied foreign analogues.

The participation of citizens in solving financial issues at a local level is becoming increasingly popular among researchers. For example, specialists from the Center for Initiative Budgeting of the Financial Research Institute of the Ministry of Finance of the Russian Federation conduct research into the practice of implementing proactive budgeting in Russia and the impact of foreign experience on Russian practice (Vagin, Gavrilova, Shapovalova, 2015). Among the theoretical studies the works of M. Turcan (2013, 2014) and S. Mironova (2017) can be highlighted. Some aspects of citizens' participation in financial activities are also considered, such as public hearings (Beher, 2013), public control (Lapina, 2012), citizens' self-taxation (Mironova, 2016), etc.

This article is a result of a critical review of the model of participation of citizens in solving financial issues of municipalities, including participatory budgeting, disseminated in Russia. The research was conducted using the traditional theoretical methods, such as specification, synthesis, and modeling, comparative jurisprudence. Empirical methods include the studying the experiences of each of the forms of citizen participation in the financial activities of municipal entities, and analyses and systematization of legislative documents with the aim of improving their use in Russian practice.

2 Forms of Citizens' Participation in the Financial Activities of Municipalities in Russia

2.1 Normative Consolidation of the Principle of Citizens' Participation in the Financial Activities of the State and Municipalities

In the government program of the Russian Federation "Public Finance Management and Financial Market Regulation", one of the objectives of subprogram 3 "Ensuring openness and transparency of public finance management" is to enhance the opportunities for direct participation of civil society in the development and examination of decisions taken by the Ministry of Finance of the Russian Federation and its subordinate federal executive bodies, the development of a mechanism for public control, which includes an implementation of appropriate mechanisms.

The concept of openness of federal executive bodies indicates the need to expand the opportunities for direct involvement of civil society in the processes of developing and examining decisions taken by federal executive bodies.

At the same time, there is no single normative legal act at the federal level that fixes the forms of citizens' participation in the financial activities of municipal entities, including forms of PB.

Holding of public hearings on the draft local budget and the report on its implementation, enshrined in Art. 28 of the Federal Law no. 131-FZ "*On general principles of the organization of local self-government in the Russian Federation*", predetermines the adoption of relevant municipal legal acts establishing the procedure for holding public hearings in a particular municipal entity. In most cases the provision on public hearings is standard, applies to all types of public hearings and differs little from the provisions in other municipalities. At the same time, certain municipalities have approved separate provisions for holding public hearings on the budget, which demonstrates the importance of carrying out these procedures for local governments, as well as the specifics of holding public hearings within the budgetary process. In some cases municipal legal acts (for example, the Regulations on the organization and conduct of public hearings in the municipal entity

of the urban settlement of Bogorodskoye) refer to the Budget Code of the Russian Federation, but the latter does not regulate the issues of holding public hearings and does not even mention them.

The means of self-taxation of citizens are fixed by the Budget Code of the Russian Federation as non-tax revenues of the budget (Article 41 of the RF Budget Code), as well as Art. 56 of the Federal Law no. 131-FZ "*On general principles of the organization of local self-government in the Russian Federation*". Unlike the conduct of public hearings, the introduction of one-off payments is not mandatory, but is established by a decision of a local referendum (citizens' meeting). Despite the voluntary nature of this payment, the possibility of its introduction (following the federal legislator) is provided for by the statutes of all municipalities. As a rule, such norms completely repeat federal law no. 131-FZ.

Initiative budgeting, the people's budget, programs to support local initiatives have not yet been established at the federal level as a form of participation in special regulatory and legal acts. At the same time, regulatory regulation is actively developing at the level of the constituent entities of the Russian Federation and municipalities, this is due to objective reasons, since regional and municipal legal acts allow to take into account the local specifics, the particular municipal formation, its socio-economic development, and focus on those forms of citizens' participation which are relevant for the given territory.

Support programs for local initiatives were first consolidated at the federal level by the Strategy for the Social and Economic Development of North Caucasus Federal District until 2025, where support for local initiatives was identified as one of the mechanisms for implementing the optimal scenario for the development of North Caucasus Federal District. Subsequently, support for local initiatives received further regulatory development at the federal level in 2013 with the adoption of the Federal Target Program "Sustainable Development of Rural Areas for 2014–2017 and for the Period to 2020", one of the main tasks of which was to grant support to local initiatives of citizens living in rural areas.

In Appendix no. 9 to the federal target program, the Rules for granting and distributing subsidies from the federal budget to the budgets

of the constituent entities of the Russian Federation for grant support of local initiatives of citizens living in rural areas were approved.

The municipal programs "Sustainable development of rural territories" are accepted. The adoption of programs at all three governmental levels shows the priority for the region to implement this program, at the same time it is important for the adopted regional and municipal programs not to contradict the federal level and to be aimed at the realization of those goals and and objectives that are set in the state program of the Russian Federation.

Since programs to support local initiatives are implemented on co-financing terms, it is important to adopt appropriate regulatory legal acts of the constituent entities of the Russian Federation that establish rules for granting and allocating subsidies to municipal budgets to support local initiatives.

The State Program of the Russian Federation "Public Finance Management and Regulation of Financial Markets" provides for "*facilitating the creation of conditions for the implementation of the practice of proactive budgeting at the level of the constituent entities of the Russian Federation and municipalities*" in order to increase the transparency of information in the management of public finances, and to ensure the involvement of citizens in the discussion of budget decisions and monitoring their effectiveness and effectiveness of their implementation. The state program does not establish any mechanisms aimed at creating conditions for the implementation of the practice of initiative budgeting, in this connection regional and municipal regulatory and legal acts that implement these provisions are of interest.

At the level of the constituent entities of the Russian Federation, the main directions for the development of budgetary policy also include a development of practices for proactive budgeting in the regions. For example, the main directions of the budget policy of the Chuvash Republic for 2017 and for the planning period 2018 and 2019 fix the need to introduce principles of initiative budgeting with the aim of involving the population of municipalities in the budget process.

In some constituent entities of the Russian Federation, the practice of initiative budgeting is being introduced in the framework of local government and civil society development programs (Yaroslavl Region, Perm Territory).

The implementation of the practice of proactive budgeting on the territory of the municipalities of the Moscow Region is included in Subprogram 4 "Public Finance Management of the Moscow Region" of the state program of the Moscow Region "Effective Power for 2017–2021."

A new stage in the formation of legislation for the implementation of projects of proactive budgeting is related to the adoption of the priority project "Building a Comfortable Urban Environment", in accordance with which the adoption (actualization) of new modern rules of improvement, corresponding to federal methodological recommendations and the adoption of municipal improvement programs, taking into account the opinion of citizens, public self-government will launch the implementation of the mechanism for supporting measures for improvement, initiated by citizens, as well as the mechanism of financial and (or) labor participation of citizens and organizations in the implementation of measures for improvement.

As can be seen from the analysis of normative legal acts and scientific literature, such participation of citizens is seen primarily as an instrument of civil society. At the same time, the mention in separate legal acts, including policy documents, of the need to involve citizens in the budget process raises the issue of the possibility of researching this topic within the framework of the financial law and the budget process. Neither the Budget Code of the Russian Federation, nor the budget legislation of the constituent entities of the Russian Federation and regulatory legal acts of municipal entities regulating the budgetary process, do not name citizens (population) as participants of the budgetary process. Even public hearings are passed beyond the budget laws and are regulated by Federal Law no. 131-FZ on local self-government. The only currently fixed in the Budget Code of the Russian Federation are the means of self-taxation of citizens. At the same time they are allocated exclusively as non-tax revenues of the budget, and the procedural issues of their establishment (including the participation of citizens in these procedures) remain outside the budget laws. It is obvious that at the present stage of development of forms of citizens' participation in the budgetary process it is still too early to include citizens as independent participants in the budgetary process in the budget legislation. But the prospects for the development of this institution allow us to hope

for the possible inclusion of citizens in the number of participants in the budgetary process after a while.

One of the factors that testify to the need to include citizens (population) in the number of subjects of the budgetary process is their interest in resolving financial issues at the municipal level. The financial activity of municipal entities is one of the ways to manifest management activities at the municipal level through the consistent application of financial and legal mechanisms to ensure public interests related to improving the livelihoods of the population of the municipal formation.

Thus, in Russia at present there is no single normative act combining all forms of citizens' participation in the financial activities of municipalities, consolidating them normatively and informally. On the one hand, the existence of such a normative act has made it possible to streamline the forms that are currently used, apply general principles of financial law to them. At the same time, at the present stage the adoption of a single law may not be an article guaranteeing the solution of all problems, since it can not yet ensure the quality of procedures and the equal effectiveness of all projects. The diversity of forms of citizens' participation in the financial activities of municipalities does not yet allow them to be combined into a single normative legal act.

2.2 Means of Self-Taxation of Citizens

Unlike other states, Russia uses self-taxation to attract people to participate in the budget process. Federal Law no. 131-FZ defines the means for self-taxation of citizens as one-time payments for solving specific problems of local significance. This definition contains only some signs of the legal nature of the means of self-taxation of citizens.

The means of citizens' self-taxation differ from the tax payments by the special procedure for the introduction and collection of one-time payments, the possibility of replacing the payment of payment by public works, and the lack of a developed mechanism for collecting unpaid self-taxation. At the same time, such signs as compulsory payment, individually gratuitous nature, as well as its direction to finance public needs, allow us to talk about the tax nature of self-financing of citizens (Mironova, 2016).

Self-taxation of citizens is actively used by individual municipalities (Kirov region, Novosibirsk region, Republic of Tatarstan, etc.) in order to replenish local budgets and participate in regional programs to support local initiatives. So, as of 1 January 2018, local referendums on citizens' self-taxation were held more than 2000 times in the municipalities of the Russian Federation (most of the local referendums in recent years have been conducted specifically on the introduction of citizens' self-taxation).

If several years ago the mechanism of self-taxation was practically not applied, with the development of initiative budgeting and programs in support of local initiatives in Russia, as well as in the absence of sufficient financial support for municipalities, self-taxation of citizens is becoming an increasingly active form of citizens' activity of municipalities.

2.3 Programs for Supporting Local Initiatives

From the currently implemented forms of citizens' participation in solving issues of local importance, such as initiative budgeting, participatory budgeting, the people's budget, programs for supporting local initiatives, the latter form is the most developed and used the longest in practice. The first projects in the framework of programs to support local initiatives began to be implemented in Russia in 2007 with the support of the World Bank.

For 10 years a lot of practical experience has been accumulated in the implementation of programs to support local initiatives in the Russian regions, which calls for a theoretical study of the programs to support local initiatives.

The main publications devoted to the programs to support local initiatives in Russia are of an applied nature, they represent principles, mechanisms, procedures and methodological basis of the programs to support local initiatives in Russia, as well as examples of specific programs supporting local initiatives (Shulga, 2016). As a rule, such manuals are intended for the executive authorities of the subjects of the Russian Federation, local self-government bodies, representatives of project centers for proactive budgeting, organizations and consultants involved in the implementation of programs to support local initiatives in the subject of the Russian Federation.

Among the theoretical works it is necessary to single out the thesis and the monograph of economist M. V. Turcan, who considers the programs

to support local initiatives as an instrument for the implementation of regional investment projects involving the state power of a constituent entity of the Russian Federation, local governments and the population (a carrier of territorial interest) (Turcan, 2014).

Normatively, the concept of "local initiatives support program", "support of local initiatives" is not fixed, although separate attempts are made for such definitions in literature. Thus, I. I. Egorov, under the programs to support local initiatives understands the allocation on a competitive basis of subsidies from the regional budget for the implementation of projects aimed at improving and repairing public infrastructure facilities. Selection, implementation and monitoring of project implementation – with the obligatory participation of the population (Egorov, 2016).

It should be noted that this definition is incomplete, because within the framework of programs supporting local initiatives not only subsidies can be allocated but grants too. M. V. Turcan believes that the programs to support local initiatives are a set of investment projects, and within the framework of the Local Initiatives Support Programs, investment projects are being implemented. (Turcan, 2014)

In Russia currently programs to support local initiatives are implemented in two areas:

- Within the framework of the World Bank program.
- Within the framework of the federal target program on sustainable development of rural areas.

Despite similar mechanisms for implementing programs, each of them has its own peculiarities, both from the point of view of the subject structure – the participants in the projects (programs for supporting local initiatives with the participation of the World Bank are designed for a larger number of municipalities), and in terms of financial support (the program for sustainable development of rural areas is realized through financial support from the federal budget). There are other differences.

In general, programs to support local initiatives are a relatively new institution, both in the Russian economy and in the legal field, we should evaluate their implementation positively and note the need for their further

development, which draws attention at the highest level. For example, the Federation Council notes the need to continue the work to consolidate subsidies from the federal budget to the budgets of the constituent entities of the Russian Federation and, in the case of budgetary savings, send them to financial support for the constituent entities of the Russian Federation, including support for local initiatives.

2.4 Participatory Budgeting

Participatory (initiative, people) budgeting – direct participation of citizens in the distribution of 1 to 10% of the municipal budget.

Participatory budgeting – distribution of a part of the budgetary funds of the municipality with the help of a commission consisting of the townspeople and representatives of the administration selected by lot. Townspeople, having received expert consultations from employees of the municipality and having got acquainted with the peculiarities of the distribution of the local budget, decide themselves where and to what part of it should go.

Experts of the Center for Initiative Budgeting of the Ministry of Finance of the Russian Ministry of Finance note that the peculiarity of Russian practices is the emphasis on the implementation of exclusively grassroots people's initiatives aimed at addressing issues of local importance, as well as the mandatory co-financing of proactive budgeting projects by the population (Vagin, Financial Journal, 2015).

Proceeding from the presented definitions, M. V. Turcan (and other authors) distinguishes:

- proactive budgeting;
- participatory budgeting;
- extra-budgeting (Tsurkan, Influence of the participatory budgeting…, 2016).

In the authors' opinion, proactive budgeting in Russia is the first stage of participatory budgeting, which in the second stage involves participation in the process of distributing part of the budgetary funds of a commission consisting of citizens and representatives of government bodies (a deliberation commission).

Participatory budgeting is called the process of developing and approving and / or distributing part of the budgetary funds of the municipality within the framework of the project approach with the use of forms of public participation in the implementation of local government and / or with the participation of a commission consisting of representatives of the administration of the municipal formation and its population. And extra-budgeting is a special case of implementation of participatory (participatory) budgeting of the first or second stage, which implies mandatory co-financing of projects.

The first concept normatively fixed in Russia was the concept of proactive budgeting established by the law of Perm Krai dated 02. 06. 2016 "On the implementation of projects of proactive budgeting in Perm Krai": "proactive budgeting – the form of residents' participation in addressing issues of local importance by determining the directions for spending budget funds." Art. 6 of the Law determines that "Financing of projects of proactive budgeting is carried out at the expense of the budget of Perm Krai, local budgets, the population of municipalities, individual entrepreneurs and legal entities in accordance with normative legal acts of the Russian Federation and Perm Krai", participation of residents, individual entrepreneurs, legal entities persons in the implementation of projects of proactive budgeting in cash is a prerequisite for the selection of projects, i.e. ehe law establishes mandatory co-financing of projects.

Thus, proceeding from the above definitions, proactive budgeting in Perm Krai can be attributed to extra-budgeting, since it is the latter that presupposes the co-financing principle, and not to the initiative budgeting.

Proactive and participatory budgeting as a form of citizens› participation in the financial activities of municipalities only begins to be implemented in practice, although they are actively spreading in Russian regions. This stage is characterized by the absence of comprehensive regulatory regulation of such projects. At the same time, Russian experience shows that in many cases it is envisaged to co-finance projects by citizens, which predetermines the attribution of such projects to extra-budgeting.

2.5 The People's Budget

"People's Budget" along with proactive budgeting and programs to support local initiatives should be attributed to the forms of citizen participation in the financial activities of the state. At the same time, the "people's budget" has a number of specific features. For the first time the project "People's Budget" was implemented in 2007 in Krasnoyarsk Territory. Analysis of the regional practice of implementing the project "People's Budget" allows us to conclude that in different regions this project has significant differences and is implemented in different ways.

Distinctive criteria are: subjects implementing the project (a subject of the Russian Federation or a municipal entity); subjects eligible to participate in the project (municipalities of different types or citizens); forms of financial resources allocated for the implementation of the project (subsidies, grants); possibility or mandatory co-financing or full funding from the regional or local budget; establishment of project implementation procedures; identification of the directions of the project (in some cases, such areas are clearly defined by the normative, in other cases not); the establishment of forms of control over the implementation of the project, as well as the implementation of financing (Mironova, 2018).

On the one hand, the lack of clear criteria allows the subjects of the Russian Federation and municipalities to independently determine the features of the "people's budget" project, which are specific for their area. On the other hand, it is necessary to generalize best practices, especially if they have been used for several years to use this experience by other regions of Russia. Thus, now there is a need to use all the accumulated experience of the regions in the implementation of the "People's Budget" project in order to develop recommendations on their use by other subjects of the Russian Federation. This is especially true with the aim of attracting as many citizens as possible to making decisions on the allocation of budgetary funds, involving the population in the budget process at the municipal level.

2.6 Public Financial Control at the Municipal Level

The implementation of public financial control at the municipal level has a specific nature. First of all, this is due to the subject composition – the need

to determine the number of persons who can exercise public control in relation to local finance. For example, the implementation of public control by citizens who are not residents of a particular municipal entity, on the one hand, but with the necessary skills and knowledge to carry out control, allows to identify more violations, thereby making better use of local budget funds. On the other hand, residents of other municipalities, especially other regions, are limited in the forms of public control and, as a rule, more often use the form of public monitoring, the detection of violations through the analysis of open and accessible information placed on websites of local governments, or in procurement for municipal needs. Thus, the implementation of public control is closely related to the implementation of the principle of transparency (openness), enshrined in Article 36 of the Budget Code of the Russian Federation. At the municipal level the implementation of public control is difficult because of the openness to the society of data on the budgets of municipalities spending budget funds.

The main financial activity, for which public control will be carried out at the municipal level, is the budgetary activity related to the development of the draft local budget, its adoption and implementation. At the same time, the implementation of public financial control in the budgetary sphere is carried out through special forms used at the municipal level.

New forms of public financial control have been emerging recently. They are related to the spread of practice of proactive budgeting in Russia, when the residents of the municipality distribute the funds of local budgets. In this case, public control has a double meaning. On the one hand, the residents control the projects, participating in distributing of budgetary funds among them. On the other hand, involving citizens in the budgetary process in this form increases their civic activity and strengthens their control over spending of the local budget as a whole. The use of such forms should be assessed positively, and the forms of public control in this case are yet to be improved (Mironova, 2018).

As part of the implementation of public financial control over procurement for municipal needs, the task of effectively spending local budget funds and reducing municipal expenditures comes first, this being especially important in the face of the scarcity of local budgets. Public financial

control, depending on the stage of the procurement for municipal needs, can be divided into preliminary, current and subsequent.

The results of the public control in the procurement sphere should be covered in the mass media as much as possible in order to inform citizens and residents of the municipality about revealed violations and amounts of budgetary savings. On the one hand, this will involve additional citizens in the implementation of public control; on the other hand, the maximum awareness of the detected violations will prevent similar violations in the future, and will encourage local authorities and municipal enterprises to use similar violations less frequently in the future.

2.7 The Use in the Russian Practice of Foreign Experience of Citizens' Participation in the Financial Activities of Municipalities

The most widespread in the world was the practice of participatory budgeting, which originated in 1989 in the city of Porto Alegre (Brazil) as a form of direct democracy and involving the participation of citizens in decisions on choosing priorities for spending budget funds (Dias, Nelson, 2014).

Currently, Brazil remains a country with the largest practice of participatory budgeting, since it uses various PB practices that cover most regions of the country (Wampler, 2010).

PB is distributed around the world, both in America, and in Europe, and in Asian countries (Gilman, 2016; Hwang, 2013). N. V. Gavrilova, examining foreign trends in the development of participatory budgeting, distinguishes such as:

- electronic participatory budgeting;
- participatory budgeting, oriented to certain social groups;
- Participation of NGOs in projects of participatory budgeting;
- Integration of participatory budgeting in the policy of budgetary openness;
- launch of innovative practices based on classical participatory budgeting (Gavrilova, 2016).

As noted in literature, foreign experience in the development of participatory budgeting is extremely important for Russia, since it began to implement

such projects later than many other countries. In particular, the practice of "neighborhood community funds" in Iceland, the activity of the Chengdu Provincial Public Investment Fund in China to finance infrastructure projects in rural areas, the creation of national legislation in the field of security in South Korea, Peru, etc. (Vagin, 2015) are of interest.

The experience of individual countries is also interesting. For example, Dawid Sześciło points out that "*The expansion of participatory budgeting (PB) appears to be the most remarkable phenomenon in local governance in Poland in recent years*" (Sześciło, 2015).

The comparative analysis of PB mechanisms applied in selected municipalities illustrates a clear and uniformed model for public participation in budget formulation in the Polish municipalities. It is characterized by four major features:

- Direct participation in distribution of a minor part of planned expenditure.
- Public participation in the allocation of the overwhelming majority of local expenditure is not mandatory.
- The range of methods applied in PB procedures is limited and uniformed in the analysed municipalities.
- The construction of the PB procedures creates an impression of direct and binding impact of citizens on the allocation of local expenditure.

Thus, the rich and diverse experience of other countries should be adopted by Russian municipalities in order to avoid the mistakes that are noted in the literature, including, for example, "*growing frustration and disappointment among citizens realizing that their impact on budget formulation is limited compared to the climate of revolution in public governance created around PB*" (Sześciło, 2015).

3 Conclusion

During the study authors made the following conclusions.

Analysis of foreign legislation and practice shows that such forms of citizen participation as participatory budgeting in all its forms are successfully applied throughout the world in order for citizens and the state to interact in solving financial problems. Public hearings are also a well-known

instrument of interaction between the population and local authorities in foreign countries. The experience of other countries can be used when introducing forms of participatory budgeting in Russia. At the same time, it is necessary to take into account the Russian peculiarities. For example, unlike other states Russia uses self-taxation to attract the public to participate in the budget process.

Due to the variety of forms of interaction between the public and the local government when forming the budget, in the absence of a proper legal basis for these relationships, it becomes necessary to study the practices of such interaction, as well as the feasibility of creating a methodological base for participatory budgeting practices, which will increase the participation of civil society in the discussion of goals and the results of using budget funds.

Despite the similar mechanisms for the implementation of programs, each of them has its own characteristics both from the point of view of the subject composition – the participants in the projects – and in terms of financial support. In general, participatory budgeting programs are a relatively a new institution both in Russian economy and in the legal field. We should evaluate their implementation positively and note the need for their further development. In the framework of studying of financial law, the institution of participatory budgeting can become a form of participation for Russian citizens in the financial activities of local government as one of the fundamental principles of financial law in general.

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FORM AND MANNER OF AID GRANTED TO REPATRIATES FROM OWN FUNDS OF THE LOCAL GOVERNMENT UNITS

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Abstract

The aim of the paper is to confirm the hypothesis that the legislator consciously gave the local government units (LGUs) freedom in choosing the forms and amount of the aid for repatriates and thus enabled regional – and even local – diversification of such aid. The applied scientific methods (legal doctrine and empirical) led to identification of the forms of the aid for repatriates and the conditions and manner of granting this aid by LGUs from own funds of these units. As Article 20 Repatriation Act has been formulated in a universal manner, it allows flexibility in shaping – by means of a resolution – the form and amount of the aid by the legislative body of the LGU. The granted aid may be of pecuniary (a subsidy) or in kind (rendering services free of charge) nature; it can even be intangible (consisting in assistance in handling official contacts with authorities regarding issues important for the repatriate). These are mostly municipalities that are involved in granting the aid, with poviats and voivodeships involved to a lesser extent. The aid may be granted on a single-off basis or periodically, however typically no longer than for two years from the moment the repatriate settles at the territory of a given LGU. Repatriates and members of their immediate families are beneficiaries of the aid. Granting the aid results in quicker adjustment of the repatriate to functioning in the new social conditions.

Keywords: Self-Government; Aid for Repatriates; Local Government Unit Budget.

JEL Classification: H2, H71, H72.

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1 Introduction

Granting material in-kind aid to repatriates is a result of the special status awarded to them by the legislator. The applicable legal regulations, introducing subject and object constructions, create different special statuses. The above evaluation applies, among others, to a repatriate, although the provisions of the Repatriation Act of 9 November 2000 do not expressly use the phrase "special status" (Jagielski, Dąbrowski, 2017: 507, 511). However, such status is an outcome of various detailed solutions, including: the mode of issuing the national visa resulting in citizenship acquisition by the repatriate at the moment of crossing the border with the Republic of Poland (RP), the right to obtain in-kind aid (granted by the government and self-government administration bodies).

The time of repatriation is defined as permanent relocation to the territory of the Republic of Poland of the persons of Polish origin permanently residing before 1 January 2001 in the territory of the current Republic of Armenia, Republic of Azerbaijan, Georgia, Republic of Kazakhstan, Kyrgyzstan Tajikistan, Republic of Uzbekistan and the Asian part of Russian Federation. Repatriation is a *conditio sine qua non* to launch specific forms of aid to repatriates and members of their family settling in Poland. Repatriation Act was being amended for several years. The existing forms of aid to repatriates have been modified (e.g. settlement or housing aid). New forms of aid for repatriates are also being introduced (e.g. adaptation centres or appointing an assistant).

The aim of this paper is to review and evaluate, based on the applicable law and judicial decisions, the principles and manner of granting aid to repatriates by the local government units (LGUs). Such activity may be considered a specific form of social aid for persons holding special status. The issues regarding social aid belong to the category of own funds of all LGUs, regardless the category (communes, poviats, voivodeships). Similarly, the aid to repatriates may be granted by all LGUs.

The starting point for conducting a detailed analysis is Article 20 RA, pursuant to which all legislative bodies of the LGU specify the form, amount and manner of granting aid to repatriates. This provision has been

formulated in a very general, yet universal manner. Thus, a hypothesis that the legislator consciously let the local government units (LGUs) choose the forms and amount of the aid for repatriates at their discretion has been verified. Hence, regional – and even local – diversification of this aid is possible. At the same time, the conditions have been created for the LGU to take flexible actions, especially in terms of offering aid for repatriates tailored to the current organizational and financial capacity of particular LGUs.

Application of legal doctrine method and empirical method allowed to identify the forms of the aid for repatriates and the conditions and manner of granting this aid by LGUs. To do so, certain resolutions of legislative bodies of the LGUs have been selected, specifically the ones adopted in 2014–2017. Focusing on this particular period is a result of critical findings by Supreme Chamber of Control, summarizing the repatriation balance for 2007–2013. The Supreme Chamber if Control has been specifically critical regarding the legal regulations applicable at that time which have not led to the significant increase in the number of persons repatriated (120 to 140 repatriation arrivals to Poland annually). It did not fulfil the assumptions of the government document entitled "Polish Migration Policy – current status and proposed actions" (Supreme Chamber of Control, 2014: 7).

The legislator, following the suggestions included in the report of the Supreme Chamber of Control, has made a number of crucial amendments the to the Repatriation Act, including two amendments in 2017. Analysis of the selected resolutions by the legislative bodies of the LGUs should bring an answer to the question if amending Repatriation Act has fostered the increased activity of the LGUs in the field of granting aid to repatriates. It should be emphasised that repatriation is an internally complex social, cultural and economic process (Cieślik, 2006: 77–79). It requires involvement of various structures of public administration as well as making significant expenses, especially financed with public funds at disposal of government and self-government administrative bodies. It can be assumed that the amendments of Repatriation Act made in 2017 (the Act of 7 April 2017 and the Act of 24 November 2017) will bring positive results only in a few years. However, they constitute legal grounds for taking significant decisions in the field of aid for repatriates.

2 Framework of Aid for Repatriates Specified in Article 20 RA [Repatriation Act]

The "repatriate" category has been used in Article 20 RA, but it should be noted it is not the only category used in this Act in the context of beneficiaries of the aid. Pursuant to Article 1 section 2 RA, a repatriate is a person arriving to the Republic of Poland holding a national visa issued for repatriation with intention to permanently reside in Poland. The following premises are decisive for granting a repatriate status to an individual: arrival to Poland, holding a national visa, intention to settle permanently in Poland. All the aforementioned conditions need to be fulfilled.

The rules for issuing the national visa have been specified in Article 9 RA. The national visa for repatriation may be issued to a person who jointly fulfils the following conditions: is of Polish origin (the condition of having Polish origin is selective in the context of fulfilling the intention to repatriate – Kowalski, 2006: 16); has lived in the following territory before the day the Repatriation Act entered into force: Republic of Armenia, Republic of Azerbaijan, Georgia, Republic of Kazakhstan, Kyrgyzstan Tajikistan, Republic of Uzbekistan and the Asian part of Russian Federation. It is also allowed to issue a repatriation visa, for repatriation purposes, to the spouse and fourth-degree descendants (and their spouses) of the person fulfilling the aforementioned criteria, provided that this persons are planning to settle in Poland permanently. Such a solution is aimed at simplifying the repatriation mode for the repatriation of the whole families residing outside Poland.

Two more categories have been identified in the provisions of Article 1a RA added on 23 December 2017: "the candidate for repatriation" and "the closest relatives of the repatriate". Repatriation candidate is a person of Polish origin for whom the consul has issued a decision on being qualified for a national visa to be issued for repatriation, or – in the case of a person applying for the national visa for repatriation purposes before 1 May 2017 – decision on a promise to issue such a visa. Defining the "candidate for repatriation" is essential to eliminate situation where the conditions for settlement would be provided to a person not be able to obtain the national visa for repatriation due to premises justifying a refusal to issue such visa. The category of "closest relatives" means "immediate

family including a spouse or underaged children of the repatriate or children under parental custody of at least one parent arriving to the Republic of Poland together with the repatriate. Thus, it is possible to provide financial help to the whole family of repatriates, not particular members (Sejm paper no. 1904, 8th term in office of Sejm).

Taking into consideration the intention of the author of the project and the final contents of Article 20 RA, as well as the provisions of Article 16 RA, it may be noted that the concept of a repatriate used in Article 20 RA should be understood in broad terms. The aid may thus be granted by the LGU to repatriates, including members of their immediate family and other persons who may be considered repatriates, once the conditions specified in Article 16 RA are fulfilled. *A contrario,* such aid may not be granted to a candidate for repatriate as such person does not yet hold this status.

3 Legal Grounds for Establishing the Form, Amount and Mode of Granting Aid for Repatriates

Pursuant to Article 20 RA, pecuniary, in-kind or other aid may be granted as the contents of this provision uses a general concept of "aid" without specifying its type. Period of time for granting such aid, its amount or possibility to accumulate different form of aid granted to the same person holding repatriate status have not been limited, either. The subjects authorised to specify the form, amount and mode of granting aid for repatriates are the legislative bodies of the LGUs, i.e. municipal councils, poviat councils, voivodeship assemblies, adopting resolutions in the form of the act of local law for that purpose. The legislative bodies of the LGUs may not vest these powers with the executive bodies of LGUs (e.g. commune head, mayor, city president, voivodeship or poviat administration) for implementation.

The legislative bodies of LGUs adopt the aforementioned resolutions pursuant to the general authority specified in a proper systemic act (respectively: Article 18 section 2 point 15 and Article 40 section 1 Act of 8 March 1990 on municipal self-government; Article 12 point 11 and Article 40 section 1 Act of 5 June 1998 on poviat self-government; Article 18 point 20 and Article 89 section 1 Act of 5 June 1998 on voivodeship self-government) and specific powers laid down in Article 20 RA. The quoted provisions

of self-government systemic acts indicate that the legislative bodies of the LGUs adopt resolutions in other cases statutorily reserved for their competence. Such reservation regarding the analysed problem has been stipulated in Article 20 RA. The general nature of the aforementioned authorisations stipulated in self-government systemic acts may not constitute independent grounds for adopting any resolution by the legislative body of LGU. (Voivodeship Administrative Court in Wrocław: III SA/Wr 134/08). A specific authorisation is necessary, derived from statutory provisions, expressed explicitly, not only resulting indirectly from the provisions of the Act. Such authorisation should indicate the public administration authority competent for issuing a given normative act and type of matters which can be regulated. Statutory authorisation for LGU to establish local law may not be presumed (Voivodeship Administrative Court in Kielce: II SA/Ke 392/10). The general competence of LGUs legislative bodies derived from the provision of the self-government systemic acts is reviewed only when other act contains provisions authorising these bodies to regulate certain situation by means of a resolution (Voivodeship Administrative Court in Lublin: II SA/Lu 385/08, LEX no. 519125). To conclude, the provisions of Article 20 RA, specifying type of matters to be regulated in the form of local law, complement the general competence of LGUs legislative bodies to adopt issue resolutions contained in self-government systemic acts.

4 Analysis of the Selected Resolutions on the Aid for Repatriates

The characteristic feature is diversification of the forms of aid specified in particular resolutions and different manner of limiting this aid, mainly by applying the criteria of amount or time for granting the aid. In order to eliminate any doubts regarding interpretation of the analysed resolutions, it is explicitly stated that the aid is aimed at a repatriate and members of their immediate family settled in the territory of a given LGU. The aid granted by the communes is the most varied in terms of the objective scope. Such aid includes: purchase of standard equipment for the residential premises to which access has been granted (furniture, a washing machine,

a refrigerator, a gas or electric kitchen and sanitary facilities); covering the costs of translating the documentation necessary to obtain Polish documents; covering fees related to the issuance of Polish documents; one-off purchase of food, hygienic articles and necessary cleaning products upon arrival of the repatriate and their family to the place of residence; covering rental fees for the use he of residential premises to which access has been granted, as well as fees related to children of the repatriate attending to a public day nursery or kindergarten; assistance in dealing with all official and administrative matters related to settling in the territory of the LGU and registration at the employment office; assistance in taking up employment by at least one member of the family of the repatriate, as well as enabling the children of the repatriate to take up education; covering the costs of current maintenance (in the amount of 100% of the current amount of unemployment benefit, paid until the employment is obtained by at least one member of the family of the repatriate (e.g. resolution no. XLVI/251/2017); covering the costs of accommodation and boarding service until the residential premises is available; covering the current living costs (limited to PLN 900 per month for the first 12 months and up to PLN 600 per month for the next 12 months) (e.g. resolution no. LXXXV/2099/17); covering fees related to the child's school attendance, including coverage of fees related to school meals; covering costs related to learning Polish language; payment for the health insurance contribution of the repatriate and their family members until they are covered by the social insurance system (e.g. resolution no. LII/428/2017); providing social support in the field of family benefits in accordance with the provisions of the Act on family benefits, educational benefit in accordance with the provisions of the act on state aid in raising children, social assistance benefits, particularly in the form of social work in accordance with the provisions of the Act on social assistance; one-off payment of the costs of transporting the repatriate and members of their immediate family from the place of arrival in Poland to their place of residence (e.g. resolution no. XVIII/117/15).

Apart from the nominate forms of aid for repatriates, some resolutions contain universal provisions allowing to grant aid in extraordinary circumstances. Such aim is achieved by adding a provision stating that a repatriate

and the invited members of their immediate family may be granted aid other than specified in the catalogue adopted in the resolution, if granting such aid is justified by vital needs (e.g. Resolution no. L/941/14).

The period of aid granted by the municipalities is normally limited – between 12 (e.g. Resolution no. XX/143/2016) and 24 months (e.g. Resolution no. LXXXV/2099/17), calculated from the day the repatriate crosses the border of the Republic of Poland as a part of the repatriation process. The sources for funding aid are included in the budgets of particular municipalities.

The aid granted to repatriates by poviats is usually associated with specific and single aims. It consists, among others, in financing the purchase of fuel (e.g. up to PLN 1000 per family once a year), specific products for Easter and Christmas (e.g. up to PLN 500 before each holiday per family), purchase of textbooks and learning aids (for young people in full-time tertiary education up to PLN 1,500 single payment per student), living costs outside place of residence regarding taking up and continuation of studies (up to PLN 4,500 per student in each semester, upon producing a certificate of continuation of studies issued by the educational institution), costs of renovating residential premises or single-family house (e.g. Resolution no. XIX/97/2016). Aid granted by poviats to repatriates and members of their immediate family is funded from the poviat own funds included in their budgets.

An example of combining two different systems of financing aid in one resolution is a resolution by Sejmik Województwa Świętokrzyskiego (e.g. Resolution no. VI/126/15). One legal act normalizes the forms of aid granted to repatriates and persons of Polish origin from the East holding Card of the Pole. It should be emphasised that pursuant to the provisions of the Act of 7 September 2007 on the Card of the Pole, the Card may be granted to a person jointly meeting the requirements set forth in this Act (demonstrating Polish identity by having at least a basic knowledge of Polish language which is considered to be a mother tongue, as well as knowledge and cultivation of Polish traditions and customs; submitting a written declaration of belonging to the Polish Nation in the presence of the consul of the Republic of Poland or the voivode; proving to be of Polish nationality or having at least one parent or grandparent or two great-grandparents

of Polish nationality or submitting a certificate by a Polish or Polish expatriate organization operating in one of the following countries, confirming active involvement in activities for the benefit of Polish language and culture or Polish national minority for at least the last three years; declaring that they or their ascendants have not repatriated or have not been repatriated from the territory of the Republic of Poland). The Card of the Pole may be granted only to the person holding the citizenship of the Republic of Armenia, the Republic of Azerbaijan, the Republic of Belarus, the Republic of Estonia, Georgia, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Lithuania, the Republic of Latvia, the Republic of Moldova, the Russian Federation and the Republic of Tajikistan, Turkmenistan, Ukraine or the Republic of Uzbekistan on the day of application or having status of a stateless person in one of these countries.

The most important provision of the quoted Act is the fact that the Card of the Pole may only be granted to a person who does not have Polish citizenship or a permanent residence permit at the territory of the Republic of Poland. This means the same person may not be a repatriate and at the same time hold the Card of the Pole. Holder of the Card of the Pole or a person of Polish origin pursuant to the provisions of Repatriation Act holds priority right in applying for financial support granted to individuals from state or self government budgets designated for supporting Polish people abroad.

Pursuant to the aforementioned resolution by Sejmik Województwa Świętokrzyskiego, material aid in the form of scholarships is granted to Poles and persons of Polish origin from the East. The aim of this aid is additional support to young Poles and persons of Polish origin from the East, including repatriates, planning to take up, continue or finish long-cycle, full-time studies or 1st, 2nd or 3rd cycle full-time studies on public and private tertiary education institutions in świętokrzyskie voivodeship. Pursuant to the principles of granting the scholarships, a student who studies in more than one faculty or university in świętokrzyskie voivodeship may apply for only one scholarship at a time. A student repeating a year may not apply for scholarship, except for documented unexpected circumstances. The scholarship may be granted regardless the other awards, financial prizes and scholarships

from other sources. The maximum amount of the scholarship is 30% of the minimum remuneration for work. The payment of scholarship is made from the funds included in the budget of świętokrzyskie voivodeship.

The sums intended for aid for repatriates are included in the budgetary resolutions of LGUs. Their amounts can vary considerably. This is due to capability of funding such expenses by particular LGUs, as well as the real needs in this regard resulting from the repatriates settling in the territory of LGUs. Each repatriation year, between 120 and 140 people have returned to Poland so far. Taking into account territorial dispersion of the repatriates settling in Poland, the annual expenses for the discussed aid in different LGUs totalled between several and a few dozen thousand zloty, e.g. in the budget of the City of Gdańsk for 2015, 2016 and 2017 the amounts of PLN 40,000, PLN 60,000 and PLN 60,000; in the budget of City of Oświęcim for 2015 it was PLN 27,500; PLN 13,000 in the budget of Byczyna Municipality in 2014; PLN 17,835 in the budget of the Town of Bełchatów for 2016; PLN 25,550 in the budget of the Town of Świdnica for 2016.

Own funds of LGUs are not the only funds in their budgets allocated for financing aid for repatriates. Separate segments of budgetary classification include expenses for such actions financed with designated subsidies received by the LGUs from state budget. These amounts vary, e.g. there was PLN 18,739 in the budget of Kluczborski Poviat for 2014, PLN 175,005 in the budget of Wadowice Municipality in 2016, PLN 100,000 in the budget of the Town of Łowicz in 2017. Designated subsidies are allocated from dedicated state budgetary allowance designated for financing aid for repatriates, mainly providing them with residential premises. Designated subsidy is transferred pursuant to agreement made between the competent voivode and the LGU.

5 Conclusion

The aims and hypotheses formulated in the Introduction have been confirmed in the course of analysis of the contents of the resolutions adopted by the legislative bodies of LGUs. It has been proved that there has been significantly more interest in granting aid to repatriates mainly since 2015, i.e. following significant amendments to the Repatriation Act.

The share of own funds of the LGUs in financing the needs of repatriates and their closest relatives is a significant contribution to satisfying the needs of people who opted for relocation to Poland as repatriates. The wording of Article 20 RA should be evaluated positively, as it allows flexible actions by LGUs, i.e. adjustment to their organizational and financial conditions. The proof supporting this conclusion is a varied catalogue of the forms of aid offered by particular LGUs, as well as their value and time of carrying out various forms of aid. The opportunity to simultaneously apply for designated subsidies from state budget aimed at satisfying the needs of the repatriates makes the offer of particular LGU more attractive from the perspective of these persons and may constitute a decisive argument for an applicant choosing a place to settle in.

The analysis of the contents of the selected resolutions by the legislative bodies of LGUs indicates that the main entities offering aid for repatriates, financed from own funds, are municipalities. Poviats and voivodeships offer help to a lesser extent, however their number is much smaller compared with the number of the existing municipalities. Moreover, municipalities, as the basic LGUs, are more oriented on fulfilling the essential needs of the members of local community (social, educational, healthcare). When setting in a particular municipality, a repatriate becomes a member of this local community in the first place. The feeling of bond is much weaker in the case of a poviat or voivodeship than in case of a municipality.

The forms of aid offered to repatriates, established by resolutions of the LGU's legislative bodies, are usually adopted within the framework of closed catalogues. However, there have been cases of such catalogues being of open nature, due to the fact that they included decisions allowing to grant "other aid", if justified by the vital needs of a repatriate or members of their immediate family.

The forms of aid for repatriates are also varied in terms of their frequency or worth. The cyclic forms are dominant, e.g. granted for the period of a year or even two. These are mainly subsidies for rental fees for using the residential premises to which access has been granted or fees connected to the repatriate's children attending public nursery or kindergarten. The aid of one-off nature is mainly the assistance in covering the costs of translating

documents or equipping the living quarters with the necessary equipment. Certain forms of occasional help consisting mainly in subsidizing purchases before specific holidays have also been identified.

Most forms of aid for repatriates implemented by LGUs is of pecuniary nature. In some cases it is in-kind and free-of-charge aid, e.g. shuttle service for repatriate from the place of arrival to the location for settlement. The aid can also take intangible form, e.g. assistance in handling official contacts with authorities. A conglomerate of the forms of aid that can be provided to repatriates by LGUs is the most important argument confirming the hypothesis about the manner of formulating the content of Article 20 RA enabling flexible operations of LGUs in this regard.

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TAXATION OF SEA PORTS IN POLAND WITH REAL ESTATE TAX

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Abstract

This contribution deals with the issue of taxation of sea ports with real estate tax. The real property tax catalogue is indicated in Art. 2 section 1 of the Act on Local Taxes and Charges. real property tax is subject to land, buildings or parts thereof, and structures or parts thereof related to running a business. However the legislator, noticing the important economic functions which are played by sea ports, introduced a catalogue of subject and object exemptions to the Act on Local Taxes and Charges. Decreasing the tax liability in real estate tax by introducing tax exemption is a considerable support for the sea ports activity, and consequently, it has a meaningful impact on their competitiveness.

The aim of this study is to analyze the issue of taxation of sea ports with real estate tax. The hypothesis to be confirmed or disproved is that the provisions of the Act on Local Taxes and Charges regarding the issue of taxation of sea ports with real estate tax are internally coherent and linguistically correct.

Research metod used is analysis of the Polish law sources, especially the text of the Act on Local Taxes and Charges of 12 January 1991 (Uniform Text: Journal of Laws of 2017, item 1785) and the text of the Act on Seaports and Harbours of 20 December 1996 (Uniform Text: Journal of Laws of 2017, item 1933).

Keywords: Sea Ports; Taxation Against Real Estate Tax; Act on Local Taxes and Charges; Tax Exemptions.

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1 Introduction

Real estate tax is one of the most important sources of tax own revenues of communes in Poland and, consequently, is a fairly noticeable burden on business entities.

Sea ports are of great economic importance, especially in the case of open countries which are increasing their share in international trade. Applying tax exemptions in real estate tax as well as extension of the exemptions catalogue, are examples of active form of support of port development on the side of the state.

The legislator, noticing the functions which are played by sea ports, introduced a catalogue of subject and object exemptions to the Act on Local Taxes and Charges of 12 January 1991 (Uniform Text: Journal of Laws of 2017, item 1785). Decreasing the tax liability in real estate tax by introducing tax exemption is a considerable support for the sea ports activity, and consequently, it has a meaningful impact on their competitiveness.

Sea ports use the exemptions in real estate tax in a limited scope only. It is caused by the fact that these exemptions generally do not comprise whole ports and the sea ports taxation has caused many disputes in the legal doctrine and has been the subject of many judgements of administrative courts. The aim of this study is to analyze the problems of taxation of seaports with real estate tax. The hypothesis to be confirmed or disproved is that the provisions of the Act on Local Taxes and Charges regarding the issue of taxation of sea ports with real estate tax are internally coherent and linguistically correct. Research metod used is analysis of the Polish law sources, especially the text of the Act on Local Taxes and Charges of 12 January 1991 (Uniform Text: Journal of Laws of 2017, item 1785) and the text of the Act on Seaports and Harbours of 20 December 1996 (Uniform Text: Journal of Laws of 2017, item 1933).

2 Sea Port Characteristics

In everyday language, a port is a coastal water area with an adjacent land strip. It is equipped with devices that ensure a safe stop and service of ships,

stevedoring of goods and service of passenger traffic, as well as a coastal city where the ships berth is located. (Szymczak, 2002: 792)

Sea ports are crucial in managing maritime economy, which is understood as a complex of various business entities, processes and regulations, linked together by the use of the sea as one of the important resources in their activities (Piocha, 2011: 30). The essence of a sea port operation are loading and unloading services of cargoe transported by ports, which means a change in the type of transport from sea to land (or vice versa) as a result of transport that involves a change in placement, even on a short distance (Klimek, 2010: 92). Initially, until the turn of the 20th century, sea ports were focused on their transport function, however, over time, the necessity of including the complex character of the sea port in its definition was noticed. The modern sea port carries out many economic tasks and has a rather complicated technical, organizational and ownership structure. The basic tasks of sea ports include such services as: stevedoring, trimming, storage, handling, towing, piloting and mooring of ships and providing service for all land transport means headed to the sea port. The literature also distinguishes a group of shipping of a special nature, consisting of courier services and dangerous, refrigerated, ventilated or oversized cargoes (Klimek, 2010: 93). Auxiliary services are also provided in the sea port area – expert services, forwarding, and cargo control and ship supply. A separate group of services includes such as: increasing the added value of cargo, consisting of weighing, banding, segregation, storage in constant temperature and humidity, labeling, completing, deconsolidation and consolidation of loads. In the sea port area duty free zones, special economic zones or distribution centres are often created, which helps with the development of the sea port which goes through the subsequent levels of port generations (Kaliszewski, 2017: 93–123).

The legal definition of a port and a marina is found in Art. 2 point 2 of the Act of 20 December 1996 on Seaports and Harbours of 20 December 1996 (Uniform Text: Journal of Laws of 2017, item 1933) which says that whenever the Act refers to a port or a marina, it is understood as the reservoirs and grounds and associated port infrastructure, within the boundaries of a port or a marina.

Sea ports in Gdańsk, Gdynia, Szczecin and Świnoujście are the ports of primary importance for the national economy in Poland, whereas a contrario other ports (sea ports in Police, Darłowo, Dziwinów, Elbląg, Kołobrzeg, Nowe Warpno, Stępnica, Trzebierz, Ustka and Władysławowo) are not of primary importance for the national economy.

3 Tax on sea port assets

The real property tax catalogue is indicated in Art. 2 section 1 of the Act on Local Taxes and Charges. According to this article, real property tax is subject to land, buildings or parts thereof, and structures or parts thereof related to running a business. The legislator have not explained how the term "land" should be understood, therefore an external systemic interpretation should be used.

The legal definition of a land can be found in Art. 46 section 1 of the Civil Code of 23 April 1964 (Uniform Text: Journal of Laws of 2017, item 459), according to which a land is a part of the surface of ground, being a separate object of ownership. The seaports occupy a large area. The largest sea port is currently the port of Gdansk, which covers 2721 ha of land area. The sea port in Gdynia occupies 493 ha, the sea port in Szczecin has 902 ha, while the sea port in Świnoujście has 597 ha (Grzelakowski, Matczak, 2012: 143).

In addition to land, also buildings and structures are subject to tax. In seaports, which comprise industrial areas, there are various types of constructions, objects, devices and buildings. The explanation whether these objects will be subject to taxation on general terms or whether they will be subject to dismissal requires determining for each of them whether it is subject to tax, and therefore determining whether they are buildings or structures (or parts thereof) within the meaning of the Act on Local Taxes and Charges.

Definitions of a building and of a structure are included in Art. 1a section 1 point 1 and 2 of the Act on Local Taxes and Charges. According to Art. 1a section 1 point 1 of the Act on Local Taxes and Charges, a building is a building object within the meaning of the construction law, which is permanently connected with the ground, separated by means of building partitions and has foundations and a roof. A structure on the other hand, is a building object within the meaning of the construction law, which is not

a building nor a small-scale architecture, as well as a construction device, as defined in the construction law, connected to a building object, which allows the object to be used in accordance with its intended purpose. Pursuant to Article 2 Section 4 and 9 of the Act of 7 July, 1994, Construction Law (Uniform Text: Journal of Laws of 2017, item 1332), the structure should be understood as any building object that is not a building or a small-scale architecture, such as: line facilities, airports, bridges, viaducts, flyovers, tunnels, culverts, technical networks, free-standing aerial masts, free-standing, permanently attached to the ground advertising boards and advertising devices, earth structures, defensive structures (fortifications), protective structures, hydro-technical structures, tanks, free-standing industrial installations or technical devices, sewage treatment plants, landfills, water treatment stations, retaining constructions, above-ground and underground pedestrian crossings, utilities networks, sports structures, cementeries, monuments, as well as construction parts of technical equipment (boilers, industrial furnaces, nuclear power plants and other devices) and foundations for machines and devices as technically separate parts items that make up the entire unit, whereas a construction device should be understood as technical devices related to the construction object, providing the facility to be used in accordance with its intended use, such as connections and installation devices, including cleaning or collection of wastewater, as well as crossings, fences, squares parking and squares under garbage cans.

The cases of administrative courts emphasize that structures are construction and non-construction elements provided that they constitute an appropriate technical and operational whole. If there is only a utility connection between the devices and the structure, which means that the individual elements can be mounted without a building permit and can be dismantled and replaced with new devices without disturbing the structure of the building, then there are no reasons to include them in the tax base of this structure[2].

Buildings used for various purposes related to running a business can be found on the site of a sea port. Buildings are used for sea port functions such as: administration, trade in goods, service for ships and passengers and

2 The issue of building objects and structures as the objects of real estate tax has been the subject of considerations in the legal doctrine e.g. W. Morawski (Morawski, 2015: 23–31).

means of transport. The sea port area can therefore consist of inter alia office, warehouse and workshop buildings.

The sea port area can consist of various types of structures, such as hydro-technical constructions, individual industrial installations, technical devices, sewage treatment plants, landfills, roads, parking lots, tanks, fences, railway lines, canals, gas pipelines, water pipelines, power lines, underground and overground cable lines, bridges, viaducts, landing areas. The list of structures provided here is only an example.

4 Port exemptions in real estate tax

The Act on Local Taxes and Charges contains a fairly extensive catalogue of exemptions. An exemption constitutes a specified category of factual or legal circumstances which fit within the general objective-subjective framework yet, by virtue of law, are transferred outside the scope of taxation. This means that tax liability exists yet tax obligation does not occur (Hanusz, 2008: 26).

Currently, the scope of exemptions from real estate tax for subjects of taxation related to sea ports activity is based upon the regulations of Article 7 Sections 2 and 2a of the Act on Local Taxes and Charges. The substantiation to the draft bill of 6 September 2001 on exemption from property tax for the indicated parts of a sea port indicated that the reason for introducing such an exemption was the fact that the maintenance and development of infrastructure to provide access to the ports from the sea constituted a burden on the state budget. At the same time, it was pointed out that the impairment of the port commune budget resulting from the exemption of sea ports from real estate taxation may be compensated with income from other sources. It emphasized the benefits brought by the ports due to the rise in employment and the development of entrepreneurship as well as the contribution of the ports to the activation and economic advancement of port communes[3].

[3] Previously, tax exemption arising from Article 11 of the Act on Seaports and Harbours was in effect, according to which sea port or marine managing entities were obliged to pay real estate tax in the amount of 40% rate adopted by the commune council. In consequence, those entities were partly exempt, in 60% of the rate (Etel, Presnarowicz, Dudar 2018: 273).

What should be emphasised is the fact that administrative judicial practice promotes the view of objective-subjective character of exemption based on Article 7 Section 1 Point 2 of the Act on Local Taxes and Charges. Accordingly, it is pointed out that the possibility to exercise exemptions depends upon whether the port managing entity makes use of specific structures and grounds and uses them to perform tasks related to providing services within the scope of the use of port infrastructure. Respectively, the content of Article 7 Section 1 Point 2a of the Act on Local Taxes and Charges introduces additional conditions for exemption related to the status of the entity in possession of the object subject to tax exemption. The content of the regulation unequivocally confirms the objective-subjective character of the exemption. Such an assumption justifies the necessity of establishing, at the first stage of inference, whether the subject of taxation ranks among tax exempt subjects and then determining whether the condition regarding the object has been fulfilled.

Pursuant to Article 7 Section 1 Point 2 of the Act on Local Taxes and Charges the following are exempt from property taxation:

- structures of port infrastructure;
- structures providing access to sea ports and marines;
- grounds occupied by structures of port infrastructure or structures providing access to sea ports and marines.

Thus, as stated within the scope of subjective exemption, the exemption does not apply to buildings. Buildings are subject to the general principles of taxation.

In the wording of the regulations the legislator failed to provide the definitions of the phrases "port infrastructure" or "structures providing access to sea ports and marines", there is also no reference to definitions comprised in other legislative acts. Due to the fact that in the results of language interpretation the understanding of the scope of exemption is too broad, it is advisable to use systemic interpretation[4], especially in view of the fact

4 The doctrine is quite consistent with regard to the necessity of applying systemic interpretation when interpreting Art. 7, although there are authors, who do not agree with it and believe that the provisions of the Act on Local Taxes and Charges are sufficient to determine the scope of the discussed exemption. They state that the linguistic interpretation should be used for this purpose (Rolewicz, Szubert, 2012).

that the currently applicable version of Article 7 Section 1 Point 2 of Act on Local Taxes and Charges was defined in the Act of 6 September 2001 on the Amendment to the Act on Seaports and Harbours as well as other acts (Journal of Laws of 2001, No 111, item 1197) (Dowgier, 2012). Both phrases used in Article 7 Section 1 Point 2 of Act on Local Taxes and Charges were defined in the Act of 20 December, 1996 on Seaports and Harbours[5].

The term of the infrastructure providing access to sea ports and marinas has been defined in Article 2 Point 5 of the Act on Seaports and Harbours. It means the waterways leading to the sea port or marina and located within the sea port or marine area along with the objects, devices and installations related to its operation. In the definition of the infrastructure providing access to sea ports and harbours the following elements have thus been indicated:

- there are waterways along with the objects, devices and installations;
- leading to the sea port or marina;
- located within the sea port or marine area.

Whenever port infrastructure is mentioned in the Act on Seaports and Harbours it refers to port basins and public objects, devices and installations located within the sea port or marina area and related to port operation and designed to be used by the entity managing the port to perform the tasks mentioned in Article 7 Section 1 Point 5 of the Act on Seaports and Harbours (i.e. to provide services related to the use of port infrastructure).

Therefore, to be classified as port infrastructure a given structure is to meet the following conditions:

- it is to be located within the seaport or marina area;
- it is to be available to general public;
- it is to be related to port operations;
- it should be designed to be used by the entity managing the port to perform the tasks mentioned in Article 7 Section 1 Point 5 of the Act on Seaports and Harbours.

5 The division into two types of infrastructure, i.e. port infrastructure and infrastructure providing access to sea ports and marinas, complies with international standards, in particular those applicable at sea ports belonging to European Union countries (Szczurek, 1998: 43).

It should be emphasised here that a different version of Article 2 Point 4 of the Act on Seaports and Harbours was binding till 6 November 2001. Port infrastructure was defined as public objects, devices and installations located within the sea port or marina area related to the port operations and situated on the grounds administered by the entity managing the port. On 6 November 2001 the definition was expanded to apply to port basins as well. A new statement was added saying that port infrastructure is to be used by the entity managing the port to perform the tasks mentioned in Article 7 Item 1 Point 5 of the Act on Seaports and Harbours. On the one hand, the aforementioned procedure broadened the definition of port infrastructure to include port basins, on the other, however, the definition was narrowed as the services were to be subject to the tasks performed by the entity managing the port and related to the use of port infrastructure (Kazek, 2016: 225). Within the scope of determining the area of exemption from property tax subsidiarily, subject to the interpretation made pursuant to Article 217 of the Constitution of Poland, one may use the resolution by the Minister of Infrastructure of 7 May 2015 on determining port basins and public objects, devices and installations included in port infrastructure for every port of primary importance to national economy (Journal of Law of 2015 Item 732), where the objects, devices and installations were defined in detail (Borszowski, Stelmaszyk, 2016: 214–215).

What should be emphasised is the requirement of the public character of the objects, devices and installations used by the entity managing the port to provide services related to the use of port infrastructure. As it was underlined in the verdict of the Provincial Administrative Court in Gdańsk of 5 December 2012, I SA/GD 958/12, Lex no 1232096, failure to meet the condition, as in the case of it being located outside the port area, having no relation to the port operation or failure to demonstrate the intended use to perform the tasks defined in Article 7 Item 1 Point 5 of the Act on Local Taxes and Charges by the managing entity excludes the possibility to be entitled to exemption.

Since, pursuant to Article 2 Point 4 of the Act on Seaports and Harbours, port infrastructure is understood as port basins and public objects, devices and installations located within the seaport or marina area and related

to the port operation and designed to be used by the entity managing the port to perform the tasks mentioned in Article 7 Item 1 Point 5 of the Act on Seaports and Harbours, the act is also to contain the explanation in regards to what subject the legislator had in mind. It was pointed out in Article 2 Item 6 of the Act on Seaports and Harbours that the managing entity means the entity established pursuant to the act and appointed to manage a sea port or a marina. The regulations determining the establishment and organization of managing entities in the ports of primary importance to national economy have been gathered together in Chapter 4 of the Act on Seaports and Harbours. In Article 13 of the Act on Seaports and Harbours it was indicated that the following are classified as such entities: the joint stock company under the business name "Management Board of the Port of Gdańsk Authority S.A.", the joint stock company under the business name "Management Board of the Port of Gdynia Authority S.A.", and the joint stock company under the business name "Management Board of the Ports of Szczecin and Świnoujście Authority S.A."[6]. Besides, it should be pointed out that providing services related to the use of port infrastructure constitutes one of several tasks performed by the managing entity. The subject matter of the activities of the managing entity enterprise comprises, in particular, the management of the real estate and port infrastructure, forecasting, port development programming and design, construction, expansion, maintenance and modernization of port infrastructure, acquisition of real estate for the purposes of the port as well as providing access to the port ship waste receiving devices so it could be recycled or treated.

Another important issue is the assessment of the consequences of delegating the managing entity tasks to another entity pursuant to a civil law agreement. The Highest Administrative Court referred to the managing entity handing over the structures and the grounds occupied by them for paid use, among others in the verdict of 12 July 2013, II FSK 678/13 and in the verdict of 29 April 2015, II FSK 876/13. It should be assumed that the entity

6 Different regulations apply to the legal and organizational forms of the management of ports that are not of primary importance to national economy. Pursuant to Article 23 of the Act on Seaports and Harbours, if land property where a seaport or harbour is located constitutes communal property, the commune is to decide what framework should apply.

managing the sea port handing over the infrastructure to another entity for paid use for the purpose of providing port services constitutes in fact the provision of services related to the use of infrastructure by the managing entity. The use of port infrastructure objects to provide services by another entity does not affect the status of the object designed to be used by the entity managing the port to perform the tasks related to providing services connected with the use of port infrastructure, therefore, the conditions for tax exemption are fulfilled. The entity managing the port handing over the structures of port infrastructure to port operators for paid use does not mean a different use of the infrastructure and as such does not affect tax exemption. Different interpretation of Article 7 Section 1 Point 2 of the Act on Local Taxes and Charges in relation to Article 2 Point 4 and Article 7 Point 5 of the Act on Seaports and Harbours would result in the tax exemption being an empty regulation. To sum up, it should be assumed that the managing entity handing over the structures and grounds occupied by them pursuant to a paid use of port infrastructure agreement does not result in the entity losing its right to tax exemption.

The Act on Local Taxes and Charges contains another exemption relating to broadly understood port activity. The exemption has been regulated in Article 7 Section 1 Point 2a of the Act on Local Taxes and Charges. In this case, exemption of grounds from real estate taxation depends upon meeting several conditions. First of all, the grounds are to be in possession of the entity managing the sea port or marina. A legal title to property is of no importance as what really matters is the possession, i.e. having actual control over the grounds. It should also be pointed out that the grounds occupied by an entity other than the entity managing the sea port or marina have been excluded from the scope of the discussed exemption by the legislator. Moreover, the grounds entitled to exemption are to be acquired for the sea port or marina purposes. Further, the grounds entitled to exemption are to be occupied for the purposes of the activity determined in the articles of association of a given entity. The exemption applies to the grounds located within the sea ports and marinas area.

This exemption is also limited in time. It applies from the first day of the month following the month when the entity which manages a port took over

the title of these grounds. The entity cannot be entitled to this exemption for a period of time longer than 5 years, except for the grounds which are occupied by an entity other than the entity managing the port or a marina.

5 Exemptions Concerning not Solely the Sea Port Infrastructure

Due to the scope of activity which is carried out in sea ports and a diversified legal status of the sea port areas, the application of another exemption specified in Art. 7, item 1 and 2 of the Act on Local Taxes and Charges, or one introduced on the grounds of Commune Council Resolution, cannot be ruled out. Cargo handling organisation justifies the use of railway transport, therefore if railway infrastructure structures, or land, buildings and structures remaining after the liquidation of railway lines, or their sections, are located within a sea port area (Art. 7, item 1 point of the Act on Local Taxes and Charges), it is justifiable to use such an exemption, providing that specific conditions are legally fulfilled.

Land and buildings entered into the register of historical monuments (Art. 7, item 1 point 6 of the Act on Local Taxes and Charges), or grounds, or buildings of registered museums (Art. 7, item 1 point 7 of the Act on Local Taxes and Charges) may also be located within the sea port area. The building of the Sea Port in Gdynia, where the Emigration Museum has had its seat since 2015, is an example of this.

6 Tax Base in Real Estate Tax against Sea Ports and Tax Amount

The structure of tax base in real estate tax has been varied depending on the type of the taxed real estate. The basis for the land taxation is the area, and for the building or parts thereof, the usable area. The usable area is, in accordance with Art. 1a section 1 point 5 of the Act on Local Taxes and Charges, the area measured on the inside of the walls on all floors, except for the surface of staircases and lift shafts, with the underground garages, basements and attics being considered as a floor. If, therefore, the subject of taxation is a building, the data concerning its usable area should be regulary updated.

The real estate taxation structure in Poland differs significantly from the rules applied in other European countries, where a valuable recognition of the real estate tax base has been adopted (Nykiel, 2008: 303).

The simplified structure of tax against the value has been applied to the taxation of structures and their parts related to running a business. This value is not determined at the market level, and the basis for their taxation is their value as of 1 January of the tax year, which is the basis for calculating amortization in this year, not reduced by amortization write-offs. In reference to buildings fully amortized, their value as of 1 January of the year in which the last amortization write-off was made is set as their tax base. In the event that no amortization write-offs are made for the building, the tax base is its market value, determined by the taxpayer as at the date of the tax obligation. If the taxpayer did not specify this value, or provided a value which does not correspond to the market value, the tax authority determines the value of the structure, appointing an expert for this purpose.

According to Art. 6 of the Act on Local Taxes and Charges, the commune council, by way of a resolution, determines the amount of property tax rates, however the maximum rates are set by the Minister of Finance. Maximum rates in 2018 are set in accordance with the announcement of the Minister of Finance of 28 July 2017 (Journal of Law of 2017, Item 1197) regarding upper limits of rates and local charges.

A higher burden of persons running businesses and having land, buildings and structures related to this activity is justified by the purpose of activity, which is to obtain a profit. As a result of the adopted solutions, the entrepreneur shares the profit with others, supporting the budget of the commune.

Sea ports will therefore be required to pay tax against the ground which is not occupied by the structures of port infrastructure or structures providing access to sea ports and marines at a rate of PLN 0.91 per 1 m^2 of land (this is the rate against land associated with running a business, regardless of the method in which land or buildings are classified in the register of lands and buildings).

It should be pointed out that in no regulations concerning exemptions which are crucial in sea port taxation has the legislator allowed for the option

of exemption against buildings. Buildings located in the areas of seaports will therefore be subject to taxation in the amount of PLN 23.10 from 1 m^2 of usable area (rate against buildings or their parts related to running a business).

The rates for structures are 2% of their value determined on the basis of the provisions of the Act on Local Taxes and Charges. Therefore, it should be assumed that structures that will not be subject to exemption under Art. 7 Section 1 Point 2 of the Act on on Local Taxes and Charges (they will not constitute structures of port infrastructure or structures providing access to sea ports and marines) will be subject to the general principles of taxation, ie 2% of their value.

7 Conclusion

The structures of port infrastructure, the structures of infrastructure providing access to ports and the grounds occupied by them are exempt from property taxation pursuant to Article 7 Section 1 Point 2 of the Act on on Local Taxes and Charges. Placement of the objects in the catalogue of property tax exemptions confirms that the legislator notices the significant social role played by seaports, which justifies waiver from the retention of public levy. However, grounds that are not occupied by structures of port infrastructure or the structures providing access to sea ports or harbours will be subject to the general principles of taxation. The legislator has thus taken the specifics of port development and the methods of port management into consideration, which has a distinctive effect upon reducing the property tax on sea ports.

However, the threats resulting from interpretation doubts should also be emphasised. Uncertainty about the validity of property tax settlement is unacceptable. Such discrepancies lead to considerable difficulties in planning the level of statutory charges against an entity which runs port business activity. Therefore, critical attention should be drawn to the fact that there are no univocal definitions of building objects, structures and buildings. The fact that the regulation referring to tax exemption lacks the reference to the definition in the Act on Sea Ports and Harbours is also a substantial defect. Introduction of univocal notation determining whether the managing entity

is solely entitled to exemption should also be proposed. Undoubtedly, a reasonable legislator is obliged to create an internally coherent and linguistically correct provision of a tax act. Uncertainty constitutes an impediment to the taxpayers' forecasts of the tax consequences of the tasks undertaken by them. It should thus been concluded that the main hypothesis of this contribution has been disproved.

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THE ISSUE OF IMPARTIALITY OF THE POLICE IN THE CONTEXT OF THE POSSIBILITY OF FINANCING ITS TASKS BY LOCAL GOVERNMENT AUTHORITIES[1]

Sebastian Skuza[2], *Robert Lizak*[3]

Abstract

The aim of this publication is to confirm the thesis that legal provisions regulating the financing (mainly in the form of donations) of the Police by local government authorities (LGAs) may have an impact on limiting the impartiality of Police commanders at particular levels of the organizational structure of the Police. In practice, these rules can create circumstances that affect behaviors that fill in the characteristics of a difficult or permanent conflict of interest or even crime.

In summary the Authors try to provide de lege ferenda conclusions. As a science method the Authors use the legal analysis of the sources of the binding law and the other documents and informations.

Keywords: Police; Local Government Authorities; Financial Law; Impartiality; Corruption; Donation; Motives of Donors.

JEL Classification: H41, H61, H72, H76, K23, K42.

1 Introduction

The impartiality of public authorities is one of the fundamental pillars of its proper functioning. Impartiality is understood as a lack of propensity to apply preferences resulting in unjust or unjustified damage to the general interest or rights of other interested parties (European Ombudsman, 2012: 6; Kulesza, Niziołek, 2010: 161).

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In striving to achieve the desired state of impartiality of public officials, two complementary elements play a crucial role, they are: properly shaped legal norms and awareness of their addressees.

In this publication, the authors reviewed both of the above-mentioned elements. The review was based on legal provisions regulating the financing (mainly in the form of donations) of the Police by local government authorities (LGAs); in addition, the authors presented the motives of donors from LGAs and recipients from the Police.

2 Legal Basis for Financing the Police by Local Government Authority on the Example of Donations

In 1989, the process of building a political democratic system began in Poland. As Jerzy Regulski notes, initiated in 1990, the decentralization broke five monopolies of the socialist state (Regulski, 2010: 1):

- political monopoly – local elections in 1990 the first fully free elections;
- monopoly of public authority – the principle of uniform state power was rejected;
- monopoly of public property – in 1990, the communes gained legal character and took over part of the state property;
- monopoly of public finances – separation of budgets of local government units from the state budget and creation of own sources of income;
- monopoly of public administration – separation of a new professional group, the government employees.

In 1990, the Police Act was adopted, which established the Police as a uniformed and armed formation serving the society and intended to protect human security and to maintain public safety and order (Police Act). In 1997, the Constitution of the Republic of Poland was adopted (Constitution of the Republic of Poland, 1997). Two years later, the reform of local government was introduced, which is the general population of the units of the basic territorial division constituting a local government community by virtue of law. Since 1999, a three-tier structure of territorial self-government has been in force in Poland, consisting of communes,

districts and voivodeships (Act on the municipal government, Act on the poviat self-government, Act on the self-government of the voivodeship).

A review of the scope of tasks of the Police and LGAs shows that in some areas they are convergent. Each of the local government acts states that the tasks of the communes, district and voivodeship cover issues related to public order and security of citizens (Act on the municipal government, Art. 7/1/14; Act on the poviat self-government, Art. 4/1/15; Act on the government of the voivodeship, Art. 14/1/14). On the other hand, the Police Act explicitly refers to cooperation between the Police and the LGAs (Police Act, Art. 1/2/3). In practice, cooperation usually involves joint development and implementation of preventive programs. Apart from the scope of convergent tasks of the Police and LGAs, attention should also be paid to legal regulations regarding the mode of appointing voivodeship, district, municipal and regional commanders – after issuing opinions by the head of voivodeship, Mayor of Warsaw, district heads, village heads, mayors or city presidents respectively (Police Act, Art. 6b-6d), as well as - enabling financing of the Police by LGAs (Police Act, Art. 13).

In this publication, the authors refer mainly to the issue of financing the Police by local government authorities on the example of donation. It happened for two reasons. First of all, it is a frequent form of financing the Police by LGAs. Second, because of its nature. There is a possibility for the donor to demand the return of the subject of the donation agreement, even after it has been made, if the recipient has committed gross ingratitude to the donor (Civil Code, Art. 898/1; Golecki, 2001: 463–478). This raises many doubts, which will be discussed later in the publication.

The financing of the Police by LGAs in the form of money should be settled on the basis of two acts, ie the Public Finance Act and the Police Act. The first one covers the processes related to the accumulation of public funds by public finance sector entities and their distribution. The above Act also defines organizational and legal forms of public finance sector entities. The most frequent forms are budgetary units (state and local government). The most important paradigm of the financial management of a budgetary unit is the fact that such a unit earns income on the account of the state budget or the local government unit, respectively, while it burdens its

expenses with such a budget. Revenues from budgetary units may include inheritances, bequests and donations in cash to such entities, however, *lex specialis* regarding the possibility of using such revenues in a manner other than transferring to budget revenues concerns only state budgetary units for which the leading body is state administration bodies conducting activities specified in the Act – Educational Law. According to Article 11a item 1 of the Public Finance Act, the above budgetary units accumulate in this separate account the income earned:

- from inheritances, bequests and donations in cash to the budgetary unit;
- from compensations and payments for lost or damaged property being in the management or use of a budgetary unit;
- from activities that go beyond the scope of the core business, as defined in the statute, consisting, among other things, in the provision of services, including training and information;
- from examination fees, for issuing attestation and certificates, as well as for checking qualifications;
- for payment for meals and accommodation for students and youth in hostels and boarding schools, borne by parents or guardians;
- from direct payments and other payments used under the Common Agricultural Policy of the European Union, received on the basis of separate provisions.

Revenues from budgetary units from the above sources may be allocated to:

- financing of current and property expenses;
- goals indicated by the donor;
- repair or restoration of property in the event of obtaining income from compensation and payments for lost or damaged property.

The above income (including interest) can not be used to finance personal wages.

According to the Police Act, the Police operating costs are covered from the state budget. However, it is also possible to co-finance the Police by communes, districts and voivodeships. According to Article 13, item 3 of the Police Act, local government authorities, state organizational units, associations, foundations, banks and insurance institutions may participate

in covering investment, modernization or renovation expenses and maintenance costs and functioning of Police organizational units, as well as purchase of goods and services necessary for their needs.

At the same time in Article 13, item 4a of the Police Act, the legislator regulated the possibility of transferring funds to the Police to create additional posts, extended working hours and rewards for officers. In this case, the legislator granted this option only to communes and districts.

Financial means obtained by the Police in this mode and on the terms specified in Article 13, item 3 and 4a of the Police Act are revenues of the Police Support Fund, which is a public special purpose fund. The Fund's resources include:

- Chief Police Commander – in the scope of the central fund;
- respectively, provincial commanders or the Warsaw Police Commander – in the field of voivodeship funds;
- Chief of the Higher Police School and Police school commanders – within the scope of the Police School fund.

It follows from the above that the provisions of the Police Act constitute a *lex specialis* in relation to the provisions of the Act on municipal, district and voivodeship governments in the scope of spending by LGA (Walczak, 2018). These provisions also determine that funds transferred from the LGA budget to finance the costs of functioning of the Police organizational units can not be used for other purposes than the objectives set out in Article 13, item 4f of the Police Act, i.e.:

- covering investment, modernization or repair expenditures as well as costs of maintaining and functioning of the Police organizational units, as well as purchasing goods and services necessary for their needs;
- monetary compensation for Police officers for duty time exceeding the norm in the 40-hour service week, in a 3-month billing period;
- awards for policemen for achievements in service.

It should also be added that the provisions of the Civil Code and the Police Act do not prohibit accepting a donation in kind. This means that the Police organizational units can accept this type of donation.

The commune, district and voivodeship have legal character, so they can act and perform legal acts themselves, including contracts for donations, by virtue of decisions of their bodies. Donation is an activity that falls under the management of property. In the case of a communes, the proper commune is the authority competent to manage communal property. As a rule, a commune head, mayor or city president submits one-person statements of will on behalf of the commune in the field of property management. In the case of district and voivodeships, the management of the district and the voivodeship management, which are represented externally by the district head and voivodeship head, who are responsible for managing the property.

3 About the Motives of Donors from Local Government Authority and those Donated to from the Police

While *prima facie*, it seems that the main initiator of the financing of the Police by LGAs are governments, because the nature of the donation begins with *animus donandi*, or the will to make donations from the donor, in this case the situation is the opposite. In the literature one can find the view that the main "perpetrators" of obtaining financing for the Police from LGAs were police commanders who directly sought support from their voivodeship heads, presidents, mayors, etc. They most often personally reached the voivodeship heads, presidents or, mayors, and they arranged the benefit of the municipalities they manage, their inhabitants and of the policemen operating there (Tatarczuk, 2010: 60). At the same time, it was added that "how much they had to overlap, what arguments to use to persuade such ideas of their government authorities, they only know" (Tatarczuk, 2010: 71).

The motives of human action result from their needs (Butler, McManus, 2012: 81–88). According to the police commanders, in this case the basic need is to meet the difficult financial and material situation of the units they manage. Probably the Police organizational units do not receive sufficient funds from the state budget and therefore look for alternative sources. Unfortunately, there are no official data or quasi-financial reports that could be analyzed, both on the side of the police and LGAs.

The available data show that the revenues of the central Police Support Fund in 2011, in particular from payments from local government units, amounted to 78,563,000 PLN (Supreme Chamber of Control, 2012: 26). The Police Headquarters, 16 provincial and capital headquarters, 271 district headquarters, 65 municipal headquarters, 7 regional headquarters, 558 police stations and 12 specialized police stations operate in the Police structure throughout the country (www.info.policja.pl). Statistically speaking, for 938 organizational units of the Police from the central fund, an amount of 83,000 PLN was allocated to each of them. In turn, for example, in 2011, the provincial headquarters, 5 city headquarters, 17 district headquarters and 21 police stations in the Podkarpackie Voivodeship spent 2,084,538.10 PLN from the voivodeship Police Support Fund, which gives an average of 47,375 PLN per unit (bip.podkarpacka.policja.gov.pl; data obtained in the mode of the act on Access to Public Information, Art. 2a/1). The amount of almost 50,000 PLN for each unit does not seem to be low. Therefore, it should not surprise the activity of commanders in seeking donations from representatives of local government units. It can not be ruled out that the activity of commanders in obtaining funds from LGA is a desirable phenomenon. The establishment of the Supreme Audit Office supports the adoption of such a thesis, which shows that the Chief Commander of the Police planned the revenues of the Police Support Fund in 2011 in the amount of 600,000 PLN in the Police Headquarters, in the absence of any previously established sources of revenue in the form of contracts or agreements constituting the basis for co-financing. It is true that the Supreme Audit Office assessed this action as unintentional, but the question arises, for example, about the methodology (assumptions) on the basis of which the Police Chief estimated the amount of potential funding and knowledge about the donors' *animus donandi*.

Other motives that may affect the behavior of police commanders considering the LGAs for funding for the Police may be:

- self-fulfillment and personal development,
- the desire to create your image and constantly meet the related needs,
- meeting the challenge,
- affiliation to the police, local and government community,

- ensuring security in a different approach, at least for the sake of staying in office, citizens, superiors, subordinates (Maslow, 2017: 62–76).

In the authors' opinion, the provisions enabling the financing of the Police by LGAs constitute a natural incentive for the Police commanders to act as a kind of "lobbyist". The range that allows the commandant to express his "gratitude" to the representatives of the local government is quite wide, for example:

- emphasizing the good cooperation of the Police with the local government auhtority among subordinates, superiors, the local community, the media, etc.,
- causing the political opponent of the local government representative to engage in operational or procedural interest,
- increasing the activity of prevention patrols inindicated places,
- influencing the attitude of subordinates that allows expressing gratitude, for example through continuous information about benefits gained from the government (e.g. additional paid services, rewards for results at work, business equipment, renovation of business premises),
- promotion of government representatives at events organized by the Police.

The commune head, voivodeship head, mayor or president are politicians at the local level, and their aim is to implement a political program by gaining and exercising power or influencing it. Co-financing of the Police by representatives of local government should therefore be treated as one of the elements of the policy they pursue. From this point of view, the funding of the Police by LGAs should not have reason other than for financing the Police, rather than improving security.

4 Conclusion

In the opinion of the authors, the provisions enabling funding of the Police from other sources than from the state budget should be repealed. To this end, it would be reasonable to repeal the provisions set out in Article 15, item 3–5 on the Police Act, which regulate the financing of the Police through the Police Support Fund. In addition, it is proposed to introduce

in the Police Act a ban on financing the Police from sources other than the state budget through the adoption of Article 13, item 1 as follows:

"*Article 13.1. Costs related to the functioning of the Police are covered from the state budget.*"

The consequence of the above change would also be the necessity to remove all provisions of the Police Act referring to the functioning of the Police Support Fund.

A number of arguments support the adoption of such a solution. First of all, the Police is not only an organ of public trust (Judgment of the Supreme Administrative Court in Warsaw: OSK 962/10), but plays a key role in Poland in the detection of crimes and offenses and prosecuting their perpetrators. The Police Act does not distinguish between material jurisdiction at the various levels of the organizational structure of the Police, but only distinguishes between local jurisdictions. The District Police Department is therefore obliged to detect crimes, even corrupt ones, just as the voivodeship command. Thus, the district headquarters operate in the district area, and the voivodeship headquarters in the district and voivodeship. It follows that the tasks of the District Police Headquarters include the detection of corruption offenses, which are perpetrated by, for example, voivodeship or district heads, voivodeship or district officials.

According to the authors, the review of the regulations regarding the possibility of financing the Police shows that they may have an impact on limiting the impartiality of Police commanders at particular levels of the organizational structure of the Police. In practice, these rules can create circumstances that affect behaviors that fill in the characteristics of a difficult or permanent conflict of interest or even crime.

Summing up, the financial situation of the Police creates the need to look for other off-budget sources of financing for the Police. However, in the authors' opinion, such a situation should not take place, because these provisions may have adverse effects, as they not only have a negative impact on the awareness of police and local government commanders, but they call into question the real benefits for the Polish state.

The analysis shows that these regulations make it difficult for the officials to strive for impartiality, especially for their particular group having the right to use coercion, that is, police officers. What is more, it is justifiable to say that the Machiavellian nature of these provisions can often create circumstances facilitating corrupt behavior in those persons whose task is to counteract such behavior and fight it. Financial expenditures for the Police should be treated within the priority as well as expenses for national defense and health care. It would be reasonable to consider the introduction in the Police Act, a mechanism for determining the amount of budgetary financing in relation to a given percentage of Gross Domestic Product.

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UNDERFUNDING OF THE TASKS COMMISSIONED TO THE LOCAL GOVERNMENT UNITS

Anna Sowińska[1]

Abstract

Problem of underfunding commissioned tasks started in the beginning of local government. During this time it only grows bigger and a local government cannot handle with such big trouble. The protection provided for a local government is ineffective and inapplicable in practice. Government administration is not interested in solving the problem, moreover there is a possibility that this situation is favorable for it, because of the savings in the state budget. A local government copes with the problem in two ways: performs a task only within the limits of funds or gives the missing amount of money from it is own budgets. Each of this ways has negative consequences for a local government and for the citizens. In the first case the citizens would not have an access to the benefits due to them and they could sue local government for compensation. In the second situation local government break discipline of public finances and worsen their financial situations which in some situations are critical. This issue is regularly brought back by representatives from a local government who estimate that level of underfunding oscillates within 50%. Finding, creating and introducing solution of this problem certainly would take a lot of time so first of all it is necessary to find temporary solutions. The easiest thing would be to legalize one of the current solutions with the mechanisms that would prevent the citizens and a local governments detriments. In the future it is possible to think about a different system of calculation and transferring funds on commissioned tasks. Cooperation of a local government and government is needful to make effective and satisfactory for both sides solution.

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Keywords: Local Government Units Underfunding; Government Administration; Public Finance.

JEL Classification: H75, H76, K34.

1 Introduction

The issue of underfunding of the tasks commissioned to the local government units (hereinafter lgu) has been raised by local governments for a long time. One can notice an increasing interest in this subject, which is important to self-government, their finances, even the idea of self-government, or simply, to comply with the law.

Ensuring by the central administration of funds, in the amount sufficient for full and timely performance of tasks commissioned is a matter so important that it was normalized in the Constitution of the Republic of Poland, in Art. 167 – "*Changes in the scope of tasks and competences of territorial self-government units take place with appropriate changes in the distribution of public revenues*". However the calculated funds due to local government units are often underestimated, which is difficult to prove, sometimes even impossible, and is necessary to effectively use judicial protection.

Worthy of distinction is the view that the ever more numerous outsourcing of central government tasks to local governments and their underfunding is a deliberate action of the central administration, intended to transfer financing their tasks to local governments to relieving the already indebted state budget (Sowiński, 2015: 236–237). Such a statement, although possible, would be very worrying, as it would imply a deliberate violation of the law and interests of the lgu by the central administration.

2 Funding of the Tasks Commissioned to the Local Government Units

Entities performing the state financial policy in the local government sector of the public finance sector have financial resources defined as public funds.

In the Constitution, as well as acts on local government of the commune (The Act of Commune Self-government), poviat (The Act of Poviat

Self-government) and voivodship (The Act of Voivodships Self-government), and the public finance law (Public Finance Act), you can find rules for dealing with tasks delegated to local government units, such as commissioning tasks by act, their financing by the central administration, or calculating the amount of subsidies according to the rules adopted in the state budget to determine expenses of a similar type.

If the justified needs of the state so require it can be ordered to perform public tasks in the statutory way, at the same time precisely defining the mode of transmission and the method of performing these delegated tasks. It is important to provide local government units a share in public revenues in a size appropriate to their tasks and this is the issue that turns out to be the key and the most difficult to implement.

The basic issue is to determine the source of financing the performance of tasks. These funds, in contrast to own tasks of lgu, do not come [or should not come] from the budget of lgu, but from the state budget. They should be transferred in an amount allowing fully and timely implementation of the tasks for which they are intended.

They are transferred to local governments in the form of targeted subsidies, usually by voivods, in accordance with specific procedures. In the case of property disputes resulting from failure to comply with the procedures competent to consider the complaint is common court (Borodo, 2011: 141). This applies to delayed transfers of funds, as well as situations when they will not be transferred, or will be transferred, but not enough for proper performance of the tasks entrusted.

In the absence of funds for the performance of commissioned tasks lgu cannot get the missing amount from their own budget, as it would be a violation of the public finance discipline. In practice, however, the issue of financing these tasks by lgu is problematic and causes many disputes and local governments often claim that they are deliberately given too low amounts of money.

According to Art. 167 of the Constitution of the Republic of Poland participation in public revenues is ensured in accordance with the tasks assigned to lgu. The first paragraph of this provision derives the so-called

principle of adequacy in a static approach, assuming a certain stabilization between the resource of public resources put at the disposal of local government and the catalog of tasks that should be implemented for it.

3 Negative Effects of Underfunding Commissioned Tasks

Local governments, left with the problem of the obligation to perform underfinanced tasks, had to find ways to deal with it. The two basic solutions are adding funds from one's own budget or perform the task partly as the funds allow. Both of these solutions, however, are imperfect and bring significant problems to local governments.

The most commonly used method by lgu is to supplement the missing sum for the task with their own budgets. This exit ensures full, effective performing of the task and meeting the needs of the society and fulfilling the obligations imposed on the institution, however, it has negative legal and economic consequences. The most important aspect here is the fact of using financial resources of local government what theoretically violates The Public Finance Act and The Act on Liability for Violation of Public Finance Discipline (Art. 14), but this issue is controversial. Looking at the RIO[2] case law, we will find examples of considering such actions as totally illegal, such as the RIO decision in Łódź (Regional Accounting Chamber in Łódź: WA 4120-3/2014-1) or allowing them, as is clear from the position of the RIO in Lublin (Regional Accounting Chamber in Lublin: RIO-I-4332/11/14). You can also find a number of RIO provisions allowing the financing of tasks commissioned with the use of self-government funds, but only under certain conditions, such as spending funds in a targeted and economical way, or choosing the optimal methods and means to achieve the goal. Such a discrepancy in the interpretation of the provisions by the authorities, which should relatively unanimously outline the limits of rights and obligations of local government, with problems with the interpretation of regulations, does not help local governments to get out of such a difficult situation. For this reason, they do not know whether

2 Regionalna Izba Obrachunkowa (RIO) – Regional Accounting Chamber, state, external and independent control and supervision body of local government units and other entities specified in the Act, in the field of financial management and public procurement.

their actions are legal or not. The result is that usually lgu, in order to avoid possible troubles with subsidies for assigned tasks, hide them under other, own expenses (Karciarz, Kudra, 2015: 33). This leads to some misrepresentation of the budget, the lack of its credibility and the concealing of the negative phenomenon, which is the underfunding of commissioned tasks. At present, it is difficult to correctly assess the size and significance of this occurrence precisely because of the concealed amount of subsidies. Local governments estimate that the funds allocated to them sometimes cover only 50% of the expenditure, and they have to pay the rest of the sum from their own budgets, which is a huge sum of money.

Another effect of these activities is the depletion of the budget of the local government, which makes it necessary to incur larger obligations or make some sacrifices in the scope of performing own tasks. This aggravate already the poor state of finances of local government, which must limit their own expenses or become more and more indebted. Finally, it ends with the necessity to repay liabilities, for which funds are obtained through continuous refinancing of debt, which is not possible indefinitely. Another way is the considerable budget constraints, which are only possible within the scope of own tasks over which the local government has control. In this situation, the citizens are harmed, because despite providing them with certain services or benefits related to the perform of the commissioned task, this takes place at the expense of the own tasks of lgu, which also concern them.

The problem is complex because there is some valuing of tasks. It is assumed that tasks in the field of central administration are more important and should be performed even at the expense of the local government's own tasks. The effect of this is the limitation of the ability of local governments to action by the central administration, to some extent even their independence. A specified community, which has a greater impact on the activities of local authorities and can more flexibly adapt its activities to its needs, has reduced opportunities for action. It limits the very idea of self-governance. Citizens will suffer not only because of the reduced scope

of activities of local governments, which they are beneficiaries, but also by some limitation of influence on the actions of local authorities.

The second, less frequently used method of solving the problem of underfunding commissioned tasks is their implementation only within the limits allowed by the funds received in the subsidy. This method, although protecting the budget of self-government and being in line with the principles of public finance management, also has negative consequences. The most noticeable effect for citizens themselves is the fact that they do not receive a particular service or receive it in a different way than is guaranteed. In such a situation, they may, in the event of injury, claim their rights and sue to the local court lgu which has failed to fulfill its duty (The Civil Code: Art. 417). It will be difficult for the local government side to defend against similar allegations and it is possible that it will be forced to pay compensation.

4 Opinion of Local Government Units in the Matter of Underfunding Commissioned Tasks

The problem of underfunding the commissioned tasks is extremely important for local governments. Representatives of all levels of local government units as well as organizations associating them raise their doubts and requests for rectifying the situation.

One of the most important is the position of the Association of Polish Cities, where the long-term character of the described practices is emphasized, which results in the gradual deterioration of the financial condition of lgu. Additionally, attention was drawn to the lack of willingness of the government to cooperate and solve the problem, despite numerous requests and appeals. It was pointed out that after years of adding money from own resources, local governments are no longer able to do this and must limit the performance of tasks assigned to the amount of funds received. In such cases, they also expect protection in the face of consequences related to this. It is also important to mention about the possibility of making a class action by lgu or associations representing them. If all local governments calculate how many funds they had to add to perform

commissioned tasks and applied for reimbursement of those funds, the central administration could have great difficulty in paying compensations due to their amount.

Worth mentioning is the appeal of the Ruda Śląska City Council to the parliamentarians of the Śląskie Voivodeship. They ask for help in the fight for the funds due to them, which they had to contribute to the commissioned tasks. It is about the amount of 3.3 million PLN for 2012, which is a considerable amount for the city budget. Again, there is talk of a government party's failure to cooperate and a lack of responses for numerous appeals to resolve a situation critical to local governments. Attention is also paid to the increasing number of transfers of tasks without providing funds for their implementation. There is also an indicated situation, where, for the sake of finances, expenditure on own tasks is reduced. Ruda Śląska, as one of the few cities, succeeds in gradually reducing debt, despite the fact that it is necessary to devote part of its resources to commissioned tasks. If it received subsidies in the right amount, the debt could be reduced even faster, and additionally, investments developing the poviat would be possible, which would be beneficial both for the residents and the self-government. Instead, the city is struggling with the problem of raising funds without increasing the indebtedness which, in fact, should be ensured in accordance with the law.

The position of the Convention of the Marshals of the Voivodships of the Republic of Poland is important and instructive, which apart from pointing out the continuous and increasing underfunding of commissioned tasks, drew attention to the non-uniformity of this underfinancing, which considered the actions of voivods as inconsistent and non-transparent. It provides a summary of the underfunding of commissioned tasks compared to real costs in individual voivodships, additionally comparing the status from 2012 and 2013. This shows the high level of amounts that voivodships are forced to pay extra for assigned tasks. The said position also indicates that some tasks are delegated to local governments without any justification and there is no reason that they can not be performed by the central administration.

Table 1: Deficiency amounts in financing tasks commissioned in individual voivodships

Voivodeship	Actual costs in 2012	The amount of shortage in financing commissioned tasks in 2012	% shortage in relation to the costs incurred in 2012	Actual costs in 2013r.	Estimated amount of shortage in financing commissioned tasks in 2013	% shortage in relation to the costs incurred in 2013
Dolnośląskie	880 255,12	730 255,12	82,96%	961 223,53	811 223,53	84,40%
Kujawsko-Pomorskie	2 084 400	1 042 200	50%	2 118 000	1 059 000	50%
Lubelskie	3 099 129,97	2 226 236,97	72%	3 149 675,75	2 296 886,75	73%
Lubuskie	1 946 245,15	1 398 456,13	72%	2 064 250,89	1 364 750,90	66%
Łódzkie	3 752 071,08	2 367 342,08	63%	3 935 189,29	2 644 189,29	67%
Małopolskie	7 591 232,22	4 487 997,22	59,12%	7 576 600	3 498 900	46,18%
Opolskie	2 256 248,10	1 538 748,10	68,20%	2 247 880,80	1 478 880,80	65,8%
Podkarpackie	Abt 3 000 000	Abt 2 300 000	76,67%	Abt 3 250 000	Abt 2 550 000	78,46%
Podlaskie	1 582 694,49	855 887,49	54%	1 710 031,32	794 031,32	46%
Pomorskie	3 349 618	2 011 618	60%	3 758 251	2 420 251	64%
Śląskie	4 153 853,38	2 015 470	48,52%	4 176 470	2 007 855,84	48,08%
Świętokrzyskie	3 942 578,39	2 204 790,49	55,92%	4 629 611,64	2 399 500,65	51,82%
Warmińsko-Mazurskie	4 158 587	3 644 587	87,64%	4 158 587	3 644 587	87,64%
Wielkopolskie	3 806 900	2 359 900	62%	4 349 162	2 647 000	61%
Zachodnio-pomorskie	Abt 3 000 000	2 466 000	82%	Abt 3 000 000	2 486 000	83%
Mazowieckie	Abt 9 800 000	Abt 8 000 000	Abt 82%	9 749 558,45	7 998 558,45	82%

Source: Position of Marshals of the Voivodeships of the Republic of Poland of 20 September 2013. no. 21/2013/K-P

Based on the above data, you can see:

- Underfunding of tasks took place in all voivodships, in both years presented.
- Significant disproportions between underfunding in individual voivodships.
- The maximum underfunding was in 2012 and 2013 – 87.64% in the Warmian-Masurian Voivodeship

- Minimum underfunding was in 2012 – 48.52% in the Śląskie Voivodship, while in 2013 – 46% in the Podlasie Voivodship.
- Between the presented annals, slight fluctuations in the level of underfunding can be observed.

Referring to the content of note 1, it should be noted that the phenomenon of underfunding the tasks commissioned to the local government is of a general nature, and in the context of remarks 3 and 4 and below presented statements from the report of the Supreme Audit Office[3], also permanent.

While the voices of the interested parties can be regarded as biased or overdone, it is difficult to assess in the same way opinion made by an independent and objective control body, such as the Supreme Audit Office. It is worth quoting here, for example, post-inspection from control P/13/175 – "Implementation in 2012 of the state budget, part 85/32 – Zachodniopomorskie voivodship", which was carried out by the delegation in Szczecin regarding that city. Speech is there about the amount of co-financing in the amount of 7.949.133,57 PLN, which was justified in the following way: "*The main reason for involving the Commune's own resources was too low subsidy, which did not cover the actual needs and expenses of units performing tasks, in particular in to maintain the work positions of the people entrusted with their implementation.*" What is equally important in the content of this report is the efforts of the president of Szczecin to obtain a larger amount of subsidies from the voivode, which, however, refused, indicating the lack of resources that have already been otherwise disposed of.

5 Examples of Ad hoc and Systemic Solutions of the Problem

The issue of underfinancing of commissioned tasks is very complex, and the attempt to solve it will certainly not be easy. There seems to be the necessary cooperation between central administration and local governments as well as well-thought-out, thoroughly discussed and consulted legislative changes. Due to the undoubtedly longer time that will be required to implement them, in the first place it should be thought about a temporary solution to the problem.

[3] Najwyższa Izba Kontroli (NIK) – Supreme Audit Office the highest control body of the Republic of Poland, subject to the Sejm. It is obligated to control the activities of local self-government bodies, municipal legal entities and other municipal organizational units from the point of view of legality, economy and reliability.

First of all, it is necessary to indicate the scope of actions necessary to be taken by the lgu in the absence of sufficient funds to perform the commissioned task. They need clear action procedures that will make them feel secure in the event of an objectively identified shortage of resources to perform commissioned tasks.

The simplest would be to allow one of the two currently undertaken actions, to add own funds or to limit the scope of the task. Both, however, bring negative consequences for the self-government as well as the citizens, which should be offset, or at least significantly limited, by appropriate procedures.

If adding resources of lgu to commissioned tasks will be continued, a clear and transparent way of documenting similar expenses should be introduced. This would introduce not only the credibility of financial statements, but also make it possible to claim these amounts from the state budget. The situation in which, in the objectively identified case of a shortage of funds, the central administration does not bear the consequences for the state caused by it, would be unacceptable. The reimbursement could take place in many ways like compensation or additional subsidies.

While limiting the performance of tasks to the amount of subsidies received, it would be necessary to allow for a situation where the needs of citizens will be unfulfilled, procedures or time limits of proceedings will be violated, and local governments may be sued and forced to pay compensation. This situation is definitely worse for citizens who will be deprived of their benefits. However, it would be necessary to provide the local government with the possibility of claims against the central administration, whether by reporting the situation and its reasons, or even in court, to return the money that had to be paid to the citizen as compensation.

It should also be noted that in the case of commissioned tasks, there are different categories of them, which affect the citizens in a different way. Another category is the underestimation of funds for road repairs, as a result of which some roads will not be renovated within a certain time. However, it can be assumed that these renovations will be carried out first in the next financing period [next financial year]. On the other hand, it is definitely another underestimation of funds for social security benefits, grants and benefits resulting from family assistance programs, poor, non-working, sick

people. In these cases, the failure to perform the task commissioned to the lgu directly affects the sphere of the citizen's existence and may negatively affect the implementation of their basic needs.

Temporary solutions, although the problems are solved to some extent, can not be accepted permanently, as they presuppose the existence of a certain irregularity, and instead of remedying its causes, mitigate only the effects in relation to the sphere of settlements in public finances, and not performing a tasks, which should be a priority for public administration.

In the first place, should be consider the scope of tasks that are commissioned to the local government. If some of them are commissioned regularly, on a continuous basis, then maybe it could be transferred permanently, as part of the own tasks of lgu or it could be possible for this option by law, accept that in the case of delegating tasks, they become the own tasks of the unit they were passed, of course after taking into account the corresponding increase in their income. In the framework of the so-called extreme options, it should also consider the possibility of prohibiting the delegation of commissioned tasks and obligation of their performance by the central administration. On the other hand, one should consider the option indirectly described above, the total transfer of all executive tasks to local government, with the need for very good reasoning, if they were to be left in the competence of the central administration.

Regardless of the choice of how to remedy the problem, it should be considered a different way of transferring funds to local governments, directly, bypassing the voivode (Sowiński, 2008: 221), which often has no influence on the manner and amount of their redistribution, or other intermediate stages. As has been shown earlier in many cases, it is the reason for the lack of funds and uneven allocation of money between local governments.

When attempting to find a way to remedy the continuous underfunding of commissioned tasks, other ways of estimating the costs of the task should be considered, as the current, as shown in practice, does not work. A list of factors and conditions should be established, which should be taken into account when calculating funds for a given purpose. It could be, among others: planned number of full-time jobs, along with related benefits, minimal office supply, possible necessity of rent, purchase or construction

of facilities etc. It would be useful to verify the co-financing estimates, in relation to real expenditure on the task, to find the reasons for possible discrepancies, to include them when recalculating due subsidies.

The dialogue between the self-government and governmental side, similar to the one carried out when transferring tasks under the agreements, would be a good solution, although difficult to implement. This would cause a number of problems due to the superior position of one of the parties, because lgu are required to perform statutory tasks and, even in the event of bad conditions, they would not be able to refuse. There could be also a situation of political disputes, where representatives of different parties might not want to cooperate with each other. The idea of a dialogue would therefore be a very good supplement to the method of setting grant amounts, a certain option, but not a basic solution.

6 Conclusion

When looking for a solution to the problem of underfunding commissioned tasks, many aspects should be considered: how to calculate subsidies, how to provide them, and how to spend them. Above all, cooperation between central and local government administration should be implemented. Both sides, having their reasons and experiences, would certainly find solutions more effective, more practical and satisfying for them. It is also important to define a unified position regarding the possible admissibility or a total ban on co-financing the performance of tasks ordered from the funds of local government. It would also help to develop mechanisms for a fuller, more effective and practically enforceable right to self-defense in this area.

The problem of underfunding is extremely important and requires a solution as soon as possible, for the sake of finances of lgu, their development, stability and, above all, for the well-being of citizens. It must not be allowed that the problem will lead to a slow fall of the smaller ones, and with time also larger ones, which is unfortunately possible, considering their deteriorating financial condition. Certainly a calm look at the issue and the elaboration of legal regulations that would be aimed at solving the problem is better than allowing for further deterioration of lgu finances. Lgu may also decide to start enforcing their rights from the state, which will only bring

destabilization, further costs and mutual hostility that would make cooperation more difficult. It should be remembered that the central and local administration are part of the same public administration of the Republic of Poland, established to serve its sovereign, that is citizens of Poland.

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LOCAL CHARGES – IMPORTANT REVENUE FOR LOCAL GOVERNANCE?

Eva Tomášková[1], *Petr Mrkývka*[2]

Abstract

This paper deals with revenue of local charges in the Czech Republic. The Czech Republic is characterized with many small municipalities. Local governances need financial independence for filling their tasks and for avoidance of inadequate state to the local activities. However, it is very important to have enough own revenue and to manage this revenue effective as well. For this reason, the last part of this paper describes the possibilities how to detect efficiency and effectiveness at local charges. The aim of this paper is to show the influence of local charges to total revenue of local governance. Compilation, comparison, analysis and synthesis were method used for writing this contribution.

Keywords: Local Charges; Local Governance; Tax Revenue; Effectiveness; Efficiency; the Czech Republic.

JEL Classification: G3, H2, H7.

1 Introduction

Today is still analyzing the independency of local governance and its advantages and disadvantages. Total independency of local governance is divided into a few of independency. It could be politic independency, personal independency, technology independency, energy independency, or financial independency. Financial independency is very important for increasing the next kind of independencies. It is the rate of own revenue to total revenue. Local governance needs some financial independency for filling its tasks and

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for avoidance of inadequate state to the local activities. For this reason, local governance needs its assets and its revenue.

Local governance can influence its own revenue through a few of possibilities. First, it can increase the number of residents and increase total incomes from shared taxes. Second, it can increase of local coefficient at immovable property tax and increasing revenue of this tax. Third, it is possible to realize steps (e.g. improve the quality of roads) for more attractive environment in the municipality for businesspersons. Fourth, the new possibilities is to allow some gambling house. The Czech Republic has the new Act no. 186/2016 Coll., on games of change (Gambling Act) and the Act no. 187/2016 Coll., on taxes from games of change (Gambling Tax Act). According to Gambling Tax Act, a part of the total revenue from this tax creates revenue of local governance.

Pařízková (2017) stress that local governance have a big independence in creation of budget because each municipality and region adjusts creation of the budget to its own conditions, e. g. the chief economist may compile the draft budget in cooperation with the mayor or council members, or a financial committee, and it is only up to the municipality and region.

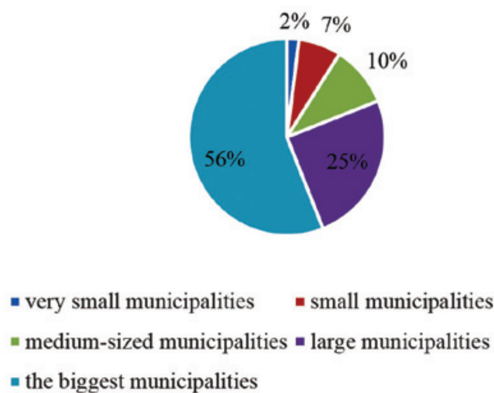
However, it is very important to have enough total revenue and to spend this revenue effective as well. For this reason, one part of this paper describes the possibilities how to detect efficiency and effectiveness at local charges.

The aim of this paper is to show the influence of local charges to total revenue of local governance. Compilation, comparison, analysis and synthesis were method used for writing this contribution.

2 Municipalities in the Czech Republic

The Czech Republic had 6258 municipalities in 2016 (according to the Czech Statistical Office). These municipalities can be divided into 5 groups according to number of total inhabitants. First, very small municipalities (1–199 of inhabitants), second, small municipalities (200–499 of inhabitants), third, medium-sized municipalities (500–999 of inhabitants), fourth, large municipalities (1000–4999) and the biggest municipalities (5000 and more of inhabitants), see Graph 1.

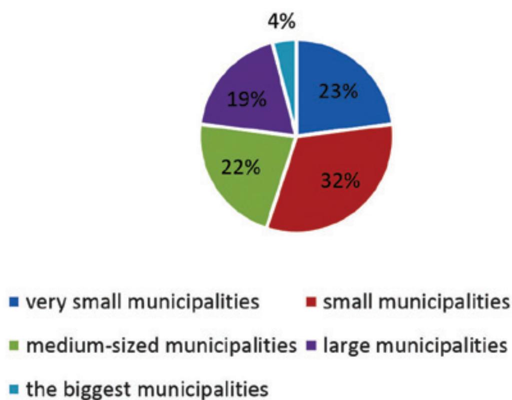
Graph 1: Number of total inhabitants of the municipalities in the Czech Republic (without Prague)



Source: Hospodaření obcí v roce 2016. iRating powered by Cribis [online] [cit. 1. 2. 2018]. Available at: http://www.informaceoobcich.cz/

More than one-half of total inhabitants lives in the biggest municipalities. Decreasing of size of the municipalities means decreasing rate of total inhabitants. It is necessary to know number of municipalities of these five groups. Graph 2 shows this situation.

Graph 2: Number of municipalities in the Czech Republic (without Prague)



Source: Hospodaření obcí v roce 2016. iRating powered by Cribis [online] [cit. 1. 2. 2018]. Available at: http://www.informaceoobcich.cz/

Graph 2 shows that small municipalities have the biggest rate of total number of municipalities; it is about one-third of total municipalities. Second position ranks very small municipalities; third position ranks medium-sized municipalities (that is only one per cent less than at very small municipalities. Large municipalities are 19% and the biggest municipalities are the lowest. They create only 4% of total number of municipalities.

Summary, the Czech Republic has a large number of total municipalities and the largest number creates small municipalities. This situation is different at its adjacent countries. Poland has about 2500 municipalities and about 40 mill. of inhabitants. The Slovak Republic has about 3000 municipalities and 5.5 mill. of inhabitants. Germany has about 12 100 municipalities and about 83 mill. of inhabitants and Austria has about 2500 municipalities and about 8.7 mill. of inhabitants. (Provazníková, 2009)

Municipalities in the Czech Republic stress still their own independency. One of important independencies is financial independency. There is still a great question how to ensure the financial independency.

3 Revenue of Local Governances

Local governances have different revenues. According to Act no. 250/2000 Coll., on Territorial Budgetary Regulations (§ 7), local governance have these types of revenues:

- Income from municipal property;
- Income from municipal economic activities;
- Economic activities of budgetary and state-funded institutions and corporate bodies established by the municipality;
- Income from administrative activities and administrative fees;
- Income from local charges;
- Income from taxes or part of revenues of shared taxes;
- State budget subsidies and state fund subsidies;
- Income from regional budget;
- Income from administrative activities made by other administrative entities;
- Gifts, contributions and grants from natural and juristic persons;
- Other incomes.

These revenues can be divided into revenue from taxes (including local charges), revenue from non-taxes, capital revenue and transfers. Revenue from taxes creates the most important revenue. Legislative changes in the area of taxes play significant role on financial structure and the level of revenue. Act no. 243/2000 Coll., on Budget Allocation of Revenue of Certain Taxes to Territorial Self-Government Units and to Certain State Funds (the Act on Budget Allocation of Taxes) and the changes of this act (the last change was Act no. 391/2015 Coll.) influence stability and financial independency of local governance. How was mentioned above, the Czech Republic is characterized by unequal occupancy of municipalities and that is reason for different allocation of tax revenue and rivalry of individual local governances. It is the question, if this type of competition is suitable from moral aspects and if this type of allocation is the best way for residents. The situation about revenue of local governances in the last years is shown on Table 1.

Table 1: Revenue of local governances in the last years

Revenue	2015	2016	2017 (estimates)
Taxes	175.4	190.8	198.1
Non-taxes	30.6	30.3	30.7
Capital	5.3	7.8	6.4
Transfers	68.1	50.1	42.9
Total revenue	279.4	279.0	278.1

Source: Ministry of Finance of the Czech Republic. Financování a hospodaření obcí, krajů, zadluženost, inkaso sdílených daní, rozpočet a legislativní změny r. 2017 – Dny malých obcí [online] [cit. 23. 1. 2018].Available on: http://www.denmalychobci.cz/file/dmo/prezentace/47/mf_rucka.pdf

Table 1 shows that total revenue of local governances is in the last three years on the same level.

The absolute level of non-taxes are in the three years on the same level and is about 11%. Capital income is the lowest income of local governance.

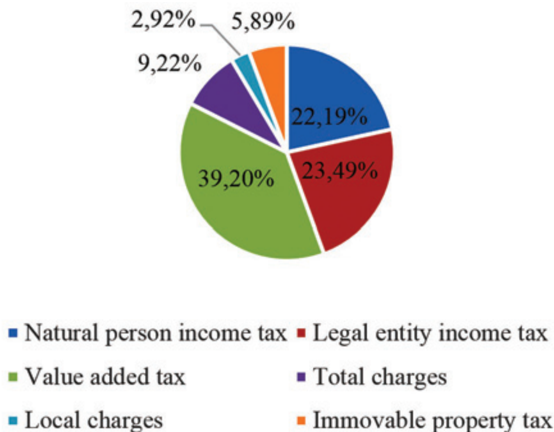
Transfers are decreased during the watching period and create from 24% to 15%. The reason is decreasing volume of non-investment subsidies and investment subsidies as well. Investment subsidies show the significant decrease, from 28.2 bill. CZK in 2015 to 11.9 bill. CZK in 2016. This trend is continuing. Medium-size

municipalities with 500–999 of inhabitants shows the main decrease (about two-third of investment subsidies). Number of municipalities, which did not receive any investment subsidies, is the highest at category very small municipalities. 62% of very small municipalities did not receive any investment subsidies. In comparison, 25% of very small municipalities did not receive any investment subsidies during the years 2013–2015. (iRating powered by Cribis)

Taxes create more than two-thirds revenue and their importance is still increasing. The growth of tax revenues in 2017 was caused of novelization about Act on Budget Allocation of Taxes which means increasing of rate of municipalities on revenue of value added tax on 21.4% (earlier 20.83%).

Tax revenue of local government is changing during the time. The main reasons are mentioned changing Act on Budget Allocation of Taxes and changing the economic cycle. If the economic is in expansion phase, tax revenue is higher and by contraries, if the economic is in decrease, volume of tax revenue is lower. Taxes, which are connected with economic cycle, are especially legal entity income tax, natural person income tax and value added tax. These three taxes create the main important tax revenue of local governance, see Graph 3.

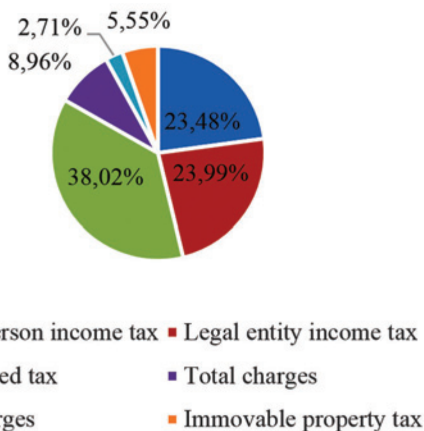
Graph 3: Tax revenue of local government in 2015



Source: Ministry of Finance of the Czech Republic. Financování a hospodaření obcí, krajů, zadluženost, inkaso sdílených daní, rozpočet a legislativní změny r. 2017 – Dny malých obcí [online] 23. 01. 2018. Available on: http://www.denmalychobci.cz/file/dmo/prezentace/47/mf_rucka.pdf

Revenue of value added tax creates 39.2%, which is the most important tax revenue. Revenue of natural person income tax and legal entity income tax creates more than 45% of total revenue. Revenue from charges are very low, it creates only 9.22% and from that, local charges create only 2.92%. The situation was not changed in 2016, see Graph 4.

Graph 4: Tax revenue of local government in 2016



Source: Ministry of Finance of the Czech Republic. Financování a hospodaření obcí, krajů, zadluženost, inkaso sdílených daní, rozpočet a legislativní změny r. 2017 – Dny malých obcí [online] [cit. 23. 1. 2018]. Available at: http://www.denmalychobci.cz/file/dmo/prezentace/47/mf_rucka.pdf

Revenue from local charges are very low and it creates only 2.71% of total revenue in 2016. Revenue from local charges and from immovable property tax create only about 8% of total revenue. Summary, local charges contribute for independency of local governances; however, the level of revenue from local charges is low. Is it possible to increase revenue from local charges?

4 Local Charges

These local charges are often named as local taxes. According to Radvan (2016, pp. 74), local tax would be a financial levy, determined to the municipal budget that can be influenced by the municipality. The taxpayer can but he or she does not need to obtain from the municipality any consideration.

This local tax can be regular or single levy. The local charges are adjusted with Act no. 565/1990 Coll., on Local Charges. It provides to assess local charges to local governances. The local governances in the Czech Republic may assess eight local charges; they are not allowed to levy any other charges. The reason is the rule that *"Taxes and fees shall be levied only on the basis of law"*, see article 11 Constitutional act no. 2/1993 Coll. Allowed local charges:

- Dog charge;
- Charge for spa and recreation stay;
- Charge for using public places;
- Charge on entrance;
- Charge for housing capacity;
- Charge on communal waste;
- Charge for permission to enter selected places by motor vehicle;
- Charge on appreciation of building land.

Local governance specify the whole essential such as the conditions for levying, the charge rate, the charge maturity and possible exemptions. Moreover, the ordinances may not exceed the limits defined by the Local Charges Act. (Radvan, 2017, pp. 340–342)

Local governance choose from these local charges. For example, Prague or Luhačovice do not use charge for permission to enter selected places by motor vehicle and charge on appreciation of building land. Brno has establish all local charges without charge on appreciation of building land. Karlovy Vary does not use charge on appreciation of building land and charge on entrance. Ostrava does not use charge for spa and recreation stay, charge on entrance, charge for permission to enter selected places by motor vehicle and charge on appreciation of building land. However, dog charge and charge on communal waste are the most popular local charges. For this reason, revenue from local charges differs according to municipality (it depends on established local charges, the high of local charge and number of inhabitants). Total revenue from different local charges is shown in Table 2.

Table 2: Local taxes in 2015 in the Czech Republic (in thousand CZK)

Charge on communal waste	3 565 910.08
Dog charge	276 639.36
Charge for spa and recreation stay	326 569.58
Charge for using public places	632 412.40
Charge on entrance	52 920.24
Charge for housing capacity	239 546.28
Charge for permission to enter selected places by motor vehicle	20 206.98
Charge on appreciation of building land	10 691.55

Source: Jirásková, Z. Místní daně a jejich přínos do obecní kasy [online] [cit. 27. 3. 2017]. Available at: http://smocr.cz/data/fileBank/8bc0ea42-3c41-45ea-b2a9-ed829879a9e7.pdf

Charge on communal waste shows the highest revenue. It was more than 3.5 bill. CZK in 2015. Revenue of charge for using public places ranks on the second position. Charge for spa and recreation stay places on the third position. The lowest revenue came from charge on appreciation of building land and charge for permission to enter selected places by motor vehicle; however, it is assumption that revenue from this two local charges will increase in future because more municipalities will establish these local charges.

Summary, there is limited increasing revenue from local charges. Local municipalities are not allowed to levy any other charges and maximal level of local charges is limited. Municipalities choose from the offer of local charges and significance of some of local charge will increase in the future. Limited revenue should lead to increase requests on efficiency and effectiveness of these revenues.

5 Efficiency and Effectiveness at Local Charges

Efficiency and effectiveness is defined in § 2 Act no. 320/2001 Coll. on Financial Control in Public Administration and on the Amendment to some Acts (Act on Financial Control). According to it *"effective management shall mean such a use of public means for ensuring the given tasks with as little as possible provision of those means while maintaining the corresponding quality*

of the tasks fulfilled". Niskanen (1971) noticed that efficiency in public sector can increase through better of competitive environment, increasing controlling and sanctioning system.

Application of increasing 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

All these steps bring many issues and it is very difficult to realize in public sector. The easiest are the first two steps (detection and analysis of inefficiency). By contraries, choice the best one suggestion is the most difficult. The reason is 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.

It is possible to recognize two types of efficiency, qualitative efficiency and quantitative efficiency. First, qualitative efficiency 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%. Second, quantitative efficiency compare real inputs and maximum possible of outputs. If it was possible to gain one hundred of outputs in the time and it we gained only sixty, efficiency is 60%.

Unfortunately, qualitative efficiency is not possible to realize at local taxes. It is possible to realize quantitative efficiency but in limited dimension. It is possible to use comparison of maximum revenue, which can gain from local charges and current revenue of local charges. It is very problematic to know maximum revenue of local charges. We have limited maximum level of local charges however; Laffer curve can plays the significant role. It shows dependency of tax rate and total tax revenue. A higher tax rate do not mean higher tax revenue (people choose tax avoidance or tax evasion. Development of total quantity of revenue can shows basic assess

of quantitative efficiency. Total revenue from local taxes increases about 1.24% in comparison of September 2016 and September 2015 (Ministry of Finance of the Czech Republic). Therefore, quantitative efficiency is increased.

According to Act on Financial Control, *"effectiveness shall mean such a use of public means which shall achieve the best possible scope, quality and contribution of the tasks fulfilled in comparison with the volume of the means exerted for their fulfilment"*. Drucker (2006) noticed that effectiveness is the ability, which every company can and must learned. It 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. Technical effectiveness is based on the approach of "the best practice". (Koopmans, 1951) This method can help to choose 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. According to Mandl, Dierx and Ilzkovitz (2008), effectiveness of allocation means the best one combination of inputs and in other words, output cannot be achieved by choosing a different set of inputs. Effectiveness measure the impact of the objectives. It is very important to register all public speeding for measuring of effectiveness. That is not easy in praxis because a lot of employees of public administration realize a few projects together at the same time and we do not know faithful public speeding of one selected project.

Technical effectiveness can be analyzed through cost analysis connected with tax acquisition and its development. Every local governance has to consider carefully all supposed costs of new local charge. Exactly estimation of costs is impossible. There are many heavily estimated variables (e.g. inhabitants' behaviors, economic cycle, inflation). Moreover, local governance do not register costs connected with individual local charges. Local governance register only costs connected with waste collection. Our recommendation is to register costs connected with local charges, e.g. time of employees attended to administration of individual local charge. Consequently, technical effectiveness can be applied.

Next, allocation effectiveness is based on maximization of utility. It is necessary to realize comparison – total utility and utility of inhabitants. Peková, Pilný and Jetmar (2012) notice that profitability and individual utility influence evaluation of public sector outcomes. Local governances want to gain maximum revenue of local charges for paying all costs. Inhabitants want to have a minimum level of local charges. Municipalities' utility maximization differ from citizens' utility maximization. It is very difficult to specify the general acceptable rate of utility in both of these groups. However, local governances have to ask to the opinion of inhabitants about local charges and all necessary expenditures and try to explain their attitudes and all their activities. Only this is the right way for increasing allocation effectiveness.

Increasing of effectiveness and efficiency at local charges often clash against political cycle. All changes needs time. However, political cycle is very short for realizing steps improving the efficiency and effectiveness. For this reason, politician prefer short-term objectives and short-term outcomes. Therefore improving the quality of public sector is slowly. According to Mrkývka and Czudek (2017), the current situation of financial law in the Czech Republic is not stabile and any positive change improving this situation in the near future is not expected.

6 Conclusion

The aim of the paper was fulfilled. The paper describes characteristics of municipalities in the Czech Republic, current revenue of local governances and contribution of local charges to total tax revenue. It was analysed efficiency and effectiveness at local charges in the Czech Republic.

The Czech Republic is characterized with a large number of total municipalities, the largest rate creates small municipalities. Local charges contribute for independency of local governances only with low share. There are some possibilities for increasing revenue of local charges, but there are two limits. First, local municipalities are not allowed to levy any other local charges. Second, it is limited the maximal level of local charges. Limited revenue of local charges should lead to increase requests on efficiency and effectiveness. There are a few possibilities to increase effectivity and effectiveness of local charges. The most important possibilities is to change attitude of politicians and inhabitants.

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EXEMPTION OF PORT INFRASTRUCTURE FROM THE REAL ESTATE TAX

Małgorzata Wróblewska[1]

Abstract

The following article presents a discussion on exemption of port infrastructure from the real estate tax. In accordance with the Act on Sea Ports and Harbours (the Act on Ports) such an exemption comes as a privilege granted exclusively to a port managing entity, if three following conditions are met: it refers to port infrastructure, it is generally accessible and related to the operation of the port, and it is dedicated to the performance of tasks by the managing entity. The aim of the article is to provide an answer to the question about the legal character of such an exemption and whether its construction is well-justified. During an analysis of relevant legal regulations the lexical, systemic and historical interpretation has been applied.

Keywords: Tax; Law; Real Estate Taxation; Tax Exemption; Port Infrastructure; Managing Entity; an Operator; Real Estate Tax; Municipality.

JEL Classification: H24, H76, K34.

1 Introduction

The real estate tax comes as one of the instruments which foster entrepreneurship. Applying its particular constructional elements, the state or a municipality can affect the tax situation of taxpayers. It is especially noticeable in the way in which the level of tax rates is determined and tax reliefs and exemptions are granted, which results in a decrease in the tax burden or in a complete resignation from taxation. The way of imposing the tax burden can be considered in terms of the cohesion of the legal system and the legislator's intentions with the developmental direction of ports and

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the role they are supposed to perform not only at the local level but also in the state economy. Apparently, the situation may seem to be obvious, however in fact, it can involve a conflict of interests which does not contribute to the development of the port sector. Assuming that the state is interested in the development of the maritime industry as a strategical sector of economy, the legislator – applying a stimulating function – may implement a systemic exemption of a subjective, objective or subjective-objective character. Another way to activate the maritime sector is granting privileges to entrepreneurs by the local authorities in a form of discretionary exemption of an objective character. It will occur when a municipality runs a long-range prospective policy oriented towards an increase in investment in its area. In practice, municipalities do not have to be interested in granting such exemptions because the most significant is the fiscal interest which is manifested in the highest level of tax collectability and its inflow into the self-government budget. At the same time, there are not any legal regulations which would not allow people to combine holding a function of, for example, a member of the City Council, a member of a management board or a president with holding a function of a member of the supervisory board of a port company. As a result, it is impossible to exclude a conflict of interests between a body of the state administration, such as a municipality, and an entity which runs mainly commercial operations, such as a company.

As the rate of the real estate tax comes as a considerable burden for entrepreneurs operating in the maritime sector, it seems interesting to analyse the exemption of the port infrastructure from taxation, implemented by the legislator. The aim of the following article is to provide an answer to the question about the character of the aforementioned privilege and whether it is well-justified in the current economic conditions. In order to provide an answer to that question, two partial issues must be considered. Firstly, an analysis of the tax exemption institution in terms of its accuracy referring to its formulation provided by the legislator. Secondly, an analysis of the range of taxpayers who have been granted the privilege of tax exemption.

The article consists of three parts and conclusions. In the first part, the Author presents her considerations on the real estate tax viewed as an imposition that burdens the property. The second part presents tax exemption

understood as a constructional element of the tax, and the third part is focused on a theoretical notion of exemption and its literal wording. The article is ended with the conclusions which come as the Author's evaluation of the implemented regulation. The abovementioned considerations are based on lexical, systemic and teleological interpretation. The publications which deserve special attention in expert literature referring to the analysed problems are the following: Abatements and Exemptions in Legal Structure of Taxation (Nykiel, 2002: 7–88), Comments on the Real Estate Tax (Etel, 2012: 7–485) and Exemption of Port Infrastructure and Infrastructure Providing Access to Sea Ports or Harbours (Morawski, 2013: 576–578). The article also refers extensively to judicial decisions of administrative courts.

2 The Real Estate Tax as the Property Tax

In the Polish law a tax is a public, non-reciprocal, obligatory and non-refundable financial benefit paid to the State Treasury, a province, a county or a municipality. It results from the Tax Act (the General Tax Regulations Act, Art. 6). Considering the real estate tax, there are not any common standards indicating which taxes should be included in the system. In view of a less destructive influence exerted by taxation imposed on real estate and differences which appear among properties on the functioning of a single market, the discussed problems exceed the scope of the EU law (contrary to indirect taxes). Hence, each EU member country independently decides how to burden real estate (Etel, 2003: 7). In Poland[2] the real estate tax (the Act on Local Taxes and Charges, Art. 2–7) is defined as a self-government tax, and it is entirely assigned to the budget of a municipality[3] (Borszowski, Stelmaszczyk, 2016: 111–267). It results from the fact that the discussed tax is closely connected with the area where a particular real property is located, hence it does not result in a situation in which an unfavourable outflow of taxpayers from that particular area can be observed, as it may happen in the case of some other taxes. Furthermore, the construction and forms of collecting that tax are relatively simple, which

[2] In Poland the system of real estate taxation includes: the real estate tax, the agricultural tax, the forest tax. All these taxes are regulated by separate acts and such a situation is unfavourable for explicit taxation principles.

[3] In Poland there are three levels of territorial self-government units (the level of a municipality, a county and a province). Each unit of territorial self-government has its own separate budget, however a municipality is the only unit which can have tax revenues.

corresponds to the character of the local tax model (Grabowiecka, Słodowa-Hełpa, 2004: 138). Moreover, there is a close relation between the purpose of the real estate, the way it is used and the tasks performed by the local authorities, e.g. in terms of the use of that real estate. Let us have the maritime municipality of Rewal where the port infrastructure, that is namely: slipway winches, the facilities for handling fishing boats, is owned by the fishermen, whereas the municipality holds the ownership of the access road to the sea harbour, a steel tank for oiled water and a place for two waste containers (Appendix no. 1 to the Resolution no. XXXV/267/13 of the Municipality of Rewal). Regardless of the ownership, all the abovementioned elements of the port infrastructure are dedicated to perform operations at the port which is located in the administrative area of the municipality.

Considering the source of collection, the real estate tax is assigned to the category of property taxes. The tax obligation is related to the fact of holding the ownership of a building or a facility, not to its technical conditions. The real estate tax depends neither on the revenue and benefits obtained from the real estate, nor on the taxpayer's material conditions.[4] Considering the tax burden, the only fact that matters is the right to decide about the real estate (ownership, possession, management). It was stated in the sentence of the Supreme Administrative Court in 1994. According to that sentence, the real estate tax is of an exceptional character which means that the ownership of the real estate is taxable regardless of the fact whether the real estate generates revenues or whether it is necessary to incur expenses for its maintenance in order to keep it in usable conditions, including its proper esthetic level (the Supreme Administrative Court: SA/Gd 1200/1993). Considering the economic aspect, property comes as a basic category, most often associated with the management process (Felis, 2012: 25). Considering the aspect of taxation law, apart from a few exceptions, the notion of property has not been defined.[5] However,

4 In accordance with the doctrine and judicial opinions, taxation on revenues from real estate takes place within the framework of income taxation, taxation on revenues from turnover – turnover taxation and taxation on real estate ownership – property taxation.

5 In accordance with Art. 5a item 2 PIT PIT (Art. 4a item 2 CIT) property assets are assets within the meaning of the Accounting Act, reduced by the assumed debt functionally related to the business operations run by the debt transferor, provided that the debt has not been included in the acquisition price, defined in the Art. 22g section 3 PIT (art.16g section 3 CIT).

some acts of international law, that is namely: regulations of the OECD Model Tax Convention on Income and Capital (the Model Convention), which comes as a specimen for agreements entered in order to avoid double taxation, provide a cue to understand the term. All the property taxes are the taxes imposed on the entire property or a part of the property, including taxes on increased capital (the Model Convention, Art. 2). The detailed list of property taxes included each time into the agreement depends on decisions made by the Parties – the countries which enter and are subject to the agreement. There are two categories of property: movable and immovable property (the Model Convention, Art. 22). It is considered that immovable property is understood in accordance with the legal regulations assumed by the state where a particular property is located. The definition includes possessions which belong to the immovable property, livestock of agricultural and forestry farms, rights to which the general legal regulations are applied with reference to the ownership of land, the right to use immovable property, the right to obtain fixed or variable benefits gained from exploitation or the right for exploitation of mineral and other natural resources. All these are assets. The basic component of property is real estate. In the Polish tax law, the notion of real estate differs from the approach represented by the civil law. The subject to the real estate tax is: land, buildings, premises, facilities and other objects defined in the tax regulations, regardless of the fact whether they are considered to be real estate in the meaning of the Civil Code. The term of real estate is defined by regulations of the tax acts: the term may include, for example, cables, pipelines, billboards, quays. Their analysis allows us to draw a conclusion that it is impossible to provide one universal definition of real estate, and its objective scope is defined by regulations of tax acts. The real estate tax is imposed on land, buildings or their parts, facilities or their parts which are related to business operation (the Act of Local Taxes and Charges, Art. 2 section 1). Considering the discussed problems, the article refers to the notion of real estate limited to the facilities of port infrastructure.

3 Tax Exemption as a Constructional Element of Tax. Theoretical Considerations

The institution of tax exemption has been incorporated for good into legal regulations on the real estate tax. Undoubtedly, the most important

aim of its application is to generate some benefits for taxpayers; this is not always related to a detriment for entities that apply such exemption. However, it does not mean that this is a permanent situation (Klink: 339). In accordance with a dictionary entry, exemption means to free someone from an obligation or liability (e.g. A Dictionary of the Polish Language, PWN). The notion refers to a form of a privilege[6], as it is identified with the right to take advantage of certain benefits which in terms of real estate taxation are manifested in a total resignation from imposing taxes (Durczyńska, 2016: 237).[7] The institution of tax exemption is stated by the Constitution of the Republic of Poland (the Constitution of the Republic of Poland, Art. 217), in accordance with which *the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute.* The abovementioned regulation states the principle of statutory exclusivity (the principle of statutory exclusivity), including, among others, subjective tax exemptions, but only in reference to the definition of the principles for granting such exemptions (the Constitutional Tribunal: K 28/98, K 6/02). The requirements stated in the act must be respected during the indication of subjects and objects, rates and other elements of taxation, however, considering exemptions, reliefs and remissions, the legislator can exercise some more considerable arbitrariness to grant them. The Constitution defines only the form of the act in which tax exemptions can be implemented, but it does not refer to any limitations in their scope. It results from the fact that the legislator defines the law implementing political, social and economic aims

6 Lat.: privilegium – the right (a document) granted by a monarch to a particular social group. Most often, it meant that the monarch resigned from some of his/her competences in favour of the group which had been granted the privilege.

7 In the Polish law system, the notions of exemption and relief have different meanings, and they cannot be understood as synonyms. The legislator does not use these terms interchangeably – on the contrary: they define various legal constructs. The relief is understood as a decrease in the amount of a tax to be paid, which is namely a reduction of the tax burden, whereas the exemption means a waiver of tax collection. The aforementioned criterion is unreliable and imprecise, especially considering partial exemptions, such as the tax exemption of income generated from the real estate sale used for the taxpayer's own housing expenses, stated in the Art. 21 section 1, item 131 of the Act on the Personal Income Tax, or the tax exemption of income up to a defined amount, stated in the Art. 21 section 1, item 92 of the Act on the Corporate Income Tax.

and exercises arbitrariness in the field of tax exemption. It is acknowledged by the Constitutional Tribunal which states that the legislative authority can arbitrarily affect the form of the taxation system. It is allowed to select various constructions of tax liabilities and to make independent decisions about granting, cancelling and limiting tax exemptions (Constitutional Tribunal: K 26/97). According to the principle of statutory exclusivity, any exemption which is not a subjective exemption may be granted by an ordinance or a decision issued by self-government authorities (resolutions of the Municipal Council). Referring to judicial decisions and based on the content of the standards defining the rights of self-governments and their tasks, it is impossible to establish any additional evaluation criteria or principles for any categorisation of exemption from the real estate tax, with a division into legally permissible and forbidden exemption (the sentence of the Provincial Administrative Court: 177/08). Self-government authorities define the constructional elements, and it is justified by the local character of the real estate tax.

The arbitrariness in formation of tax exemption exercised by the legislator or by self-government authorities faces some limitations. It is defined by the Constitution of the Republic of Poland, Art. 217 in particular and tax regulations among which the principle of fair taxation is the most significant one. In accordance with an indication provided by the Supreme Administrative Court *tax exemptions come as an exception from the constitutional principle of a democratic state under the rule of law which respects the principles of social justice. Tax exemptions granted only to some taxpayers come as a waiver of the principle of fair taxation, which implies the universality and equality of taxation, requiring equal imposition for public purposes, collected from all citizens. The principle of fair taxation is not only a postulate of science addressed to the legislator and practice of law application but it also has its legitimate basis in the current legal system in Poland* (the sentence of the Supreme Administrative Court 1598/93). In the doctrine of the tax law, the principle of fair taxation (Gomułowicz, 2001: 36) incorporates the principle of universality (the Constitution of the Republic of Poland, Art. 84) and the principle of taxation equality (the Constitution of the Republic of Poland, 32 section 1). Considered in broad terms, the principle of universality refers to taxes in general; in narrow terms, it is restricted to the particular taxes.

Considered in broad terms, the principle of universality means that all people should be subject to tax burdens within the limits defined by legal acts. Viewed in narrow terms, the principle of universality refers to a particular tax, and it is evaluated with regard to the type of the tax, its subjective and objective scope. Taxation equality, which is also referred to as tax uniformity, is manifested by the distribution of taxpayers' paying capabilities. Tax uniformity requires that all entities in the same economic conditions (referred to as significant conditions) should be treated in the same way in terms of a particular tax. The discussed problems cannot be confined exclusively to tax equality, because tax exemptions are not always treated as a waiver of the principle of tax universality (Nykiel, 2002: 78–83). The relation of tax universality to tax uniformity in the tax law can be considered in the aspect of its application and legislation. Taking the aforementioned considerations into account, the aspect of legislation becomes significant because, while analysing statutory regulations, it is possible to state whether the problem of discrimination appears, that is namely: whether the principle of non-discrimination has been violated (Orłowski, 2013: 97).

A certain cue for understanding the notion of exemption is provided by a normative definition of a relief (the General Tax Regulations Act, Art. 3, item 6). It is of very extensive nature, and it states that reliefs are to be understood as exemptions, deductions, decreases or reductions defined by regulations of the tax law, the application of which results in a decrease in the tax base or in the tax amount payable. For this reason, the character of the abovementioned definition is disputable. It is believed that it has been stated exclusively for the requirements of the General Tax Regulations Act, and its aim has been to provide a general, technical term for all the types of reliefs which appear in the tax law. Hence, the definition does not have a universal character, and it cannot be applied for other tax acts (Durczyńska, 2016: 447–448).

Considering the theoretical approach, the constructional elements of a tax are divided into qualitative and quantitative. Qualitative elements include the subject and the object of the tax, whereas quantitative elements refer to the tax base and tax rates. Tax exemption is most often listed next to the subject, the object, the tax base and rates as a constructional element of the tax.

However, it should be noticed that tax exemption (similarly to tax relief) comes as a reduction of four aforementioned constructional elements or the tax amount. It means that it does not function in isolation from other constructional elements, that is namely: it is not an intrinsic element of the tax. Its lack does not result in a fault in the construction of the tax, because it is not indispensable for the very existence of the tax. The institution of tax exemption affects qualitative elements, and it consists in the limitation of the subjective scope (subjective exemptions) or the objective scope (objective exemptions) of the tax (Buczek, 2006). Tax exemption can also be of a mixed, subjective and objective character (Nykiel, 1998: 174). Including tax exemption into one of the three categories is reflected in technical formulation of the provisions of the act. Tax exemption occurs when the subject (the taxpayer) characterised by features specified by legal regulations is exempted from a particular tax, for example: people over 65 who independently run their households are exempted from the estate tax. The objective exemption is exemption from taxation granted in cases of actual and legal situations in which taxpayers characterised by features specified by legal regulations may find themselves, for example: land, buildings and facilities included into port infrastructure are exempted from the real estate tax. The mixed type of exemption refers to exemption of certain actual and legal situations in which entities characterised by some specific features, for example: land owned by the entity responsible for the management of the port, are exempted from the real estate tax. Depending on the dominant features of mixed exemption, it is possible to define mixed exemption with dominant features of objective or subjective exemption. In the first case, only a small group of actual or legal situations shall be exempted from the tax, and it shall refer almost to the whole scope of subjects. In the second case, it shall refer almost to the whole objective scope but to a very small category of taxpayers.

Considering aims and functions of law, tax exemptions can be divided into economic, social and others (Nykiel, 2002: 43). This division is to manifest protection of legal assets exempted from taxation. Economic exemptions are implemented in order to achieve some particular economic conditions. Let us have exemption of port infrastructure facilities as an example.

The exemption is granted in order to boost the development of port infrastructure. Such an exemption is of stimulating nature, and it reflects economic aims set not only by a local community but also by the whole country, because the investment into the facilities of port infrastructure has been made for the benefit of Poland as the entire state, not only for the benefit of the local self-government. Social exemptions are to implement social aims. This type of exemption is implemented to support certain groups of entities or certain types of activities to make such entities support aims which are positively evaluated by the society. Other exemptions are exemptions which are not included in any of the abovementioned categories. Their aim is neither to decrease the tax base nor to induce any economic or social results. They are of mere technical nature.

4 Exemption of Port Infrastructure as Systemic Exemption

In accordance with the Polish law, sea ports are divided into two groups: sea ports of particular significance for national economy and other sea ports and harbours. Presented in this article, the considerations refer to the first group which includes the ports of Gdynia, Gdańsk, Szczecin and Świnoujście. According to Art. 7 section 1, item 2 of the Act on Local Taxes and Charges (the Act of Local Taxes, for short), *facilities of port infrastructure, facilities providing access to sea ports and harbours and land they are constructed on shall be exempted from the real estate tax*. It indicates that the following objects are exempted from the real estate tax: 1) facilities of port infrastructure, 2) facilities which provide access to sea ports and harbours and 3) land on which facilities of port infrastructure or facilities which provide access to sea ports and harbours are constructed on. However, neither buildings of port infrastructure nor buildings which provide access to sea ports and harbours – although these would be difficult to imagine – are exempted from taxation. The presented analysis is limited to the exemption of port infrastructure from the real estate tax.

To properly apply the abovementioned exemption, first of all, a definition of the scope to which the *port infrastructure* notion refers to is required. As there is not any normative definition provided in the Act on Local Taxes, it is advisable to refer to the linguistic or systemic interpretation. In the tax

law the use of extensive interpretation is forbidden. Since definitions of *port infrastructure* provided by dictionaries are rather general and imprecise, their application can result in some problems of practical nature. Therefore, it seems well-justified to search for a definition of this term in some other legal acts which refer to the discussed problems (the sentence of the Provincial Administrative Court: I SA/Sz 391/07). The Act on Local Taxes itself does not provide any guidelines which legal act should be referred to. The lack of such a guideline, however, cannot be interpreted as inadmissible (Etel, 2012: 390). In such a case, it is natural to refer to the Act on Sea Ports and Harbours (the Act on Sea Ports) where the term of *port infrastructure* is applied (the Act on Sea Ports: Art. 2, item 4). Historical interpretation also favours such an approach. The wording of the Art. 7, item 2 of the Act on Local Taxes has been defined by the amendment act modifying the Act on Sea Ports (the Act on Amendment to the Act on Sea Ports and Harbours and some other acts of 6 September 2001: Art. 1, item 1a). Hence, the advisability to apply a definition included in the Act on Sea Ports is proved by the fact that it has been incorporated into the legal act modifying the Act on Local Taxes, and the fact that this act has modified the wording of the *port infrastructure* definition which was applied until 2001 in the Act on Sea Ports. It indicates that the legislator's intention has been to apply the above-mentioned definition in two ways: in the Act on Local Taxes and in the Act on Sea Ports. Such argumentation finds its justification in a well-established approach of judicature (the sentence of the Supreme Administrative Court: II FSK 996/07, the sentence of the Supreme Administrative Court: II FSK 434/10). However, there is also a sentence (the sentence of the Provincial Administrative Court: III Sa/Wa 933/11), in which the Court states that the Act on Sea Ports cannot be applied to understand the *port infrastructure* term (Morawski, 2013: 576–578). Nonetheless, the Author has no doubts that the interpretation of this term should be of external systemic – not lexical – nature.

The notion of port infrastructure includes port waters, generally accessible facilities, equipment and installations located in the area of a sea port or harbour, which are related to port operations and dedicated to perform tasks defined by *Art. 7, section 1, pkt. 5* (the Act on Sea Ports: Art. 2, item 4)

by the port management authorities. Taking the above into consideration, in order to define a facility as an element of port infrastructure, it must meet three requirements. Firstly, it must be located in the area of a sea port or harbour. Secondly, it must be publicly accessible, and thirdly, it should be dedicated to tasks performed in order to provide services related to the use of the port infrastructure by the port management authorities. A tax exemption can be applied only when all three requirements are met. Having considered numerous interpretative disputes on including particular elements into port infrastructure, in 2011 the legislator (the Act on Sea Ports, Art. 5, section 2a) authorised the Minster responsible for the affairs of maritime economy to clarify the objective scope of the notion. At present, the applicable and binding regulation is the Ordinance of 2015 on the scope of the port infrastructure in Gdynia, Gdańsk, Szczecin and Świnoujście (the Ordinance of Minister of Infrastructure and Development on port waters and generally accessible facilities, equipment and installations included in the infrastructure of each port of the particular significance for national economy: § 1–5). However, it does not change the fact that taxpayers are still not certain whether a particular investment is subject to exemption, as for example, the LNG regasification terminal (the sentence of the Provincial Administrative Court: I SA/Sz 973/15). Althought in its report of 2015, the Supreme Audit Office indicated that problem, stating that the subsequent ministers responsible for the affairs of maritime economy had not undertaken any efficient actions to provide relevant legislative changes and to formulate a definition of port infrastructure that would have made tax exemption well clarified for application (the Supreme Audit Office, 2015: 28).

In order to classify a particular facility as an element of port structure, it must be located in the area of a port, and it must be generally accessible. The limits of a port are defined by legal regulations, and there are not any ambiguities in that respect. The term of general accessibility has not been specified in the Act on Sea Ports. In common understanding *generally accessible* means accessible for everyone (A Dictionary of the Polish Language, PWN), that is namely; for an unspecified group of people. In other words, *generally accessible* means *unrestricted*. Hence, as L. Etel observes, general accessibility of a facility is related to the fact that companies which manage ports

are of public interest nature (the Act on Sea Ports: Art. 6, section 1), and their aim is to permanently and unceasingly satisfy human needs. In this respect any facilities of restricted access cannot be treated as generally accessible. If the port management authorities transfer the ownership of the facility to the third party on the grounds of a civil-law contract, the access to the facility will not be, in fact, generally available but reserved only to the owner, as it is difficult to expect that the owner will make it accessible to the public (Etel, 2012: 392). Court judicature mostly shares the aforementioned argumentation because if the facilities of port infrastructure are not used by their management authorities, it is assumed that tax exemption is not applicable (the sentence of the Supreme Administrative Court: II FSK 434/10, II FSK 435/10). The restriction of accessibility by the facility owner comes as a general assumption, and in practice any waivers from that assumption cannot be excluded. The notion of public interest is permanently related to the objective scope of port management, and it does not refer to the subjective scope. Public objects serve common public interest as they are dedicated for the implementation of particular public aims. Hence, everyone can use them in accordance with their purpose, which does not limit other people's rights in this respect. Moreover, such activities as providing access to port facilities for collection of waste from vessels for its further recycling or disposal are of strategical nature because they affect public interest of the state. The Court has also provided its decision in that respect, indicating rightly that it is impossible to agree with opinions which claim that renting or leasing port facilities actually results in restriction or exclusion of general accessibility of port infrastructure. General accessibility is provided by regulations of the administrative law applicable also to entities responsible for port infrastructure management. These regulations cannot be cancelled by any civil-law agreements (the sentence of the Provincial Administrative Court: I SA/Gd 1411/13).

In order to exempt a facility of port infrastructure from taxation, it should be dedicated to perform tasks which involve providing services related to the use of port infrastructure by the port management authorities. Such a formulation of the provision indicates that the analysed exemption is of a mixed subjective-objective type (Dowgier, 2012: 37). The main reason for the controversy

in the field of the subjective element are the problems resulting from ownership relations at the discussed sea ports. As a result of social and economic transformation which took place after 1989 at the ports of particular significance for national economy, the management and operation fields have been split. Hence, the management field is covered by the Port of Gdynia Authority S.A. (i.e. Joint Stock Company), the Port of Gdańsk Authority S.A. Szczecin and Świnoujście Seaports Authority S.A., whereas the operation field at each port is covered by commercial companies – operators of the particular terminals. Considering the lexical interpretation, exemption is applicable only to specified persons, that is namely management entities. It means that these are primary features of exemption, and its character is of mixed nature with dominant attributes of subjective exemption.

A question appears whether the management authority which enters any civil-law agreement with an operating entity can still be exempted from taxation. In other words, should the Sea Port Authorities treat a facility as dedicated for tasks performed by these Authorities after the transfer of its ownership, or not? In fact, to solve the problem it is necessary to find an answer to the question whether the discussed facilities retain the character of port infrastructure facilities in light of regulations stated by the Act on Sea Ports. The court sentences present a prevailing opinion that only the facilities which are actually used by the management entity and which have not been acquired by any third parties on the grounds of civil-law agreements can be included into port infrastructure (Morawski: 2013, 584). It is of no importance whether exemption applies to the real estate owned by the management entity or not. The only significant matter is the way the real estate is used by the management entity to perform its tasks – it does not matter who its owner is. This standpoint seems to be incorrect, and it leads to some absurd conclusions. The aim of the legislator has been granting exemption to facilities related to the functioning of the port, which are dedicated to perform tasks defined as the *numerus clausus* principle by the port management entity. Such tasks involve, for example, providing services related to the use of port infrastructure (the Act on Sea Ports, Art. 7, item 5). To *provide* means to *do something for someone* (A Dictionary of the Polish Language, PWN).

If the management entity (service provider) enters a civil-law agreement with a third party, then on the grounds of that agreement the customer is obliged to perform activities in favour of the service provider. The agreement shall always include the provision about accessibility of the port infrastructure managed by the management entity to an entity which will use it. Summing up, if the management entity is entitled to real estate tax exemption of port infrastructure buildings related to the functioning of the port, which are dedicated for tasks performed by the management entity such as, for example, providing services related to the use of port infrastructure, then – in accordance with judicial decisions – performance of such activities will result in the loss of the right for exemption which has been granted exactly for that purpose. Regardless of the character of provided services, a facility does not lose its own attributes, and it will be still related to the functioning of the port, and it will remain dedicated to tasks performed by the management entity.

Taking the aforementioned considerations into account, another question can be posed: are entities other than the port management entity (or the parties of a civil-law agreement entered with the port management authorities) allowed to benefit from tax exemption of port infrastructure? An answer to that question is extremely significant because there are various entities from the management and operation fields which operate in the port area and which often perform the same tasks. As it has been already indicated, the analysed exemption is of subjective and objective nature, and its subjective aspect excludes operating companies from the exemption privilege. This is a solution which violates the principle of non-discrimination.

5 Conclusion

The presented analysis allows us to formulate the following conclusions:

The exemption of port infrastructure from the real estate tax has been incorporated into the Act on Sea Ports. It is of systemic (not discretionary) nature and remains in force for an indefinite time period. Undoubtedly, the way it has been formulated respects the constitutional principle of statutory exclusivity of tax concerns. The exemption is of a subjective and objective character – it means that while providing relevant legal regulations,

the legislator has clearly indicated the subject and the object of the exemption. The subject is actually the State Treasury which owns the majority of the share capital, and the object is, briefly speaking, port infrastructure.

The restriction of the subjective field exclusively to the port management entity raises a question about its consistency with the principle of non-discrimination. It cannot be referred to when there are differences between the management entity and an operating entity which would justify their various treatment. Certainly, the ownership status of the Port Authorities (the majority shareholding of the State Treasury) is different than the status of commercial companies (private capital). It is related to the fact that the ports of Gdynia, Gdańsk and Szczecin-Świnoujście have been established in a form indicated by the legislator: as joint-stock companies, and they perform strategical tasks. Such tasks involve operations in the public sphere: management of the port real estate and infrastructure; the forecasting, programming and planning of port development; construction, extension, maintenance and modernisation of port infrastructure, acquisition of real estate for the requirements of port development, providing services related to the use of port infrastructure; providing access to port facilities for collection of waste from vessels for its further recycling or disposal. Operating companies provide services related to transportation of cargo and passengers, handling vessels and other means of transport which start or end their transportation cycles at the port. Hence, the scopes of operations performed in the field of management and operation are closely related.

Such a relations is based not only on the fact that two entities operate in the port area. Their functional relation is more important because operations performed by operating entrepreneurs support achievement of public aims which are implemented in favour of all the users of a sea port. At the same time, it should be noticed that some tasks are performed by the management entity as well as by the operating entities. In such a context, granting tax exemption only to one entity results in a situation in which only this one can benefit from the privilege. Summing up, the presented analysis indicates that – considering the simplification of the understanding of legal regulations and investment operations run by commercial entities at ports – it is advisable

to change the definition of port infrastructure in order to provide its exclusively objective character.

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PART 3:
LOCAL TAXES

PODATKI LOKALNE

LEGAL CONCEPT OF LOCAL TAXES IN THE SLOVAK LEGAL ORDER[1]

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Abstract

In submitted contribution the authors give us a look at local taxes under the legal order of Slovak Republic. First of all the presentation introduces historic evolution of municipal authorities as well as reform of financing the municipalities. The authors' aim is to define and to characterise status of local taxes not only from tax law but also from other public legal sectors' point of view. On this basis the authors seek to emphasise the importance of local taxes for financing the municipalities. The authors use various scientific methods, in particular descriptive methods followed by methods of specification and synthesis.

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JEL Classification: H200.

1 Introduction

The issue of formation of the revenue basis for the local self-government has for a long period of time been considered as a very demanding, extremely

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sensitive and complicated problem. The scope of duties to be fulfilled and the quality and effectivity of fulfilment of these duties depend on the revenues of municipalities based on legal regulations. In this respect, widely debated is the issue of mutual relationship and connection between local budgets and state budget.

Authors of the article aims by standard scientific methods (the analytical method, the comparative method, method of synthesis and statistical method) to identify importance of local taxes in relation to financing of municipality as well as identify their status in Slovak law.

2 Fiscal Decentralization as a Pathway Leading to Introduction of local taxes

From 1990, when the current legal regulation of local self-government originated, for almost 15 years, no significant changes occurred apart from verbal proclamations on the strengthening of financial-economic independence of the authorities in financial practice of local self-government, with the exception of the creation of higher territorial units in 2001 and the allocation of revenues connected therewith. The reform of financing the local self-government, labelled by the generally accepted term "fiscal decentralization ", however, had to still await its birth.

Fiscal decentralization presented a radical intervention into the sphere of public administration. In the first place, it influenced the area of financial resources and the possibilities of financing in the sphere of local self-government, but it also had an impact on local self-government authorities in its very nature.

The aim of fiscal decentralization was to strengthen the powers and responsibilities of local self-government in its decision-making on the use of public finances within the framework of local self-government authorities; further, to contribute to a more righteous and transparent distribution of financial resources by omitting the subjective agent in providing subsidies from the state budget (financial resources should be distributed based on clearly-stated criteria applicable uniformly to every person), as well as to contribute to the stabilization of revenues of local self-government for a longer period of time.

Fiscal decentralization is related to the financing of self-government powers of municipalities (and of higher territorial units) in compliance with the given legal situation. The creation of the revenue basis of municipalities in our conditions has always been connected to political, economic and social factors but also to legal aspects related to several branches of law. The literature on this issue highlights especially the constitutional, financial, tax and administrative law connections.

The basic characteristic features of local self-government should undoubtedly include the ability to secure their own financial resources. By ratifying the European Charter of local self-government (hereinafter referred to as the Charter), the Slovak republic undertook to create mechanisms to secure the financing of municipalities and higher territorial units. The complex ratification of the Charter was carried out in 2007. The European Charter of local self-government defines local self-government as "right and ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population."[4] The budgetary aspects of self-government are regulated predominantly by the article 9 of the Charter – *Financial resources of local authorities*. The basic departure point here is the power of local authorities, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers. Financial resources of local authorities shall be commensurable with the responsibilities provided for by the constitution and the law of the state. The Charter presupposes that at least a part of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of the law, these local authorities have the power to determine the rate[5]. Further, the article 9.4 of the Charter stipulates that the financial systems on which resources available to local authorities are based shall be of a sufficiently and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the costs of carrying out their tasks.

4 Art 3.1 of the European Charter of local self-government.
5 Compare art 9.3 of the European Charter of local self-government.

3 Public-law Branches and the Existence of Local Taxes

It is important to emphasize in this connection that the mentioned branches of law, i.e. constitutional law, administrative law, financial law and tax law create conditions for the implementation of tax-law relations in the sphere of local taxes in a varying manner and intensity.

Every branch of law is founded on constitutional rules. In this respect – the Constitution of the Slovak republic[6] is crucial with regards to local taxes – in its two articles which precondition the existence and imposition of local taxes, namely, the articles 59 and 93 of the Constitution of the Slovak republic. The article 59 enshrines two principles of the Slovak system of taxation.

The first principle addresses the difference between the state taxes and local taxes (the same classification applies to charges). The second principle expresses the constitutional power to impose taxes and charges by law or by virtue of law. Considering the fact that taxes and charges represent the most important type of revenue not only to the state budget but also to municipal budgets, and in their nature determine the financial obligations of natural persons and legal entities, the existence of the principle must be traced back to the article 13.1 of the Constitution of the Slovak republic which provides for the legal basis for imposing the obligation. In this sense, obligations can be imposed by law or by virtue of law, within the limits of the law and while maintaining the fundamental rights and freedoms; by international agreement pursuant to article 7.4 which directly creates rights and obligations of natural persons or legal entities or by a government decree pursuant to art 120. 2.

Another significant constitutional article, article 93.3 concerns the prohibition to conduct referendum about local taxes. This prohibition should be extended to the system of local taxes as well, although, it must be admitted that the issue of prohibition to conduct referendum about local taxes is not as politically motivated as it is in the case of state taxes.

The above mentioned constitutional articles form the constitutional framework for the imposition of local taxes. The articles 86 and 119

6 Act no. 460/1992 (Collection of Acts) as amended.

of the Constitution of the Slovak republic could also be highlighted for their importance in relation to local taxes (power of the Government of the Slovak republic and the National Council of the Slovak republic to deliberate and approve tax bills), further mention would, however, go beyond the scope of this paper.

It has been suggested so far that constitutional law plays a significant role in local taxation, especially, with regards to the distinction between local taxes and state taxes which the previous Constitution[7] from the time of common state failed to do. The Constitutional Act no. 143/1968 (Collection of Acts) on Czechoslovak federation of 1968 tackled the issue of imposing taxes pursuant to the article 12.1 in such way that taxes and charges could be imposed only by virtue of law and the whole article was only concerned with the division of the powers in tax matters between the authorities of the federation and of the republics. In this view, the wording of the paragraph did not presume the existence of local taxes despite the fact that its formulation, paradoxically, resembled present-day wording of the article 59.2 of the Constitution of the Slovak republic with application to local taxes. The above mentioned article 12 serves as an example of inconsistence in the work of then constitutional authority in relation to the statutory framework for the imposition of taxes and charges.

Let us put it explicitly, the original wording of the article 13.1 of the Constitution of the Slovak republic of 1992 was founded on the fact that the obligations could be imposed by virtue of law exclusively. Fortunately, the original wording of the article 59.1 of the Slovak Constitution made a distinction between state taxes vs. local taxes and the imposition of taxes by law vs. by virtue of law. As a result, these two constitutional articles were partially in conflict with each other, on the other hand, though, the Slovak Constitution in its original wording sought to strengthen the position of local government authorities, and their differentiation also provided for the legality of the basis for the imposition of state taxes and local taxes. Tax liability for state taxes derives directly from the law, whilst local taxes can be imposed by virtue of law that would authorize the municipalities to impose and collect taxes under conditions stated by the statute. If it were

7 Constitutional Act no. 143/1968 (Collection of Acts) on Czechoslovak federation.

applied in practice, local taxes would be imposed compulsorily for certain taxpayers. The Act on local government laid these conditions down, and its essential precondition was the approval and the following taking effect of the generally binding decree of the municipality which was issued in compliance with the section 11 subs 4 of the Act on local government[8] enshrining the so-called reserved competence of the municipality with the related provisions of this legal regulation.

Administrative law in one of its basic sources – Act no. 369/1990 (Collection of Acts) – already in 1990 presumed the existence of local taxes. This was at the time when the joint federative state existed and the then Constitutional Act on Czechoslovak federation did not expect any local taxes be introduced in the future. The Act on local government has radically changed both the organizational structure of the then local self-government authorities and also their legal status, competences and revenues and expenditure. Under the Act on local government, the municipalities became the core of local self-government. It was subsequently confirmed by the Constitution of the Slovak republic, which in the article 64 stipulated that the municipalities form the basis of local self-government. Higher territorial units were not under consideration in the original wording of the Constitution of the Slovak republic.

The Act on local government introduced the concept of "local taxes" as the first. Several mentions can be found at various points in the relevant provisions stating the following:

- anyone is entitled to participate in self-administration of the municipality who… pays local taxes or local charges (section 3 subs 5 par a),
- municipality "shall decide in matters of local taxes and local charges and administer taxes and charges" (section 4 subs 3 par c),
- local council is empowered "to decide on the introduction and cancellation of local taxes…" (section 11 subs 4 par d),
- local council is empowered "to determine the formalities of local taxes…" (section 11 subs 4 par e).

In spite of the fact that the Act arranged for real substantive-law prerequisites for the introduction of local taxes, fundamental legal regulation that would authorize municipalities to impose and collect local taxes was still lacking;

8 See Act no. 369/1990 (Collection of Acts) on local government as amended.

not to mention the further clarification on the type of local taxes. This eventually happened in 2004. It must be emphasized, though, that the Act on local government has, to a great extent, influenced the approach of constitutional authorities to the issue of financial basis of municipalities, which is also evident (apart from the article 59) in the article 65.2 stating that "the law shall stipulate which taxes and charges are considered the revenues of the municipality".

Another branch of public law, namely financial law, is also, in a certain context, related to the issue of local taxes. In this regard, the Act no. 583/2004 (Collection of Acts) on budgetary rules of local self-government in the section 5 subs 1 par a) stipulates that "proceeds of local taxes and charges shall be for the revenue into the budget of municipality…". At the same time, pursuant to section 5.3, the revenues into the budget of municipality also include the proceeds from local taxes. Tracking the history, we discover that the Act no. 145/2001 (Collection of Acts) which amended the Act no. 303/1995 (Collection of Acts) on budgetary rules, as a predecessor of the contemporary regulation of budgetary rules, started to use the term "proceeds from local taxes…" in relation to revenues into the budgets of municipalities.

Apart from the so far mentioned remarks, the importance of the financial-legal regulations in the context of local taxes must also be spotted in the fact that the Act on budgetary rules of public administration commenced the process of fiscal decentralization in Slovakia. Up to 2004, the financing of self-government competences was annually regulated by the Act on state budget for the respective year. As of 2005 the multiannual budget, as the medium-term economic instrument of the financial policy of municipality, has been being drafted and approved.

No significant change in social relations is possible without taking relevant legal measures to carry out such changes. Serving as the foundation in this respect, apart from the Act on budgetary rules of public administration and the Act on budgetary rules of local self-government, was the Act no. 582/2004 (Collection of Acts) on local taxes and local charges for municipal waste and small construction waste[9] and certain other legal

9 Act no. 582/2004 (Collection of Acts) on local taxes and local charges for municipal waste and small construction waste as amended.

regulations[10]. As for the relation between financial law and local taxes, we would like to conclude that financial law regulates the issue of local taxes in a framework only and exclusively from the perspective of determination of the basic types of revenues into budgets of municipalities, which, in the first place, include proceeds from local taxes.

Among the branches of public law, the widest possible attention devoted to the issue of local taxes is to be found in tax law which seems very natural taking into account the subject-matter of the regulation of tax-law relations.

4 Tax Law and Legal Regulation of Local Taxes

The Act on local taxes stood in the foreground as the most important legal regulation and the core of fiscal decentralization. It was a completely new Act not recognized by our legal order so far. This must be stated here despite the fact that the Constitution of the Slovak republic back in 1992 made a distinction between state taxes and local taxes.

The classification of taxes into state taxes and local taxes has its basis in the addressee, or alternatively, in the recipient of these payments, who, based on the classification above, can be the state or the municipality. At first sight, it appeared to be a very transparent classification of these most important financial obligations. From the theoretical-legal perspective, though, this was not so straightforward. It must be stressed in this connection that taxes have always served as the most important economic and power instrument in the hands of the state that interfered with the property and personal freedom of the person. The legislative initiative was vested in the state and the state decided on the imposition of taxes. Tax sovereignty is generally considered to be one of the attributes of national sovereignty irrespective of the fact, whether the state decides to impose taxes by law of by virtue of law. Neither the municipality nor any other public entity disposes of such sovereignty. It is essential to highlight the fact that up to 2004, there was no legal regulation in Slovakia that would differentiate between state taxes and local taxes. Naturally, the Constitution of the Slovak republic could not resolve this

[10] For instance: the Act no. 564/2004 (Collection of Acts) on the budgetary calculation of tax proceeds from revenues of local self-government as amended; Decree of the Government no. 668/2004 (Collection of Acts) on distribution of tax proceeds from revenues of local self-government as amended.

issue either, because, taking into consideration its significance, it had not and would not appear to be appropriate. Even today, this issue is properly regulated by law only in relation to local taxes. The existence of state taxes can, therefore, only be derived from the Act on local taxes which enumerates local taxes, and on the basis of extensive and logical interpretation, all other taxes should be included among the state taxes. In addition, we can indirectly proceed in the same way based on the provisions of individual laws on budgetary calculation of proceeds on these taxes.

The Act no. 212/1992 (Collection of Acts) on the system of taxes has partially touched upon this issue by calculating which taxes created the system of taxes of the former Czechoslovak federative republic and stating that no other taxes can be provided for. The Act is ineffective as of 1999, otherwise, it would be impossible to discuss local taxes in real situations.

As noted before, the mentioned concept of "local taxes" was indeed used in the Act on local government, however, the concrete provisions of the Act on local government after 1990 remained ineffective, because not one municipality in Slovakia was empowered to introduce any local taxes. The situation has rapidly changed after the Act on local taxes became effective on 1 November 2004 (excluding the repealing provisions). The Act on local taxes regulated the local taxes with respect to the powers of municipalities (and of higher territorial units in one case) to impose and collect local taxes; individual types of local taxes; general legal construction of individual types of local taxes, as well as the specific features in local tax administration in comparison with the Act no. 563/2009 (Collection of Acts) on tax administration (Code of Tax Procedure).

The Act on local taxes has emerged and derived from the basis that local taxes can be imposed by municipalities and in one case by higher territorial units (it could impose motor vehicle tax until 31 December 2014). The scope of these competences or the range of powers to impose local taxes varies for municipalities and higher territorial units. Legal regulation of local taxes introduced optionality in imposing and collecting local taxes on the part of municipalities (and of higher territorial units in one case), which in practice means that, within the limits of law, municipalities may opt for the imposition and collection of local taxes, however, the law does not provide for the obligatory nature of imposition. Further, powers and independence

of municipalities (and of higher territorial units in one case) was strengthened in deciding whether to introduce and collect local taxes. Apart from the mentioned optionality of imposition of these payments, which constitutes the most important factor contributing to the strengthened position of local government authorities in relation to tax obligations, this statement also applies to determination of certain basic formalities of taxes, especially, of tax rate, determination of conditions for exemption from payment or decrease of the tax, etc. Moreover, the upper limits of rates of local taxes (with the exemption of property tax) are not determined, and the municipalities themselves set the rates of taxes on their territory. This creates a space for increasing and stabilising their own financial resources inevitable for the fulfilment of tasks by local government authorities. In addition to these local taxes, which create the system of these payments, municipalities are not authorized to impose and collect any other payments of similar nature. The tax period for the majority of local taxes is one calendar year. This concerns the property tax, dog tax, tax on vending machines, tax on gaming machines, tax on nuclear facilities, and it also concerned the motor vehicle tax. Tax on the use of public space, accommodation tax and tax for entry and parking of motor vehicles in historical part of the city, where the tax period is determined by the tax administrator, are beyond this scope. This provision shall not apply to local taxes with tax period of one calendar year, when the taxpayer is dissolved without liquidation or is declared bankrupt or is dissolved by liquidation or when the taxpayer deceases. The Act on local taxes simultaneously emphasizes the importance of generally binding decrees of municipalities which are decisive in administering local taxes in practice.

As regards the previously mentioned motor vehicle tax, this tax was included in the system of local taxes until 31 December 2014. According to the principles of approved fiscal decentralization, the motor vehicle tax was the only original tax revenue of higher territorial units, which were empowered to decide on the introduction of this tax on the territory of self-governing region. In connection with this tax, attention must be drawn to various disproportions arising from the application of the provisions of the Act on local taxes. The practices of higher territorial units in determining the rates of taxes and tax allowances received criticism mainly from the entrepreneurial

environment. The entrepreneurs pinpointed the inadequately high rates of taxes in comparison with the neighbouring countries and the insignificant consideration or failure to consider ecological motor vehicles in taxation. Such unequal treatment in motor vehicle taxation in the whole Slovak republic consequently created unfair economic conditions for conducting business in respective self-governing regions, which, in turn suppressed the interest of the entrepreneurs in their activities, in new investments into ecological motor vehicles and, as a result, endangered the healthy economic competition. The entrepreneurs frequently sought to evade higher taxes, for example, by reregistering their motor vehicles into another self-governing region with lower tax rates or higher tax allowances. They also pointed out the fact that the proceeds from this tax was not purpose-bound by the law for the repair and maintenance of roads, i.e. there was no direct connection between the acquired proceeds from "higher taxes" and the quality of roads in that region. It can be said that the experience gained from the application of the Act on local taxes in practice confirmed that the attitude of the concrete self-governing regions and the exercise of their powers in determining the tax rates and tax allowances had not always been in compliance with the purpose declared in the principles of fiscal decentralization. Seeking the removal of undesirable deficiencies in motor vehicle taxation, new significant measures were taken, namely, motor vehicle tax was exempted from the category of optional local taxes in the authority of higher territorial units. As a result, with the effect of 1 January 2015, motor vehicle tax was introduced as a state tax regulated by new separate Act no. 361/2014 (Collection of Acts) on motor vehicle taxes as amended.

According to the valid legal regulation, local taxes imposed by municipalities include the following taxes: property tax, dog tax, tax for the use of public space, accommodation tax, tax on vending machines, tax on gaming machines, tax for the entry and parking of motor vehicles in the historical part of the city and tax on nuclear facilities.

The adoption of the Act on local taxes as the basis of fiscal decentralization constituted the first important measure to bridge the gap in our legal order where local taxes were absent. We must concede, though, that the Act on local taxes, receiving generally positive evaluation, especially due to the effort

of the state to resolve the financial-economic independence of local self-government, has also its negative sides. This is a matter of imbalance evident in the text of the statute which adopted practically the whole provisions of legal regulations on property tax[11] and road tax[12]. By adopting the mentioned Act, the Act on local charges was simultaneously repealed[13]. The so far valid local charges which became an integral part of our charges system back in 1990, were transformed into local taxes, although, in a certain modified version. This requires further explanation that the Constitution of the Slovak republic itself places local taxes and local charges on the same level, including the provision that they must be imposed by law or by virtue of law.

We must critically admit that taxes and charges differ in significant theoretical and well as legal-application features; if it be to the contrary, the Constitution of the Slovak republic itself would make a distinction between taxes and charges. According to the valid legal regulation, Slovakia only has a local charge for municipal waste and small construction waste which is regulated by the Act on local taxes and the local charge for development.

5 Conclusion

Up to 2004 the financing of municipalities was annually regulated by the Act on state budget for the respective budgetary year. Their revenues in 1990s were constituted by the subsidies from the state budget, shares in state taxes, their own resources and other revenues. Apart from the level of subsidies, the rules determining the share of municipalities in state taxes were subject to change every year; for example, in 1991 and 1992 the share of municipalities in taxes from wages was 13% and agriculture tax was 18,5%; in 1993 the Act on state budget determined the income tax of natural persons from employment and emoluments, as the only shared tax, in the amount of 70%.

Based on the implementation of fiscal decentralization and creation of higher territorial units, as of 1 January 2005, the rules concerning the distribution of proceeds from income taxes of natural persons were altered to be distributed among the state budget, budget of higher territorial units and budgets of municipalities. The new model of financing and the adoption of the Act

11 Act no. 317/1992 (Collection of Acts) on property tax as amended.
12 Act no. 87/1994 (Collection of Acts) on road tax as amended.
13 Act no. 544/1990 (Collection of Acts) on local charges as amended.

on local taxes significantly contributed to the increase in property taxes into the local budgets. This continuously accrued in 2005–2008 by cca 68,5% and during the following years the increase is within the range of 4 to 7%.

As for other local taxes, permanent increase with regards to revenues into local budgets is evident in case of dog tax and accommodation tax. On the contrary, since the introduction of local taxes, revenues from taxes on vending machines and taxes on gaming machines have decreased. It can be noted that despite the undisputable strengthening of the position of towns and municipalities owing to fiscal decentralization and distribution of new revenues in the form of local taxes, this process can by no means be considered completed. At present, almost 50% of revenues consist of subsidies from the state budget (in the amount of binding limits) and 70% of tax revenues consist of shares in proceeds from income tax of natural persons, which is actually a state tax that the municipalities cannot influence at all.

It must be emphasized that despite certain legal-application and theoretical deficiencies and delays in the adoption of the Act on local taxes, the legal regulation concerning local taxes in the Slovak republic is in compliance with the Constitution of the Slovak republic as well as with the European Charter of local self-government.

For comparison with the Slovak legal regulation, we would like to call upon, for instance, that the Czech Republic has not adopted any Act that would expressis verbis delimitate the concept of local taxes. According to M. Radvan, it is hardly possible to talk about economic independence of local self-government in the Czech Republic, because the Czech Republic has ratified the European Charter of local self-government, however, with major reservations which concern the articles 9 par 3,5,6, based on which at least part of the financial resources of local authorities derives from local taxes and charges, and their rates are determined by local authorities within the law; moreover, they provide for the scope of protection of financially disadvantaged local authorities, and the manner of allocation of distributed resources must be consulted with local authorities. The regulation in the Constitution of the Czech Republic is similarly insufficient because it fails to emphasize the financial independence of local self-government.

In conclusion, we would like to highlight certain specific features of local tax administration in relation to the Act no. 563/2009 (Collection of Acts) on tax administration (Code of Tax Procedure). The majority of powers of municipalities is exercised in accordance with the Act on local taxes in the form of generally binding decrees. This form authorizes the municipality to increase or decrease the annual tax rate (or alternatively to determine various annual tax rates) for certain categories of taxes (e.g. property taxes). The municipality can only do so with the effect to 1 January of the respective tax period. At the same time, the municipality can decide to decrease or exempt lands, buildings or flats from taxes but only with effect to 1 January of the respective tax period. The Code of Tax Procedure empowers the municipality, apart from these competences, to remit the penalty or decrease the penalty for certain taxes that the municipality administers, when the taxpayer so requests.

Property tax, dog tax, tax on vending machines and tax on gaming machines are levied by the tax administrator annually as to 1 January of the respective tax period for the whole tax period. These taxes are taxes which the tax administrator levies for the tax period. The tax for the use of public space and tax for the entry and parking of motor vehicles in the historical part of the city are of similar nature; however, the tax administrator levies the taxes at the soonest when the tax liability arises. As regards the tax on nuclear facilities, the tax administrator must levy this tax until 31 January of the tax period for the previous calendar year. The accommodation tax is not levied by the tax administrator taking into account its specific nature.

Filing tax returns is an important peculiarity in relation to general regulation of tax administration. In this respect, the Act on local taxes enshrines the concept of declaration of tax (it is one common declaration to property tax, dog tax, tax on vending machines and tax on gaming machines), which is to be understood as tax return pursuant to Code of Tax Procedure. Apart from this concept, the Act on local taxes regulates the concept of partial declaration (it relates to the mentioned taxes), which is unknown in other laws on different taxes. This tax return is filed in addition to the already filed "regular" tax return. In this connection, the Act takes into consideration the fact that changes in the facts decisive for levying the tax can occur during the tax period. For this reason, the tax administrator imposes local taxes annually;

however, individual taxpayers receive one decision on taxes only, namely, for those local taxes which are proven to 1 January of the tax period. The partial declaration of taxes of the taxpayer shall only list the changes occurring with respect to the previously filed tax return to property tax, dog tax, tax on vending machines and tax on gaming machines, including the partial declaration to any or all of these taxes. The Code of Tax Procedure and certain special legal regulations anchor other specifics related to tax return filing, payment or collection of taxes in comparison with the legal regulation of local taxes which reflect the existence of different types of taxes, of their distinct position in the system of taxes and the various functions they fulfil. The scope and the content of this paper make it impossible to develop this issue further.

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CERTAINTY OF TAXATION IN THE LIGHT OF RUSSIAN REAL ESTATE TAX

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Abstract

This contribution deals with the certainty of taxation in the light of Russian real estate tax. The main aim of the contribution is to indicate the basic problems in the legal structure of real estate tax. Certain applications and information are also presented in a comparative context with reference to Polish tax law.

Keywords: Tax Law Principles; Tax Law Certainty, Property Taxation, Real Estate Tax, Real Property.

JEL Classification: K34.

1 Introduction

Certainty of tax law has become one of the main areas of legal research in Russia, Poland and abroad. Regardless of the wide range of different definitions of the certainty of taxation, the content of this rule should be understood in the way, which legal norms despite their abstractness should precisely indicate to the manner of behaviour of the tax entities. There should be no doubt what is the appropriate behaviour of particular entities. The formal certainty of tax law should enable an appropriate organization of their tax-law relations through a precise outlining of their rights

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and responsibilities towards the state in terms of payment of taxes (see more Filipczyk, 2013: 300).

It must be added that the certainty of law (certainty of tax law) is a constitutional value of many states (for example, the Republic of Poland is a state under the rule of law – Art. 2 of the Constitution of the Republic of Poland or Russia is democratic federal law – bound State)[3]. From Art. 1 of the Constitution of the Russian Federation, Russian doctrine and Constitutional court derives not only the principle of certainty of tax law, but also the exclusivity of the statute, the prohibition of retroactivity, the principle of trust in the state and the tax law, the principle of protection of acquired rights and the principle of fair taxation. Some of these principles have also been included in subsequent articles of the Constitution of the Russian Federation.

The principle of tax certainty means that the tax that taxpayer should pay need to be specified in an accurate manner. It should be accurate determination of rights and obligations of taxpayers that are related to tax payment. The implementation of this principle should prevent the arbitrary action of tax authorities and guarantee the taxpayer to collect tax from him in the amount resulting from the tax law. Common phenomenon in research on tax law that vast majority of scientific research among research ends with a summary that the regulations of a given research area (tax law) are created with imperfect legal norms, which in principle should result in failure to implement the principle of certainty of law (tax law certainty). (see Lawsky, 2017: 377–380).

2 Taxation of Real Estate in Russia

The main problem of local budgets in Russia is the chronic shortage of funds in conditions of economic instability, which does not allow municipalities to fulfill their public obligations to the public properly. Russian politicians

[3] Art. 2 of The Constitution of the Republic of Poland of 2 April, 1997 as published in Dziennik Ustaw no. 78, item 483 – "*The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*" and art 1. of The Constitution of the Russian Federation as published in Rossiiskaya Gazeta newspaper as of 25 December 1993.– "The Russian Federation – Russia is a democratic federal law-bound State with a republican form of government".

plan to solve this problem by increasing the tax revenues of municipalities. The main role is to play is chosen a tax on real estate paid by individuals.

However, it should mentioned here that Russian Constitution in Art. 132 states that local self-government bodies may be vested by law with certain state powers and receive the necessary material and financial resources for their implementation. This is a common problem, when the implementation of constitutional principles means, in practice, for local government units, a shortage of funds.

The real estate tax has obvious merits. Income from real estate tax is predictable, stable and does not depend on the results of the taxpayer's activities; administration costs are low, and the possibilities of aggressive tax optimization and evasion from tax payment – in comparison with income taxes – are very limited. In addition, the population as a whole understands and supports the concept of the market value of real estate as a tax base (see Etel, Dowgier, 2013: 19–23; see also Michasaeva, Chuchina, 2008: 57–61; see Animica, 2012: 50–56).

The personal property tax (real estate tax, real property tax) in Russia is a local tax and it is regulated jointly by federal legislation and municipal regulations and is fully credited to the local budget at the location of the real estate property. At the federal level, the basic elements of the tax are regulated by the norms of Chapter 32 of the Tax Code of the Russian Federation (the Tax Code of the Russian Federation), which is effective from 1 January 2015. Previously, the tax on the real estate property of individuals was paid on the basis of the Law of the Russian Federation of 9 December 1991, no. 2003-1 "On Taxes on the Property of Individuals" (the act repealed).

Taxpayers are individuals (physical persons) who own real estate property located within the boundaries of a municipal formation. Tenants are not recognized as taxpayers. Citizenship, age, sanity, solvency, residency and other personal characteristics do not matter for real estate tax purposes.

In Russia, commercial organizations (legal persons) and ordinary citizens pay different property taxes and it is often a question of which regime individual entrepreneurs should pay property taxes? In practice physical persons (individuals) – for tax purposes – often are treated as commercial organizations

and pay taxes as legal persons. The Constitutional Court of the Russian Federation in 2010 examined this problem and explained that individual entrepreneurs owning real estate property pay real estate tax as other individuals; in this case, they are subject to the tax regime of ordinary citizens, and not commercial organizations (Constitutional Court: 310-O-O/2010).

The object of taxation is recognized as residential buildings located within the municipality; flats, rooms; garages, car places (parking lot)[4]; single immovable complexes[5]; objects of unfinished construction[6]; other buildings, buildings, structures and premises.

Residential buildings located on land plots granted for the conduct of personal subsidiary, dacha farming (summerhouse, summer cottage), gardening, individual housing construction, belong to residential houses. It should be mentioned that the real estate property included in the common property of an apartment building is not recognized as an object of taxation.

When referring to certain objects of real estate to objects of taxation, often arise some kind conflicts and "zones of uncertainty". For example, legal disputes arise when taxing objects are "apartments[7]", which tax status is not certainly regulated by law. On the one hand, the apartments belong to the hotel-type rooms and are intended for temporary accommodation of citizens. However, on the other hand, construction companies often sell them as separate real estate (as a flat) intended for permanent residence.

4 Car place (parking lot, parking place) – an individual-specific part of a building or structure that is not limited or partially limited by enclosing contruction or other structure intended for the placement of a vehicle.

5 A single immovable complex is a collection of buildings, structures and other things united by a single appointment, which are either located on the same land plot, or are inextricably linked physically or technologically (for example, railways, power lines, pipelines and other linear objects).

6 The object of unfinished construction is taxed if it is properly registered with the right of ownership.

7 Apartment – in variuos sources it means a room or a separate room in the house (apartment). But also the apartment is usually called a room, which includes one or more rooms for rent or purchase. In the housing legislation of the Russian Federation, you will not find the definition of the concept of apartments. The Housing Code lists residential buildings, houses, part of a house, flats, part of a flat, a room. In addition, the difference of apartments and flats in the thoughts of many Russians is purely functional – apartments are rooms intended for long term or for temporary accommodation of the owner or tourists.

Unfortunately, the share of property tax in the revenue side of local budgets is quite small (on average, no more than 2%). Today, the fiscal potential of the property tax of individuals is clearly underestimated, despite the fact that in other countries it plays a significant role in local budget revenues (for example, in France – 52%, in the USA – 70%, in the UK – 90%, in Denmark – 76%) (see also statistics at Wang and Peng, 2015: 91). In the light of regular legislative updates and the transformation of other taxes and public fees, real estate tax over the past decades have been levied on an obsolete Soviet model. The tax base for calculating the tax was the inventory value[8] of real estate, which does not take into account market pricing mechanisms (Głuchowski, 1995).

So-called tax reform is going to correct this situation, which is based with the transition from real estate taxation based on inventory value, to taxation – on the cadastral value[9]. Until 2020, all Russian regions should finally switch to the tax regime of cadastral value. The difference between the two regimes of taxation is very significant, since the cadastral value is close to the market price of real estate, while the inventory value is calculated based on town planning standards and much lower than the market price.

Reforming the real estate tax is accompanied by an increase in uncertainty, ambiguity, inconsistency and fragmentation both in the system of legal regulation of this tax and in the interpretation of relevant tax rules. At the same time, the main obstacle for the formation of the real estate tax base is the lack of a complete list of real estate objects in the estate cadastre.

Today some municipalities have already switched to a new tax regime, others – no. Therefore, in the first of them the tax base is cadastral value of real estate, for other – inventory value.

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8 Inventory value is determined on the basis of the cost of the property, as well as its material wear and tear in the process of operation and the dynamics of growth of prices for construction products, work and services. As you can see, the mechanism itseld is very far away from the market price mechanism.

9 Cadastral value is the market value of a real estate object, established in the process of state cadastral valuation, determined either by mass valuation methods that involve the allocation of real estate objects with similar technical and price characteristics; or - if a mass valuations is not possible, it will be a value established individually for a particular real estate object using a cost, comparative or profitable valuation method.

Local legislators, depending on the applicable procedure for determining the tax base, set tax rates. At the same time, the federal legislator in Chapter 32 of the Tax Code imperatively fixes the minimum and maximum limits of tax rates[10].

In municipalities where the cadastral value is applied, rates are set by local legislators in amounts not exceeding:

- 0.1% for houses, flats, rooms; objects of unfinished construction in the event that their designed purpose is a house; single immovable complexes, which include at least one house; garages and car places; economic buildings, if the area of each does not exceed 50 square meters, and which are located on land plots granted for the conduct of personal subsidiary, summerhouse, truck farming, gardening or individual housing construction;
- 2% in respect of taxable objects, where cadastral value of each of object exceeds 300 million rubbles;
- 0,5% – in relation to other objects.

From the tax base, the law allows taxpayer to make deductions of a fixed amount. So, for example, for the purposes of taxation, the cadastral value of a flat is reduced by the value of 20 square meters of the total area of a flat; cadastral value of the room is reduced by the value of 10 square meters of the area of this room; cadastral value of a house is reduced by the amount of cadastral value of 50 square meters of its total area; the cost of a single real estate complex, which includes at least one residential building, is reduced by 1 million rubbles. Municipalities have the right to increase the amount of tax deductions on their territory (see conclusions at Pjanova, 2016: 134–138).

In municipal formations of the Russian Federation, where the inventory value is applied, tax rates are set as the product of the total inventory value[11]

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10 According to Art. 399 of tax code of russian federation representative bodies of municipalities (legislative (representative) bodies of state power of cities of federal significance Moscow, St. Petersburg and Sevastopol) determine tax rates within the limits established by this chapter (chapter 32) and the specifics of determining the tax base in accordance with this chapter.

11 The total inventory value is the sum of the inventory values of real estate taxable objects and located on the territory of the municipality.

of taxable objects and the deflator coefficient[12]. With the value of the inventory value of all taxable objects belonging to the taxpayer and located within the municipality, up to 300 thousand rubbles inclusive, the rate is up to 0.1%; more than 300 thousand rubbles up to 500 thousand rubbles – from 0.1% to 0.3%; more than 500 thousand rubbles – from 0.3% to 2%.

Municipalities have the right to reduce tax rates to zero percent or increase, but not more than three times. In addition, municipalities can differentiate tax rates depending on the cadastral value of the object of taxation, its type and location on the municipal territory. For example, Art. 1 of the Moscow City Law "On the Personal Property Tax" differentiates the federal rate for residential buildings, houses, single immovable complexes comprising at least one residential building (house), economic buildings or structures, where the area of each building or structure does not exceed 50 square meters; and in case if they are located on land plots granted for the conduct of personal subsidiary, summer cottage farming, gardening, or individual housing construction, as follows:

- up to 10 million rubbles – 0,1%;
- over 10 million rubbles and up to 20 million rubbles (inclusive) – 0.15%;
- more than 20 million rubbles and up to 50 million rubbles (inclusive) – 0,2%;
- more than 50 million rubbles and up to 300 million rubbles (inclusive) – 0.3%;

As we see, for these types of real estate the Law provides a progressive scale of taxation. As a consequence, minor "fluctuations" in the cadastral value entail significant changes in the amount of tax, which does not meet the requirements of horizontal tax equity (horizontal justice): for the same objects – the same tax (see Elkins, 2006: 41–46 and Infanti, 2007: 1–5). For example, if the cadastral value of an apartment in Moscow is exactly 10 million rubbles, then the tax will be 10 thousand rubbles. If the cadastral value increases by only 1 rubble, then the tax will amount to 15 thousand rubbles, that is, it will increase by one third.

12 The deflator coefficient takes into account the change in consumer prices for goods (work, services) and is established annually by the Ministry of Economic Development of Russia. So, the size of the coefficient-deflator for 2017 is 1.425, for 2018 1.481.

Regardless of the reform of regional legislation, the tax base is defined as the cadastral value in relation to so-called "commercial" real estate, namely: administrative-business and shopping centres, premises in them, as well as non-residential premises, the purpose of which involves placing offices, shops, public catering facilities and consumer services. The rate is 2% of the cadastral value of such real estate. This tax regime is similar to the taxation of property of organizations and is established to prevent a targeted transfer of "commercial" real estate from the balance of commercial organizations to controlled individuals for the purpose of unfair tax optimization.

Since the cadastral value of real estate is several times higher than its inventory value, during the tax reform process the tax burden significantly increases for the population. In order to more equitably distribute the tax burden, the Russian legislators provided various measures of social protection of the population. In particular, the first four years after the introduction of tax based on cadastral value are a transitional period. Throughout this time, there are special decreasing factors, which allow reducing the tax burden on citizens.

In addition, federal and local legislation establishes numerous tax breaks (tax privileges, tax benefits) for disabled people, pensioners, military members, war veterans, liquidators of the Chernobyl disaster, as well as other people engaged in gardening, persons of creative professions etc. The tax break (tax privilege, tax benefit) in the form of complete exemption from payment of tax is given in respect of one object of taxation of each type at the choice of the taxpayer, regardless of the number of legal grounds for applying tax break. The main thing for the purpose is to get a tax break, so that real estate is not used for entrepreneurial (commercial) purposes.

Unfortunately, as practice shows, property tax benefits are often not targeted as it was planned by legislator. Moreover, their effectiveness is not assessed. Therefore, today the urgent problem in Russian is monitoring tax benefits on the basis of an assessment of their effectiveness.

The tax period is a calendar year. As a general rule, the change in the value of real estate during the tax period is not taken into account when determining the tax base in this and previous tax periods. With respect to property

transferred by inheritance, the tax is calculated from the day of opening the inheritance.

In the Russian Federation, the tax on the real state property of individuals is calculated by the tax authorities on the basis of information about real estate objects and their owners. Such information is provided by bodies that carry out real estate registration of rights to immovable property (real estate property).

Individuals pay real estate tax once a year at the location of the object of taxation on the basis of a tax notice that is sent by the tax authority and contains information on the amount of tax, taxation objects, tax base, and the time of tax payment. The tax notice can be delivered to the taxpayer personally against a receipt or sent via registered letter or transmitted electronically via the Internet. In the case of sending a tax notice by registered mail, there is a presumption of the "sixth day", namely: it is considered received after the expiration of six days from the date of sending the registered letter.

The taxpayer is obliged to pay real estate tax within one month from the date of receipt of the tax notice, unless the notice indicates a longer period of time for payment. The deadline for tax payment is until 1 December of the year following the expired calendar year. At the same time, the taxpayer pays the tax not more than three calendar years preceding the year of sending the tax notice. The tax declaration is not required.

The main way to avoid paying taxes for citizens is not to register ownership of real estate. Unfortunately, many citizens do not provide the necessary information and documents to the registration authorities after concluding the contract of sale, building a new house, obtaining real estate for inheritance or privatization, avoiding estate registration of ownership of their property, which means that they avoid and pay the tax in bad faith.

However, the majority of disputes and conflicts today concern the size of the cadastral value of real estate subject to taxation. The cadastral valuation of real estate in Russia is made by independent experts (appraisers) and is updated at least once every five years. Often, cadastral value, determined on a mass basis by common average indicators, is higher than market value.

If it does not agree with the size of the cadastral value, it can be disputed either in a special commission under the territorial directorate of Rosreestr, the ministry of estate registration, cadastre and cartography, or in the courts of general jurisdiction. Moreover, to challenge the results of determining the cadastral value in court, a preliminary appeal to a special commission is not necessary. Courts make their decisions and argue them, as a rule, on the basis of the conclusion of a judicial appraisal examination.

3 Conclusion

In conclusion, we note that the reform of the property tax of individuals produces serious challenges and problems. On the one hand, the transition to real estate taxation based on cadastral value can significantly strengthen and increase the revenue base of local budgets, and hence the financial independence of municipalities, but, on the other hand, the tax burden on citizens as a result of the reform is significantly increased, which, in its turns, aggravates the issue of observance of social justice when taxing citizens with different incomes (vertical justice).

To answer these challenges and risks, the following solutions can be offered. First, it is more fair to differentiate the tax base and rates-for example, instead of using the cadastral value, use the market value of real estate, take into account such indicators as transport and infrastructure security at the location of the property, as well as rent that shows the prestige of the area where the property is located. Secondly, when calculating the tax, it is necessary to take into account the solvency of the taxpayer, that is, the income level of the taxpayer, to ensure an even distribution of the tax burden and the requirement of vertical justice. It is also possible to take into account the amount of utility payments paid by the owner of the real estate, and fees for capital repairs. Thirdly, it is necessary to differentiate the taxation in more detail depending on the value of real estate by increasing the number of units (classes of profitability) and the corresponding tax rates.

The obscurity of approaches, methods and models of cadastral value determination leads to an increase in tax disputes related to its administrative and judicial challenges. Therefore, it is required to develop and implement clear, understandable and transparent methods for estimating the cadastral value

of taxable items. It is advisable to provide in the law mandatory notification of the owner of real estate on the estate cadastral assessment (with the possibility of citizen participation in the assessment) and its results. It is also necessary to radically improve the work of the commissions on the resolution of disputes on the results of determining the cadastral value in the direction of strengthening the responsibility of their members and improving their skills. And, finally, it is necessary at the state level to solve the problem of shortage of qualified specialists in the field of cadastral valuation and independent valuation of real estate.

These proposals will, on the one hand, maximize the revenue side of local budgets, and on the other hand, ensure compliance with the fundamental principles of taxation for real estate taxation (equity, equity, ability to pay, legal certainty, etc.).

Regardless of the time period and condition of public finances, to develop a proper and effective tax policy (in the narrow sense also of tax policy in the light of real estate taxation), it is required a serious analysis of economic interests as well as determination and examination of the conflict interests in various areas of public finances. Certainly, it is already proved by economists that taxation of real estate based on market value of property is good for the economy of the state. However, it should be also considered that any impact of tax law (in this case in the light of real estate tax law) may also have a social dimension (see McGee, 1997: 158–159). It's worth mentioning that, in Poland we constantly discuss about tax on real estate which should be based on cadastral value[13]. Bearing in mind the high percent of ownership of real estate in Poland, each government knows that any changes in tax burden will make changes in voices in the parliamentary election. No one wants to risk to lose the majority of voters.

It should be also added that the principle of tax equity is integrated expression of all general taxation principles and is the quintessence each of the principle of taxation and tax law. In other words, the need for tax equity manifests itself in universality, certainty, equality, proportionality and other principles of taxation and tax law.

13 Tax base in real estate tax in Poland is based square meters of real state where individuals reside.

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MUNICIPAL POWERS TO GRANT TAX PREFERENCES FOR ENTREPRENEURS

Rafał Dowgier[1]

Abstract

Under the Polish legal system, tax receipts are divided between central budget and budgets of individual local government units while only municipalities, i.e. the lowest level of local government, have their own tax revenue. Municipalities are entitled to decide about the level of tax through their right to set a tax rate and introduce tax reliefs and exemptions. These rights are not uniform with regard to individual taxes. Assuming that one of the functions of tax is to stimulate, that is exerting positive impact on specific actions of taxpayers in particular, the system of tax preferences may be an incentive to support entrepreneurs' investment activities. In practice, however, due to the European Union laws that restrict granting State aid, municipalities do not enjoy absolute freedom to support entrepreneurs through tax preferences. A purpose of the study is to present possible forms of support granted for entrepreneurs by municipalities as well as the principles under which such aid is provided.

Keywords: Taxes; Tax Exemptions; Tax Reliefs; State Aid.

JEL Classification: H34.

1 Introduction

The system of local government units' own revenue, which at the lowest level in Poland is represented by municipalities, is based on municipalities' own revenue deriving from taxes. Specifying municipalities' own revenue, Article 4 of the Act of 13 November 2003 on Local Government Units Revenue[2] enlists tax revenue effected independently by municipal tax authorities (a real estate

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2 Uniform text: Journal of Laws of 2017, item 1453 as amended.

tax, agricultural tax, forestry tax, and transportation tax) as well as revenue effected by state tax authorities (Heads of Revenue Offices). Poland has adopted the system where a part of tax supplying municipal budgets is not collected by their tax authorities but by the state bodies, which then forward the effected revenue to municipalities. Such a situation concerns inheritance and donation tax, tax on civil law transactions, and a simplified form of paying tax on natural persons' income – a tax card.

The above-mentioned dualism is of crucial importance for the scope of municipal powers with regard to determination of the level of the above quoted taxes, including implementation of tax reliefs and exemptions by municipalities. In general, such powers enjoyed by municipalities are solely limited to the tax they collect themselves. A decision on reliefs and exemptions from taxes effected by Heads of Revenue Offices that are then forwarded to municipal budgets is made by the legislator; hence such decisions are made centrally. Exceptionally, municipal tax authorities have also been also entrusted with certain powers thereon in the form of co-deciding on granting reliefs to pay tax (Etel eds., 2017: 565).

Due to insignificant fiscal importance of the following taxes in the structure of municipal revenue in Poland: tax on civil law transactions, inheritance and donation tax, or tax on natural persons' income that is paid in the form of a tax card, further considerations will be limited to taxes effected by municipal tax authorities. Among these taxes, a real estate tax is of the highest fiscal importance.

2 Restrictions on Granting Tax Preferences by Municipalities

Local government units share public revenue in a part corresponding to their tasks, respectively, in compliance with Art. 167 of the Constitution of the Republic of Poland[3]. Art. 168 of the Constitution enshrines impact on the level of tax which constitutes local government's own revenue. Pursuant to this provision, local government shall be entitled to set the level of local tax and fees (charges) to the extent established by statute. This regulation fulfils obligations accepted by Poland in effect of the ratification

[3] The Act of 2 April 1997 – The Constitution of the Republic of Poland (Journal of Laws of 1997, no. 78, item 483).

of the European Charter of Local Self-Government drafted on 15 October 1985. Art. 9 par. 3 thereof introduces a rule according to which at least a part of financial resources of local authorities shall derive from local taxes and fees (charges) of which, within the limits of statute, they have the power to determine the rate (Dowgier, 2015: 76).

The Constitution itself clearly indicates that local government units are entitled to decide about the value of their tax solely within the statutory limits. Due to the above, the subject literature claims that fiscal jurisdiction of municipalities is limited (Dowgier, 2015: 76). They are authorized to act only within the limits of competence enshrined by statutes. Within this scope, it is necessary to refer to another provision of the Constitution – Art. 217, under which specified categories of entities may be exempt from tax only by means of statute. In consequence, municipal law making bodies are not entitled to introduce tax exemptions for individual categories of entities under acts of local law (resolutions). Such exemptions, which will be discussed further in the study, may be solely objective.

Apart from the statutory law, another restriction of municipalities' fiscal jurisdictions is the European Union law. As far as support in the form of various tax preferences of businesses is concerned, Art. 107 par. 1 of the Treaty on the Functioning of the European Union implies a general ban on granting such aid. Pursuant to this provision, "save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market". In consequence, Member States must refrain from granting State aid also in the form of tax preferences that would infringe the EU rules of competition. In practice, it means that departures from the above-mentioned ban must result straightforwardly from the European Union law; otherwise, European Commission's consent is required. Most of all, we deal with such departures with regard to the so-called *de minimis* aid. Due to its relatively insignificant value (in principle equal to EUR 200.000 in three subsequent years), such aid may be granted under a simplified procedure, which does not require European Commission's consent.

It is the most popular form of granting State aid by Polish municipalities in the form of tax exemptions (Dowgier, 2015: 196).

Another possibility of granting aid without breaching EU law provisions is to use the formula of the so-called block exemptions. Under Art. 108 par. 3 of the Treaty on the Functioning of the European Union, European Commission designated border limits the application of which enables granting State aid. The Regulation of the EU Commission no. 651/2017 of 17 June 2014 recognizing some types of aid to be consistent with the internal market in application of Art. 108 of the Treaty is of a crucial importance within this scope. On the basis of this act, the principles of granting exemptions from a real estate tax and transportation tax in Poland were described more precisely in the Regulation of the Cabinet of 9 January 2015 on the conditions to grant exemptions from a real estate tax and transportation tax constituting regional investment aid, aid for culture and preservation of cultural heritage, aid for sports infrastructure and multifunctional leisure facilities, aid for local infrastructure, aid for regional airports, and aid for water ports[4].

It is a general rule that support for entrepreneurs granted by municipalities either in the form of an act of local law (a resolution) or under an individual decision (a relief to pay tax obligations), must be within the limits of statutory authorization and consistent with the State aid regulations. Due to this, opposite to tax preferences granted to entities that do not pursue a business activity, local government units are quite considerably limited therein. In some cases, it may lead to a situation where due to the interest of a municipality and a taxpayer, tax support should be granted but it is not possible because of a general ban on granting State aid. It should be stressed once again that tax exemptions and reliefs constitute instruments of State intervention that are recognized as State aid in a negative meaning, i.e. by decreasing public burdens (Nykiel-Mateo, 2009: 169).

3 Tax Exemptions and Reliefs

From the practical point of view, tax exemptions are of the greatest importance in supporting entrepreneurs with regard to burdens concerning local taxes. Although the Polish tax law comprises an elaborate catalogue

4 Journal of Laws of 2015, item 174 as amended.

of exemptions from a real estate tax, transportation tax, agricultural or forestry tax, the legislator has authorized municipal law making bodies to additional exemptions within this scope. The requirements for such exemptions contained in the Acts are, above all, their objective (a thing but not a person may be subject to exemption) and general nature (exemption may not be addressed at concrete entities). An exemption should be based on such general formulations that will not enable identification of entities that will use it in the future once the exemption is implemented. Even if an exemption is formulated in a general way but it is possible to attribute it to a concrete entity, it may not be implemented.

The above general rules related to the structure of exemptions mostly result from the form in which they are introduced. Acts regulating local taxes indicate that an authorized body within the above scope is a Municipal Council as a law making authority, which should effect this in the form of a resolution. A tax resolution is a source of local tax law adopted within the limits of statutory authorization and valid within the territory of a municipality whose law making body has enacted it (Etel, 2004).

Due to the value of burden for a given tax, the most practical importance is assigned to the Municipal Councils' right to introduce exemptions from a real estate tax and transportation tax that are regulated in the Act of 12 January 1991 on Local Tax and Fees[5]. With regard to entities pursuing a business activity, such exemptions may be granted in the form of *de minimis* aid, or pursuant to the principles specified in the above-mentioned Regulation of the Cabinet of 9 January 2015. Under the latter act, exemptions constituting State aid of a considerable value may be granted, in particular to support a launch of new investment and to create new workplaces in a municipality.

The Municipal Councils' rights to introduce tax reliefs are of marginal importance in the Polish system of local tax law. Opposite to exemptions, such reliefs do not fully exclude the obligation to pay tax but merely decreases the tax amount, base or rate (Etel eds., 2013: 32). Municipal Councils may introduce tax reliefs solely with regard to agricultural tax; in result of which, the importance of this preference is minimal in relation to entities pursuing other business activity than agricultural.

5 Uniform text: Journal of Laws of 2017, item 1785 as amended.

4 The Rights Related to Tax Rates

In the economic meaning, tax burdens for local tax may also be decreased by Municipal Councils' decision to set a tax rate for a given tax on an appropriately lower level. The constitutional guarantee entrusting local government units with a possibility to impact the level of local tax constituting their revenue is expressed in their right to determine a rate of local tax binding within their territory. Such a right, however, is not unlimited. Most of all, the Act indicates maximum rates of tax that may be introduced in a given municipality. As far as transportation tax is concerned, the legislator has additionally reserved minimal rates for some categories of objects of taxation. Hence, determining the level of a tax rate, Municipal Councils must respect statutorily designated limits.

As long as Municipal Councils are obliged to determine local tax rates binding in a given tax year, these Councils may also differentiate the rates within the limits stipulated by the Act. In other words, apart from a basic rate, other rates (higher or lower) for a given category of taxation objects may be introduced. Apart from the basic rate of a given tax, if a Municipal Council also determines lower rates applicable in specific situations to be used by the entities pursuing a business activity, they may be granted State aid. Art. 20c of the Act on Local Tax and Fees, containing legal grounds for different rates of a real estate tax and transportation tax, expressly reserves that if State aid is granted in effect of such differentiation, it is granted as *de minimis* aid. In consequence, the Polish legislator himself has considerably limited Municipal Councils' rights to grant State aid to entities pursuing a business activity by limiting it exclusively to a relatively small amount within the formula of *de minimis* aid (Dowgier, 2012: 45–48). For this reason, local tax rates for entrepreneurs are not often lowered. Tax exemptions clearly prevail as a form of aid granted under resolutions of Municipal Councils.

5 Reliefs to Pay Tax Obligations

As long as the above mentioned tax preferences in the form of reliefs, exemptions and lowered tax rates are granted under the acts of local law in the form of Municipal Councils' resolutions, the Polish legal order provides a possibility of granting taxpayers reliefs to pay tax obligations under individual

decisions as well. Such a possibility is envisaged by the provisions of the Act of 29 August 1997 – Tax Ordinance[6]. Art. 67a-67e thereof regulates reliefs to pay tax obligations that may involve tax remission, arrangement of installments, and deferred payment. With regard to the scope of these reliefs, remission of tax arrears and default interest are of the greatest importance. Upon the taxpayer's request, and exceptionally ex officio as well, a competent tax authority may grant such a relief due to the taxpayer's important interest or public interest. Polish legislation uses blurred notions with regard to the above-mentioned reliefs in order to provide tax authorities with certain flexibility in applying these institutions. Moreover, a tax authority acts within the limits of inherent administrative discretion expressed in the word "may". Hence, even if statutory prerequisites do occur, a tax authority may but does not have to grant a relief.

It should be emphasized that with regard to municipal tax revenue effected by Heads of Revenue Offices, they are authorized to apply reliefs. A municipality expresses an opinion on granting a relief only under the so-called co-decision while it may not be granted without its consent.

The provisions of the Tax Ordinance (Art. 67 b) contain separate regulations on granting entrepreneurs reliefs to pay tax. A general rule thereon is identical to the one concerning the application of tax exemptions and reliefs and lowering tax rates by the lawmaking bodies of local government units. Even if the prerequisites to grant reliefs to pay tax occur, it may not be effected against the regulations on State aid. Therefore, in practice, the aid is most often granted to entrepreneurs in the form of *de minimis* aid. Higher reliefs, exceeding the limits of *de minimis* aid, may be granted under aid programs adopted in the form of appropriate regulations of the Cabinet. However, such acts are not issued too often. For this reason, State aid in the form of reliefs to pay tax obligations other than *de minimis* aid is generally not granted (Dowgier, 2015: 245).

6 Conclusion

The study presents basic categories of tax preferences that may be applied by municipalities with regard to entities conducting a business activity.

6 Uniform text: Journal of Laws of 2017, item 201 as amended.

The analysis of valid legal regulations thereon in Poland leads to the conclusion that independence of municipalities in developing their own tax policy is strongly limited. It results both from the supremacy of statutory law in shaping local tax structure and restrictions ensuing from the competition law implemented by the European Union laws. With regard to the first case, it may be claimed that financial independence of municipalities may be extended, in particular by extending the rights of their lawmaking bodies, e.g., to introduce tax reliefs as well as facilitating granting aid in the form of lowered tax rates, beyond the formula of *de minimis* aid.

As far as valid limitations connected with granting State aid are concerned, it should be pointed out that within legal orders of individual Member States it is possible to introduce legal regulations that will allow granting aid in the form other than *de minimis* aid to a wider degree. However, Member States would have to draft legal acts that would become grounds for granting national State aid after the European Commission has approved them. With regard to Poland and local taxes, such an act is in force but it refers solely to a real estate tax and transportation tax while additionally indicating the purpose of the aid. It seems particularly reasonable to adopt similar solutions for the needs of granting reliefs to pay tax obligations as well. Even though there are competency rules to introduce domestic solutions within the above scope by the Cabinet, they are not applied. In consequence, local government tax authorities, in particular, are limited in applying reliefs to pay tax obligations with regard to entrepreneurs if they result in large amounts of, e.g., remissions. Meanwhile, the efficiency of such support largely depends on the intensity of aid being granted.

Summing up, it should be emphasized that Poland has yet underused potential to increase a stimulatory impact of local taxes. A pursuit of their own tax policy by local government units, i.e. using non-fiscal functions of tax, would require the extension of fiscal jurisdiction of municipalities with regard to the new categories of both tax preferences and their level.

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THE TAXPAYER'S LEGAL SITUATION IN REAL ESTATE TAX – THE POLISH PERSPECTIVE

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Abstract

Tax law is characterized by the fact that public interest is a priority and dominates the interest of the individual. Increasingly, however, attention is being paid to ensure that the taxpayer is not only seen as a source of income. It is necessary to secure the interest of the individual, shaping the norms of tax law in such a way that the taxpayer is also protected.

The purpose of this article is to analyze the legal situation of real estate taxpayers. The research will cover the key elements that shape the legal status of the real estate taxpayer. It should be emphasized that the legal situation of real estate taxpayers is not uniform and depends on many factors.

Keywords: Tax; Law; Real Estate Tax; Taxpayer.

JEL Classification: K340.

1 Introduction

Respect for human and civil rights is the foundation of the existence of a modern democratic state. The European philosophy of human rights, which has shaped the consciousness of Europeans, combines the human rights of different generations and emphasizes the multidimensionality of the individual (Zajadło, 2004: 27). In the first place, the taxpayer should be perceived as a person and citizen, and in the second, they must be perceived as an entity obliged to bear burdens on behalf of the state (Szczurek, 2008: 39). This means that the legislator should shape tax standards in such a way as to weigh the public interest, i.e. the need to earn income, and the private taxpayer's interest. The nature of tax law comes down to the fact that the public interest is a priority and dominates the interests of the individual, therefore it is necessary to provide effective safeguards to protect the interests of the individual (Gomułowicz, 2005: 81).

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It can be stated that the legal situation of the individual determines the limits of taxation set by the legislator – how much the wellbeing of the individual(the interest of the individual) has been sacrificed by that legislator for the benefit of the public good (public interest)[2].

Legal norms contained in the Constitution of the Republic of Poland (Journal of Laws, no. 78/483) on the one hand directly define the legal status of the individual (Tuleja, 2003: 130). It must, therefore, be assumed that the provisions of the Constitution of the Republic of Poland should guarantee that the legislator will take the appropriate direction of tax policy in order to safeguard the taxpayer's interest in this way (Gajl, 1996: 2). On the other hand, the provisions of the Constitution stipulate that the individual must participate in satisfying the state's financial needs. Article 84 of the Constitution of the Republic of Poland introduces the universality of the obligation to maintain the state. This results in a permanent tax burden, but only if it is introduced and specified by the law (Dębowska-Romanowska, 2009: 114). At the same time, to protect the taxpayers, the constitutional legislator introduces the principle of exclusivity of the act in the scope of imposing tax burdens. As a result, the taxpayer is obliged to pay only the tax burden imposed on him by law. The real estate tax was introduced by the Act on Taxes and Local Fees (i.e. Journal of Laws of 2017, item 1785).

Real estate tax is the most important source of own income of municipalities (Hanusz, 2015: 36). It is a fact that the shape of each tax is the result of a political decision. If the purpose of tax regulations is only caring for the fiscal effect, then individual rights and economic freedoms may be violated (Gomułowicz, 2005: 64; Kosek-Wojnar, 2012: 162). The aim of this publication is to analyze how the legal situation of real estate tax taxpayers is shaped. It will be interesting to investigate the answer to the question whether the legislator correctly balanced the public and private interest by shaping the structure of the real estate tax or whether they were tempted by excessive fiscalism? In view of the above, it is necessary to analyze the key elements of the tax that affect the taxpayer's legal situation. It should be emphasized that the legal situation of real estate taxpayers is not uniform and depends on many factors.

2 Cf. Gomułowicz, 2005, p. 63; Łączkowski, 2003, p. 44 and ff.

2 The General Concept of the Real Estate Tax

The subjects of real estate tax are land, buildings or their parts, and structures or their parts related to running a business. Agricultural land or forests are not subjects to the real estate tax but, respectively, to agricultural and forest tax.

The scope of real estate tax and the connection of the tax base with the usable floor area of buildings or the actual land area indicates that it is a typical tax related to the possession of property (Smoleń, 2010: 337). Therefore, it could be concluded that the basic concept of real estate taxation in Poland is based on traditional and easily identifiable physical assets. However, such a statement is denied by some of the other elements of the tax structure. First of all, it should be noted that the property should be used with the goal of performing business activities. It can also be seen that the catalog of exemptions include real estates that, by its nature, do not generate revenue. This is also evidenced by the differentiation of the level of taxation – in the first instance, the legislator treats differently taxpayers holding property that is not used for commercial purposes and real estate related to running a business, and therefore potentially generating income. In fact, the legislature reaches for the revenues that the property brings or potentially can bring (Brzeziński, 2001: 44).

Real estate tax may be a revenue tax or a typical real estate tax (Smoleń, 2010: 336). In the light of the above remarks, there should be no doubt that the Polish real estate tax should be classified as mixed, i.e. property and income tax. The obligation to bear the tax burden is directly related to the fact of owning property regardless of the income earned, but the amount of the tax burden will be affected by the commercial nature of the property, i.e. the potential for generating revenue.

3 The Taxpayer's Payment Capacity

The tax burden must be "bearable". The level of tax burden should always be in a rational relation with the taxpayer's ability to pay it (Gliniecka, Harasimowicz, 1997: 5/1). This thought was formulated by A. Smith saying that the tax burden should be proportional to the income of taxpayers, should be closely related to financial possibilities (Smith, 2007: 500).

The disadvantage of real estate taxes is that they do not adequately illustrate the ability to bear the tax burden of the person owning the property (Smoleń, 2001: 44). The mere fact of owning a property does not imply that the taxpayer owns the money needed to pay the tax (Brzeziński, 2003: 45).

In the structure of the real estate tax, the tax base for the land area is its area expressed in square meters or hectares, for buildings or parts thereof – usable floor area expressed in square meters[3], and for buildings – their value. Conditioning the burden of real estate tax on their surface (physical or utilitarian) can be seen as unfair[4]. The comparison of simple surface parameters is not fully rational, because it does not take into account the real value of the property. The starting point for real estate tax is a simple assumption: the bigger the property, the higher the tax should be. This is a big simplification, which on the one hand makes the tax dimension relatively uncomplicated, but on the other hand violates the sense of tax justice. The tax dimension does not take into account such important factors shaping the taxpayers' ability to pay as the actual value of the property, its location or economic potential.

The city council, by means of a resolution, determines the amount of tax rates, within the limits set out in the Act. The city council cannot exceed the maximum rates specified in the Act. This means that rates vary across the country, although they often approach the maximum level. It should be emphasized that the city council is entitled to differentiate tax rates in the municipal area taking into account e.g. the location of the property and the type of conducted activity or type of building, and the purpose and method of use of land, condition and age of buildings.

As indicated above, the city council has the right to set tax rates and to introduce real estate tax exemptions. The implementation of these competences is an expression of financial independence. It creates the possibility to adjust the shape of the real estate tax, its amount to the local situation, and this in turn raises expectations from taxpayers (Borszowski, 2013: 79). In the assumption of the legislator, the city council should use the freedom granted

3 The legislator specifies what is understood as a usable area for the purpose of real estate tax. Compare Art. 1a para. 1, point 5 of the Act of 12 January 1991 on local taxes and charges, from 2017, item 1785.

4 Cf. e.g. Hanusz, 2015, p. 58 and literature quoted there.

to it for example by adjusting the amount of rates to the conditions of functioning of a given municipality, its nature and assumed budget revenues. Tax practice shows that municipalities, especially smaller ones, unfortunately do not analyze the situation of taxpayers and basically automatically assume maximum rates (Borszowski, 2013: 82).

For individual subjects of taxation – land and buildings, tax rates vary depending on the function they perform. Recognizing the relationship between the subject of the tax and running a business, the legislator tries to adjust the amount of the tax to the potential, purely theoretical taxpayer's ability to pay. The amount of rates is very diverse, it seems that the criterion of such differentiation is econometric. Tax subjects that generate revenues are taxed at higher rates. The real estate tax extends to the potential income of the taxpayer. The legislator differentiates the load capacity of this tax on individual properties subject to tax liability.

Regarding the shape of the legal status of real estate taxpayers, it should be emphasized that taxpayers are burdened with the same tax, regardless whether they own properties of large or small market value. Meanwhile, the market value of real estate in individual country regions varies greatly. The factor influencing the price of a square meter of real estate is also the number of inhabitants of a given commune. As a rule, the more residents, the greater the value of the property. In this context, it is worth considering whether the upper limits of tax rates should not be linked to the number of inhabitants (Borszowski, 2013: 82). It would have a positive effect on shaping tax justice.

In summary, the applicable rules do not bind the value of land and buildings with the height of the due tax. On the other hand, the size (area or usable area) of a property influences the differentiation of the tax burden. This means that the amount of real estate tax is not always in a rational relation with the taxpayers' ability to pay.

The taxpayers of real estate tax are natural persons, legal persons, organizational units, including companies without legal personality, being:

- owners of real estate or construction objects;
- owner-like possessors of real estate or construction objects;
- perpetual lessee of a land;

- owners of real estate or their parts or building objects or their parts, owned by the Treasury or local government units – under the conditions specified in the Act [5]. The tax obligation weights jointly on all co-owners or co-possessors of the property. An important caveat should be made here. The provisions of the Act on Taxes and Local Fees do not give grounds for differentiating tax rates based on subjective criteria[6]. The legislator has assumed that the choice of the tax rate is determined by the economic character of the object of taxation, and not by the subjective characteristics of taxpayers. In case when the co-owner (or co-possessors) of the real estate are at the same time an entity not conducting business activity and an entrepreneur, due tax will have to be determined based on increased rates applicable to real estate or construction works related to running a business (Art. 1a, para. 1, point 3 in relation with Art. 5, para. 1 of the Act on Local Taxes and Charges).

It should be clarified that in the context of real estate tax, significant consequences for taxpayers result in the classification of a building or land as related to running a business – the highest tax rate is then applied. According to Art. 1a, para. 1, point 3, land, buildings, and structures owned by the entrepreneur or other entity conducting business activity are considered to be land, buildings, and structures related to business activity. Despite the introduction of a legal definition of "real estate related to business activity", the interpretation of this concept is a source of discrepancies in judicial decisions. Judicature has not yet developed a uniform position in the interpretation of the concepts discussed. Although it should be indicated that increasingly often the courts interpret the term "binding properties with economic activity" in a manner favorable to taxpayers, i.e. they assume that the mere fact of ownership of property by an entrepreneur (especially in the case of natural persons) is not sufficient for assuming an existence of such a relationship[7].

5 Cf. the content of Art. 3 para. 1 of the Act of 12 January 1991 on local taxes and charges, i.e. Journal of Laws of 2017, item 1785.

6 Cf. e.g. the judgment of the Supreme Administrative Court of 6 September 2012, II FSK 190/11, LEX no. 1244107; the judgment of the Voivodeship Administrative Court in Rzeszów of 24 September 2010, ISA/Rz 402/10, LEX no. 607456; judgment of the Provincial Administrative Court in Gliwice of 28 November 2012, I SA/Gl 501/12, LEX no. 1247680.

7 More on the topic: Wojtuń, 2017, p. 111 and ff.

4 Differentiation of the Conditions and Manner of Tax Payment

Conditions and mode of payment of real estate tax are different for the taxpayers who are natural persons and other entities. The taxpayers who are natural persons submit to the competent authority information on real estate and construction objects, within 14 days from the occurrence of circumstances giving rise to the tax obligation, under which the tax authority determines the amount of tax due by means of a tax decision. The remaining taxpayers are obliged to annually (by 31 January) submit a tax return to the competent authority, indicating the amount due.

The legal situation of real estate taxpayers varies depending on which category of civil law entities they belong to. In the case of taxpayers who are not natural persons, tax liability arises ex lege and implies tax calculation. Therefore, such a taxpayer is obliged to assess their tax status and then calculate the amount of tax liability and pay the tax without being called by the tax authority. As a result, the entire process of applying current tax provisions and all of its consequences has been passed on to the taxpayer (Dębowska-Romanowska, 1998: 32; Mariański, 2011: 25; Teszner, 2010: 659). On the other hand, tax liability for taxpayers who are natural persons is done via the delivery of a tax decision in which the body determines the amount of tax due. A taxpayer who receives a decision from that body every year finds out in advance how much tax they will be required to pay. It should be noted that if the property is jointly owned by natural and legal persons or entities that do not have a legal entity status, physical persons are obliged to submit tax declarations and pay tax on the basis of provisions for legal persons.

5 Legal Certainty

The legal status of the entity is essentially shaped by the applicable legal regulations. However, it should be noted that the taxpayer's situation is also influenced by less accessible elements, such as, for example, stability and certainty of taxation regarding both regulations and their interpretation, or good legislative technique.

Immutability and stability of tax law are very important factors affecting the taxpayer's legal situation. Foremost, they give taxpayers a sense of security

(Stelmachowski, 2000: 22). The tax law directly and imperiously affects the situation of the taxpayer, ailments related to this fact should not be further aggravated by the lack of legal certainty (Zimmermann, 2012: 198). At this point it should be pointed out that the Act on Local Taxes and Fees, which, *inter alia*, regulates real estate tax, since its adoption in 1991 was changed over a hundred times. What is more, the introduced changes were not always well thought out and often made while making changes to other legal provisions.

Tax standards, as well as other legal norms, should be built in a correct, precise and clear manner[8]. The certainty of taxation is influenced, among other things, by the clarity and communicative nature of tax regulations, which should be formulated in such a way that every recipient can understand them (Kiszka, 2003: 6). In this context, it must be stated that the real estate tax, unfortunately, does not provide taxpayers with an adequate level of security. The rules are not clear and precise enough. Among other things, it is a result of the great number of changes made to it. Frequent changes cause that the application of local tax law becomes an increasingly complicated process, and the lack of precision of the legislator in the formulation of concepts leads to a number of interpretative doubts (Glumińska-Pawlic, 2012: 56).

6 Conclusion

The need to respect and protect the rights of the taxpayer was already expressed in the classic tax rules, and these demands are still valid (Fedorowicz, 1965: 164; Gajl, 1992: 38). Unfortunately, the issues discussed above indicate that the legal situation of real estate taxpayers is not satisfactory.

The norms of tax law are intrusive, that is, they enter the sphere of human freedom, into the person's property (Brzeziński, 2002: 10; Rosmarin, 1939: 208). By introducing regulations regarding financial matter, the legislator must choose from whom and in what amount to obtain monetary resources and how to distribute the collected funds. In these decisions, the interlacing of public and private interests is clearly visible. However,

[8] Cf. e.g. the judgment of the Constitutional Tribunal of 21 March 2001, K 24/00, OTK 2001, no. 3, item 51; the judgment of the Constitutional Tribunal of 17 December 2002, U 3/02, OTK-A 2002, no. 7, item 95; the judgment of the Constitutional Tribunal of 11 January 2000, K 7/99, OTK 2000, no. 1, item 2.

it should be emphasized that stable and efficient sources of public revenues, such that will guarantee public interest, will be ensured only if the private interest of the taxpayer is respected, their strong legal situation (Wójtowicz, Gorgol, 2006: 99).

It should finally be noticed that the shape of the legal status of the taxpayer affects taxpayers' attitudes, their inclination to bear tax burden or escape tax burdens, so it is in the state's fiscal interest to care for the legal situation of taxpayers, so that they accept their responsibilities to the widest extent possible (Kiszka, 2003: 3).

The main complaint to be made is that the construction of the real estate tax does not take into account the taxpayer's payment options. Real estate tax is generally not dependent on the value of real estate (buildings are an exception). The tax rate, depending on the function of the land or the building, is placed on taxpayers equally regardless of the value of the property or the level of income it can generate. Moreover, unfortunately, the practice indicates that municipalities rarely use the competences granted to them by the legislator regarding the possibility of shaping tax rates or introducing tax exemptions.

In addition, attention is drawn to the fact that the conditions and manner of payment of real estate tax vary depending on which category of civil law entity the taxpayer belongs to. They should be unified.

Finally, one should also raise the argument of uncertainty, i.e. stability, precision or clarity of real estate tax regulations. The communicativeness of the legal text shapes the legal security of the taxpayer[9]. Unfortunately, the lack of precision in the legal text may cause disputes between taxpayers and tax authorities. The quality of the regulations leaves much to be desired. An important signaled problem are doubts related to qualifying property as related to running business activity, because it determines the application of the highest tax rate.

9 Cf. e.g. the judgment of the Constitutional Tribunal of 11 January 2000, K 7/99; the judgment of the Constitutional Tribunal of 21 March 2001, K 24/00 and the judgment of the Constitutional Tribunal of 22 May 2002, K 6/02, OTK-A 2002, no. 3, item 33.

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MUNICIPAL TAX AUTHORITIES: ARE CHANGES NEEDED?

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Abstract

This article contains the evaluation of the model of local government tax authorities currently in force, and proposals referring to its perfection. The proposals of a fundamental reform of the two-instance structure of judicial organs deciding on local taxes are groundless. This model has worked well and it does not make sense to experiment looking for better solutions. In Poland communes/municipalities have their own tax bodies, which, however, do not realize all the taxes feeding into local budgets. It is not sufficiently justified. Local organs should be competent for all taxes feeding into their budgets. There is no justification for maintaining the competences of wójts, mayors, presidents to issue individual interpretations of local tax law. All interpretations (including those of local government taxes) should be issued by one organ: the director of the National Revenue Information. The procedure of annual tax assessment requires changes. In the current form it is applied too extensively, and thereby generates too high costs. The mode of communication of the tax authorities and the taxpayer should become more efficient. At so high a number of decisions establishing the obligation, the organs have to deliver them more easily and effectively. Also simplified procedure should be introduced, the aim of which is cheaper and faster settling a tax case, without infringing the taxpayer's right.

Keywords: Municipal Tax Authorities; Local Taxes.

JEL Classification: H71, K34.

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1 Introduction

The reactivation of local government in Poland in 1990, and granting communes/municipalities their own tax incomes resulted in the need for appointing tax authorities, which deal with assessing and collecting the taxes (Pomorski, 2009: 244). It was decided that communes would have their own tax authorities, which would collect most taxes feeding into the municipal budget. Certainly, it was possible to consider the introduction of a solution operating in other states (e.g. France), where local government taxes are collected by specialized state tax services. Local government there has no own tax authorities because the state tax organs collect all taxes composing the tax system. This model has its advantages, among which the most frequently pinpointed is the high professionalism of the employees and the uniform supervision over their work from the minister of finance. However, it is also possible to point at its fundamental disadvantages resulting from the fact that the costs of collecting taxes constituting local budget incomes would have to be transferred onto the units of local government, which, at the small incomes obtained by certain units, would result in its unprofitability.

The state granting the local government powers to form local tax payments shakes off itself the burden of their annual servicing (establishing rates, issuing decisions of assessment, proceedings, etc.). It is worth noting that there are more local taxes than state taxes and that they are very time-consuming because most of them in relation to natural persons come to existence on the delivery of the establishing decision. Simultaneously, incomes obtained from these payments are incomparably lower that those from state taxes paid on the basis of self-calculation (the taxpayer calculates and pays the tax himself). These payments, due to the qualities pointed at, would be very inconvenient to administer by state authorities. Thus, for this reason any profound discussions on if it is worth maintaining the municipal tax authorities do not seem to make sense in Poland. Experiences connected with their functioning confirm the rational assumption adopted at the moment of their nomination, that local government taxes would be best realized by local tax authorities. At the moment there are no proposals to liquidate local tax authorities and to take over their competences by the organs of the national tax administration. Introduced in March 2016

the reform of the state tax administration left the competences of the local tax authorities intact. This does not mean that the rules of functioning of these authorities do not require any alterations, for it is possible to point at several problematic questions connected with the activity of these authorities, which need corrections.

2 Should Municipal Tax Authorities realize all Tax Incomes of Communes/Municipalities?

In Poland communes/municipalities collect local taxes, in most of cases, through their own tax authorities (wójt, mayor, president)[2]. In my opinion this model should be maintained, yet in a modified version. The modification should go in such a direction that all the taxes and local fees are collected by local government bodies. In the current legal status certain taxes feeding the budget of the commune/municipality, are collected by the state tax authorities. I mean here the inheritance and donation tax, tax on civil law transactions and tax card, which are collected by the heads of tax offices. This is a certain inconsistence of the legislator, who nominated the commune/municipality tax authorities and simultaneously failed to vest in them the collection of all local taxes. This is justified by the fact that the structure of these taxes is characterized by a high level of difficulty as to the assessment and collection of these payments, and therefore it is indispensable to have professional personnel and technical background. It was assumed that the employees of communes/municipalities are not properly prepared for dealing with "so difficult taxes". As many years of practice showed, absolutely more problems connected with the assessment and collection were caused by the provisions regulating the property tax, and despite of this fact nobody proposed an idea to transfer this tax to the state tax authorities. In my opinion, there have long been good conditions for all the taxes making the income of the budges of communes/municipalities to be vested in the commune/municipality tax organs.

The recognition of the fact that the municipal tax authorities are competent in all taxes feeding the local budget would solve the problem of the intricate

2 A tax organ i salso starost and marshal, but both the poviat (district) and the voivodeship (province) have no own taxes; hence the further considerations are focused on municipal tax authorities, which are wójt, mayor or president.

procedure in granting reliefs in the payment (Etel, 2015: 262). In accordance with the current regulations the head of the tax office collecting the taxes being the commune/municipality's income (inheritance and donation tax, tax on civil law transactions and tax card) may discontinue, postpone the date of payment or spread out the liabilities into installments, as well as exempt the tax payer from the obligation of payment or reduce the collection of the payment with the consent of wójt, mayor (president of the city) only. When reliefs are applied in the payment of the aforementioned local government taxes, the head of the tax office is obliged to co-decide with the commune/municipal tax organ. This narrows down to the statement that granting a relief by the head of the tax office requires consent from the municipal tax organ. The expression of consent by this organ itself does not result in the head of the tax office being obliged to grant the relief. He/she may do it if it meets the statutory criteria of the so-called important interest of the taxpayer or the public interest. As seen, it is an excessively intricate mode of granting reliefs in fiscally little significant taxes, forced by the fact that part of the local taxes are collected by the state tax authorities. Especially glaring is the situation where the consent of the commune/municipal tax organ to the relief may not be recognized by the head of the tax office. Regardless of if and when the local authorites will be granted the competences to collect all the taxes feeding the commune/municipal budget, it is now that wójt, mayor or president may be vested in the exclusivity for granting reliefs in these payments. Who should exercise the authoritative tax preferences should be decided by the organ to whose budget the income from taxes comes, which needs no justification. This proposal may be easily implemented by introducing slight amendments in the Tax Ordinance.

3 The Municipal Tax Organ and the local Government Appeal College

In my opinion, no major objections are raised by the current model of tax authorities deciding on local government taxes. The firth instance organ is wójt, mayor (president of the city). The appeal body is the local government appeal college (Polish SKO and so hereinafter). This system forces the implementation of the rule of two-instance system and devolutivity

in local government taxes. In this context it is important to clearly assert that the ideas of "flatting" the structure of tax authorities through vesting the competences to reconsidering the case in the same organ (instead or the classical appeal) have no justification in relation to the local government organs (Presnarowicz, 2014: 40). First of all, SKO is a unit completely independent (functionally and financially) from the municipal tax authorities. It is a state budget unit supervised by the President of the Council of Ministers. This situation of SKO guarantees preserving all advantages resulting from the constitutional principle of challengeability of the decisions issued by the first instance. SKO is a quasi court (it takes decisions collectively) in the scope of tax decisions issued by the municipal tax authorities. I think that in so formed a structure of the organs deciding in the cases of local government taxes is certainly better than that of the national tax authorities, where decisions are considered within the framework of the organs supervised by the Minister of Finance (and the Head of the National Tax Administration). And this is the only point where we may consider a need for maintaining devolutivity in the situation where in both instances the judicial decisions are taken by the state organs of tax administration. This drawback does not occur in the structure of the authorities competent for local government taxes, which justifies the need for its maintenance in the basically unchanged form.

Approving of the current model of tax authorities dealing with local government taxes, it is important, however, to point at its certain drawbacks, which should be eliminated.

In my opinion, the commune/municipality, as a legal person – a beneficiary of the incomes from local government taxes should have an opportunity to challenge the decision of the local government appeal college before an administrative court. The right of this type is already granted to the commune/municipality, in reference to, for example, supervisory solutions of regional clearing houses deciding on the invalidity of tax resolutions of the commune/municipal council. They may also be challenged by the commune/municipality before the administrative court. These complaints serve the protection of the commune/municipality's interest in the event of the clearance house's questioning resolutions concerning taxes and

local fees (Etel, 2004: 256). Unfortunately this right is not vested in the commune/municipality in reference to the decisions of SKO and decisions concerning the assessment of local taxes and fees (Dembczyńska, Pietrasz, 2009: 7–8). As a result of SKO's decisions unfavorable for communes, the commune/municipality – a legal person – very often loses considerable tax profits, likewise this takes place at deciding on the infalidity of a tax resolution by the regional clearing house. Incomes from taxes as municipal own profits are protected by the Constitution of the Republic of Poland, which guarantees their inviolability. Simultaneously, the commune/municipality as a local government unit has no right to challenge SKO's decisions before the administrative court. In the light of the Tax Ordinance (Act on Books no. 201/2017, Article 133) the commune/municipality is not a party in the proceedings, and thus has no right to challenge SKO's decisions. This right should be vested in the commune/municipality as a unit of local government and not wójt, mayor (president) as a tax organ deciding in the first instance. The principal argument for depriving the communes/municipalities of this right is the identification of the tax organ (wójt, mayor, president) with the commune/municipality as a legal person obtaining profits from taxes. This results from, for example, the lack of regulation determining the constitutional position of wójt, mayor, president as a tax organ. The Tax Ordinance states only that they are first instance organs and this is it. There is no law which would regulate the constitutional and organizational questions of municipal tax authorities modelled on the law on the National Tax Administration. In effect, a sign of equality is put between the executive organ of the commune/municipality and the tax organ. The argument that the first instance organ cannot have the right to challenge before the administrative court the decision of the second instance tax organ is by all means justified. It is the commune/municipality – a legal person (and not wójt, mayor, president as a first instance tax organ) that should have a possibility to protect its profits in the proceedings before the administrative court. On behalf of the commune/municipality the complaint will be filed by wójt, mayor, president as its executive organ.

The proposal of vesting in the commune/municipality the right to challenge SKO's decisions would definitively put an end to SKO's long proceedings

occurring in practice, which causes the expiration of considerable amounts of taxes (e.g. tax on telecommunication structures). At the moment the commune/municipality has no legal instruments enabling it to combat SKO's inaction and the chronicity of the proceedings conducted by this organ. The problem was noted in the bill of the new tax ordinance (justification of the bill: Tax Ordinance of 6 October 2017). The bill imposes on SKO an obligation of delivering the local government unit whose tax organ issued a decision being a subject of proceedings conducted by the college, a note on not handling the case on time. Additionally, the commune/municipality was granted the right to file a reminder against the inaction or chronicity of the proceedings conducted by SKO. Unfortunately, the bill includes nothing referring to the commune/municipality's competence to submit a complaint against SKO's decision to the administrative court. Appropriate regulations, indeed, should be placed in the law on proceedings before administrative courts but in the Ordinance itself the notion of the party should have also been appropriately modified.

4 Issuing Individual Interpretations by Municipal Tax Authorities

At the moment municipal tax authorities, on the application of the concerned, issue individual interpretations on local taxes and fees. They may also, in particular in the case of the change of court judgment, change the interpretation issued before. The fundamental problem connected with this form of the activity of municipal tax authorities is connected with the fact that the individual interpretation is effective in the area of the local competence of wójt, mayor, president who issued it only. In practice, the taxpayers who have land and structures on the territory of several communes/ municipalities may receive two mutually contradictory interpretations referring to the same subject of taxation. An example may be the taxation of wind farms, where certain municipal tax authorities issued interpretations confirming the position of the taxpayers, in accordance to which in 2017 the rules of establishing the values of these structures for the needs of property taxation did not change (Pokojska, 2017: 116). Another inconvenience for taxpayers in obtaining interpretations from commune tax authorities

is the need for submitting applications in each commune/municipality, where the taxpayer has property. The scale of the problem is visible in the case of the pipeline running through a few hundred communes/municipalities. In order to avoid these problems it is important to change the rules of issuing individual interpretations. It is important to note the proposals included in the bill of the new tax ordinance (The Bill of the new Tax Ordinance of 6 October 2017). In accordance to them, it is the Director of the National Tax Information who will issue individual interpretations concerning all taxes, including those being local governments' income. This organ, before issuing an interpretation referring to taxes for which the competent organ is the local government tax organ, is obliged to apply for the opinion of this organ, sending it a draft interpretation. The competent local government tax organ, within 14 days of the day of the application, may submit it to the Director of the National Tax Information. No opinion within this time is recognized as the acceptance of the draft individual interpretation. The issued interpretation must include the positions presented by the local government tax organ and its justification.

The bill guarantees the influence of local government bodies on the content of these interpretations through, among other things, securing access to the submitted applications for interpretation, presenting one's own opinion on the case and the obligation of the interpreting organ to refer to the position of the municipal tax organ in the content of the interpretation. Centralized procedures of issuing individual interpretations in tax rights will eliminate the aforesaid problems, even though, there are such opinions, it may be treated as the reduction of the powers of municipal tax authorities. The arguments of the opponents of this procedure are unconvincing, claiming that the Director of the National Tax Information is a state organ and therefore has no competences to issue interpretations on local taxes, especially in reference to the elements of their structure regulated in the local tax law (tax resolutions of commune/municipal concils). The director acts as an organ of the national tax administration supervised by the Minister of Finance. The Minister of Finance is statutorily obliged to, for example, securing the uniform application of the provisions of tax law by tax authorities. This competence of the Minister of Finance concerns all the provisions

of tax law (thus, including the local tax law). This is confirmed in general interpretations issued by the Minister of Finance *ex officio* or on application. The subject of these interpretations is also local taxes.

5 Municipal Tax Authorities and the Clause against Evading Taxation

During the works on reintroduction into the tax ordinance the clause against evading taxation, a great number of controversies were raised by the issue of its application in relation to local taxes and fees. It was not a point, however, if municipal tax authorities should have competences to apply this clause independently and, in effect, issue decisions levelling the effects of artificial actions of the taxpayer, the fundamental aim of which is evading taxation. Since the beginning it has been rightly assumed that the clause may be applied by one organ: first it was the Minister of Finance, and after the reform of the national tax administration, the head of the National Tax Administration (Polish: KAS; hereinafter: the head of KAS). The discussion referred to the question if evading paying local taxes should be eliminated through this instrument. The dominating opinions opted for limiting the application of the clause to income taxes only. They argued that the payer of the property tax cannot escape with their property to a tax paradise or hide it, and thereby the application of the clause to these taxes makes no sense. However, the practice demonstrated, even during this discussion, that it is possible to successfully evade paying the property tax on a big scale as a result of creating artificial agreements between the connected entities. This circumstance was crucial in the decision that the regulations introduced into the ordinance concerning the clause against evading taxation are fully applicable to local taxes, except local fees. Therefore, it was necessary to introduce an appropriate procedure of the clause application by the head of KAS in the cases referring to the taxes feeding local budgets, so as not to infringe the rights of municipal tax authorities. This was successful due to the fact that the head of KAS may, in the case of the taxes which the local tax organ is entitled to asses, may initiate or take over the tax proceedings in order to apply the clause on the application of this organ only. Thus, if the municipal tax organ sees premises for applying the clause against evading taxation,

it should submit an request to the head of KAS as the organ competent to initiate the proceedings with the application of the clause. The procedure ensures a real influence of municipal tax organs on the application of the clause in reference to the taxpayers who evade paying taxes to local budgets (Dowgier, 2015: 7). Problems may emerge when the head of KAS refuses to initiate or take over the proceedings in the case where the clause should be applied. The municipal tax organ has no effective instruments of challenging the decision of the head of KAS concerning initiating or taking over the proceedings. The head of KAS's decision cannot be appealed. Thus, the organ may not take into consideration the requests of communes/municipalities to apply the clause, especially that potential incomes on this account will go to the local budget and the costs connected with the conducted proceedings are financed form the state budget.

Certain drawbacks in the case of local taxes are also in the method of calculating the minimal amount of tax benefit – PLN 100 thousand, which determines the possibility of the application of the clause in the particular case. At the taxation of the property located on the territory of one commune/municipality, the benefits cannot exceed PLN 100 thousand, but if one sums up the benefits gained by the taxpayer on the territories of other communes/municipalities, it may turn out that they reach millions zlotys. In the light of the regulations currently in force a request may be submitted by a municipal tax organ only when in the case the tax benefit gained exceeds PLN 100 thousand. There is no mechanism summing the benefits gained by the taxpayer on the territories of all the municipalities where they have properties. This problem was noticed in the draft of the new tax ordinance. In accordance with the bill, in the case of local taxes, the amount of tax benefits is calculated summing, in the same accounting period, the amount of these benefits regardless of the number of the organs competent in the particular case. However, there may still be a problem with the question who will sum the benefits from particular municipalities/communes. Formally only the head of KAS has such possibilities. However, there are no obstacles for the municipal tax authorities competent for the particular taxpayer, acting in concert, to submit so many requests as not to raise doubts referring to the fulfillment of the requirement of the minimal amount of tax benefit gained by one taxpayer.

The aforementioned problems are of no fundamental significance and one should positively evaluate the procedure introduced into the ordinance of the application of the clause against evading taxation in the cases concerning local taxes. Municipal tax authorities cannot independently apply the clause for objective reasons, but they are entitled to request for its application by the head of KAS in the case of the taxpayers evading paying local taxes.

6 Annual Tax Assessment

The characteristic of the functioning of municipal tax authorities in Poland is issuing and delivering a great number of decisions determining a tax obligation. It is only the delivery of such a decision that results in the obligation. It is very convenient way of creating tax obligations for the taxpayers-natural persons because they receive the decision with the calculated tax (property, agricultural and forest taxes). Natural persons paying these taxes do not have to calculate and declare the amount of the tax, which is sometimes very problematic due to the intricacies of local tax law. However, it is the most expensive mode of creating tax obligations. This is the most visible at the beginning of the year when in a commune/municipality, a few up to a few tens of thousands determining decisions are issued. The costs of a yearly assessment are very high and absorb a great part of the incomes gained from taxes realized through the delivery of the decision. Only the costs of delivery of the decision through post reach PLN 7. The problem is also burdening of the employees of the organ with preparing such a great number of decisions and their sending off the office. Where is this high number of determining decisions from? It results from the rule adopted in the structure of property tax, agricultural tax, forest tax, according to which the tax obligation in relation to natural persons occurs on delivery of the decision. Thus it may cancel the determining decisions and replace them with declarations, where taxpayers calculate the tax themselves and the organ acts only when the declaration is incorrect? Because of the specificity of the taxpayers paying the aforementioned taxes it does not seem possible, especially in reference to the payers of agricultural tax. In my opinion, on the other hand, the number of taxpayers obtaining determining decisions should be definitely reduced. Natural persons with the status of entrepreneurs should declare the amounts of these taxes themselves, without the necessity

of delivering them assessment decisions. Entrepreneurs pay independently (without a decision) much more complicated state taxes (VAT and income) in the form of their own calculation, which is an argument for the same declaration and payment of local taxes.

7 Simplified Procedure

The annual assessment is also connected with the problem of too extended and formalized procedure of realizing local government taxes. Municipal tax authorities must assess and then collect taxes with all formal requirements of the proceedings defined in the Tax Ordinance. This right rule in reference to local taxes entails a great number of negative consequences. One of them is that proceedings concerning millions in taxes are realized in the identical way as in the case of a few tens zlotys. This results in the situation where tax authorities are heavily burdened with petty cases, whereby have less time for the proceedings concerning considerable amounts. Moreover, the already-introduced simplifications in the form of the possibility of delivery of just a determining decision at the so-called annual assessments in the situation where the actual state has not changed or where a decision is to be issued on the basis of the data resultant from the information submitted by the taxpayer, is insufficient. It is necessary to introduce a classical simplified procedure applied at small amounts of the tax or where the actual state raises no doubts (Popławski, 2017: 333). The proposal of introducing such simplified procedures is included in the bill of the new tax ordinance. If there is no need for conducting evidence proceedings or the amount of the tax does not exceed PLN 5,000, the tax organ may, at the party's consent, immediately issue a decision without its justification. The simplification of the procedure will result in swift handling cases, within the time not longer than 14 days. Such a procedure will definitely facilitate and accelerate most of the proceedings conducted by municipal tax authorities, which will also be beneficial for taxpayers.

8 Costs of Communication with the Taxpayer

One of the major problems connected with the annual assessment is the question of the effective delivery of thousands determining decisions to taxpayers. Owing to the fact that in the regulations currently in force there is no taxpayer's obligation of reporting the change of address to the tax

organ (in the period beyond tax proceedings), the delivery of decisions very often cause a great number of difficulties and is expensive. Taxpayers (their proxies) take advantage of the loopholes in legal regulations referring to deliveries in order to evade paying taxes. The lack of an effective delivery of the determining decision results in the lack of obligation and the interest for late payment is not calculated. In this situation the necessity of delivering such a huge amount of decisions within a short time (January–February) by all means justifies the proposal of introducing into the tax ordinance more effective procedures of communication with the taxpayer. These problems were noted in the bill of the new tax ordinance. In the opinion of the Codification Commission of the General Tax Law (KKOPP), it is important to introduce a cheap and effective way of communication with the taxpayer and their representative. The bill proposes extending the possibilities of delivery through the means of electronic communication. The correspondence in this form will be possible to deliver not only to professional proxies and public entities but also entrepreneurs (except those taxed in the form of the tax card and the lump sum tax on registered incomes, unless they provide their electronic address) as well as the users of ICT systems (e-PUAP and the tax portal). Additionally, it is proposed that the data provided in the register report and stored in the Central Register of Entities of the National Register of Taxpayers (CRP) were the basis for determining the address of residence and the address of the business for the purpose of correspondence delivery. The possibility of effective delivery to the address provided in the register will increase the effectiveness of deliveries and will reduce the costs thereof. Taxpayers who failed to provide the address in CRP, the correspondence will be delivered in accordance to general rules.

9 Conclusion

In conclusion, it is important to state that previous experiences connected with the work of municipal tax authorities confirm the assumption adopted in 1990, that the commune/municipality should have its own bodies collecting its tax incomes. The proposals of transferring all taxes being incomes of local budgets to the competence municipal tax authorities are well-grounded.

No objections are raised by the two-instance system of local tax authorities, where in the first instance competent is wójt, mayor, president, and in the second instance the local government appeal college. Communes/municipalities, as legal persons obtaining incomes from local taxes should have a possibility to challenge the decisions of the colleges before the court. In this way they would have an opportunity to question decisions resulting in huge losses in tax incomes. This would also eliminate the problem of inaction and chronicity in proceedings conducted by local government appeal colleges.

Issuing individual interpretations of the provisions of local tax law should be centralized. Such interpretations should be issued by one organ: the director of the National Tax Information. Communes/municipalities should have an influence on the mode of issuing and content of these interpretations.

It is good that the clause against evading taxation may be applied in reference to local taxes. Municipal tax authorities may request for the application of this clause to the head of KAS when the taxpayer evades paying taxes being incomes of local budgets.

The number of decisions issued by municipal tax authorities within the framework of the annual tax assessment should be considerably reduced. Natural persons who are entrepreneurs should calculate and declare local taxes themselves. The communication of the tax organ with this group of taxpayers should be based on modern electronic devices.

We should also introduce simplified procedures of realization of obligations of relatively small amounts or where the actual state does not raise doubts. This will reduce the costs and accelerate the handling of tax cases.

The implementation of the aforementioned proposals would certainly contribute to increasing the effectiveness of municipal tax authorities. Their nature indicates that we should perfect the current model of these organs. There are no well-grounded premises for introducing any revolutionary changes therein.

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FUNCTIONAL ASPECTS OF THE LEGAL STRUCTURE OF TAX ON MEANS OF TRANSPORT IN THE POLISH SYSTEM OF PUBLIC LEVIES

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Abstract

This contribution deals with functional aspects of the legal structure of tax on means of transport in the Polish system of public levies. The main aim of the contribution is to confirm the hypothesis that taxes have a broader use in the light state economics and behaviour of various entities. The author used in this study, in particular, legal-dogmatic, functional and historical research methods.

Keywords: Tax; Local Tax; Public Levy.

JEL Classification: K34.

1 Introduction

Tax on means of transport is a public levy related to ownership and use of specified means of transport. The nature of those means endows the public levy with the features of a revenue type of a burden and determines its income function. The function of a public levy is related to its effect. The public levy functions are the objectively observable consequences of its establishment, assessment and collection. The effects of the public levies imposition, assessment and collection can be subjected to empirical cognition. They can be assessed as intended or undesirable. The effect in relation to function appears to be a static concept. Obtaining typical and repeatable effects of public levies provides the basis for determining their function.

Public levies perform fiscal and non-fiscal functions. Providing budget revenues is the primary purpose for their imposition and collection by the public

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law association (the state or the local government authority). Imposition of public levies usually induces various effects. Regardless of whether the public law entity acts consciously or not, some non-fiscal effects related to the imposition of public levies will always take place, but at the same time their imposition solely for the execution of non-fiscal objectives is somewhat hard to conceive.

Being aware of the fact that the principle function of public levies is their income function (even though the proceeds from various public levies are different and include, among others, public fees, which do not play a leading role in the structure of public levies, and it is even one of minor sources in terms of financial significance), it should be also acknowledged that using them in the Polish system of public levies is justified by non-fiscal objectives. At the same time, it is worth formulating here the postulate of a broader than before use of all types of public levies present in the system of budget revenues in order for them to affect the economic processes and attitudes of entities to which they relate (Łączkowski, 2005: 232).

Therefore, it is worth adding that non-fiscal functions of public levies are to affect the situation of the entity obliged to pay the levy. Public levies play the role of an instrument affecting specified entities. The influence of the state through the public levies may have a diversified character and scope. Public levies have an intervening function, and as a result may have a positive, stimulating or negative, inhibiting impact on specific situations or entities' actions. Such functions of the public levy can be therefore divided into having tax negative and positive impact. Negative impact, justified by the public interest, involves the limiting, among others, by the amount of the public levy, the availability of benefits burdened with the levy.

This function of the public levy (prohibitory) remains, however, under the influence of the general formula that the amount of public levies cannot be the reason for excessive and unjustified limitation of the availability of official procedures or benefits of the public law body, to which they are related. Public levies related to the official operations of public bodies have sometimes the objective of inhibiting, when it comes to counteracting the absorbing of such bodies' attention with unnecessary or excessively burdensome activity. The inhibiting function of the public levy is usually not their

primary or single objective, because those levies implement, first of all, the fiscal objective, and thus are mainly treated as the source of public revenues.

The positive impact of public levies can be associated with the creation of benefits for entities paying the levy, which in exchange for the decrease of their monetary resources have received a specified personal benefit or right. The manifestations of the implementation of these actions are varied. By applying an appropriate structure of public levies, the state can steer the activities and behaviours of specific entities in various directions desired by itself and implement varied functions of public levies.

It is worth distinguishing the objectives of public functions from their functions, the latter are situated in the subjective plane; they are determined by aspirations and expectations. The objective of public levies is to achieve the effects designed and submitted by the public-law entities that set the objective. An objective is always in its essence intended.

2 The Legal Structure of Tax on Means of Transport

Against this background, it can be notice that burdening means of transport with public levies is not a new solution in the Polish system of public revenues. It was present in the interwar and post-war periods. Is also present contemporarily. In that period, not only the name of the public-law levy has changed (fee on means of transport, registration fee, road tax, tax on means of transport), but also its subjective scope, which is decisive when it comes to its nature and the scope of levy income function. Until 1998 (Act on Financing Public Roads) the tax on means of transport involved, among others, passenger cars, mopeds, yachts equipped with engines or motor boats, which endowed that public levy with clear signs of consumption tax.

It is worth mentioning that in the interwar Poland the construction and maintenance of public roads was financed both from the state, as well as municipal revenues. In some part those costs were transferred to road users, owners and possessors of means of transport (Act on the State Road). However, the issue that was already noticed at that time, was in what part and in what way should the users of public roads participate in such costs. The answer to this question determined the scope of income function of the tax (fee) on means of transport.

In the interwar Poland, the object of fee on means of transport was the possession of motor vehicles, lorries, motorcycles (with or without a trailer), carriage of cargo and persons by mechanical or horse-drawn vehicles, and also the transport of cargo or persons, as well as unladen journeys, made with vehicles registered abroad, and temporarily introduced to road traffic in the territory of Poland (The Regulation of the Minister of Communication and Treasury issued in agreement with the Minister of Internal Affairs on the implementation of the Act on the State Road Fund and Regulation of the Council of Ministers on the change of fees on motor vehicles and some horse-drawn vehicles to the benefit of the State Road Fund).

This fee realized the income function as a result of combining its amount with the vehicle's weight, load capacity and number of passenger seats in such a way that a higher vehicle weight was the basis for collecting a higher fee (e.g. passenger motor vehicles except for motorcycles were charged with a fee in the amount of PLN 15 for every 100 kg of vehicles own weight, and lorries and tractors – PLN 20 for every 100 kg of own weight). The amount of fee for motor vehicles used for commercial transport of persons (beyond the territory of a single commune) was dependent on the number of passenger seats in the vehicle, and moreover on the daily mileage. Load capacity as the basis for assessment of fee on means of transport was applied in case of collection of fee for horse-drawn vehicles used for commercial carriage of goods.

However, the fee on means of transport raised doubts already at that time, both in terms of its structure, as well as the financial efficiency, thus the degree of realization of its income function (see shorthand report from the 7th sitting of the Sejm of the Republic of Poland of 26–27 January 1931, column 186 and the following; the shorthand report from the 96th sitting of the Sejm of the Republic of Poland of 15 March 1933, column 31 and the following; the shorthand report from the 130th sitting of the Sejm of the Republic of Poland of 7 February 1935, column 35 et seq.). The negligibly small efficiency of the income function of fee on means of transport was particularly associated with the lack of realism in planning and exclusion of relationships taking place between the fee's structure and its impact on the scope of the burdened subject. Because the collection of fee

on means of transport resulted in numerous cases of vehicles withdrawal from use and thus avoidance of financial burden connected to it (the shorthand report from the 96th sitting of the Sejm of the Republic of Poland of 15 March 1933, column 32 and the following). It was noticed that the principle of imposing fees on owners of motor vehicles depending on the vehicles' weight or number of seats, for example, for passengers, did not reflect the intended diversification of fees amounts with reference to the degree of road use. The concept of collecting fee (tax) from road users included in the price of fuels (petrol, oils, etc.) to some degree was used to eliminate those doubts. Its justification could have been seen in the fact that the intensity of road use is better certified by the quantity of consumed fuel than the vehicle's weight. However, the concept was not transformed into a particular legal solution at that time. The goal was effectively returned to at the end of the 90's of the 20th century.

In the post-war Poland (Decree on some taxes and local fees) as amended. The latter was repealed by the act of 14 March 1985 on taxes and local fees (Dziennik Ustaw no. 12, item 50) as amended, which was repealed by the current act of 12 January 1991 on taxes and local fees (consolidated text: Dziennik Ustaw of 2017, item 1785) as amended) the fee on means of transport was extended to the possession by natural and legal persons of motor vehicles, trailers, trolleybuses, yachts, ferries, boats, trolleys with auxiliary motors and mopeds with engine cylinder capacity up to 50 cm3, transport bike trailers and horses, and also transport of cargo and persons and unladed journeys, made with lorries and buses (with or without trailers) registered abroad, and temporarily introduced to road traffic in the territory of Poland. In 1967 the possession of cars, trailers and trolleybuses was excluded from the fee on means of transport and covered with the registration fee. Since 1986 the financial burden imposed on means of transport has been called the road tax (Act on local taxes and fees), and since 1991 – tax on means of transport, which currently covers with its scope, first of all, trucks of maximum permissible weight of 3.5 tones. Secondly – truck-tractors and ballast tractors adapted for the use with a semi-trailer or trailer with a maximum permissible laden weight of a vehicle combination from 3.5 tones. Thirdly – trailers and semi-trailers which together with a motor

vehicle have a maximum permissible laden weight from 7 tones, excluding those that are used solely in connection with agricultural activities carried out by an agricultural tax payer. Fourthly – buses (Etel, Presnarowicz, 2002: 28–29; Smoleń, 2005: 323).

The tax obligation in terms of tax on means of transport lies on natural and legal persons, who are the owners of such means. The organizational units that do not have a legal personality and for which the means of transport has been registered is treated equally as the owner, which points to some kind of a legal fiction (Hanusz, Czerski, 2002: 99). If means of transport constitute a co-ownership of two or more natural or legal persons, the tax obligation in the scope of the mentioned tax covers jointly all co-owners. In case of change of ownership of a registered mean of transport, the tax obligation lies on the previous owner until the end of the month in which the transfer of vehicle ownership occurred.

Tax on means of transport plays in fact solely an income function by providing the budget fund with monetary means. This function stems from the structure of the subject, and especially from the structure of the amount of the levy. The rates of tax on means of transport are diversified depending on the type of means of transport (lorries, tractors, buses, etc.). They are determined by the municipal councils within the statutory boundaries and, for example, they cannot (annually) exceed: for lorries with a maximum permissible total laden weight above 3.5 tones to 5.5 tones – PLN 676.2, above 5.5 tones to 9 tones – PLN 1103.81, and above 9 tones – PLN 1324; for truck-tractors or ballast tractors with a maximum permissible total laden weight of vehicle combination up to or equal 36 tones – PLN 1819.56, above 36 tones – PLN 2354.12; for buses with less than 22 passenger seats – PLN 1918.5 and with number of seats equal or higher than 22 – PLN 2425.51. Additional criteria (not always practically determinable (Etel, 2002: 44–48) that can be applied here are, therefore, permissible total vehicle laden weight, number of axles and suspension type (lorries), permissible total laden weight of a combination of vehicles, number of axles and suspension type (truck-tractors or ballast tractors, trailers and semi-trailers), number of passenger seats.

It is worth making two points against that background. First of all – the structure of tax on means of transport allows to capture the external features of the profitability (real or estimated) of the means of transport. Second of all – this tax rates' structure (higher for vehicles with higher weight) takes account of their nuisance to the environment, fulfilling similar functions as road fees (Act on public roads). The latter are collected, for example, for parking motor vehicles on public roads in paid parking zones, in a designated place, in specified working days, and in specified hours or 24 hours a day. It can be added that paid parking zones are designated in areas characterized by significant shortage of parking spaces (e.g. historic city centers), if this is justified by the traffic organization requirements. The assumption behind this solution is to increase the rotation of parking motor vehicles. It is also the expression of the local transport policy intended, in particular, to limit the availability of a given area to motor vehicles or introduce the preference for public transport. The road fees shaped in that way reveal their prohibitive function, which is, however, a side function in relation to the primary one, which is the income function. The latter is especially visible in the method of binding the amount of fee with the place (higher fee in the city center than on the peripheries) and the time (progressive rates during the first three hours) of vehicle parking.

It is worth mentioning here that in the years 1968–1983 the collection of fees on means of transport was abandoned (The Ordinance of the Minister of Finances on the abandonment of the establishing of tax obligations in the scope of fee on means on transport for motor vehicles), and cars, trailers and trolleybuses were subjected to registration fee (Regulation of the Minister of Communication and Internal Affairs of 20 July 1968 on the traffic on public roads), the Ordinance of the Minister of Communication of 31 March 1969 on registration fees of motor vehicles and trailers and trolleybuses was issued subsequently repealed by the Ordinance of the Minister of Communication of 26 June 1971 on registration fees of motor vehicles, trailers and trolleybuses as amended). Determination of the subject of the fee, and also the method of diversifying its rates, indicated that the fee realized also the income function. The registration fee was collected on vehicles with engines fueled with gasoline, gas etc., with the exception

of diesel oil and also on trailers (semi-trailers) belonging to natural persons and to non-socialized economy units [TN: refers to non-state economic entities during the times of Polish People's Republic]. The amount of fee rates was dependent on the type of motor vehicle (other rates were foreseen for motorcycles, other – for passenger cars, lorries, truck-tractors and ballast tractors, buses, trailers), engine cylinder capacity (higher engine cylinder capacity involved appropriately higher registration fee rates), number of passenger seats (e.g. on a bus) and vehicle load capacity (e.g. a lorry). The relationships that occurred between the number of passenger seats on a bus, the load capacity of a lorry, the engine cylinder capacity or eventually the type of e motor vehicle, and the amount of registration fee rates were in essence the same as the ones that occurred in the fee on means of transport.

It can be added that the registration fee on motor vehicles was also collected from public entities (state administration units, state institutions, socialized economy units, political and social organizations) (see Cz. Kończał, 1973). The scope of income function of the registration fee collected from those entities was, however, narrower than that of a fee collected from non-public entities (natural persons and non-socialized economy units), for which there were two causes. First of all – the application of lower rates for that fee and their smaller diversification, second of all – assuming the principle of collecting the fee only at the first registration of the vehicle (with subsequent ones – if this involved issuing new license plates), and not – annually, as was the case with the non-public entities.

The analysis of the fee on means of transport function draws attention to the issue of the relation of public levy and tax. The determination of the objective of allocation of proceeds from fees on means of transport had in the interwar period the character of a legal association of that income with the objective (road construction and their maintenance). The determination of the objective of allocation of proceeds from the fee could have meant its direct equivalence, but the association of the public levy with the objective, for which it is collected, was, as we know, also applied in tax structures. The tax on means of transportation currently applicable in the Polish system of local government income does not have such a character. Therefore,

it seems in that case more appropriate to collect tax rather than fees, because the tax that is an element of the fuel price will usually affect more those users who use the road more often. The fee on means of transport (registration fee) may also be in fact diversified with regard to its amount, but the basis for its diversification was completely different – the type of motor vehicle, engine cylinder capacity, motor vehicle load capacity – therefore, it did not cause such significant differences in the amount of financial burden, as are caused by the road tax that constitutes an element of the fuel price. The burden with this tax increases with the increase in fuel consumption, thus, indirectly with the user's exploitation of roads.

Earmarked levies were also present in the post-war budgetary economy, especially when this economy had a strictly centralized nature and there were no funds in it yet. At that time, the establishment of earmarked levies could have been perceived as the mechanism that opened the way for local funds. Among others, the tourist tax, which is one of the sources of creating the municipal fund, had such a nature (Act on municipal fund). Creating legal provisions that constitute the basis for distinguishing funds within the framework of local budgets led to the liquidation of this type of income. Their role was taken over by designated subsidies.

However, the use of appropriated taxes (fees) in the system of public levies has long been criticized "… *appropriated taxes that create special privileges for certain state purposes are an anachronism that can be applied for some side reasons.*"(Grodyński, 1932: 164), although contemporarily it is a solution that is (sometimes) utilized.

3 Conclusion

Against the background of those issues concerning tax (fees) on means of transport presented in normative and functional terms – historically and in the light of the applicable law – several more general reflections can be formulated.

Taxes (public fees) are the traditionally utilized instrument for implementation of the levy policy. Public law association (the state or local government authority) uses taxes (public fees) as the dominative forms of public

revenues in order to achieve various objectives, and to implement a specified objective it uses various taxes (public fees).

The scope of functions realized by the public levies in the system of public revenues and the effectiveness of their impact through those functions are varied. The effectiveness of impact of public law association with the help of public levies on the decisions (behaviours, attitudes) of entities that are burdened with them is greater, for example, when it introduces public fee in the place of tax. Although this type of solutions cannot be denied fairness, especially when it comes to realization of public fees functions, however, it should be remembered that extending the public fees to an increasing number of entities that qualify rather for a tax burden results in the extension of the "tax" part of such fees.

The completion of this task is facilitated by the utilization of the psychological impact of the name of the public levy. It must be stated that this function of public levy has an important, although little appreciated, significance. When introducing new structures of public fees or making changes in the already existing structures, therefore, influencing the public fees entities in the specified direction, the state or the local government authority should consider also their reactions, thus their attitudes towards the imposed tax obligation. The importance of the psychological factor, under the influence of which, to a certain degree, the public fees remain, is quite crucial, because according to the public opinion they seem (often illusively) a lesser financial burden than tax.

The advantage of fees in relation to other public levies is also their uncomplicated legal structure. The necessity to pay a public fee may, therefore, evoke lesser resistance of entities obliged to pay it. The utilization of the public levy name impact on the psychology of entity burdened with it, sometimes constitutes the mean for conflict-free achievement of levy policy objectives and therefore it is difficult not to appreciate it. Application of taxes under the name of public levies, and also fees that are partially fees and partially taxes, allows for fuller realization of public fees functions, and therefore can constitute basis for criticism and postulates of complete elimination of this type of solutions. In the Polish system of public levies it is justified to collect many already used taxes in the form of public fee; with time,

it will be advisable to introduce other types of taxes in that form, referring to various factual states and economic phenomena (which cannot be said, however, about the recently introduced fee on dog possession). Bearing this in mind, it should be remembered that designing the system of public levies with an excessive use of the "fee" name impact, therefore, with the application of bigger number of public fees that have in fact more features of a tax, may result in the neutralization of the psychological attitude of the entities towards the public fees, and therefore, decrease the effectiveness of impact through fees on the attitudes of entities burdened with them.

In this context it is worth recalling that in the Polish system of public fees there are fees understood in their classical sense, and thus, as payable levies and fees that are fees only by name, and are in fact taxes. Separating taxes from fees was for years a secondary issue in relation to, for example, the desire to create legal and financial incentives for the development of some sector of economy (e.g. craft service and production activities). From the point of view of the hierarchy of set objectives, the rightness of such attitudes cannot be negated. Substituting taxes with a public fee became, at a certain time, a phenomenon so highly characteristic of the Polish system of public levies that they could have been considered as one of the features of the system. As a result of extending the scope of the subject of public fee, gradually the difference between taxes and public fees faded. More and more, the public fee has ceased to be a form of public levy, with which the payability feature was associated, and has become a less severe and less technically complicated tax.

When it comes to the issue of separating taxes from public fees, it should be acknowledged that it constitutes practically a secondary issue with reference to the primary one, which is utilizing the instrumental character of various dominative forms of public revenues. Utilizing taxes under the name of public fees – and also fees that are partially public fees and partially taxes – aids sometimes the performance of the primary (fiscal) objective of those levies; it aids also the realization of derivative functions of public levies. Therefore, it is impossible to advocate absolutely the elimination of tax features from public fees and draw a sharp dividing line between them.

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PROPERTY TAX EXEMPTION OF MONUMENTS: HOW THE CONDITIONAL EXEMPTION TAX SCHEME WORKS IN POLAND AND WHAT MAY QUALIFY FOR EXEMPTION

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Abstract

Protection of cultural heritage (monuments, historic sites, archaeological finds) is an essential obligation of states, local governments and all citizens. Cultural and creative industries are a vital asset for regional economic competitiveness and attractiveness, while cultural heritage is a key element of the image and identity of cities and regions and oftentimes the focus of city tourism. Therefore all legislative measures devoted to protection and preservation of cultural heritage are highly desirable and wide accepted in EU policy. An example to illustrate this approach is property tax exemption of monuments in Poland despite the property tax is a major source of local budget revenue.

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The article addresses the issue of property tax exemption of monuments. Its main objective is the analysis of conditions for such exemption in the Polish legal order – in the light of administrative courts' judicial practice and the views of the legal doctrine. The authors focus on that condition from among the others that in practice raises biggest doubts, and that is the problem of proper maintenance and restoration of a monument. It is mainly the consequence of the fact that in order to ascertain whether the exemption is eligible, the analysis of the provisions of act on local taxes and fees is not sufficient, but it is also necessary to consider the regulations concerning the issues of monuments care and protection.

Keywords: Tax Law; Property Tax; Taxation of Monuments; Protection of Cultural Heritage.

JEL Classification: K34 (Tax Law).

1 Introduction

The subject matter of the property tax, regulated in the Polish tax system by the Act of 12 January 1991 on local taxes and fees (i.e. Dziennik Ustaw of 2017, item 1785 as amended), hereafter referred to as the a.l.t.f., is limited by legislator's introduction of many tax exclusions and exemptions (Hanusz, 2006: 26). In general, as a result of tax exemption applied in the tax structure, despite the existence of tax obligation, no tax liability arises – thus, the legislator resigns from tax assessment in relation to the determined actual and legal conditions.

Among the statutory catalogue of property tax exemptions regulated in Art. 7 a.l.t.f. the Polish legislator included the tax advantage, which encompasses the lands and buildings individually entered into the register of monuments. On the basis of Art. 7 para. 1 subpara. 6, the lands and buildings entered individually into the register of monuments are exempted from tax, provided they are maintained and restored in accordance with the laws on monuments protection, excluding those occupied for the purposes of conducting business activity. This exemption is characterized by the fact that when all the conditions specified in the provisions of the act are met, the exemption can be applied without any decisions, thus, without any individual decisions issued in that scope by the commune tax authority (Dowgier, 2018: 1).

The tax exemption specified in Art. 7 para. 1 subpara. 6 of a.l.t.f. is to, among others, compensate the historic property owner's specific obligations and limitations regarding the use of the property, which decreases the business possibilities of the property use and therefore deriving profits from its ownership. The historic property owner is subject to various limitations in the scope of exercising their rights resulting from their ownership rights, including the use of such property, and has various obligations in the scope of the monument care (Zeidler, 2016: 535). Such limitations and obligations result especially from the provisions of the Act of 23 July 2003 on the protection and care of monuments (i.e. Dziennik Ustaw of 2017, item 2187 as amended), hereafter referred to as a.p.c.m. They are significantly greater than the limitations and obligations of owners of properties that have no historic character and resulting, mainly, from the provisions of the Civil Code, but also other laws. The fact that a property was acknowledged in the light of the applicable law as a monument and covered by legal protection, results in its specific legal order.

In accordance with the literal wording of the Art. 7 para. 1 subpara. 6 a.l.t.f. such exemption encompasses only the historic buildings (palaces, castles, tenements) and lands (gardens, squares, alleys), and does not included the historic facilities (bridges, viaducts, ramparts, fortifications, etc.), regardless whether they are entered into the register of monuments (Wołowiec, 2014: 38). The doctrine explains this by saying that facilities are usually used for conducting a business activity (Hanusz, 2006: 30). Nevertheless, it is justified to postulate the extension of exemption to all objects of taxation – not only the ones individually entered into the register of historic lands and buildings, but also facilities – with the exclusion of those occupied for the purposes of conducting business activity (Etel, Dowgier, 2013: 126–127). Under the current state of law the facilities are taxed, essentially, only at the entrepreneurs', which is also a misguided solution.

The structure of property tax monuments exemption is relatively simple and its use in practice should not pose major problems. However, granting such exemption poses some difficulties for the employees of local tax authorities, as well as the taxpayers themselves. Among the conditions for granting the exemption, the biggest doubts are raised by the issue of proper monument

maintenance and restoration. And that is mainly the consequence of the fact that in order to ascertain whether the exemption is eligible, the analysis of the provisions of act on local taxes and fees is not sufficient, but it is also necessary to consider the regulations concerning the issues of monuments care and protection.

2 Statutory Conditions for Property Tax Exemption of Monuments

In accordance with the view commonly accepted, both in the doctrine, as well as in the judicial practice, tax exemptions constitute a deviation from the principle of taxation equity and universality (the Polish Constitutional Tribunal ruling no. TK: K 1/94). This determines essentially the way the laws regulating that element of normative structure of each tax are interpreted. Thus, the interpretation of those tax advantages should be based, first of all, on the literal wording of the laws, and only alternatively, other methods of statutory interpretation can be applied – systemic interpretation or interpretation of intent, with significant limitation of the extensive interpretation directives (*interpretatio extensiva*). In that context it is extremely important to accurately and correctly read the provisions of tax acts, in which the tax exemptions are established.

The analysed tax exemption from Art. 7 para. 1 subpara. 6 of Act on local taxes and fees has a statutory and objective nature[3]. The exemption is eligible on the basis of the tax act itself, thus, no administrative decision in that scope is necessary. Moreover, the fulfilling of statutory conditions for exemption does not have to result from the actions of the taxpayers themselves. The exemption concerns specified objects of taxation (lands, buildings), regardless of their possessor. In the economic sense, the taxpayer who will always benefit from the exemption, does not have to be necessarily the same as the subject actually using the facilities and lands (Dowgier, 2018). It should be underlined here that such exemption can be applied, for obvious reasons,

3 Such objective exemptions are introduced by the legislator due to purpose or method of application of the property. In case of objective exemptions, the principle is that the tax preference is used by the object of taxation itself, regardless of who actually possesses it. Tax exemption, in turn, cause specified objects to shift outside the scope of taxation, due to certain features of its owners or the entities in possession of the property.

only with regard to such lands that are not subject to property tax, and therefore have an appropriate marking in the land register (Dowgier, 2005: 2)[4].

The possibility of covering land or a building with a tax exemption is dependent only on the fulfilment of three, previously mentioned, conditions. Conditions for property tax exemption regulated in Art. 7 para. 1 subpara. 6 a.l.t.f. are, namely, the following:

- entering the property individually into the register of monuments;
- maintenance and restoration in accordance with the monuments protection laws;
- properties are not occupied for the purposes of conducting business activity.

The first two of the indicated conditions of the discussed tax exemption are positive conditions, that means their presence conditions the obtaining of the right to exemption. However, the third one is a negative condition – its presence conditions the exclusion from the tax exemption.

The analysed tax exemption is, therefore, dependent, among others, on the presence of the condition of the appropriate maintenance of the monument, the determination of which allows the tax authority to refrain from fiscal burdening of the monument owner in terms of property tax.

3 Individual entry to the register of monuments as the condition for tax exemption

The object, scope and forms of monuments protection and care, the principles of establishing a national monuments protection and care program and financing of maintenance, restoration and civil works at monuments, and also the organization of monuments protection bodies, and a series of other detailed issues, are determined in the act on the protection and care of monuments.

In accordance with Art. 3 subpara. 1 a.p.c.m., the monument is an immovable or movable good, their parts or assemblies, which are a work of man or are related to their activity and constitute the testimony of the bygone era

[4] In accordance with Art. 2 para. 2 of act on local taxes and fees, cultivated lands or forests are not subject to property tax, excluding those occupied for the purpose of conducting business activity.

or event, the maintenance of which is in the public interest, due to their historical, artistic or scientific value. Property tax exemption relates to immovable monuments, which are – under Art. 3 subpara. 2 of a.p.c.m. – immovables, their parts or assemblies, of which is said in subpara. 1 of that article. It can be surely stated that one of the most problematic issues in the monuments protection law is the definition of the monument itself. Because it refers to assessment criteria and non-systemic criteria, i.e. in the thinking process that is to lead to the conclusion that a given object is or is not a monument, one must go beyond the legal system to a system of assessments and values other than law. It is the reference that constitutes part of the definition that introduces the necessity to value, i.e. find within the object an appropriate intensity of historical and/or artistic and/or scientific values. What is more, it is necessary to indicate the public interest in the protection of such an object. The mere statement that it is the testimony of the bygone era – which is itself an indefinite and evaluative element of the provision – and the work of man or related to their activity, is not enough to consider such an object a monument.

However, in case of the condition indicated in Art. 7 para. 1 subpara. 6 of a.l.t.f., the problem of the definition of monument or recognition as a monument, is not that important, because it remains at the discretion of the monuments protection body. The monument is entered into the register of monuments on the basis of an administrative decision issued by the voivodship monuments conservator, who is at the same time responsible for keeping the register. Thus, both the monuments owner or possessor, payer, as well as the tax authority – have no problem with determining whether the condition is fulfilled.

The register of monuments is the main form of monuments protection, which provides the most comprehensive and far-reaching protection – with regard to legal, as well as factual consequences. Pursuant to Art. 9 para. 1 of a.p.c.cm., the voivodship monuments conservator enters to the immovable monuments ex officio or at the request of the moveable monument's owner or the perpetual lessee of land on which the immovable monuments is located. Therefore, the initiative of fulfilling the first of the conditions is eligible also to the immoveable monument owner. Pursuant

to Art. 9 para. 4 and 5 of a.p.c.m., the entry of immoveable monument into the register is disclosed in the land and mortgage register of a given property, and the decision constitutes an additional basis for the entry into the cadastre.

In literature it is indicated that the literal wording of Art. 7 para. 1 subpara. 6 of a.l.t.f., clearly indicates that the condition for applying such an exemption is that the land and building were separately entered into the register of monuments. Because these constitute separate objects of taxation (Pahl, 2009: 31; Radzikowski, 2010: 15). From the judicial practice it follows that an individual entry of buildings that constitute a separate object of taxation into the register of monuments cannot be considered a basis for extending the exemption also to the lands occupied by those buildings. Therefore, if only the building is entered into the register of monuments, then the land occupied by them does not benefit from the property tax exemption (NSA: II FSK 450/09; Pahl, 2010: 66).

4 Controversies around the Condition of "Maintenance and Restoration in Accordance with the Monuments Protection Laws"

The requirement for tax exemption in the form of maintenance and restoration of an immoveable monument is of absolute and complete nature, and is not subject to gradation (the ruling of the Voivodship Administrative Court (WSA) in Wrocław: I SA/Wr 580/16). In practice, the controversies and interpretative disputes are raised by the wording "under the condition of maintaining and restoring them [the monuments] in accordance with the monuments protection laws". The loss of exemption described in Art. 7 para. 1 subpara. 6 of a.l.t.f. occurs when the property entered into the register of monuments is not maintained and restored in accordance with the provisions of monuments protection.

Observing the obligation to maintain and restore the monuments in accordance with the regulations on the protection and care of monuments will be included in the statutory concept of monuments care, i.e. will involve, generally speaking, the use of monument in the way ensuring permanent preservation of its value and popularization and dissemination of knowledge

about the monument and its significance in historical and cultural terms, though not only. Because, pursuant to Art. 5 of a.p.c.m., the care over the monument executed by its owner or possessor involves, in particular, fulfilling the following conditions:

- scientific research and documentation of the monument;
- performing maintenance, restoration and civil works at the monument;
- protection and preservation of the monuments and its surroundings in the best possible condition;
- use of monument in a way allowing the permanent preservation of its value;
- popularization and dissemination of knowledge about the monument and its significance in historical and cultural terms.

However, what is problematic is the open catalogue of actions that make up the monuments care – which is directly indicated by the legislator using the wording "in particular" – which means "above all, but not only". In the context of considerations contained in this document, a question arises what kind of intensity of care will be required, in order to consider the condition of maintenance and restoration in accordance with the provisions on monuments protection fulfilled. In case of some monuments, the fulfilment of all conditions enumerated in Art. 5 of a.p.c.m. will not be necessary, and it may often be possible that in case of other monuments, actions that go further than what is listed by the legislator will be necessary.

Further specification of obligations resulting from the act, the fulfilment of which will condition the acknowledgement of "maintaining and restoring in accordance with the provisions on monuments protection" can be found in chapter 3 of a.p.c.m. A series of other detailed provisions scattered in various places of the act should be added here. In most general terms – the provisions on monuments protection should be treated *en block*, and the highly individual character of each monument shall require an equally individualized approach and assessment of the fulfilment of the condition for tax exemption specified herein.

However, what is exceptionally important, conditioning the application of exemption under the condition of maintenance and restoration in accordance with the provisions on the protection of monuments, the legislator

did not indicate who and in what way is to verify the fulfilment of such condition. Still, if the maintenance and restoration of facilities is to fulfil the requirements of the provisions on the protection of monuments, this indicates the necessity to conduct such verification also in accordance with the act on the protection and care of monuments. There are also some inconsistencies in that scope regarding the provisions of the act on local taxes and fees and the act on protection and care of monuments, in terms of documentation of tax exemption condition (Babiarz, 2016).

In accordance with the previous respective jurisdiction approach, tax authorities are not entitled to conduct proceedings regarding the observance and application of provisions on the protection and care of monuments by the taxpayer (WSA in Kraków: I SA/Kr 1034/16; NSA: II FSK 2487/14). It is rightly pointed out that the tax authority is not competent to determine whether a given property is maintained and restored in accordance with the provisions of the act on protection and care of monuments. Therefore, the tax authority should in that scope base its judgement on the assessment of another body, competent to resolve such issues.

The view that the voivodship monuments conservator is the public administration body appointed to decide whether a building individually entered into the register of monuments is maintained in accordance with the provisions of the act on the protection of monuments has already found expression in the administrative and judicial practice. The Supreme Administrative Court in particular expressed its opinion in favour of this view in the ruling of 13 October 2016. (NSA: II FSK 2487/14), and also the ruling of 6 December 2016 (NSA: II FSK 2014/16).

In the opinion of the courts, in case of doubts, the commune tax authority should request the opinion of the voivodship monuments conservator. Nevertheless, the acts of law do not impose on the tax authority the obligation to request such opinion from a relevant voivodship monuments conservator pursuant to Art. 209 of the Act 29 August 1997 – Tax ordinance (i.e. Dziennik Ustaw of 2017, item 201, as amended) – on the decision undertaken by another body in the mode of cooperation between public administration bodies when issuing tax decisions. In that scope it is sufficient, for example, to provide the certificate obtained from the conservator

on the request of the taxpayer or the tax authority (WSA in Kraków: I SA/Kr 1257/16). Issuing certificates in cases specified in the act on protection and care of monuments and other provisions – on the basis of Art. 91 para. 4 subpara. 4 of a.p.c.m. – is part of the tasks of the voivodship monuments conservator.

However, it should be underlined that lack of such a certificate excludes the possibility for the tax authority to conduct such proceedings leading to the confirmation of the existence of the tax exemption condition (NSA: II FSK 1884/15). However, a doubt may arise here whether the content of Art. 7 para. 1 subpara. 6 of a.l.t.f. is a sufficient basis for Voivodship Monuments Conservator to issue, in accordance with the competence, a certificate in the matter specified in the separate provisions such as tax laws. If the interpretation of intent is assumed, this statement can be confirmed.

5 Occupying the Monument for the Purposes of Conducting a Business Activity – the Negative Condition that Excludes the Tax Exemption

Exempting a historic property from property tax does not involve buildings and lands occupied for the purpose of conducting a business activity, so, for example, functioning as hotels, restaurants, etc. Thus, the taxpayers who use buildings and lands of historical value to conduct their business activity in order to gain income (revenues) are subject to taxation. Therefore, making the building available to visitors for money excludes the possibility of applying the property tax exemption (Radzikowski, 2010).

The land or building will be occupied for the purpose of conducting a business activity, if the entrepreneur actually conducts activities there falling within the scope of that business. While, lands and buildings should be considered occupied for the purpose of conducting a business activity both when the activity is directly conducted inside them, as well as when they are the object of trade (Wołowiec, 2014: 41). It should be remembered that only this part of the historic building or land is excluded from exemption which is physically occupied for the purpose of conducting the business activity. Since occupancy should be understood as the use of land or building for the purposes of actual business activity with the exception of other functions,

thus, building or land occupancy for the purpose of conducting a business activity should be tantamount to separating them to conduct such activity (Dowgier, 2018)[5].

Such regulation means that the occupancy, so the factual use of lands and buildings individually entered into the register of monuments, maintained and restored in accordance with the provisions on the protection and care of monuments, results in the loss of such a tax exemption. Whereas, the mere fact of possessing such monuments by the entrepreneur shall not result in the loss of such an exemption. This solution raises justified doubts with regard to its compliance with the Constitution of the Republic of Poland (Babiarz, 2016). It can be evoked here that this solution is in contrast with Art. 5 with reference to Art. 84 and Art. 217 of the Constitution of the Republic of Poland. Since, it is impossible to understand why the immovable monuments possessed by the entrepreneur will be exempted, and if they use them for the purpose of conducting the business activity, even partially, then the exemption will be lost in full.

6 Conclusion

The appropriate application of provisions on the property tax exemption of lands and buildings individually entered into the register of monuments requires a direct reference to the special provisions, i.e. act on the protection and care of monuments. Being unaware of that regulation is undoubtedly the most crucial reason for interpretative doubts that arise in practice. It is also important to acknowledge that in the scope of use of the analysed property tax exemption of monuments there is a necessity to include the actual state of "maintenance and restoration in accordance with the provisions on monuments protection" (positive condition) and "no occupancy for the purpose of conducting a business activity" (negative condition). These elements, changeable in their nature, should be controlled by the tax authority on a current basis.

5 In this sense, the presence of a park around a palace occupied for the purpose of running a hotel does not mean that such a surrounding park will be excluded from the exemption due to the mere fact that the hotel guests use it. Since it is not physically separated for the purposes of conducting a business activity and is used also for other purposes. Although, this example also requires specification in the context of the more specific factual situation.

Thus, the most important object of dispute in terms of covering monuments with property tax exemption is the issue of maintaining and restoring the historic property entered individually into the register of monuments in accordance with the provisions on the monuments protection.

The fulfilment of the obligatory condition, which is the maintenance and restoration of monument in accordance with the requirements of law, can be proven in any legally acceptable way. However, since the tax authorities have no knowledge that would allow them to assess the condition of the monument and the method of its maintenance, and also assess other actions related to that monument, it is appropriate for the tax authority to request from the voivodship monuments conservator relevant information, or alternatively to present by the concerned taxpayer the relevant certificate issued by the voivodship monuments conservator.

In accordance with the judicial practice it is considered that the only body competent to determine whether a given monument is being maintained and restored in accordance with the provisions of the act on protection and care of monuments, which is the condition for application of the tax exemption, is the voivodship monuments conservator or the employees of the provincial office for the protection of monuments acting under the conservator's authority, or possibly the self-government monuments conservator. Nevertheless, allowing other evidence to confirm the fulfilment of the above mentioned condition should be considered (especially, the documents comprising the conservation documentation, if, however, they will use the required arrangements that the historic facility is maintained and restored in accordance with the provisions on the protection and care of monuments), although the opinion of the voivodship monuments conservator will be in that case binding. In practice the problem is, however, first of all the validity of all certificates issued by the voivodeship monuments conservators and the efficiency of the voivodeship offices for monuments protection, which find it difficult to fulfil their existing duties and even more the additional obligations following from the tax provisions.

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TIME CONTEXT OF TAX REVENUES IN RELATION WITH SPECIFIC INCOME OF MUNICIPALITIES[1]

Michal Liška[2]

Abstract

Since the introduction of the last two significant measures against tax evasions (VAT control statement, electronic record of sales, EU blacklist), the question arises – Is there any relation between the obligation to identify the tax entity's supplier in the field of value added tax and corporate income tax[3]; will fail in identification of supplier of goods or services have similar consequences in both taxes? However, the essential for the article is to think about whether the error of tax subjects, including non-professional municipalities, may in some cases outweigh (prevails) legal certainty in the form of preclusion period? Therefore, the hypothesis is determined by answering the question: is it correct that in the field of Tax law the legal certainty in the form of the preclusion prevails individual justice in the form of protection of the right to assess tax correctly?

Keywords: Legitimate Expectations; Preclusion of Law; Taxable Revenues and Expenses.

JEL Classification: K340.

1 Introduction

The author wants to explain by way of introduction that the income of legal entities is a frequent subject of the jurisprudence of the Czech and European courts. Thus, be the jurisprudence one of the main sources of this work.

At present, municipalities or a voluntary created union of municipalities often establish artificial legal persons within the scope of article 49 of Act No. 128/2000 Coll., On Municipalities, as amended (hereinafter

1 This article is the outcome of the research project MUNI/A/1017/2017 (Selected aspects of direct taxes and their interpretation and application in case law II).

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3 The same applies to taxable income of individuals.

referred to as "AoM") and pursuant to article 35a of AoM. (Sound) financial management of these legal entities is mostly subordinated to their meaning and purpose. The dominant purpose of the establishing legal entity by municipalities is to being beneficial to the public (to have status of public benefit/convenience)[4]. However, the law, as with all other capital companies, requires as one of the reasons for the establishment of corporate legal entity profitability[5] of it, respectively making a profit[6].

Taxation of legal entities established by municipalities, without exception, is under regulation of the Act no. 586/1992 Coll., on Income Tax, as amended (hereinafter referred to as "ITA"). Under the application of aforementioned Act are all legal entities regardless of the (non-) professionalism of its management and purposes of the establishment.

2 Revenues of Municipalities and Non-Professionalism of its Representatives

One of the basic sources of municipal revenues are subsidies. The Czech jurisprudence on the matter of subsidies – precisely violation of budgetary rules – is a clear example of the Czech judicial approach to the situation of non-professionalism of representatives of municipal legal entity.

Municipalities are obliged, in the sense of article 38 of the AoM, to use the property of the municipality in a purposeful and economical manner in accordance with its interests and tasks as it provided by the law. In general, the municipality is obliged to take care of the preservation and development of its property. Definition of obligation by this way is taking into consideration specific nature (character) of self-government of municipality when

4 Public benefit was introduced to the Czech legal system by Act no. 89/2012 Coll., Civil Code. However, following the day of effectiveness of articles concerning public benefit, an application for the annulment of these general provisions of the Civil Code was filed, since private law cannot directly create public subjective rights of taxable persons. Therefore, provisions 147–150 of the Civil Code on public benefit status were derogated for being obsolete. Thus, public benefit is currently defined for the purposes of tax law in article 17a of the ITA, which defines a publicly beneficial taxpayer.

5 Corporations are primarily established for the purpose of doing business. (For further details see Art. 420 par. 1 of the Civil Code).

6 Profit will generally not be just a result of financial managing of the legal entity within the meaning of Art. 23 par. 2 letter a) of the ITA, but rather the final state of non-profitability of the total investments in compared with results of the activity, namely the effective fulfilment of the objective of establishing of the legal entity.

managing own property. For example, organizational units of the state, as well as other public bodies/entities, are falling under the scope of application of Act no. 219/2000 Coll., On property of the Czech Republic and its representation in legal relations, as amended, are obliged to observe the lot of duties when managing public assets. Some authors refer those obligations, for their extensiveness as principles[7].

Besides the obligation to dispose of the property of a municipality in an efficient and economical way, representatives of municipal legal entities are subject of entrepreneur risk – are put into risk of maladministration of their action and infliction of constructive loss of municipality. The practical implications of this situation are expressed by the case law of the Supreme Administrative Court concerning violation of the budgetary rules (errors in the managing of the subsidy). The judgment of the Supreme Administrative Court of 14 July 2017, no. 2 Afs 208/2016-52, is a clear example of the approach of the administrative judiciary to the status of municipalities. In paragraph 29, the Court stated that: "[i]*n the case being considered it must be taken into account that the contracting authority is a very small municipality (with fewer than one hundred inhabitants, so that it is not possible to assume full-time job of its representatives, ie professional performance of the function")*".

Although the author completely understands that the behaviour of "unprofessional" representatives (taxable subjects) create an inner feeling of injustice in each of us, it is necessary to recall that the problem lies in entropy of the laws and obligations imposed by the legislator. Even unprofessional management of municipality legal entity cannot stand as reason to treat those entities differently. All artificial legal persons are bound by the same rules.[8] In the case the Supreme Administrative

7 For example, Vesecká defines 5 main principles: 1. the principle of economical and efficient use of state property to fulfil the functions of the state and the performance of legally imposed activities, 2. the principle of keeping account of the assets and performing its inventory, 3. the principle of custody of the property and its maintenance, 4. the principle of property protection and the application of all legal remedies to defend the rights of the state as the owner; 5. the principle of decide about unnecessity of a property and deal with it in the manner and under the conditions laid down by the law. See Vesecká, 2009.

8 The author does not exclude the possibility, that the municipal legal entity would be characterized as publicly beneficial taxpayer and some exclusion of taxation would not apply (see Art. 20 par. 7 of the ITA).

Court has failed as even a formal breach of budgetary rules still remains a violation of the budget rules.[9]

3 Time context of revenues

In a recent judgment of 21 March 2018, in the case *Volkswagen AG vs. Financial Affairs Directorate of the Slovak Republic*, C-533/16, the Court of Justice of the European Union pronounce for the purpose of this work[10] fundamental ideas. First of all, he reiterated that "[h]*owever, the possibility of exercising the right to deduct VAT without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely (judgment of 28 July 2016, Astone, C332/15, EU:C:2016:614, paragraph 33 and the case-law cited). The Court has thus already held that a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of the input VAT, by making him forfeit his right to deduct, cannot be regarded as incompatible with the regime established by Directive 2006/112, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, that it does not render in practice impossible or excessively difficult the exercise of the right to deduct VAT (principle of effectiveness) (judgment of 28 July 2016, Astone, C332/15, EU:C:2016:614, paragraphs 34 and 35 and the case-law cited).*"

After these words, the Court of Justice of the European Union has made the following conclusion: "…*since Volkswagen did not demonstrate a lack of diligence, and in the absence of an abuse or fraudulent collusion with the Hella Companies, a limitation period which began from the date of supply of the goods and which, for certain periods, expired before this adjustment, cannot validly deny Volkswagen the right to a refund of VAT.*"

Nowadays it seems that the preclusion period is only formal (from the point of view of the nature of the obstacle) or substantive (from the point of view of the nature of the impacts) obstacle (national requirement

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9 The intensity of the violation of budgetary rules will be reflected in the amount of the levy (tax payment).

10 Although the object in pended case was a value added tax.

non-conforming EU law) to the application of full neutrality of value added tax. The obstacle in the form of preclusion period can thus be applied as a mean of combating tax evasion and abuse of law[11]. Otherwise, if the taxable person acts in good faith, the exclusionary time-condition for applying right to deduct VAT should not apply.

However, the Court of Justice of the European Union has not only putted into question the preclusion period of VAT, but the passage of time in law itself and legal certainty in law. The Preclusion, as a legal institute, is defined by the Doctrinal Literature as follows: The Preclusion, the consequence of which is the extinction of the right by its non-application in the forfeited (ie preclusive) period (Article 583 of the Civil Code), two assumptions shall be fulfilled to the termination of the right on the basis of the preclusion: the expiration of a certain (legally specified) period and the non-application of the law at that time (Fiala, 2009) Similarly, Madar looks at the preclusion (See Madar, 1995) or Alexa from nowadays authors (Alexa, 2014). The Constitutional Court even emphasizes in a number of judgements that preclusion as that is defined by the basics of the law theory (Constitutional Court IV. ÚS 816/07)[12].

These basic legal theories have been formulated in ancient Roman times.[13] The Justinian Code already fixed the limitation period into the law in force in 424 AD. Continental legal philosophy and theories of law, led by Jhering[14], Bydlinski (Bydlinski, Bydlinski, 2012) and Radbruch, considered the passage of time and the extinction of the law as the basis for legal certainty, which is one of the cornerstone(s) of the rule of law. Radbruch even considered legal certainty as a sort of arbiter in a duel of individual justice and public welfare (Radbuch, 2012: 36 et seq.). By expiration of the preclusive period, every duel ends.

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11 Court of Justice of EU is using term: abuse of law. Continental legal theory is using for the same purpose term: abuse of rights. See paragraph 23 of the Opinion of General Advocate Bobek in case *Edward Cussens, John Jennings, Vincent Kingston v. T.G. Brosnan*, Case C 251/16.

12 Similarly, Constitutional Court findings of 30 March 2009, file no. IV. ÚS 1418/07, of same day, file no. IV. ÚS 1139/08, of same day, file no. IV. ÚS 2701/08 or of 21 April 2009, file no. II. ÚS 1464/07.

13 To this day every lawyer knows antic Roman principle vigilantibus iura scripta sunt.

14 Jhering in his works casts doubt on the objective hierarchy of the purposes of law, yet he gives legal certainty leading position among all other. See Jhering, 2009.

The Court of Justice of the European Union, despite the centuries of legal certainty and the establishment of a place of preclusion in law, which often, as the main value of law, strike a balance between iuspositivism and iusnaturalism, has put into question by simple expediency of non-limiting the right to deduct VAT.

4 Situation of the overweight of the law over the legal certainty

In practice, there may be situations where the law in force is not sufficient and the need of iusnatural intervention against legal certainty arises. In fact, this is just about the situation of extreme injustice described by legal philosophers and rarely judged by constitutional courts against war criminals. Theoretically, the abuse of rights could also be considered. In the case law of the administrative courts in the Czech Republic, even one such case has appeared.[15] It was an abusive practice to delay payment for services and products provided to a trading company by its own shareholders; they did not have to pay the income tax of natural persons until the artificial legal person could work and the tax maturity would be further extended (prolonged).[16]

However, in the case of abuse of rights, this is an interpretation of a particular right to the detriment of its meaning and purpose (Acevedo, 2012: 179 or Prebble, 2008: 151–170). The case of a system burst through the preclusion period is not taken into account, unless it is stipulated by the law, or if there is an obvious interest in individual justice in an ad hoc case. Continental legal theory provides protection of the legal certainty established by preclusion, in some cases it is even in preference to the principle of legality.[17]

5 Similarity of corporate income tax and value added tax

The author initially states that there are significant systemic differences between value added tax and income tax; from their basic qualification

15 For more details see judgement of Supreme Administrative court of 30 November 2016, file no. 4 Afs 137/2016-43.

16 This problem had at the time of decision on the case purely academic nature, as the rule of taxation all goods and services in the period in which they were provided had been already in force.

17 See the main ideas of Schonberg, 2000; Schwarze, 1992; Tridimas, 1999.

(Radvan, 2008: 20), the way they are applied, the budget determination to the degree of harmonization of the European Union. Yet tax requirements for proving of taxable transactions are getting closer systematically.

The Court of Justice repeatedly emphasized in the judgment of 15 September 2016, Senatex, C-518/14, that "[u]*nder Article 167 of Directive 2006/112, the right to deduct arises at the time when the deductible tax becomes chargeable. The substantive conditions which must be met in order for the right to arise are set out in Article 168(a) of that directive. Thus, for that right to be available, first, the person concerned must be a taxable person within the meaning of that directive and, secondly, the goods or services relied on to give entitlement to the right of deduction must be used by the taxable person for the purposes of his own taxed output transactions and those goods or services must be supplied by another taxable person as inputs (see, to that effect, judgment of 22 October 2015, PPUH Stehcemp, C277/14, EU:C:2015:719, paragraph 28 and the case-law cited).*"[18] In the case of income tax, legal requirements to prove the taxability of expenses under Article 24 of the ITA are similar. There must be a material and time context between revenue and expenditure; seriousness of will to achieve, secure and maintain of the taxable revenue, and rationality in the last mentioned. It is precisely the context between revenue and expenditure that is related to the person of the supplier, and the condition for the identification of a particular supplier remains questioned to some authors (Oudes, 2017: 43–49), due to the case-law of the Court of Justice[19].

Revenues and expenditures for corporate income tax can be mutually paired to each other as well as input and output for value added tax (the output tax is linked to the input tax of another person, as well as the expenditure of one person is the income of the other one). Within this fact, the importance of proving the person of supplier has the same meaning for application of benefits of both taxes.

18 Similarly, Centralan Property, C-63/04, EU:C:2005:773, bod 52; Tóth, C-324/11, EU:C:2012:549, bod 26; Bonik, C-285/11, EU:C:2012:774, bod 29; Barlis 06, bod 40; or decision in case Jagiełło, C-33/13, EU:C:2014:184, bod 27.

19 The key case law dealing with tax evasion are decisions of Court of Justice of the European Union of 22 October 2015, *PPUH Stehcemp sp. J. Florian Stefanek, Janina Stefanek, Jarosław Stefanek v Dyrektor Izby Skarbowej w Łodzi*, C-277/14; and case of 13 February 2014, *Maks Pen EOOD v. Direktor na Direkcia „Obžalvane i danačno-osiguritelna praktika" Sofija*, C-18/13.

A factual resignation on the condition of proving the link between the revenue and the real taxpayer would ultimately lead to legal uncertainty in the factual findings. The tax administrator would not be able to pair individual taxpayers so the current pensum of information that he collects would be completely worthless.

Another fact related to connection link of aforementioned taxes is that the VAT control statement, which has barely passed the test of constitutionality, can find its income tax reflection in the registration of sales, so the tax administrator can therefore pair revenue and expenditure as well as input and output, but there is still no overall settlement of the information asymmetry between the taxpayer and the tax administrator. By the VAT control statement and registration of sales only the default information asymmetry between them is being put straight (Bražina, 2017: 109). Therefore, the tax administrator will usually be aware of the fact between who the business case occurs but he may not know all details of the case, since he has only formal documentation – cash flow, invoices, etc. The taxpayer can therefore, at the level of rationality, increase or decrease some of his revenues and expenditures, and he is not bound by the fact that these will be reimbursed in full. It is because there is no practice in the Czech income tax system that is similar to the one of the Court of Justice's institute of tax frauds[20] which are only related to value added tax.

6 Change (Correction) of the Tax Assessment or the Way to Break Legal Certainty?

The Court of Justice, in the case of VAT, has accepted the breaking of preclusion period to assessment of the tax. This theoretically, as they are interconnected legal-theoretical vessels, has impacts even in the area of recognition of corrective additional tax assessments, especially to changes in preclusion's income tax periods.

20 See cases of Court of Justice of the European Union, *Mahagében Kft v. Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága*, C-80/11 and *Péter Dávid v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága*, C-142/11 or *Optigen Ltd*, C-354/03, *Fulcrum Electronics Ltd*, C-355/03 and *Bond House Systems Ltd*, C-484/03 *v. Commissioners of Customs & Excise*.

Correction or change of the tax assessment may have various implications and consequences. It can be done in a situation where someone realize after years and will increase or decrease tax liability.[21]

In the case of a decrease (application of the deduction VAT), the Court of Justice of the European Union approved this procedure because the VAT was firstly paid by the supplier in the court's present case, and later Volkswagen applied for tax deduction. Likewise, it may be the application of taxable expenditure. The problem, however, will occur when the tax will be changed by fictitious companies (white horses) on the rebound.[22] It is because of a ban on examining the tax after preclusion.

Thus, the Court of Justice of the European Union has opened Pandora's box and has prolonged the opportunity to test the tax administrator's attention for an unlimited period (also if the ban on examining the correct amount of assessed tax even in periods after preclusion will be broken through too) in the case of individual justice for Volkswagen, the car factory (un)influenced by the diesel-gate affair. No provision, except of exclusion of the abusive manner and accomplicity of tax fraud, stated that it is not possible to apply for previously non-applied expenditures on the rebound. Imagine for example 15-year-old business case, where there are invoices, bank statements about the price of the work and the work itself, but the bank account movements, trading standards in the branch and testimonies etc. can no longer be made and proved. In that case, searching for and studying good faith of a taxpayer raises a number of questions.

But there are even more questions in the case of income tax.

The construction of the building at an exorbitant (not standard) price by the business partner for which self-employed persons made the work, can be a classic example to mention. Data on the number of employees, business background, negotiations, etc. are being shredded over time as its tax file;

21 The most common case is accounting records of tax cases that "lie on the court´s table" for more longer than preclusion period is. Until the court decides, the tax entity may not be sure that it has acted correctly, and it is likely that the mistake will no longer be reversed (corrected) because of expiration of the preclusion period.

22 As stated above, the non-payment of taxable income of a legal person is not a condition for the application of taxable expenses. The Court of Justice of the European Union in the Volkswagen AG case for VAT made similar conclusions but, in the case court conditioned tax deduction by non-existence of tax fraud (evasion) and abuse of rights.

the font fades. The so-called audit trail is no longer trackable (Řezníčková, 2016: 106). With the passage of time, the facticity of its passage falls to the subject matter in substantive way.

The correction or change of the tax liability should therefore be ruled (guided), for both value added tax and income tax, by existing principles for the application of expenditures pursuant to Article 24 of the ITA. If the expenditure is not applied to revenues connected by material (substantive) and time context, its recognition as tax deductible expenditures should be denied (Pelc, 2015: 617). The time context should be viewed in a broader sense. Therefore, preclusion of revenues should be equivalent to preclusion of expenditures if they are not applied in the same tax period. So, the correction could only be done in the preclusion period.

At the first sight, the state budget would not be found in loss in certain cases of breakage of the preclusion period. It is not possible, however, to precisely quantify the amount of expenditures on the administration and human resources of the tax administrator that can be caused by the de facto pulverization of the possibility to assess the correct amount of tax liability. The preclusive period also sets a significant milestone in the outlook for the economy of the state budget.

The author believes that the correction of faults is possible only within the preclusive period. If there is no conclusion for the taxpayer even after three years that he is "missing some money", courts should not decide in his favour. There should no longer be possible to open tax proceedings in criminal matters either. The case should only be opened for criminal proceedings and criminal penalties. This approach is not respected in a number of Member States' legal systems.[23] This is because there should exist the equality between the tax administrator and the taxpayer in terms of legal certainty for assessment of the tax. The deadlines for breaking the preclusion should therefore be the same on (for) both sides – same reasons and length too.[24]

23 See well-known cases of the Court of Justice of the European Union, *A. a B. v. Norway,* no. 24130/11 and no. 29758/11 of 15 Novemebr 2016 and of 18 May 2017 no. 22007/11, *Jóhannsson and others v. Iceland.*

24 The preclusion periods by effective tax rules are set for the benefit of the tax administrator.

7 Cases of Apparent Breakage of the Principle of Legal Certainty

In some cases, the tax administrator may use an extraordinary legal remedy in the form of a review procedure and change assessed tax. These cases are connected to sub-category of legal certainty in the form of legitimate expectations. The principle of legitimate expectations sometimes (see below) can prevail over the principle of legality and preserve incorrect tax assessment.

The doctrine of legitimate expectation enshrined to the Common law from speech of Lord Denning, *obiter dictum* in case of M. R in Sehmidt v. Secretary of Home Affairs when he stipulated: "*The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say…*".

The doctrine finding the roots in British common law brings clear rules and obligation to clear, unambiguous and uncontroversial manifestation of the outside will of the administration bodies; the initiation of negotiations which has led to legitimate expectations by the administration; not exceeding the powers of the administrative authority (acting ultra vires – recognizable, by rational individual, over-lapse of powers) and not-causation of disproportional (undue) damage by the revoking previously expressed will of the tax administrator.

There are also limitations of legitimate expectations in the field of macro-political issues (except tax matters it may concern social policy). In tax matters, the protection of fiscal function overweighs the legitimate expectation. The legitimate expectation of the British (factual commonwealth) taxpayer will prevail the fiscal interest only if it demonstrates the existence of such a clear, generally widespread, well-known and sufficiently recognizable (by rational individual) practice that it carries itself a commitment to certain treatment of a particular group or individual tax payers.

Whereas, the continental doctrine tends to fulfil the three elements of legitimate expectation. The extended chamber of the Supreme Administrative Court published on this issue decision of 21 July 2009, file no. 6

Ads 88/2006-132. Supreme Administrative Court has stated that "*administrative practice establishing legitimate expectations is a steady, unified and long-term activity (or even inactivity) of a public administration body that repeatedly confirms a certain interpretation and application of legal provisions. Such practice is bounding administrative bodies. Only such administrative practice is a supplement to written law as source of law and is capable to modify the rules contained in the legal norm*." If central administrative body issues a methodical opinion or a binding assessment is made, a legitimate expectation could be created. The core is therefore the steady, unified and long-term activity of the tax administrator.

The doctrine of the legitimate expectations in the European Union law system is based on two conditions. Taxable person must fulfil criterion of "prudent trader"[25] and the change of expressed will of the administrative state body must be done after the expiration of reasonable time[26].

The European Court of Human Rights protects the legitimate expectations in connection with property (Article 1 of Additional Protocol no. 1 to the ECHR). The most significant judgments on this principle are Béláné Nagy against Hungary, Kopecký against Slovakia and Stec and others against the UK. However, for the purpose of this article, the doctrine developed by the European Court of Human Rights is not overly applicable.

8 Conclusion

At the beginning of this contribution, questions related to common foundations of income taxes and value added tax were set. When it comes to the sense of recognizing taxable expenditures and tax deductions, it is necessary to find some similarity in basic principles. The right to deduct VAT in its application framework is preferred by the jurisdiction of the Court of Justice before the principle of legal certainty in form of expiration of a preclusion period. By the author's opinion, this is not very appropriate solution. The author suggests to persevere on the ancient vigilantibus iura

25 The prudent trader is defined by the case-law gradually. It is clear that he must know law (C-80/89, *Behn*) and the revocation of decision must not be his fault (C-500/99 P, *Conserve Italia*).

26 On the one hand, it is clear from the case-law that two years for the change of the will of the administrative authority is too much (C-15/85, *Consorzio*). On the other hand, the three months are reasonable time limit (C-365/89, *Cargill*).

scripta because a systemic breakage of legal certainty would have unimaginable consequences for the entire system of tax law. The author has thus confirmed the hypothesis and considers legal certainty as the guiding principle of tax law.

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LOCAL TAXES IN RELATION TO RECENT JUDGEMENT OF CZECH CONSTITUTIONAL COURT[1]

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Abstract

This contribution deals with the issue of local taxes in relation to recent judgement of the Constitutional Court of Czech republic. The main aim of the contribution is to confirm or disprove the hypothesis that the Czech legislation of the local charge on communal waste was in relation to minors unconstitutional at some point in time. In the contribution, methods of analysis and comparison will be used. The analysis will be used to analyze and define theory and legal regulation. Furthermore, I will try to compare different wording of the local charge on communal waste regulation.

Keywords: Local Taxes; Local Charges; Local Charge on Communal Waste; Constitutional Court of Czech republic; Constitutional Order; Unconstitutionality; Protection of Children and Adolescents; Supreme Administrative Court.

JEL Classification: K34.

1 Introduction

The aim of this contribution is to discuss the local charge on communal waste as one of the set of local charges, more generally as one of the set of local taxes. Specifically, the impact of this local charge on minors who have been in a certain period of time in the Czech legal environment without any possibility of avoiding this local charge will be analyzed.

The impact of a local charge on communal waste on minor taxpayers, especially minor taxpayers from socially unfunctional families, has become

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a problematic issue within the Czech Republic some time ago. The effect of the charge, in some respects, appeared to violate the fundamental human rights and freedoms of individuals. Whatever the question may seem to be marginal, it was a matter that was perceived very heavily both by the lay and professional public.

The matter in question was lawfully brought before the Czech administrative courts which, following a certain development, submitted a case to the Constitutional Court for the purpose of assessing the constitutionality of the local charge on communal waste in relation to underage taxpayers. The Constitutional Court recently ruled on this motion.

The hypothesis of this contribution is that the local charge on communal waste under the examined legal status affected some minor taxpayers in unconstituonal way, and the Constitutional Court therefore had to declare its unconstitutionality. Throughout the paper, analytical and comparative menthods will be used to build text of this contribution.

Nowadays, the issue of the effect of the local charge on communal waste on minor taxpayers is elaborated particularly in decisions of regional courts, three judgments of the Supreme Administrative Court and obviously in one judgement of Constitutional Court. By academic environment the topic was subject especially of research of Radvan (Radvan, 2012) and Pařízková (Pařízková at al, 2013). However, these works were published prior to the decision of the Constitutional Court.

2 Local Taxes, Local Charges

Local charges levied in the Czech Republic are, by their nature, part of a wider range of local taxes. Radvan defines local taxes as statutory benefits of a monetary nature that go to a municipal (regional, regional, etc.) budget that a territorial self-government unit can introduce or cancel. Territorial self-government unit also can affect these taxes in some other ways (tax base, tax rates or some of the correction factors). It is not decisive whether a taxpayer collects a consideration from the beneficiary and whether it is a regular or a one-off benefit. A local tax may be administered by both a self-governing territorial unit and another tax administrator (Radvan, 2012: 17).

Thus, local taxes include both taxes in the strict sense and charges. Legal science, as the difference between tax and charge, points to the equivalence and irregularity of the charge (Radvan, 2012: 19). Bakeš points out in this connection that while taxes are mostly non-equivalent payments for which no direct consideration is provided and payments that are more of a periodic nature, the charges are mostly levied on a one-off basis in relation to any counter-performance by the State or its authorities, regions, municipalities, etc. They usually have the character of a certain equivalent for the provision of a particular service (Bakeš, 2003: 87).

3 Local Charges

It is obvious, therefore, that local taxes, specifically local charges, are part of municipal revenues. Legislatively, this follows from Act no. 250/2000 Coll., On Budgetary Rules of Territorial Budgets, as amended, according to which the revenue of the municipal budget includes, among others, revenues from local charges under a special law. It is important to note that this is not a substantial income. On average, these earnings do not exceed 2% of total local budget revenues. In spite of this fact, however, revenue from local charges complements other municipal revenues, contributing to increasing the autonomy of municipalities and reducing the strains in the financial management of municipalities. Local charges thus fulfill the fiscal function as they provide municipalities with revenue (Pařízková at al, 2013: 45–46).

Additional function of local charges is their regulatory function. Using local charges, the municipality can regulate the frequency of certain activities carried out in the municipality (Pařízková, 2013: 46). Municipalities have absolute freedom in relation to what local charge will they introduce in their territory. However, it should be noted that they can not introduce any kind of charge, but only some of the charges listed in the Local Charges Act.[3] This is because the basic constitutional principle of charges, which is Article 11 (5) of the Charter of Fundamental Rights and Freedoms, stipulates that taxes and charges can be imposed only on the basis of law.

[3] Act no. 565/1990 Coll., on local charges, as amended.

Municipalities have freedom not only in terms of the type of local charge, but also in terms of its construction elements. Municipalities can determine the rate of the charge; introduce certain types of exemption, etc. Even in this area, however, the above rule that taxes and charges can only be imposed by law must be respected. Thus, the municipality can not, for example, set a higher local charge rate than the maximum rate of the charge established in the Local Charges Act.

This relatively wide discretion in relation to the local charges of the municipality is realized with the help of generally binding decrees issued by municipalities.

As already mentioned above, the municipalities are only allowed to impose on their territory local charges explicitly listed by law. At present, the Czech law allows municipalities to introduce the following local charges: a) a charge for dogs, b) a charge for a spa or recreation stay, c) a charge for use of the public area, d) an entrance charge, e) a charge for accommodation capacity, f) a charge for the permission to enter the motor vehicle into selected places and parts of towns, g) charge for evaluation of the building plot of its connection to the water supply or sewerage system and h) charge for the operation of collecting, transporting, sorting, utilizing and disposing of communal waste.

The subject of this contribution will be the last of the above-mentioned, ie the local charge for the operation of collecting, transporting, sorting, utilizing and disposing of municipal waste (hereinafter referred to as the *"local charge on communal waste"*).

4 Local Charge on Communal Waste

4.1 Basic Facts

Local charge on communal waste in question was introduced into Czech law by Act no. 185/2001 Coll., On Wastes. The Explanatory Memorandum to the Act does not say anything relevant except that this charge is a variant in the event that a new law on municipal taxes, which also includes a proposal for a new waste tax, will not be approved by the time the Waste Act is approved. If the law on municipal taxes is approved, this part of the Waste Act will

be deleted. The law on municipal taxes never became part of our legal system, so a local charge on communal waste was introduced.

The subject of the local charge on communal waste is, as can be clearly seen from its title, municipal waste, more specifically collecting, transporting, sorting, utilizing and disposing of communal waste. It is, in essence, a flat-rate contribution to the municipality to these activities.

The rate of the charge on communal waste is determined by the municipality itself by means of a generally binding decree. The law, however, sets the highest possible limit of the charge, which is currently CZK 1,000. According to Radvan, the charge on communal waste is fiscally the most interesting of all local charges (Radvan, 2012: 107).

4.2 Taxpayer, Minors as Taxpayers

The most important question (due to the topic of the contribution) is to identify the taxpayers of local charge on communal waste. The law stipulates several groups of taxpayers. For the purpose of the contribution, the most important group of taxpayers is determined by their permanent residence. The charge, according to an explicit legal text, applies to any natural person who has permanent residence in the municipality that has the charge applied (§ 10b of the Local Charge Act).

It means that even the newborn becomes under certain conditions a taxpayer of the charge. Even such person has permanent residence in the Czech Republic. Pursuant to § 10 (3) and (4) of Act no. 133/2000 Coll., On the Registration of Citizens and Birth Numbers and on Amendments to Certain Acts, as amended, the place of permanent residence of the citizen is at the time of his birth the place of residence of his mother. If the mother does not have a permanent residence in the Czech Republic or if the mother is not a Czech citizen, the place of residence of the child shall be the place of residence of the father at the time of his or her birth.

In other words, a minor becomes a taxpayer of the local charge on communal waste automatically at the moment of his birth. Due to the construction of a legal norm, it is also irrelevant whether the person actually lives in his or her permanent residence or whether he produces any waste here (this charge does not therefore have the regulatory function described above).

It should be noted here that the currently effective legislation reflects the specific status of underage taxpayers, since § 12 of the Local Charge Act constructs the transfer of a tax liability to a legal representative (parent) of a minor individual by stating that, in the event of a unpaid balance of minor, the taxpayer's duty is passed on to the legal representative; the legal representative has the same procedural status as the taxpayer himself. In such cases, the municipal authority charges the legal representative (if there are more than one, they are obliged to pay the charge jointly and severally).

Until 30 June 2012, however, the Local Charge Act did not take into account the specific situation of minors. Although the charging obligation was actually set at the date of the birth of a natural person, the Act did not contain any standard that would respond to the need for a different approach to minors. This legislation was built on the assumption that the charge would be paid by the minor's parents. However, parents did not have any legal obligation to pay, and the tax administrator could not have done anything about it. The taxpayer was a minor himself, not his parents. This legislation will be further interpreted.

4.3 The Impacts of the Legislation of Local Charge on Communal Waste Effective until 30 June 2012 on Minors

As has been stated above, the charge on communal waste legislation effective unitl 30 June 2012 imposed a charging obligation on a minor since the date of his birth. At the same time, however, the legislation completely disregarded the very specific position of underage taxpayers and did not take into account whether the underage taxpayer was in fact able to pay a charge, ie whether he had any own financial resources.

If the charge was not paid (in time or in the right amount), the law stipulated that the municipal authority charge minors the charge by a decision. In the meantime, unpaid charges or a part of these charges could have been increased by up to three times.

Thus, if the minor did not pay the charge in question and his legal representatives did not do so (but they did not have any legal obligation to pay), the administrator of the charge issued formal decision. This decision,

of course, could not have been delivered directly to the minor, but it was delivered to his legal representative. That said, it led to a situation where a minor taxpayer was charged every year, but he could not in principle have been aware of this (his intellectual maturity did not anticipate awareness of the legal system, and the charge decision did not have to come within his sphere).

This way arrears on local charge was creating for many years.[4] After reaching the age of majority, the tax administrator proceeded to execution of that charges. This moment was often the moment when the person first learned about the existence of the arrears on the local charge.

It should also be noted that the legislation at the time in question did not allow the tax administrator to waive local charges. So there was no legal possibility to break out of the obligation.

Above all, it was especially difficult for minor taxpayers from socially malfunctioning families. Their parents rather did not pay charge for them and they usually did not reflect the decisions sent by the tax administrator. A large group belonging to this category were children in children's homes. Although they had a permanent residence in the town of their original residence, they were actually outside this community and usually out of touch with their legal representatives. This fact was also answered by the legislator who, with effect from 1 January 2016, introduced a legal norm according to which a natural person placed in the children's home or similar facility is free from the local charge on communal waste.

All of the above, in the author's opinion, leads inevitably to the conclusion that the described legislation can not stand the test of constitutionality. Moreover this legislation violates many provisions of Convention on the Rights of the Child. Last but not least the cited legislation is in the opinion of the author just unfair, because it disadvantages children originatining from social malfunctioning families.

4 Radvan states states that at the relevant time (2012) the city of Brno recorded 8,000 cases of minors who have not paid the charge in question. The lump sum exceeded CZK 15,000,000 (Radvan, 2012: 113).

5 Approach of Judicial Courts in the Administrative Judiciary

It is certainly not surprising that people who have been subjected to a charge on communal waste for their minor days have been dissatisfied with it. Their appeals (either directly against the decisions imposing the charge itself or against the acts of the tax administrator in the execution) were, however rejected due to the unambiguous nature of the legislation and the impossibility of taking their age into account.

Consequently, these people turned to the judiciary courts in the administrative judiciary.

The first important decision was the judgment of 12. 11. 2014, no. 1 As 116/2014-29, of the Supreme Administrative Court in which the designated court confirmed that the taxpayer of local charge on communal waste is minor himself, not his parents. At the same time, however, court stated that the law in question, although in some situations, seems irrational and unfair, is not inconsistent with the Czech constitutional order as it does not have confiscatory effects in relation to the property of an individual and it does not violate the principle of equality.

The recapitulated judgment, however, was not the final judgment in the case in question. Subsequently, the Supreme Administrative Court was about to adjudicate on other disputes concerning the establishment of local charge on communal waste for minors. In the context of these, the Court did not incline to the above-mentioned conclusion on the constitutional compliance of the legislation. On the contrary, court decided to submit a case to the Constitutional Court of the Czech Republic in order to assess the compatibility of the legislation in question with the Czech constitutional order.

The court did so in the case held under file number 9 As 211/2014 in which complainant was eleven-years old when she was charged with local charge for the years 2002 and 2003. Related decisions were delivered to the mother of the complainant; she did not accept them. In years 2007 and 2008, the mother of the complainant received calls for payment of the arrears in the alternative period. The complainant's mother did not respond to these in any way. In 2011 (after the complainant had reached the age of majority) the tax administrator issued an enforcement order to make deductions

from the complainant's salary. The complainant's appeal was rejected. Subsequent action was also dismissed.

The Supreme Administrative Court, in the matter in question, considered in the preliminary examination that the provisions of § 10b (1) (a) of the Local Charges Act, which at the time covered the above rule, that a taxpayer of charge on communal waste is any natural person resident in the municipality is unconstitutional in the part where it imposes a charge liability on minors. Court pointed in particular to the need of protection of children and also to the fact that the application of the given rules leads to the negation of the property base of a minor taxpayer.

6 Constitutional Court Judgment of 8 August 2017, no. Pl. ÚS 9/15

The Constitutional Court ruled on the basis of the Supreme Administrative Court's motion by judgement no. Pl. ÚS 9/15.

However, before the factual assessment, the Constitutional Court had to decide whether it could do so at all. The problem was that the contested legislation was already substantially amended at the time of the Constitutional Court's decision. The Constitutional Court continued its previous practice and stated that it was possible to judge motion to declare the unconstitutionality of the already abolished law (or its individual provision) if it is still applicable to the present case and governs the relationship between the individual and the public authority.

To the very merits of the matter, the Constitutional Court first recalled the general points of reference in the review of the tax rules. Court emphasized that the issues of optimal tax burden are among the issues arising from social consensus, preferences, population values, population mentality, tradition, etc. The transfer of political debate into the form of tax legislation is the task of the political representation that emerges from the elections. Assessing taxes in terms of fulfilling their basic functions or the suitability of the tax system is a matter for the democratically elected legislator, not the Constitutional Court. This can also be reasonably related to charges as well, even though they are different in some details (charges are, in contrast to taxes, mostly paid in relation to the consideration, see above).

Despite this restraint in reviewing tax (and charges) regulations, however, the Constitutional Court is empowered to assess whether a charge does not have so-called "choking effect" for taxpayers, ie whether there is no objective (unavoidable) inability to pay the charge. In other words whether a public duty to pay has not been imposed wholly irrespective of the ability of the taxpayer to meet it in terms of its income, wealth or capabilities.

The Constitutional Court initially concluded that the local charge in question was an acceptable solution to the financing of the waste management system. However, court did not stop at this conclusion, and went on to examine in more detail the relationship between charge and minors as its payers. Court pointed in particular to the need for increased protection of minors and a fundamentally undesirable situation in which minors are forced to pay the charge without any consideration of their property situation. Minors do not usually have property, and they are limited by law in relation to its acquisition (working). In the case of minors, it is also necessary to take into account their right to freely modify their lives according to their needs. However, this right is significantly affected if a person is burdened with debts immediately after entering the adult life.

Since the local charge on communal waste could not at the relevant time be waived in any way, since it does not take into account neither the property nor the income of the taxpayer, nor whether the taxpayer uses the services to which the charge is bound, and also the fact that the charge imposes an obligation on minors who, as a rule, do not have the means to comply with it, the Constitutional Court concluded that the charge in question had an inadmissible "choking effect" on minors.

At the same time, the Constitutional Court pointed out the need for increased protection of children and adolescents enshrined in the constitutional order of the Czech Republic. Nor did the Court overlook the above-mentioned fact that the charge on communal waste legislation was particularly burdensome for a group of children from socially unfonctional families. This has led to unacceptable discrimination on the basis of social origin.

For all of these reasons, the Constitutional Court upheld the motion of the Supreme Administrative Court and declared the relevant provision of § 10b (1) (a) of the Local Charge Act unconstitutional. In view of the fact

that the reasons for unconstitutionality only apply to minor taxpayers, the scope of courts decision has been limited to this group of taxpayers.

7 The Impact of the Constitutional Court's Finding of 8 August 2017, no. Pl. ÚS 9/15

It is certain that the cited derogation judgement has huge impact to legal environment. It has implemented the duty of the administrative authorities not to apply § 10b (1) (a) of the Local Charges Act, in the version in force until 30 June 2012, so far as it imposes obligations on minors. In other words the tax administrator could not impose a charge to minor in the time period in which was effective legislation reviewed by the Constitutional Court. Therefore, it is not possible to issue decision; in the case of an appeal, the first-instance decision must be revoked and the proceedings suspended.

If the case has already got throught to the court, it is appropriate to uphold the action or cassation complaint and to cancel the contested decisions. In this spirit, the Supreme Administrative Court has also ruled in three trials on the issue in question (see Judgments no. 9 As 211/2014-153, no. 2 As 149/2014-54, and no. 7 Afs 18/2015-71).

8 Conclusion

Fundamental human rights and freedoms enshrined in the constitutional order of the Czech Republic are without any doubt worthy of high protection. This protection then becomes of particular importance in relation to some protected groups such as children and adolescents, as individuals whose development and general well-being must be kept in mind all the time.

Among the values that need to be protected against inappropriate interference belongs the property base of minors. It is essential to take into account that minors do not have to possess any property and that they are significantly limited in the acquisition of property.

The minor's property (not just minor's, of course) can be significantly affected with charges as public-law payment obligations. In the Czech legal environment, the local charge on communal waste, which set a payment

obligation for every natural person, regardless of age, became a publicly debated issue.

Opinions were expressed that such legislation conflicts with the Czech constitutional order. The author of the article identifies with these. It is not possible to impose public-law payment obligation on minor without taking into account in any way the specific status of minors. In this way, not only is there a disproportionate interference with the property of the minor, but also the denial of the need of special protection of the rights of children and adolescents. Moreover it is not possible to ignore the fact that such a payment obligation most severely affects children from socially unfunctional families. In their case, there is a growing likelihood that their parents will not pay local charge in question.

Such a general and objective payment obligation can not succeed. In this context, there can also be no analogy between the local charge in question and other tax obligations which may affect the minor. These namely respond to the fact that the minor has certain assets (eg income tax, real estate transfer tax, etc.).

The lawmaker himself was also convinced of the inadequacy of the legal regulation and so he changed the legal bases of the charge in question with effect from July, 1 2012. In the present, the effective legal regulation includes the statutory transfer of the tax liability to the legal representative (parent).

Despite the clear unconstitutionality of the law, the administrative authorities have established and enforced local charge on communal waste on minors. This practice ended with a recent decision of the Constitutional Court, which declared the Czech legislation to be unconstitutional. This court decision can only be approved and appraised. At the same time, the aforementioned final decision for the Czech legal environment confirmed the hypothesis of this contribution, which was that the proposed legislation can not stand, as it is unconstitutional.

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PRINCIPLES OF INCURRING FINANCIAL LIABILITIES BY LOCAL GOVERNMENT UNITS FOR TASKS CARRIED OUT UNDER THE REGIONAL POLICY OF THE EUROPEAN UNION

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Abstract

The aim of the article is to present and evaluate the rules of incurring liabilities by local government units with the implementation of investment projects co-financed from European funds. This aim is based on the research hypothesis, according to which the Polish legislator treats this type of obligations in a preferential manner. Considering a significant change in the legal order that occurred in Poland after the entry into force of the Public Finance Act of 27 August 2009, the conducted considerations are limited only to the current programming period of European funds (the financial perspective for 2014–2020). The study was based on literature studies and legal-dogmatic analysis. The conclusions from these analyses allow for a positive verification of the formulated hypothesis.

Keywords: Regional Policy; Fiscal Policy Rules; Public Loan.

JEL Classification: H7, R1.

1 Introduction

The notion of regional policy within the European Union (hereinafter: EU) is understood differently. Moreover, along with the evolution of integration processes, its scope was subject to significant changes (Adamiec,

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2017: 1). In the literature on the subject, as well as in the practice of regional development, regional policy of the European Union can be determined by numerous terms, for example: Community (EU) regional policy, structural policy, regional structural policy, EU regional development policy, regional EU economic policy, socio-economic cohesion policy, etc. (Woś, 2005: 46–49; Klimowicz, 2010: 43–46; Domiter, 2013: 11–13; Dorożyński, 2012: 87–122; Smętkowski, 2013: 54–88) These concepts are used as identical, although from a formal point of view they are not synonymous. Regional policy is part of economic policy. Its main purpose is to stimulate by public authorities economic and social development of less developed areas, especially those with a naturally unfavourable geographic location. From the point of view of the EU, the regional policy pursued at the supranational level aims at counteracting marginalization and equalizing the development of 311 regions to which the countries integrating within the EU have been divided. In turn, financial aid provided to the poorest regions should in practice be used to permanently rebuild their economic structure, so that conditions for their independent growth arise. In this way, regional policy becomes identical with structural policy (Adamiec, 2017: 1). Nevertheless, this last concept has a broader character. The purpose of structural policy is to create specific conditions both in individual regions and in the interregional system, in the scale of the whole country and in international relations for broadly understood changes and modernization of the economic structure, allowing to achieve, maintain and increase the potential of competitiveness of economic activities of individual entities (Woś, 2005: 46). On the other hand, the cohesion nature of regional policy consists in undertaking actions by public authorities aimed at increasing social and economic cohesion at the EU level.

The entities authorized to apply for support from European funds include, among others, local government units (hereinafter: LGUs). The condition for the absorption of assistance funds is the possession of funds to finance the own contribution. In the case of local governments, the willingness to take advantage of EU subsidies often means the need to provide the own contribution through their income from loans or bond issues, which affects the level and structure of LGUs debt. In addition, in the case of investment

projects implemented by local governments, one of the key issues affecting the amount of co-financing applied for is the so-called funding gap.

The aim of the article is to present and evaluate the rules of incurring liabilities by LGUs with the implementation of investment projects co-financed from European funds. This aim is based on the research hypothesis, according to which the Polish legislator treats this type of obligations in a preferential manner. Considering a significant change in the legal order that occurred in Poland after the entry into force of the Public Finance Act of 27 August 2009 (hereinafter referred to as: p.f.a.), the conducted considerations will be limited only to the current programming period of European funds, which began in 2014. The study was based on literature studies and legal-dogmatic analysis.

2 European Funds for LGUs in the Financial Perspective for 2014–2020

Support under the cohesion policy is primarily directed to underdeveloped regions of the Member States and financed from funds raised under the EU budget. In programming for 2014–2020, these funds function under a common name as European Structural and Investment Funds. They include two structural funds, i.e. the European Regional Development Fund and the European Social Fund, in addition to the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund (European Commission, 2014: 6–7).

In programming for 2014–2020, the European Commission has allocated EUR 351.8 billion[3] for cohesion policy instruments. Poland can receive EUR 120.1 billion from these funds, once again being the largest beneficiary of the EU aid. These funds are to be aimed primarily at the implementation of cohesion policy – EUR 82.5 billion (including EUR 76.6 billion under 6 national and 16 regional operational programs). EUR 32.1 billion are planned for the purposes of the Common Agricultural Policy and around EUR 0.5 billion for the European Maritime and Fisheries Fund. In addition, EUR 5 billion is to be allocated under other programs, e.g. Horizon 2020 or Erasmus (Ministry of Development, 2015: 157–161).

[3] Funds allocated to the financing of cohesion policy account for 32.5% of the total EU budget for 2014–2020 amounting to EUR 1081 billion.

The application process for grants from European funds in practice is not simple and is not limited to properly filling out the application for co-financing of the project. Applicants wishing to benefit from EU support may face many barriers ranging from the lack of sufficient knowledge, where to look for funding opportunities, through numerous difficulties when applying for aid, ending with problems regarding the correct settlement of the received grant and preparation of payment applications or reporting documents. At every stage of the application process, use and settlement of the received grant, knowledge of numerous EU and national regulations relating to the operation of European funds is required. The procedure for applying for co-financing from the structural funds starts with the preparation of the project to be supported, and then identifies the relevant operational program and within its priority axis and the action under which support for projects of a given type is provided. In the case of projects implemented by self-governments, co-financing is possible from both national and regional programs. Table 1 presents examples of types of projects undertaken by local government units that may receive EU funding. The full list of areas in which local governments can apply for financial support is much longer, however, formal limitations of this study prevent its presentation. It is worth noting that co-financing of local government projects usually appears in the regional programs of individual voivodships.

Table 1: Sources of financing of local government projects from operational programs in programming for 2014–2020

Examples of types of projects	Operational program, operation under the priority axis
Transport	
Construction and modernization of roads and accompanying elements, reconstruction of the existing road and street network, construction of internal bypasses, construction and reconstruction of rail, trolleybus and bus networks along with the purchase of low-emission rolling stock, construction of intermodal interchange stations.	OP Infrastructure and Environment, 4.1, 4.2, 5.1, 5.2, 6.1 OP Eastern Poland, 2.1, 2.2 Regional Operational Programs Rural Development Program, Measure M07

Examples of types of projects	Operational program, operation under the priority axis
Technical infrastructure	
Waste management (e.g. installations for collection, selection, waste treatment), water and sewage management (development of water supply and sewage networks, construction of sewage treatment plants, projects in the area of residents' safety: construction of retention reservoirs, retrofitting of emergency services, monitoring of environmental hazards).	OP Infrastructure and Environment, 2.1, 2.2, 2.3 Regional Operational Programs Rural Development Program, Measure M07
Environmental Protection	
Construction of a thermal waste treatment plant, increasing the efficiency of the industrial wastewater treatment process, activities for Natura 2000 sites and national parks, ecological education and reclamation of degraded areas for natural purposes, creation of green infrastructure and ecological corridors.	OP Infrastructure and Environment, 2.4, 2.5 Regional Operational Programs
Power Engineering	
Projects supporting energy saving, thermomodernization of buildings for public and social purposes as well as residential buildings.	OP Infrastructure and Environment, 1.3, 1.5, 1.6, 1.7 Regional Operational Programs
Computerisation	
Development of public e-services, training activities focused on the development of digital competences.	Regional Operational Programs OP Digital Poland 2.1, 2.2, 2.3, 3.1
Social infrastructure	
Construction, extension, modernization of infrastructure for schools and kindergartens, hospitals, social welfare homes.	Regional Operational Programs Rural Development Program, Measure M07

Examples of types of projects	Operational program, operation under the priority axis
Social activity	
Grants for regional job centres and other labor market institutions for counteracting unemployment; for social welfare centres and family support centres for projects activating people in a difficult life situation; for local governments as bodies running educational institutions (classes for pupils, raising teachers' competences, scholarships for talented youth).	Regional Operational Programs
Culture	
Projects in the field of e-culture, related to the protection of cultural heritage, renovation of monuments, provision of cultural resources in digital form, construction, modernization or equipping of buildings performing cultural functions, including community centres; renovation or improvement of the condition of historic buildings for the preservation of cultural heritage.	OP Infrastructure and Environment, 8.1 PO Polska Cyfrowa, 2. 3. 2 Regionalne Programy Operacyjne, Rural Development Program, Measure M07

Source: own study based on: (Ministry of Infrastructure and Development, 2015); (Ministry of Investment and Development, 2018); (Ministry of Investment and Development, 2017); (Ministry of Agriculture and Rural Development, 2017); Regional Operational Programs, Available at: https://www.funduszeeuropejskie.gov.pl/strony/o-funduszach/dokumenty

Funds from EU assistance funds have become an important source of financing the investment activity of local governments. Nevertheless, their use is connected with the need for the local government to cover so-called own contribution and ineligible costs that are not possible to be financed from EU subsidies. Own contribution is an expression of the implementation of one of the principles of the EU cohesion policy, the so-called principle of additionality, according to which the financing from European funds cannot replace the national expenditure of the Member States. In the case of local governments, funds to cover own contribution come from their

budget. For this reason, EU regulations regarding the amount of co-financing are of significant importance for LGUs. In the financial perspective for 2014–2020, the European Commission set maximum co-financing rates at the level of priority axes, depending on the type of fund from which support is derived and the level of development of the region in which the project applying for co-financing is implemented (Ministry of Regional Development, 2011: 16):

- 85% in the case of the Cohesion Fund;
- 85% in the case of less developed regions whose GDP per capita for the period 2007–2009 was below 85% of the EU-27 average in the same period and for the outermost regions;
- 80% in the case of less developed regions eligible for the transitional system of the Cohesion Funds on 1 January 2014;
- 75% in the case of less developed regions other than those indicated above;
- 75% for all regions whose GDP per capita for the 2007–2013 period was less than 75% of the EU-25 average for the reference period, whose GDP per capita, however, is more than 75% of the average GDP in the EU-27;
- 60% in the case of other transition regions;
- 50% in the case of better developed regions (apart from those whose GDP per capita was less than 75% of the EU average in 2007–2013);
- 75% in the case of European Territorial Cooperation.

The results of an expert study commissioned by the Ministry of Regional Development indicate that in the years 2014–2020, Poland needs PLN 76 billion for own contribution to European projects, of which PLN 60.6 billion will have to be provided by local governments. The analyses were conducted assuming an average level of co-financing of projects by LGUs at the level of 36%, thus much more than 15% assumed as a general minimum level of necessary co-financing. This assumption was based on the results of the analysis of projects included in the SIMIK database, which showed the following actual level of their co-financing with EU funds: for municipalities – 58.35%, for regions (poviats) – 64.68%, for provinces (voivodeships) – 70.26% (Sierak et al, 2013: 9).

In the case of investment projects carried out by local governments, one of the key issues affecting the amount of co-financing applied for is the so-called project generating income. It is an activity that brings cash inflows from direct payments made by users for goods or services provided by a specific operation, in excess of all project-related operating and replacement costs incurred during the implementation and economic life of the project. In the perspective for 2014–2020, the level of co-financing for such investments is determined by means of a new mechanism, based on the so-called lump sum interest rates or using the so-called financing gaps method. The methodology of calculating the amount of co-financing for these projects has been regulated in the 'Guidelines on issues related to the preparation of investment projects, including income-generating projects and hybrid projects for the years 2014–2020' (Ministry of Development and Finance, 2017). In practice, in the case of projects generating income, the eligible costs covered by the EU subsidy are reduced to the extent to which the planned revenues finance the incurred capital expenditures.

It is also worth mentioning hybrid projects which are projects implementing public investments, combining co-financing from EU funds and a public-private partnership (PPP) formula. In the context of LGUs' problems with obtaining funds to cover the own contribution and the related issue of debt limits, the implementation of public investments in this form may be very attractive for local governments. In the PPP model, a private entity is not only responsible for the preparation, construction and management of a given infrastructure, but also for obtaining the necessary financial resources. In this case, direct users are charged or the so-called payment for accessibility is received from a public entity. What is important, in the case when the private party manages the majority of key risks in the project, costs related to the implementation of the PPP contract, as a rule, do not charge the public entity's debt (Kałuża, 2014: 23–24). However, in most hybrid projects, the provisions regarding co-financing of income-generating projects shall apply.

3 Reasons for Limiting the Independence of LGUs in Terms of Incurring Financial Liabilities

One of the manifestations of financial independence of LGUs is the possibility of borrowing loans and issuing securities (so-called municipal bonds). These instruments can be referred to collectively as a public loan. It is a source of budgetary resources that are classified as revenue. At the same time, this source is of a complementary, repayable and extraordinary nature.

The use of a public loan generates multifaceted consequences for both LGUs benefiting from it and the public finance sector as a whole. Undoubtedly, obtaining repayable budget funds allows to implement tasks that are not covered by the obtained income. In this respect, the public loan increases the development opportunities of LGUs. However, the use of repayable budget funds leads to an increase in the indebtedness of these units. This indebtedness results in the necessity to pay specific payments by LGUs. They take the form of expenses for servicing incurred liabilities and expenditures related to repayment of the borrowed capital. These types of payments in the subsequent financial years temporarily reduce the freedom of self-government units in the area of budgetary policy. They also generate additional risk, which, however, depends on the types of debt instruments used and assumptions regarding the method of repayment of liabilities incurred (e.g. interest rate risk, exchange rate risk, refinancing risk).

When analysing the consequences of using a public loan by LGUs, it is worth paying attention to the content of Art. 72 para. 1 and Art. 73 para. 1 of the Public Finance Act of 27 August 2009 (hereinafter: p.f.a.). Pursuant to the first provision, credits and loans taken and securities issued for cash receivables constitute debt items classified as public debt. Pursuant to Art. 73 para. 1 of the p.f.a. this debt is calculated as the nominal value of liabilities of public finance sector units after elimination of mutual obligations between these units. Public loans incurred by LGUs increase the level of public debt. These circumstances are significant from the point of view of the limitation imposed by Art. 216 para. 5 of the Constitution of the Republic of Poland of 2 April 1997. According to the aforementioned provision, state public debt may not exceed the level of 3/5 of gross

domestic product (GDP). Thus, an excessive increase in local government debt is a potential challenge for other public finance sector entities, and in particular for the State Treasury.

Considering the above circumstances, the Polish legislator limits the possibility of incurring financial obligations by local government units in various ways. Four groups of regulations can be mentioned in this respect, the essence of which is to:

- Indicate the goals that can be financed by revenues from a public loan;
- Introduce fiscal policy rules that limit the possibility of free-of-charge development of selected fiscal indicators by LGUs;
- Define requirements for the construction of debt instruments (determination of the maximum discount and introducing the prohibition of capitalisation of interest);

Establish a ban on incurring liabilities denominated in foreign currencies (with exceptions specified by the Council of Ministers by regulation).

In the first two cases, the legislator clearly refers to the issue of financial liabilities incurred in connection with the implementation of projects financed from the EU budget. These regulations will become the subject of analysis conducted further in this paper.

4 Goals financed by local government units with revenues derived from contracted financial obligations

The enumerative catalogue of goals that can be financed by local government units with revenues from a public loan is defined in Art. 89 para. 1 of the p.f.a. (Stupieńko, 2014: 230). The funds obtained in this way are allocated to:

- Cover the budget deficit of LGUs occurring during the year,
- Finance the planned budget deficit of LGUs,
- Repay the previously incurred liabilities arising from the issue of securities and loans and credits taken,
- Advance financing of activities financed from funds from the EU budget (so-called bridge financing).

The above catalogue is further extended by Art. 90 of the p.f.a. It allows the possibility of borrowing by LGUs the loans from state special purpose funds for financing investment and investment purchase expenses included in the projects referred to in Art. 226 para. 3 of the p.f.a. The latter provision refers to multiannual programs, projects or tasks related to, inter alia, programs financed with non-returnable funds from foreign sources (including from the EU budget).

Provisions contained in Art. 89 para. 1 and Art. 90 of the p.f.a. define five independent grounds for incurring financial liabilities by LGUs. It is worth emphasizing that under the previously binding Act of 30 June 2005 on public finance, the above catalogue had a narrower scope. It excluded, inter alia, bridge financing. The current regulations give LGUs a lot more freedom in terms of incurring financial liabilities. In particular, local governments may use a public loan as bridge financing also in those situations in which they do not plan a budget deficit (Szmaj, 2017: 380). Contents of Art. 89 para. 1 subpara. 4 of the p.f.a. also caused some doubts in the literature on the subject. The question was whether this provision could be the basis for incurring liabilities to cover the entire amount of expenditure planned for an action financed from EU funds or only for the part which is subject to reimbursement (Karlikowska, 2010: 251). It seems that the phrase 'advance financing of activities', which appears in the aforementioned provision, is of crucial importance here. The literal wording of Art. 89 para. 1 subpara. 4 of the p.f.a. allows to assume that the amount of the liability incurred by LGUs is limited by the amount of financial assistance granted for the implementation of the project, and in a given year also in addition the amount of expenses included in the budget for the project (Walczak, 2017: 333).

Table 2: Financial liabilities incurred by local government units in the years 2014–2016 (in PLN million)

Year	2014	2015	2016
Liabilities incurred	11234.0	8091.0	5000.3
Including those in connection with projects co-financed from non-returnable foreign sources	2101.6	1427.5	263.6

Source: own study based on: (National Council of Regional Audit Chambers, 2017).

The amount of financial liabilities incurred by local government units in 2014–2016 is presented in Table 2. It distinguishes the liabilities incurred in connection with projects co-financed from non-returnable foreign sources. A significant drop in the use of the public loan in 2016 results from the delay in implementing the perspective for the years 2014–2020. Meanwhile, by the end of 2015, the 2007–2013 perspective was still being settled.

5 Fiscal policy rules

The ability to incur financial liabilities by LGUs is limited, inter alia, by the quantitative fiscal policy rules in force in Poland, which limit the size of selected fiscal indicators. In this respect, the key role has the so-called individual debt ratio, which is regulated in Art. 243 of the p.f.a. The addressee of the restrictions resulting from this provision is a body constituting the LGUs. At the stage of adopting the budget, it must comply with the so-called individual debt ratio, calculation of which is based on an extensive mathematical formula. The limit value is determined by the arithmetic average of the relation of current income increased by income from the sale of assets and diminished by current expenses, to the total budget revenue. In a simplified form, it reflects the creditworthiness of a given LGU. It is assessed from the point of view of the mid-term ability of the local community to generate surplus in the current part of the budget and the possibility of obtaining income from the sale of assets. Both volumes illustrate a certain pool of 'free' financial resources that can be used to support the financial liabilities incurred. The subject matter of the restriction resulting from Art. 243 para. 1 of the p.f.a. is the size of planned or possible payments resulting from the existing and potential indebtedness of the local government unit. These payments include both expenditure related to the repayment of liabilities incurred and the costs of service.

Pursuant to Art. 243 para. 3 restrictions resulting from paragraph 1 shall not apply, however, to payments resulting from financial liabilities incurred in connection with the agreement concluded for the implementation of the program, project or task financed with non-returnable funds from foreign sources. Such sources include, among others, EU budget. However,

this shall only apply for a period not longer than 90 days after the end of the program, project or task and receiving refunds from the aforementioned measures. The rigorism resulting from the individual debt ratio is additionally mitigated by Art. 243 para. 3a of the p.f.a. This provision came into force on 28 December 2013. It excludes the application of Art. 243 para. 1 of the p.f.a. for payments related to liabilities incurred to finance a national contribution in programs, projects or tasks financed in at least 60% of funds from the EU budget or assistance provided by Member States of the European Free Trade Agreement (hereinafter: EFTA). In the case of projects generating income, the level of financing from foreign funds is determined after deducting the discounted income. On the other hand, the amount of expenditure for a national contribution is set in the amount that would result if the level of financing from foreign funds was calculated without taking into account the discounted income.

The shape of the fiscal policy rule specified in Art. 243 of the p.f.a. is the best example of preferential treatment by the Polish legislator of financial obligations incurred by local government units to implement projects that are partly financed from non-returnable foreign sources. Exclusions contained in Art. 243 para. 3 and 3a of the p.f.a. increase the absorption of EU funds by LGUs and precisely for this purpose they were created (Sejm, 2008: 39), although the scope of their application is slightly wider. It is not without significance that they are the only permanent exemptions from the rigours of the described fiscal policy. It is also worth paying attention to two details that increase the usefulness of the solutions contained in Art. 243 paras. 3 and 3a of the p.f.a. for LGUs. This first provision mainly includes only payments related to the bridging financing process, but introduces a time census. The preferential treatment of contracted liabilities ends after 90 days from the end of the project and the receipt of a refund. The conjunction used ('and' conjunction) means that the delay of the refund will not have a negative impact on the situation of LGUs. Only after receiving financial resources from a foreign source, the local government should pay off the previously incurred liabilities. In the case of excluding payments related to loans used to finance the national contribution, it is important that the legislator notices the issues of projects generating income, as well

as the establishment of the subsidy threshold from non-returnable foreign funds at a relatively low level of 60%. However, for many projects this threshold will turn out to be too high.

6 The Mode of Incurring Financial Liabilities by LGUs

Legislative solutions regulating the mode of incurring financial liabilities by LGUs that give rise to some interpretation problems deserve special attention. At least two reasons for this situation can be indicated. First of all, the legislator diversifies the competences of local government units in the use of debt financial instruments depending on their form and maturity. Secondly, the provisions regarding this matter have been placed both in the p.f.a. and in constitutional laws, i.e. in the Act of 8 March 1990 on communal self-government (hereinafter: the c.s.a.), the Act of 5 June 1998 on regional self-government (hereinafter: the r.s.a.) and the Act of 5 June 1998 on provincial self-government (hereinafter: the p.s.a.). This state of affairs does not affect the transparency of existing legislative solutions, which, inter alia, increases the risk of violation of competences by LGU authorities. It also seems that the majority of local governments did not notice the possibilities offered by the legal status in force since the entry into force of the law, and in particular the contents of Art. 212 para. 2 subpara. 1 of this Act.

In accordance with the provisions of the constitutional laws, the authority of the local self-government unit is under the exclusive power to adopt resolutions on matters exceeding the scope of ordinary management, concerning, inter alia:

- Issuing bonds and defining the rules for their disposal, acquisition and redemption by the executive body (Art. 18 para. 2 subpara. 9 point b of the c.s.a., Art. 12 subpara. 8 point b of the r.s.a., Art. 18 subpara. 19 point b of the p.s.a.),
- Incurring long-term loans and credits (Art. 18 para. 2 subpara 9 point c of the c.s.a., Art. 12 subpara. 8 point c of the r.s.a., Art. 18 subpara. 19 point c of the p.s.a.).

A contratio the executive body of the LGU is entitled to incur short-term loans and credits. These activities can therefore be included in the activities of ordinary management. Thus, the adoption by the council

or the local-government assembly of a resolution on taking a short-term loan or loan is tantamount to a violation of the law, necessitating the annulment of such a resolution by the regional accounting chamber (Resolution of the RIO of 2 June 2009). This state of affairs does not mean, however, that the executive body has full discretion regarding the use of these instruments. It can act only within the limits set for a given budget year by the council or the local-government assembly (Art. 18 para. 2 subpara. 9 point d of the c.s.a., Art. 12 subpara. 8 point d of the r.s.a., Art. 18 subpara 19 point d of the p.s.a.). However, the constitutional statutes do not give the executive body any competence to issue bonds.

The fairly clear division of competences of the organs of the local government unit resulting from the political system is 'complicated' by Art. 212 para. 2 subpara. 1 of the p.f.a. In accordance with this provision, the council or the local-government assembly may authorize the management board to incur loans and credits and issue securities referred to in Art. 89 para. 1 and Art. 90 of the p.f.a. These provisions set out all the objectives for which local authorities may incur public loans. These goals include, inter alia, bridge financing. This means that pursuant to Art. 212 para. 2 subpara. 1 of the p.f.a. the council or the local-government assembly may authorize the executive body not only to incur short- and long-term loans and credits. The authorization may also include the issue of municipal bonds. It is worth noting that there were no such possibilities pursuant to the p.f.a. of 2005. However, this solution is fully justified. Pursuant to Art. 91 para. 1 of the p.f.a. one of the obligatory elements of the budget resolution is the limit of liabilities due to loans and borrowings incurred and securities issued. Should the authority constituting local government units pass a separate resolution on a specific financial obligation, it duplicates, in a way, its previous activities (Salachna, 2013: 822). Authorization for the executive body established on the basis of Art. 212 para. 2 subpara. 1 of the p.f.a. therefore simplifies the process of budget implementation and LGU debt management. However, it should be emphasized that it undergoes some modification in the case of municipal bond issues. In accordance with the provisions of the constitutional laws, the body constituting LGU must specify in a separate resolution the rules for the disposal, acquisition and redemption of these instruments by the executive body.

The authorization established on the basis of Art. 212 para. 2 subpara. 1 of the p.f.a. is the legally binding limit of liabilities incurred by the executive body. At the same time, it has a non-renewable and general character. On the one hand, the repayment of previously incurred liabilities does not 'restore' the global limit amount. On the other hand, the constituting authority can not precisely determine the purpose of the funds incurred by the executive body under the authorization granted to it. The literal wording of Art. 212 para. 2 subapara. 1 of the p.f.a. also leaves no doubt that the authorization is one of the optional elements of the budget resolution. Therefore, it is unacceptable to include it in a separate resolution of the council or local-government assembly (RIO Resolution in Opole of 22. 12. 2003). The shape of this authorization must also be correlated with other provisions of the budget resolution. For example, it is unacceptable to authorize the executive body to incur financial liabilities in excess of the liability limit resulting from Art. 91 para. 1 of the p.f.a.

Irrespective of the mode adopted, incurring a specific public loan depends on the prior issuance of a relevant resolution or order by the competent authority of the LGU. This act should specify the allocation of revenues obtained in this way (RIO in Łódź of 16. 4. 2010) Literal interpretation Art. 89 para. 1 of the p.f.a. does not exclude the possibility for the LGU to contract a specific public loan for more than one of the purposes set out in this footnote. In this case, however, it is necessary to correctly indicate the legal basis by cumulatively recalling all relevant provisions (GKO of 17. 10. 2013). Resolutions and orders on incurring a specific public loan should be considered as budget-related acts. Thus, they are subsequent to the budgetary resolution. It gives rise to many legal consequences. In particular, the resolution and order regarding a specific public loan must comply with the provisions of the budget resolution. In addition, they may enter into force at the earliest on the same day as the budget resolution (RIO in Warsaw of 14. 1. 2014).

A separate issue is the manner of representing LGUs in the performance of a legal transaction consisting in taking out a public loan. In the p.f.a. this issue is regulated by Art. 262 paras. 1 and 2. Pursuant to the regulations included therein, when concluding a public loan agreement, the commune

is represented by the commune head (mayor, president of the city), and the region and province by two members of the management board indicated by that body in the resolution. The above provisions constitute an exception to the general rules for the representation of LGUs specified in the constitutional laws. They introduce significant restrictions regarding the subjective conditions of this representation (Mikos-Sitek, 2017: 842). For the validity of a legal action consisting in incurring a public loan, a countersignature of the LGU is also necessary (Art. 262 para. 1 of the p.f.a.). This solution can be considered a tool of budgetary discipline. It is a part of the tasks carried out by the treasurer as the chief accountant of the LGU. Attention should also be paid to solutions enclosed in the constitutional laws. They depend on the effectiveness of legal acts that may result in monetary liabilities from the countersignature of the treasurer (Art. 46 para. 3 of the c.s.a., Art. 48 para. 3 of the r.s.a., Art. 57 para. 3 of the p.s.a.). Between Art. 262 para. 1 of the p.f.a., and the provisions of constitutional laws, however, there is a significant difference. Refusal to countersign a legal act of incurring a public loan means its absolute invalidity (Glumińska-Pawlic, 2007: 38) – the activity does not exist in legal transactions. Meanwhile, refusal to countersign in the case of other activities only causes their ineffectiveness. In contrast to invalidity, it does not deprive the contract of mutual legal validity, but only creates the right of the parties to release or differently shape its effects (Supreme Court verdict of 27. 03. 2000). Art. 262 para. 1 of the p.f.a. can be therefore considered as *lex specialis* against the aforementioned provisions of the constitutional laws (Salachna, 2010: 829).

7 Conclusion

Access to financial resources from the EU operational programs significantly increases the development opportunities of LGUs, enabling them to implement various types of projects. Nevertheless, obtaining these funds is associated with serious challenges, both organizational and financial. In the latter case, local governments must collect funds necessary to ensure co-financing of the implemented project (to cover the own contribution and costs not eligible for support from EU funds). In addition, it may also be necessary to finance the eligible costs associated with the implemented

project, as co-financing from European funds often takes place on the basis of refunds incurred by the beneficiary of expenses. For many of the LGUs, a public loan becomes the source of funds necessary to conduct such activities. The Polish legislator, recognizing the benefits of the absorption of EU funds, significantly facilitates incurring financial liabilities to LGUs for the implementation of tasks financed from the EU budget. Furthermore, in recent years, legislative changes have been beneficial from the point of view of LGUs. Bridge financing has become an independent goal for local governments to incur financial liabilities. Payments resulting from this type of liabilities as well as public loans ensuring an appropriate level of own contribution to the projects implemented have been excluded from the rigours of the individual debt limit of LGUs. The mode of using the instruments classified as debt securities by local governments was also simplified. The conclusions from the above analyses allow for a positive verification of the hypothesis formulated in the introduction to this study.

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TAX EXEMPTIONS IN LOCAL TAXES AS AN ELEMENT OF STATE AND LOCAL GOVERNMENT TAX POLICIES

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Abstract

The aim of this paper is to present the mechanisms of forming tax exemptions in local taxes. The reflections presented in this paper confirm the hypothesis that the structure of the laws regulating local taxes enables now the implementation of the tax policy of the state, foremost, and not local governments. The state is capable of introducing any number of arbitrarily shaped tax exemptions. Moreover, the state does not bear any economic consequences of the exemptions introduced in local taxes. The paper also points the following proposals. First, it is important to pursue the situation where the statutory exemptions in local taxes are accompanied by an obligation of the state's compensations for the municipality's income foregone. Second, statutory provisions should include optional exemptions. The methods used are descriptive analysis, literature and judgments analysis of the subject matter, analysis of legal regulations concerning the functioning of tax exemptions in local taxes in Poland.

Keywords: Local Taxes; Tax Exemption; Obligatory and Facultative Tax Exemption; Compensation for the Lost Tax Incomes; Tax Policies.

JEL Classification: H71, H79, K34.

1 Introduction

The aim of this paper is to present the mechanisms of forming tax exemptions in local taxes in the context of the possibility of shaping the tax

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policy. Through the introduced tax exemptions, one may implement the goals of both state and local government policies. This paper will verify the hypothesis, in accordance with which the structure of the laws regulating local taxes (including foremost the property tax, the agricultural tax and the forest tax) currently enables the implementation of the tax policy of, foremost, the state. The local government has a possibility of affecting the entities paying local taxes in a lesser range than the state. This is connected with the higher level of freedom of the legislator than local units in forming tax exemptions. This freedom refers to both legal and economic aspects. The legislator, in contrast to the local legislator, has no legislative limits consisting in the possibility of introducing only exemptions of a particular nature. This entity may introduce subjective exemptions. The legislator, unlike the municipality, actually bears no economic consequences of the introduced tax preferences.

2 Tax Exemptions and Tax Policy

A tax policy should be treated as a type of financial policy, which in literature is understood as a deliberate and purposeful activity of people and institutions involving the establishment and realization of particular goals with financial means (steps and actions) (Ruśkowski, 2003: 32). The literature also shows that the tax policy fulfills two functions (Dziemianowicz, 2011: 70). One of them is of a fiscal nature connected with providing incomes serving the realization of particular public tasks. The other function, of a non-fiscal nature, involves the use of taxes in such a way that they could encourage the development of economy, and thereby the stimulation of social development. It is underscored that in the case of municipalities it is difficult to consider the aforementioned functions separately, since they play a particular role in the hands of both tax authorities (being executive bodies of municipalities) and legislative bodies (Filipiak, 2015: 221).

Tax exemptions introduced in local taxes by both the state and municipalities affect also the municipalities' incomes. They may influence both the economic and the social spheres. It should raise no doubts that tax exemptions may have an impact on the incomes from a particular tax. In a short perspective, the exemptions the most frequently result in the fall

in the incomes from a particular tax. However, in a long-term perspective they may contribute to the increase in the incomes. This refers to, foremost, the so-called temporary investment exemptions, i.d. the exemptions the exercising of which for a time being (for example 10 years) depends on the investment of particular means on the territory of a particular municipality. A consequence of these exemptions may be the contribution to increase in the tax basis, since the encouraged taxpayers, for example entrepreneurs, invest and thereby the number of objects of taxation, e.g. buildings or structures on a particular territory, increases. The introduced exemptions may also affect both economic and social development. The introduction of a tax exemption referring to, for example, a property dedicated to production on condition of creating a particular number of workplaces, may have positive effects in many dimensions. On the one hand, it may contribute to the economic development through the growth in production in a particular area; on the other hand, it may contribute to the decrease in the unemployment rate.

3 Obligatory Tax Exemptions Introduced by Law

The current range of statutory exemptions is very extensive. In the property tax the regulations from which they result are twenty-five, in the agricultural tax twenty, and in the forest tax there are ten exemptions. The exemptions may be divided into a few groups. One of them refers to the property serving public purposes. It embraces, for example, plots of land, buildings and structures being part of the railway infrastructure, structures of port infrastructure, structures of the infrastructure providing access to ports and sea harbors as well as the plots of land occupied for them, buidlings, structures and the land occupied for them in the area of the airfields of public airports. The other group make the exemptions referring to properties utilized for the activity of a special public importance. This refers to the broadly understood activities: educational, agricultural, forestry, fishing, charity, carried out by supported employment enterprises, or entrepreneurs of the status of research-development center. The third category of exemptions includes the entities which have little potential of income generation: structures of protective shafts, land for protective shafts and

between the shafts, farmlands of the weakest classes of soil (class V, VI), fallow land, ecological farmlands, wooded and bushed lands. The global value of the preferences occurring in local taxes is quite considerable. For example, it amounted in 2014 PLN 7.9 billion, which makes, like in the years 2011–13 nearly 0.5% of GDP. The most considerable stream of support is, in this case, addressed to agriculture and in 2014 amounted PLN 2.6 billion (Preferencje podatkowe w Polsce, 2015: 5). The data acquired from the Ministry of Finance for 2014 show that in local taxes the most significant amounts of tax preferences occurred in the property tax. They are, like in the previous reporting period, exemptions for farm buildings situated on the lands of farms, serving agricultural activity only (PLN 1.8 billion, or 23.3% of the exemptions granted). Exemptions for fallow lands made PLN 1.3 billion, or 16.3% of the exemptions granted. Exemptions for railway structures and lands for them amounted PLN 1,0 billion and made 13.0% of the exemptions granted. Exemptions for wooded and bushed lands amounted PLN 788 million, which constituted 9.9% of the exemptions granted. To compare, the exemptions from the property tax resolved by municipalities amounted jointly in 2014 nearly PLN 0.8 billion (Preferencje podatkowe w Polsce, 2015: 36).

4 Obligatory Tax Exemptions Introduced by the Law and Compensation of the Lost Incomes of the Municipality

Currently, municipalities obtain only minimal additional means to compensate the income foregone as a result of the decrease in tax incomes resulting from the exemptions from local taxes introduced by the government. In the property tax, out of twenty-five existent statutory exemptions, only three of them involve the return of the income foregone (Local Taxes and Fees of 12 January 1991, Art. 7/6 and 6). Municipalities are entitled to the return from the state budget of the income foregone from the objects of taxation, which are subject to taxation and are not exempted therefrom on the basis of other provisions of this law, in reference to lands, buildings and structures located in national parks or nature reserves and serving directly and exclusively the achievement of goals in the nature protection (Local Taxes and Fees of 12 January 1991, Art. 7/1 point 8a). The other category of exemptions

for which municipalities receive compensations refer to the lands being the property of the Treasury under the flowing surface waters of lakes and occupied for artificial water reservoirs, except the lands transferred into possession to other entities than those named in particular provisions of the Act Water Law (Local Taxes and Fees of 12 January 1991, Art 7/1 point 8a). The third category of exemptions, from which municipalities receive the return of the income foregone refers to the exemption of entrepreneurs of the status of a research-development center obtained in accordance with the rules determined in regulations on certain forms of supporting investment activity, in reference to the objects of taxation occupied for research and development works (Local Taxes and Fees of 12 January 1991, Art. 7/2 point 5a). It is difficult to indicate the reasons which decided why it is in the case of these exemptions (three out of twenty-five statutory exemptions) compensations are introduced for the income foregone.

5 Tax Exemptions Introduced by Resolutions of Municipality Council

5.1 Objective exemptions

Currently, municipalities may introduce objective exemptions only. They cannot, however, introduce subjective exemptions. This results from the regulation constituting the basis for introducing exemptions by municipality councils. In accordance with it a municipality council may introduce, as a resolution, objective exemptions other than those determined in Paragraph 1 and in Article 10 para 1 of the Act of 2 October 2003 on the amendment of the law on special economic zones and certain laws (Act on Books no. 1785/2017, Art. 7/3). This position is confirmed, foremost, in judicial decisions which refers to the aforementioned regulation constituting the basis for adopting tax resolutions. It is raised that the limits of legislative powers of the units of local government are determined by laws, which results unequivocally from the Constitution of the RP and the law (Act on Books no. 1591/2001, Art. 18/1 point 8 and Art. 40/1 and Supreme Administrative Court: 2 Afs 2833/2012). It is also underscored that the exemption determined in the law on local taxes and fees, where the property tax is regulated, may exclusively refer to the object,

i.e. the property used for various types of activity (Supreme Administrative Court: 2 Afs 2592/2012, Supreme Administrative Court: 2 Afs 2217/2014, Supreme Administrative Court: 2 Afs 2531/2016). These judicial decisions also assert that the object should be defined in such a way, that no identification of a particular taxpayer is possible, so the qualities of the object should be defined in the regulation in such a way, that they concern a potentially (hypothetically) indeterminate individual taxpayer. In addition, it is pointed out that it is insomuch a difficult tax as the exemption in each case will eventually refer to a particular subject, because the structure of the tax includes both the object and the subject subject to taxation. Consequently, the judicial decisions underscore that there is no objective exemption which could not be ascribed to a particular subject. This impediment requires from municipality councils precision in making provisions of local law, foremost determining the criterion of the exemption through the identification of the object and not the subject of the exemption. In every case, if it is possible to directly derive from the legislated regulation who is subject to exemption, and not only which object is covered by the exemption, the exemption may be ascribed the nature of object-subject exemption, which, consequently, means the exceeding of the statutory delegation to establish the exemption determined in Art. 7 para 3 of the Act on local taxes and fees (Supreme Administrative Court: 2 Afs 2592/2012, Supreme Administrative Court: 2 Afs 2217/2014, Supreme Administrative Court: 2 Afs 2531/2016).

The literature on the subject one may also find statements supporting assertions that the right to establish exemptions by the municipality concern exclusively a certain category of the objects of taxation and does not include the right to establish objective-subjective exemptions (Koperkiewicz-Mordel, 2005: 71). Also a different position is presented, in accordance with which the provisions, currently in force, of, for example, the Act on local taxes and fees constitute the basis for the introduction of not only objective exemptions but also objective-subjective ones (Etel, 2004: 35, and also Popławski, 2011: 111). For it is difficult to question the statement that all objective exemptions refer to particular subjects. Making all exemptions, including those objective, the legislator has to anticipate who will be included in the particular tax preference. Obliging municipalities to make the exemptions

introduced by them purely objective is a solution generating complications, and thereby impractical. Municipalities wanting to meet the requirement that exemptions were of objective nature must create intricate legal structures. This may be confirmed by the situation where a municipality would like to exempt lands and buildings transferred for public purposes to municipal budget units from the property tax (Act on Books no. 2077/2017, Art. 11/1)[2]. It would be easier to directly record that, for example, municipal budget units are exempted from the property tax, than to attempt to point at the objects which should be exempted in this situation, for instance, the lands, buildings connected with the activity serving to satisfy the collective needs of the community are exempted from the property tax. The first formula is more precise. The other solution may evoke interpretative doubts. Of course, it is possible to try to make the latter more precise through specifying its range. This solution would be thereby more complicated. The wording of this exemption could be as follows: The exemption from the property task shall refer to: lands and buildings connected with, for example, the issues of spatial order, property economy, environment and nature protection as well as water economy: waterworks and water supply, sewage, removal and purification, maintaining cleanliness and order, as well as sanitary devices, dumps and disposal of municipal waste, local public transport, health care, social assistance, including care centers and facilities, supporting the family and the foster care system.

5.2 Introducing Additional Conditions of the Application of Exemptions Introduced by Municipal Councils

It should raise no doubts that the tax exemptions introduced by municipalities should have their legal basis in the provisions of the law. This concerns not only the range of the exemption but also the conditions of its application. Therefore, it is pointed out that unauthorized are such records in resolutions, on the basis of which: the tax authority confirms in writing the entrepreneur meeting the conditions of obtaining public assistance, the tax

2 In accordance with this regulation, budget units are the organizational units of the sector of public finance without a legal personality, which cover their expenses directly from the budget, and the collected income transfer to the account of, respectively, incomes of the state budget, or the budget of the local government unit.

authority provides an exemption in the form of the decision of this body; the exemption may be granted only on the justified request of the taxpayer (Popławski 2011: 102). In reference to the decision of granting an exemption it is important to state that the taxpayer, having fulfilled all the conditions pointed by the resolution, necessary to exercise the exemption, should point at the immovable properties as those exempted in the tax information or declaration, and if the tax authority decides that the taxpayer fails to meet the necessary conditions, it will have to issue a tax decision. In the case of physical persons it shall be a decision establishing the amount of the tax obligation in the property tax, and in the case of legal persons and organizational units with no legal personality, the competent decision will be that determining the amount of the tax obligation. Issuing these decisions will actually be a confirmation that the taxpayer does not fulfill the conditions necessary to exercise the tax exemption (Popławski, 2011: 104).

In the context of a possibility of introducing in resolutions additional conditions of exercising the exemption, the judicial decisions show, however, quite a liberal approach. It is possible to point at the view that recreating the range of authorization to make local acts of law included in the law, we should accept the rule that municipalities are entitled to determine in the resolution not only the wording of the exemption from the property tax itself, but also additional elements, which are necessary for its proper application, in accordance with the adopted assumption, unless it infringes other acts of law. This means that the authorization to introducing tax exemptions also includes the right to determine by which rules and in which period they are applicable unless these decisions are in contradiction to other provisions of law (Supreme Administrative Court: 2 Afs 1289/2017). This judgment was issued in the state of affairs where the college of the Regional Accounting Chamber stated the lack of legal grounds for the city council making regulations concerning submission of certain documents, on a strictly defined forms, or the obligation of the control of the degree of utilizing public aid and legislating on the circumstances of the loss and expiry of the right to exemption. Judicial decisions also underscore that municipalities have the right to determine in their resolutions the deadlines for reporting the intention of using an exemption, and a failure to report

this intention within by the specified period results in the loss of the right to exemption (Supreme Administrative Court: 2 Afs 2852/2016).

6 Facultative Tax Exemptions Introduced in the Tax Law

Tax exemptions introduced by the state can be facultative. They may consist in the legislator introducing in the law specific exemptions, indicating that they shall function on condition of their acceptance by municipality councils. This action could involve enabling municipalities to introduce the exemption from the property tax for, for example, entities making the sector of public finance. This term covers, for instance, public authorities, including the organs of government administration, bodies of state control and law protection, as well as courts of law and tribunals, units of local government and their unions, metropolitan unions, budget units, local budget institutions, executive agencies, institutions of budget economy, state special purpose funds, independent public facilities of healthcare, state and local cultural institutions, as well as other state and local legal persons created on the basis of separate laws in order to perform public tasks, excluding enterprises, research institutes, banks and companies of commercial law (Act on Books no. 1785/2017, Art. 9). Thus, an example of a facultative tax exemptions introduced in the tax law may be as follows: The municipal council may introduce an exemption for entities making the sector of public finance.

The solution involving statutory facultative exemptions includes certain advantages. It is undoubtedly good that the character of such exemptions may be subjective. This results in the simplification of the introduction of these exemptions by municipalities. The solution would not require creating an extensive legal structure of the exemption. The solution entails a limited risk of the acceptance of an exemption the construction of which is faulty. This is an important issue, for the research concerning the quality of making tax resolutions demonstrate that the situation in this area is not good. It is confirmed by the fact that tax resolutions adopted by municipalities and introducing tax exemptions contain a great number of drawbacks. Moreover, some of them occur very often. This refers to, for example, introducing exemptions referring to entrepreneurs without defining the procedure of granting the public assistance, too extensive defining the range

of the exemptions concerning the so-called natural monopoly, introducing tax reliefs, introducing provisions contradicting other regulations, exempting nontaxable entities, or introducing exemptions with imprecise terminology (Popławski, 2011: 246).

It is important to underscore that facultative exemptions cannot be an exclusive mechanism of constructing exemptions functioning in local taxes. The legislator is not able to anticipate all needs of municipalities and accept all possible facultative exemptions including any possible need in this matter. This solution would not guarantee the security of the state's interest either. For there is no guarantee that the exemptions essential for this entity would be introduced by municipalities, for example, in the public transport infrastructure. Facultative exemptions may constitute a fundamental mechanism of exemptions in local taxes. It should be, however, complemented with other solutions, i.e. obligatory exemptions introduced by law as well as exemptions introduced by municipalities, the nature and substance of which would be different from the statutory facultative exemptions.

7 Conclusions

The reflections presented in this paper confirm the hypothesis that the structure of the laws regulating local taxes enables currently the implementation of the tax policy of, foremost, the state and not local government. The legislator can introduce any number of tax exemptions the range of which may be also arbitrarily formed by this entity. The state bears no economic consequences of the exemptions introduced in local taxes. The mechanism of the state compensating the incomes lost by municipalities as a result of the exemptions introduced by the state, is applied selectively and refers to a small part of these exemptions only, c. 10%. It is important to postulate that the introduced statutory exemptions in local taxes should be accompanied by an obligation of the state introducing compensation for the lost incomes of the municipality.

The mechanism of statutory exemptions currently in force is complemented with a solution on the basis of which municipalities may introduce objective exemptions. This solution, however, is not optimal. Obliging municipalities to give the exemptions introduced by them a purely subjective nature

is a solution causing a great number of legislative problems, and thereby is an impractical solution. Municipalities, wanting to meet the requirement that exemptions were objective, must create intricate legal constructions, with which they make a great number of mistakes. It is important to introduce a solution where statutory provisions will include facultative exemptions. They may consist in the legislator introducing in the law specific exemptions indicating that they will function on condition of being accepted by the municipal council. It should be, however, complemented with other solutions, i.e. obligatory exemptions introduced by the law as well as exemptions introduced by municipalities.

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CORRECTION ELEMENTS IN CASE OF CZECH LOCAL CHARGES

Michal Radvan[1]

Abstract

This contribution deals with correction elements in case of Czech local charges. The main aim of the contribution is either to confirm or disprove the hypothesis that the up-to-date regulation in the area of the correction elements in case of Czech local charges is easily applicable for both taxpayers and tax administrators. Critically analysing the local charges correction elements and the tax procedure connected with these elements and synthetizing the gained knowledge, the hypothesis was disproved. It is necessary to prepare a completely new Local Charges Act respecting principles of modern law-making. The new Act should rigorously distinguish between the various structural components. The structure of the legal regulation of each charge should be as uniform as possible: taxpayer – object of charging – exemptions (as the only correction element) – charge base – charge rate – other necessary special provisions. Only the most basic parameters should be regulated by the Act so as to give the municipalities the widest scope to specify the legal norms. The material regulation should be complemented by the procedural one, but only by special provisions in relation to the Tax Code as a general procedural law for the taxes and charges administration.

Keywords: Tax; Tax Law; Charge; Structural Component; Correction Element.

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1 Introduction

Historically, there are many problems in the legal regulation of local charges in the Czech Republic. The Local Charges Act itself was adopted in 1990 and even though it was emended 22 times, this act is still obsolete and does not respect principles of modern law-making.

One of the most frequent problems is the issue of correction elements, i.e. especially exemptions, but as well definitions of non-taxable objects of taxation, tax waivers, reductions, etc. The terminology in the Local Charges Act is inconsistent and brings many practical problems in tax (charge) administration. The partial aim of this contribution is to summarize the existing correction elements in case of Czech local charges, using the exploration method including the description. Later it is necessary to critically analyse the duties of taxpayers to apply for the correction elements, as there is a new regulation valid since July 2017, but practically to be applied since the taxable period of 2018. The main aim of the contribution is either to confirm or disprove the hypothesis that the up-to-date regulation in the area of the correction elements in case of Czech local charges is easily applicable for both taxpayers and tax administrators. For this task, the method of synthesis is being used.

Concerning the state of literature, there are several authors dealing with local charges from the general point of view, i.e. Pařízková (2012) and Radvan (generally especially 2012, and many times on specific issues connected with local charges).

2 Local Charges in General

Local charges together with the immovable property tax create a group of local taxes. I have created and previously published my own definition that the local tax would be a financial levy, determined to the municipal budget that can be influenced (tax base, tax rates or one of the correction elements) by the municipality. It is not crucial whether the taxpayer obtains from the municipality any consideration or if it is a regular or a single levy – local taxes include both taxes sensu stricto and fees (charges) (Radvan, 2016 Article: 74; Radvan, 2016 Taxes: 515). The Local Charges Act provides for the power of municipalities to assess local charges by means of issuing

their ordinances (bylaws). Such generally binding ordinances must specify the conditions for levying, the charge rate, the charge maturity and possible charge allowances if any. The ordinances may not exceed the limits defined by the Local Charges Act (such as, for example, the absolute charge rate and the types of charges permitted). Presently, the municipalities in the Czech Republic have the opportunity to levy only these following local charges (the list is complete, i.e. municipalities are not allowed to levy any other charges) (Radvan, 2016 Article: 75–76):

- Dog charge;
- Charge for spa and recreation stay;
- Charge for using public places;
- Charge on entrance;
- Charge for housing (accommodation) capacity;
- Charge for permission to enter selected places by motor vehicle;
- Charge on communal waste;
- Charge on appreciation of building land (Radvan, 2017: 341–342).

3 Local Charges Correction Elements

The holder of the dog pays the dog charge. Some holders are exempt from paying by the Local Charges Act. This rule concerns blind or helpless people, persons with the severe disability who hold a ZTP/P card according to a special legal regulation and persons conducting training dogs intended to accompany such persons. The additional exemptions are for persons operating a shelter established by the municipality for lost or abandoned dogs, and persons who are specified by the obligation to keep and use the dog in a special legal regulation (hunters).

Municipalities can extend the list of exemptions. It seems to be clever to include rescue dogs, police dogs (used by both state and municipal police), canisterapeutical dogs, dogs in zoos, etc. In case of chipped dogs, a municipality can apply unlimited or time-limited exemption as part of the stimulation function of the charge.

While the basic charge rate can run up to 1 500 CZK for a dog per year, for pensioners (with invalid, old-age, widow's or widower's and orphan's pension)

the reduced rate is up to 200 CZK and is set by the Local Charges Act. The concrete charge rate must be set in the municipal bylaw.

In case of two tourist charges (charges for spa and recreation stay paid by the guest, and for housing capacity paid by the quartermaster), there is no exemption set directly in the Local Charges Act, but there are groups of taxpayers not liable to charge. Blind or helpless people, persons with the severe disability who hold a ZTP/P card according to a special legal regulation and their guides do not pay the charge for spa and recreation stay. Persons under the age of 18 and over 70 and persons with the right to child allowances are not liable to the charge either. Even the basic military service was abandoned in the Czech Republic, soldiers in basic military service and persons performing civilian service are formally not liable to the charge for spa and recreation stay. Dealing with the charge for housing capacity, the capacity in facilities used for the temporary accommodation of students and pupils, in medical or spa facilities (under the condition they are not used as hotel facilities) and in facilities serving social and charitable purposes is not liable to the charge.

The municipality has the right to set additional allowances (usually exemptions) in the local bylaw, but this possibility is not used often. In rare cases of exemptions set in the municipal generally binding ordinance for the accommodation capacities in certain parts of the municipality, the municipality must be aware of the public support rules (Dowgier, 2010; Glumińska-Pawlic, 2010).

Dealing with the charge for using public places, the Local Charges Act itself is not very spesific, as it states that the charge is not payable by the user of public place for events organized in public areas, the yield of which is intended for charitable and public benefit purposes. There are two unsolved problems:

- Is that enough for the allowance to use just a part of the yield (as in case of the entrance charge, the "full yield" is mentioned)?
- Is that enough just to intend the yield or charitable and public benefit purposes, or shall it be really used for this purposes?

I believe in both cases it is not enough and the full yield must be really used for charitable and public benefit purposes.

As the municipalities have the right to set additional allowances in the local bylaw, they very often set an exemption for the public places owned by the municipality itself. The argument is the necessity to pay the rent to the municipality and it would mean "double taxation" to collect additional payment – local charge. This argument is incorrect for at least two reasons: primarily, the local charge is a public payment with tax characteristics, while the rent is a private payment for service. Secondly, such a rule is considered as a public support: to use rented municipal property is cheaper than to use rented property owned by any other subject (Dowgier, 2010; Glumińska-Pawlic, 2010).

Problem number one mentioned above in case of charge for using public places is expressly solved for the charge on entrance; the Local Charges Act states that the charge is not payable by the organizer for events, the full yield of which is intended for charitable and public benefit purposes. Unfortunately, problem number two still remains the same.

Municipalities quite often exempt cultural and sport events by local generally binding ordinances and only sale and advertisement events are charged.

For the charge for permission to enter selected places by motor vehicle, generally paid by the holder of the permission to enter chosen places and parts of towns (where nobody else can get because of a road sign), there is a negative definition of taxpayers. The charge is not payable by natural persons with a permanent residence or owning an immovable property at the selected place, by their close persons, their husbands and wives and their children. Moreover, the charge is not payable by persons (both natural and legal) using an immovable property for business or public benefit purposes at the selected place. Finally, the charge is not payable by ZTP/P cardholders and their guides. All these allowances are applicable only if the charge is collected in one lump sum payment. However, for individual one-time entrance payments, it is many times impossible to decide whether the driver should pay or not.

Appropriate exemptions provided for by a generally binding ordinance could include exemptions for state and local authorities whose offices are located in selected places, and for diplomatic representations of foreign states. Consideration should also be given to exemption for supply vehicles.

On the contrary, I do not recommend too much to extend exemptions for vehicles of employees working in selected places; if these and possibly, also other persons would have free entry, the regulatory function of the charge would be largely disputed. Municipality may exempt persons renting family houses and flats in selected places without having a permanent residence there (Radvan, 2012: 105).

The Czech law includes three possibilities for the municipalities to collect money to provide communal waste management. Approximately 80% of municipalities are using charge on the operation of the system for picking, collection, transport, sorting, recovery and disposal of municipal waste as a local charge, i.e. a local charge on communal waste, regulated by the Local Charges Act. Charge on communal waste according to the Waste Act is being used in 19% of municipalities and the rest prefers a contract between the municipality and the persons producing communal waste or has no charge on communal waste at all (Radvan, 2016 Taxes: 516). The local charge on communal waste is paid by each natural person with a permanent or temporary residence at the territory of the municipality. The charge is paid also by all natural persons who own a building designated for individual recreation, an apartment or a house, where does not live any person paying the charge. I.e. the tax shall also be paid for rented houses and apartments, and for cottages and other buildings for individual recreation, even just as an amount equivalent to the fee for one natural person. The taxpayer of the charge on communal waste according to the Waste Act is every person producing communal waste. (Radvan, 2016 Taxes: 516–517)

The list of exemptions from the local charge on communal waste is quite broad. Natural persons with a permanent or temporary residence at the territory of the municipality are exempted if they are:

- Placed in a children's home for children under 3 years of age, a school facility for the exercise of institutional or protective care, or a school facility for preventive educational care, based on the court decision or the contract;
- Placed in a facility for children requiring immediate assistance on the basis of the court decision, or at the request of the municipal office, or the legal representative of the child;

- Placed in a home for people with disabilities, a home for the elderly, a home with a special scheme or in a sheltered housing.

The municipality has a right to set more exemptions in the bylaw. The most common are exemptions for persons living long-term abroad, in prison, or in the hospital for the chronically ill. Such exemptions are clever, as these people are not producing the waste at the territory of the municipality. Much more problematic from this point of view is the exemption for underage persons. There are just a few municipalities exempting at least partly from the waste charge those who are sorting their waste. Of course, such an exemption is complicating the charge administration, but as an economic and ecological tool, it is very useful (Radvan, 2012: 119–120).

During the tax proceedings, at the request of the taxpayer, the municipal office as the tax administrator may waive, in whole or in part, the local charge on communal waste or its accessories, in order to remove the hardness of the law, and if justified by the circumstances of the case.

Dealing with the charge on appreciation of building land paid by the owner of the lot, if he has a possibility to connect it to municipal water conduit or sewerage, no exemption is directly enacted in the law. Its introduction in the form of a generally binding ordinance would be extremely inappropriate and would very likely lead to discrimination of a certain group of taxpayers. The only exception that is offered is the case of taxpayers who contributed financially to the construction of a water supply or sewerage system before or during the construction. However, their contribution should not be less than the amount of the charge; if such a situation arises, it is appropriate to consider a reduced rate or, rather, a reduction in the amount already paid (Radvan, 2012: 127).

4 Partial Conclusions for the Substantive Law Regulation

As it is obvious from the text above, the legal regulation (not only dealing with correction elements) is obsolete. The structure of individual structural components of the local charges is non-uniform, the terminology in the act does not follow amendments for the other legal regulation (especially social security law, public law and civil law). Concerning the correction elements, these are used randomly: there are exemptions, tax reductions, waivers,

negative definitions of the taxpayers (taxpayer not liable to charge) or negative definitions of the object of taxation (charge is not payable). Art. 14/2 of the Local Charges Act states that the municipality is introducing the charges by the generally binding ordinance regulating the details of their collection, in particular by setting the specific charge rate, the occurrence and termination of the charge duty, deadlines for the reporting obligation, the charge maturity, charge allowances and eventual charge exemptions. Well, as it is obvious from the previous sentence, for the legislator allowance and exemption are different categories. For me as a tax law theorist, the allowance is the synonym for the correction element and the exemption is one form of the tax correction elements. Moreover, the term allowance is not generally used in Czech tax law, with the exemption of the term tax allowance to modify (reduce) the personal income tax base (e. g. by charitable gifts, interest paid on a mortgage, etc.) (Radvan, 2015).

Generally, I would prefer to have the general regulation for each local charge, stating the subject and the object of taxation, the charge base and maximum charge rate. The only correction element should be the exemption: the basic list should be stated in the Act. The municipality should have the right to issue a generally binding ordinance to set the concrete charge rate/s and to extend the list of exemptions. Dealing with these exemptions issues at both state (Parliament) and municipal levels, the exemptions must not allow any public support (as nowadays in case of tourist charges and charge for using public places). All exemptions should have any regulation or stimulation purpose to respect the needs of the municipality. In every case, correction elements should respect the principles of good governance and they should be easily and cheaply administered.

5 Procedural Local Charges Regulation

Unlike other taxes, there is no registration duty according to the Tax Code for the local charges. The taxpayer has the reporting obligation. Besides personal identification, he is obliged to report all the data decisive for determining the amount of the charge, including the information necessary for the tax allowances. This fact has been confirmed by the Constitutional Court: the reporting duty represents only a minimal burden for people

entitled to the exemption (Pl. ÚS 30/06). In case of any change, the taxpayer must notify the change within 15 days of the date on which it occurred.

Until the end of 2017, it was impossible to impose any sanction on the taxpayer who missed the reporting obligation (the first one or the changes). Art. 11/4 of the Local Charges Act stated that it is not impossible to impose any sanctions from the Tax Code (penalty, interest, fine) with the exemption of disciplinary (procedural) fine. However, the disciplinary fine can be imposed only a person who (Moravec, Radvan, 2016: 267):

- Seriously complicates negotiations with the tax authorities, i.e. despite previous warning, disturbs order, does not obey an instruction of a tax officer, despite previous warning behaves offensively to a tax officer or any other subject involved in tax administration;
- Makes grossly offensive submissions;
- Seriously impedes or obstructs the tax administration by without sufficient excuse, fails to meet the call of procedural non-pecuniary obligations established by the tax law or the tax administration.

Failures to meet general non-pecuniary legal obligations themselves are also fined. These fines may be imposed on persons who fail to comply with the registration, reporting or other notification obligations, or who fail to comply with the record-keeping obligations established by the tax law or the tax administration. Also, respecting the principle of electronic proceedings, the fine is imposed on any person whose filings are made in any other way than electronically (when such electronic filing is required) (Moravec, Radvan, 2016: 267).

From the above-mentioned text, it is unfortunately clear that until the taxable period of 2017 it was not possible to impose the fine for failures to meet general non-pecuniary legal obligations if the taxpayer did not meet his reporting obligation. This created serious problems for the tax administration. For example, if the dog died and the holder did not report that, the tax administrator (in good faith that the dog was still alive) assessed the charge. After several years, for example, during the recovery procedure, the holder objected that the dog had died and he submitted some certificate (from veterinary). The only possibility for the tax administrator was to re-open the proceedings (even there are still some formal obstacles according to the Tax

Code). It was not even possible to impose a fine for failure to meet general non-pecuniary legal obligation (to report the changes – the dog has died). Such a fine could be imposed only if there was a previous call of procedural non-pecuniary obligation. However, in practice, there was no such a call, as the tax administrator did not have any doubts about the dog being alive.

The new regulation, practically effective from the 1 January 2018, allows the tax administrator to impose the fine for failures to meet general non-pecuniary legal obligations. To be honest, in the above-mentioned case it brings nothing new to the tax procedure, if the taxpayer fails to report the death of the dog, as stated by the Constitutional Court ("*Establishing the termination of the duty to fulfil the reporting obligation goes beyond the law, respectively, it finds itself inconsistent with the law and constitutional order.*" – Pl. ÚS 30/06). However, the tax administrator may impose the fine and to a certain limit compensate the increased costs of the tax proceedings.

There is another amendment practically effective from the 1 January 2018. If the taxpayer fails to comply with the obligation to report the information applicable for the exemption or the tax allowance within the period prescribed in the bylaw or within 15 days of the date on which the information or change occurred, the entitlement the exemption or the tax allowance shall be extinguished. In such a situation, the fine for failures to meet general non-pecuniary legal obligations cannot be imposed; the taxpayer is "punished" by losing the right to the allowance. This type of "conditional exemption" is very useful for practice: until the taxable period of 2017, the taxpayer was still exempted from the charge, even the tax administrator did not have any information about the real situation (for example, the holder of the dog is blind, the communal waste charge payer is living in a home for the elderly, etc.). Nowadays, the exemption or the tax allowance could be applied only if there is a previous reporting by the taxpayer.

What is still unclear, even after the amendment of the Local Charges Act, is the frequency of the reporting obligation. In my opinion, it is adequate to report all the facts decisive for determining the amount of the charge, including the information necessary for the tax allowances, just once. On the other hand, if the municipality wants to introduce a specific tax allowance, it is possible to condition the exemption from annual reporting

obligations. This seems to be clever for example in case of exemption from the charge on communal waste for people with the permanent residence at the territory of the municipality actually staying abroad. According to the opinions of the officials working for the tax administrators and the participants of my courses at the faculty, the county offices and the Ministry of the Interior as supervisory authorities state that the reporting obligation should be submitted just once. Only in case of any changes, it is necessary to report these changes within 15 days of the date on which the information or change has occurred. Annual reporting obligation would mean, according to their opinion, an excessive burden for the taxpayer and might be unconstitutional. Unfortunately, this opinion was never published officially. I strongly believe that annual reporting obligation, especially if it means a benefit (tax allowance) for the taxpayer, cannot be considered unconstitutional. However, this conclusion is valid only for tax allowances regulated by the municipal generally binding ordinances and not for those stated in the Local Tax Act; the municipality is limited by law while issuing a local bylaw and setting any other conditions for the tax allowance would go beyond the law and would really be unconstitutional.

The tax waiver, dealing only with the local charge on communal waste, was mentioned above. At the request of the taxpayer, the municipal office as the tax administrator may waive, in whole or in part, the local charge on communal waste or its accessories, in order to remove the hardness of the law and if justified by the circumstances of the case.

6 Conclusions

Aforementioned, I was dealing only with the correction elements of local charges. Even from this narrow part of the local charges regulation, it is evident that there are many problematic aspects. The Local Charges Act itself is obsolete and does not respect principles of modern law-making. It is necessary to prepare a completely new Local Charges Act, responding to the related legislation, and avoiding paradoxical situations where, for example, soldiers in the basic service and civilian servants are exempt from paying the charge.

The new Act should rigorously distinguish between the various structural components. It is necessary to determine the taxpayers and the object of charging in general and without exception and only subsequently to exempt selected taxpayers or behaviour, either directly by the Act or according to the will of the municipality in a generally binding ordinance. The structure of the legal regulation of each charge should be as uniform as possible: taxpayer – object of charging – exemptions (as the only correction element) – charge base – charge rate – other necessary special provisions. Only the most basic parameters should be regulated by the Act so as to give the municipalities the widest scope to specify the legal norms. The material regulation should be complemented by the procedural one, but only by special provisions in relation to the Tax Code as a general procedural law for the taxes and charges administration (for example local charge waiver).

Dealing with correction elements, the existing terminology in the Local Charges Act summarized in the article is inconsistent and brings many practical problems in tax (charge) administration for both the taxpayers and tax administrators. Even the last amendments valid since July 2017, but practically to be applied since the taxable period of 2018, are useful, the up-to-date regulation in the area of the correction elements in case of Czech local charges is still not easily applicable for both taxpayers and tax administrators. The hypothesis was therefore disproved.

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TAX COMPETENCE OF LOCAL AUTHORITIES: EXPERIENCE OF THE RUSSIAN FEDERATION

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Abstract

In each state, regardless of its territorial structure, there are some problems of differentiation of jurisdiction and powers between central and local authorities. Russia is the federal state therefore distribution of competence takes place at three levels: federal, regional and local. This research is connected with problems of differentiation of tax competence between federal, regional and local authorities.

The main objective of the article is to confirm a hypothesis of essential restriction of tax competence of local authorities in Russia that is connected with concentration of competence in local taxation at the federal level. The evidence of this hypothesis was obtained from the analysis of the legal data following primarily from Russian tax laws and legal positions of the Constitutional Court of the Russian Federation as well as from economic data obtained from official statistics.

Keywords: Tax; Tax Law; Tax Competence; Local Authorities.

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1 Introduction

According to official statistics currently there are more than 22 000 municipalities in Russia. Nowadays, in the conditions of an economic crisis in Russia, there is a crucial question of the search for additional financial source of the state and municipalities. If municipalities had sufficient competence in public finances in general, and in the field of the taxation in particular, they would play a significant role in increasing incomes of local budgets. Thus, the question of competence of local authorities in the taxation is topical in Russia.

The purpose of the study is to describe the model of the distribution of competence in local taxation between federal and local authorities in Russia by legal and economic characteristics. Ongoing research is expected to prove strong restriction of tax competence of local authorities in connection with centralization of tax powers at the federal level. Besides, the study will reveal tendencies in legal regulation of distribution of tax competence, which consist in strengthening of centralization of powers and further restriction of tax competence of local authorities.

To achieve stated goal, the following will be carried out:

- defining the boundaries within which local authorities can exercise their competence;
- analyzing the list of local taxes and fees;
- estimation of fiscal value of local taxes and fees;
- analyzing the procedure for establishing local taxes and fees;
- considering the practice of granting tax incentives.

The purpose of the research predetermined the choice of applied research methods, among which a systemic method should be emphasized. Federal, regional and local authorities are in interconnection and interdependence among themselves and represent a complex hierarchically constructed system. At the same time, local taxes and fees are also part of a unified system – the system of taxes and fees charged in Russia. The research focused on the interaction of federal and local authorities about local taxes and fees.

The problems of local taxation in Russia are reflected in many scientific articles. However, most of the works is devoted either to the problems of implementing the fiscal competence of the federal government, or the theory and practice of charging local taxes and fees. Among the few works that are close on the subject of research to present study, we can note the work of D.V. Tutin, who concludes that changes in the legislation taking place in Russia make it possible to trace the gradual movement of the entire legal system of Russia, including tax system, from formal federalism to an actual unitary (Tutin, 2017).

In our work we were based on Russian legislation in force, including decisions of representative authorities of municipalities on local taxes and fees, legal positions of the Constitutional Court of the Russian Federation and official statistical data.

We suppose that Russia's experience in distribution of tax competence between federal and local authorities, although not always positively evaluated by experts, may be useful in other countries for the practice of tax regulation as well as for comparative researches.

2 Legal Basics of Tax Competence of Local Authorities in the Russian Federation

The current period of development of local self-government in Russia began in connection with the changes of the entire system of public administration in the early 90-ies of the twentieth century. The legal basis for elaborating a new model of functioning of local self-government was the Constitution of the Russian Federation adopted by nationwide referendum in 1993. It stipulates that Russia recognizes and guarantees local self-government, which is independent within its powers (Art. 12).

To exercise their powers, local authorities must be provided with sufficient financial and economic resources as well as legal and organizational mechanisms. For mentioned purposes the Constitution fixes that authorities of local self-government independently (Art. 132):

- manage municipal property;
- form, approve and execute local budget;
- impose local taxes and fees.

It should be noted that providing ample opportunities and guarantees for local self-government, the Constitution of the Russian Federation did not reflect the actual situation in the state. It represented an ideal which local self-government in its development should come to.

The constitutional right of local authorities to impose local taxes and fees independently is consistent with the European Charter of Local Self-Government, which provides that part of the financial resources of local self-government should be replenished through local fees and taxes (Art. 9). However, right after the adoption of the Constitution of the Russian Federation, two important questions arose:

- To what extent are the local authorities independent in establishing local taxes and fees?
- Should the local authorities be guided by the rules and principles established by the federal center and regional authorities while solving issues of levying local taxes taking into account that establishment of general principles of taxation in Russia referred to the joint jurisdiction of the Russian Federation and its Subjects (Art. 72 of the Constitution)?

The resolution of these questions was largely depended on the choice of economic approaches to local taxation.

In many developed countries, the levying of taxes by local authorities is regarded as a kind of payment by the population for services rendered by the local administration, for example, related to the improvement of the territory. If the state follows such an approach, the local authorities are endowed with significant tax autonomy. In legal positions it is expressed in granting of powers to local authorities to establish a wide range of local taxes and duties, to determine independently the essential elements of such taxes (tax rates, payment procedure, etc.), to provide tax allowances and preferences. This leads to redistribution of tax powers in favor of local authorities, which allows them to implement their own tax policy and respond promptly to changes in socio-economic conditions in their territory and it also increases the interest of local authorities in development of the tax potential of the territory and responsibility for tax decisions. At the same time, the dependence of the local budget on local tax revenues is increasing.

Despite the fact that the legal provisions of the Constitution of the Russian Federation allow to implement the stated approach, economic and administrative realities have led to significant centralization of tax powers at the federal level. In Russia, there had not been made differences in the nature of national and local taxes. All taxes are considered as mandatory payments levied for the purpose of financial support of the state and local self-government activities. Under this model, the major tax competence, including the competence in the field of local taxes and fees, was focused on the federal level. Local authorities implement tax competence only within the limits established by the federal law and Tax Code of the Russian Federation (hereinafter – Tax Code).

Tax Code defines the system of taxes and fees in Russia, including a list of local taxes, as well as general principles of taxation. Local authorities do not have the right to establish any local tax but only those ones contained in the list.

The Constitutional Court of the Russian Federation gave estimation to such a correlation of tax competence of the federal and local authorities. Some municipalities established local fees that were not included in the list of local taxes fixed by the federal legislator (for example, a fee for the sale of gas and fuel, a fee for the purchase of currency intended for the maintenance of medical organizations, a tax on the provision of paid parking services, etc.). The Constitutional Court pointed out in its decision no. 22-O dated 5 February 1998 that the principles of unified financial policy, including tax policy and the unity of the tax system must be applied in Russia in accordance with its Constitution.

The establishment of taxes and fees is carried out by all three levels of authorities: federal authorities, regional authorities and authorities of local self-government. The federal legislator has the right to establish independently federal taxes and fees defining not only their list but also all elements of tax obligations. At the same time the introduction of local taxes by municipalities should be consistent with the constitutional principle of the unity of economic space. According to this principle, it is unacceptable to introduce regional and local taxes, which can directly or indirectly restrict the free movement of goods, services and financial resources within the common economic space as well as to introduce regional and local taxes,

which allows to form the budgets of some territories at the expense of tax revenues of other territories or transfer the payment of taxes to taxpayers of other regions or municipalities. The unified system of taxes and fees established by the federal legislator, including the list of local taxes, is a guarantee of the implementation of mentioned principle. Therefore, the local authorities have no right to impose additional taxes and fees that are not provided by the federal law. Any other understanding of the right of local authorities to impose taxes and fees would violate the principle of the unity of economic space.

In addition, the Constitutional Court pointed out the exhaustive nature of the list of local taxes established by the federal legislator. Consequently, the local authorities have the right to decide only the issue of introducing or not introducing local taxes listed in the federal law.

Local taxes and fees in Russia are: land tax, tax on property of individuals and trade fee (Art. 15 of Tax Code). Land tax and tax on property of individuals have been introduced everywhere in Russia. To date, the trade fee has been introduced only in Moscow. Besides that Saint Petersburg and Sevastopol are endowed with the right to impose trade fee on their territories, however, these cities haven't used their right yet. The rest of municipalities will be able to introduce trade fee after adoption of additional law by federal legislator.

The fiscal role of local taxes can be illustrated by the following figures: according to results of 2016, the total amount of land tax revenues to local budgets amounted to 156.4 billion rubles, and property tax revenues – 28.9 billion rubles (Official site of the Ministry of Finances of the Russian Federation). Local tax revenues amounted to 17.6% of local budget tax revenues or 7.6% of all own revenues of municipalities in the same year. It is obvious that importance of local taxes as sources of income of local budgets is relatively insignificant.

The competence of local authorities in the field of taxation is not limited to the establishment of local taxes. Tax Code gives certain municipalities[3]

[3] This right is granted to municipal districts, which unite the territories of several settlements, and city districts where local self-government is carried out at the same level. In addition, such subject of the Russian Federation as federal cities of Moscow, St. Petersburg and Sevastopol are also given the right to introduce a unified tax on imputed income for certain types of activities.

the right to introduce on their territories special tax regime[4] – a unified tax on imputed income for certain types of activities (Art. 346.26). This regime is used for taxation of small businesses in order to create more favorable economic and financial conditions, simplify the calculation and payment of tax and reduce the cost of tax control. Unified tax on imputed income replaces such taxes as corporative income tax and tax on property of organizations for organizations and individual income tax and the tax on property of individuals for individual entrepreneurs. Organizations and individual entrepreneurs who pay unified tax on imputed income do not pay value added tax as well.

However, unified tax on imputed income for certain types of activities does not have a significant fiscal impact on local budgets. According to results of 2016 the total income from the revenues of this tax amounted to 72.8 billion rubles, which is 6.9% of the tax revenues of local budgets or slightly more than 3% of the total volume of all own revenues of municipalities.

Tax revenues of local budgets are formed not only from local taxes and unified tax on imputed income. Following revenues are redistributed to the budgets of municipalities in accordance with the standards established by the budget legislation:

- revenues from federal taxes;
- revenues from regional taxes;
- revenues from special tax regimes.

The main source of local tax revenues is revenues from individual income tax that is federal tax. In 2016 the total share of this tax in the tax revenues of local budgets amounted to 62.7%. At the same time, the total tax revenues of local budgets amounted to 44.8% of all own revenues of municipalities.

Local authorities, receiving a significant part of tax revenues from redistribution of federal and regional taxes, are not endowed with any competence in the field of legal regulation of such taxes. Municipalities have no right to influence the rates of these taxes, establish tax allowances for these taxes

4 Special tax regimes represent a special procedure for calculation and payment of taxes within a certain period of time. Special tax regimes may provide substitution of one tax from special tax regime for several taxes from the common system of taxation or using of special order of determining of tax elements of taxes from the common system of taxation.

or provide any other preferences. Consequently, local authorities cannot influence the collection of these taxes by legal measures.

The analysis of the competence of local authorities in the field of establishment of local taxes and the economic result of the implementation of this competence expressed in statistics lead to the conclusion that currently local taxation in Russia is not the basis for the formation of local budgets. Formation of local budgets occurs in the centralized order through distribution of part of the federal and regional revenues in favor of municipalities. The large-scale use of distributing mechanism for the financial support of local self-government, on the one hand, protects local budgets reducing their dependence on local tax revenues, but on the other hand, deprives local self-government of significant component of independence.

The lack of sufficient tax powers of local authorities does not contribute to the development their interest in increasing tax potential of their territories. In attempt to solve this problem, the federal authorities are not going to expand tax competence of local authorities but are going to improve mechanisms for redistribution of revenues from federal and regional taxes.

Unified standards for distribution of revenues from federal and regional taxes to local budgets are fixed in Budget Code of the Russian Federation (hereinafter – Budget Code). Budget Code also gives to Subjects of the Federation the power of additional distribution of federal taxes and fees payable to the regional budgets and regional taxes to local budgets. (Art. 58). At the same time, regions are obliged to establish additional allocations from individual income tax and excise on certain fuels and motor oil to local budgets (amount of such allocation is specified by the Budget Code). The establishment of allocation from all other federal and regional taxes to local budgets is the right but not the duty of the region. In 2016, only 51 of 85 Subjects of the Russian Federation exercised mentioned right.

In 2016 tax revenues that were transferred to the municipal level in accordance with regional laws in excess of the standards set by the Budget Code are estimated at 102.1 billion rubles or 9.7% of the total tax revenues of local budgets.

Delegation of authority to redistribute revenues from federal and regional taxes to local budgets to the regions is intended to strengthen the interest of municipalities in expanding tax base by developing the investment attractiveness of the territories, creating necessary economic and social infrastructure, improving the quality of life, etc.

In our opinion, further development of local taxation in Russia is possible only under condition of gradual decentralization of tax powers and expansion of competence of local self-government in the field of establishment of local taxes and fees, which will lead to an increase in the share of revenues from local taxes and fees in local budgets. In scientific literature there is also a proposal to form an orderly system of local fees on the basis of the law. The basis for levying local fees and determining their amount may be accepted as economically reasonable characteristics of programs for socio-economic development of territories of municipalities. Local fees should be sent to the implementation of these programs (Kukelko, 2017: 17).

However, at present, the federal legislator has taken steps that, in our opinion, will lead to later reduction in the tax competence of local authorities but not to decentralization of tax powers. In particular, from 1 January, 2013, the federal legislator imposed new special tax regime – the patent system of taxation. This regime should be introduced by laws of Subjects of the Federation and should be levied on their territories. Local authorities have not been granted any authority to regulate the patent system of taxation.

The patent system of taxation competes with unified tax on imputed income for certain types of activities. Both regimes have the same object of taxation (the expected income of taxpayers) and can be used by individual entrepreneurs in respect of the same activities. Individual entrepreneurs applying patent system, as well as those who pay unified tax on imputed income are exempted from paying individual income tax, tax on property of individuals and they are not payers of value added tax. The advantages of the patent system for individual entrepreneurs consist in easier calculation of the value of the patent, that is, the tax that should be paid, in comparison with the unified tax on imputed income. In addition, when applying the patent system of taxation, individual entrepreneurs keep a simplified tax accounting and do not provide any tax reporting except for the application for a patent.

Revenues from the patent system of taxation in the order of the budget redistribution of incomes enroll to the local budgets in full. Meanwhile revenues from the patent system of taxation in total revenues of local budgets is only 4.5 billion rubles, or 0.4% of the tax revenues of local budgets. However, financial authorities noted a steady increase in revenues from this regime (in 2016 the growth was 32% compared to 2015).

Unified tax on imputed income for certain types of activities will cease to be levied with the spread of the patent system of taxation among individual entrepreneurs. The federal legislator has already provided the abolition of unified tax on imputed income from 1 January 2021. With the abolition of unified tax on imputed income local authorities will lose part of their tax competence. Accordingly, local authorities will have even less legal opportunities to influence the formation of local budgets.

The above-discussed powers of local authorities to establish local taxes and fees are the main tax powers of municipalities but not the only ones. Tax Code gives local authorities some competence in the field of tax administration and tax incentives. This competence is additional to the competence to establish local taxes.

In particular, in the field of tax administration financial authorities of municipalities have the right to give written explanations to the taxpayers on issues of application of normative legal acts of municipalities on local taxes and fees (Art. 34.2).

However, our study has shown that taxpayers do not appeal to local authorities for written explanations of normative legal acts on local taxes. In our opinion, local authorities do not exercise mentioned power for two main reasons:

- Local authorities often do not have specialists with necessary knowledge in the field of tax law who could clarify Russian tax legislation that is usually very complicated.
- Federal authorities that are the Ministry of Finance of the Russian Federation and the financial authorities of Subjects of the Russian Federation have the same right to clarify legal acts on local taxes and fees. Taxpayers prefer to apply to the federal authorities as to the most competent authorities, thus, obtaining greater tax certainty[5].

5 It should be noted that in case of fulfilling written explanations of tax legislation taxpayers are exempted from tax liability. This rule applies regardless of whether these explanations are given by the Ministry of Finance of the Russian Federation, financial body of Subjects of the Russian Federation or financial body of the municipalities.

The competence of local authorities in the field of granting tax incentives will be discussed in the chapter 4 of present article.

We would like to draw attention to the fact that the local authorities do not have any competence in the field of tax control and prosecution for tax offenses. These functions are carried out by centralized system of tax authorities, the main purpose of which is implementation of state control over compliance with tax legislation when paying all taxes – federal, regional and local ones.

Summing up the intermediate results, here are the following brief conclusions:

- In Russia powers in the field of local taxation are distributed in favor of the federal authorities. Local authorities are implementing tax jurisdiction on a residual basis. They have the right to establish only those local taxes and fees that are fixed in the federal law (in Tax Code).
- Analysis of statistical data reflecting revenues from local taxes and fees to municipal budgets illustrates that local taxes and fees in Russia currently are not the basis for the formation of local budgets. Formation of local budgets occurs in the centralized order through distribution of part of federal and regional revenues in favor of municipalities.
- We believe that for the development of local self-government in Russia it is necessary to gradually expand tax competence powers of municipalities. However, the opposite trend in the development of Russian tax law was revealed.

3 Procedure for establishing local taxes and fees

When establishing local taxes and fees local authorities should be guided by general tax principles established by the federal legislator. It means that tax acts adopted by local authorities must comply with the principles and requirements fixed in the Constitution of the Russian Federation and in Tax Code, both in form and content.

It is reasonable to distinguish the following requirements to decisions on establishment of the local taxes and fees accepted by local authorities:

- Decision should be adopted by the competent authority.
- Decision should be adopted in the prescribed form.

- Decision should be adopted in compliance with the established procedure.
- The content of the decision should comply with Tax Code.

The Constitutional Court has repeatedly considered appeals in which he challenged conformity of tax laws with the Constitution. As a result, the Constitutional Court formulated a number of legal positions on the establishment of taxes and fees that allow better understanding of the requirements of the Constitution and Tax Code. We will illustrate the contents of the abovementioned requirements taking into account the positions of the Court.

1. Decision should be adopted by the competent authority. Unlike some other countries, the direct will of the population does not apply in the field of taxation in Russia. The following principle is applied: taxes are not negotiated. Although Federal constitutional law "On the referendum of the Russian Federation" does not prohibit directly the adoption of decisions on tax issues on a referendum (Act no 5-FKZ/2004), such prohibition follows from the Constitution of the Russian Federation and Tax Code.

   Issues related to the exclusive competence of the federal public authorities may not be submitted to the referendum. Among others these issues include federal taxes and fees. Accordingly, a referendum may not be hold on levying of federal taxes and fees. With regard to regional and local taxes, Tax Code determines that laws of Subjects of the Federation and regulatory legal acts of representative authorities of municipalities regulate regional and local taxes and fees. There are no other legal forms of regulation of taxes and fees provided. Thus, the issue of local taxes or fees cannot be submitted to a local referendum.

   The only competent authority for introducing local taxes and fees on the territory of particular municipality is representative authority of this municipality. The Constitutional Court of the Russian Federation stated that the Constitution of the Russian Federation excludes the possibility of establishing taxes and fees by executive authorities (Act no 9-P/1996). The representative authority of municipality is composed of deputies elected directly by the population of that municipal area. Thus, the interrelationship of local taxation and people's representation is ensured (Shepenko, 2014: 49).

Implementing tax competence representative authority of local self-government has no right to expand the powers granted to them by the federal law. In addition, representative authority must exercise their powers independently. The Constitutional Court of the Russian Federation determined that, in case of the absence of federal law's direct instruction, the representative authorities are not entitled to delegate implementation of their powers or part of them to other authorities on the basis of their own decision (Act no. 289-O/2005).

2. Decision should be adopted in the prescribed form. The Constitutional Court of the Russian Federation determined that the tax or fee may be established only by law. "Taxes that are levied not on the basis of the law cannot be considered as legally established ones" (Act no 9-P/2016). In the case of local taxes and fees, this rule means that local taxes and fees can be established only by normative legal acts adopted by representative authorities of local self-government. Russian law doctrine considers normative legal acts as official written documents of the law-making authority within its competence that are directed at establishment, change or cancellation of mandatory rules of conduct. Normative legal acts of representative authorities of local self-government are called decisions (Act no. 131-FZ/2003).
3. Decision should be adopted in compliance with the established procedure. Decisions of representative authority of local self-government on local taxes and fees should be made in compliance with the established procedure and shall enter into force in accordance with the rules established by Tax Code. The Constitutional Court of the Russian Federation noted the importance of compliance with the procedure for the adoption of tax acts, stating that only law because of its certainty, stability and special procedure of adoption can provide the reliable data for the performance of tax duties to taxpayers. If essential elements of the tax or fee were established by the executive power, the principle of certainty in tax liabilities would be in jeopardy, as those liabilities would be changed for the worse for taxpayers in a simplified procedure (Act no 16-P/1997).

   Any decision of the representative authority of the municipality must be made in compliance with the established procedure. However, decisions related to local taxes and fees are made under a particularly

complicated procedure. This complication consists in limitation of the law-making initiative. The right to submit tax decision to the representative authority of municipality without any restrictions has only the head of the local administration[6]. Other subjects of law-making initiative have the right to submit tax decisions for consideration of representative authority of local self-government only in the presence of resolution of the head of local administration.

Similar procedures are provided at federal and regional levels. Such procedures ensure an opportunity to assess the tax consequences and budget risks of proposed tax decisions. If proposed tax decision a affects the budget negatively, in particular, if it is expected to reduce tax revenues of the budget, the head of the local administration may refuse to issue the relevant resolution.

4. The content of the decision should comply with Tax Code. The federal legislator established not only the types of local taxes and fees but also defined all the essential elements of their legal construction (taxpayers, object of taxation; tax base; tax period; tax rate; procedure of tax calculation; procedure and terms of tax payment) as well as minimal tax incentives granted to taxpayers.

   In relation to the Subjects of the Federation the Constitutional Court of the Russian Federation pointed out that their right to establish taxes is always derivative as the Subjects are bound by the general principles of taxation adopted by the central authority (Act no. 5-P/1997). The same approach applies to municipalities. Establishing local taxes and fees local authorities are not free to determine the conditions of levying of local taxes. Local authorities exercise their powers only within the limits fixed by Tax Code. The powers of local authorities apply to tax rates on local taxes, procedure and terms of payment of local taxes and tax incentives. Other essential elements of local taxes are established in Tax Code.

   The rates of local taxes fixed in Tax Code are maximal in some cases and can be lowered by decisions of local authorities (for example, rates of land tax). The federal legislator established a rate of tax on property of individuals. Local authorities are entitled to increase

6 The head of local administration is the sole head of the local administration (executive-administrative authority of municipality).

these rates to the maximal limit set by the federal law. Tax Code fixed the minimal and maximal rates of a unified tax on imputed income. Local authorities independently determine tax rates in these limits. Minimal rates established by the federal legislator determine the minimal size of tax burden, which can't be reduced by decisions of local authorities.

If decisions of representative authority of this municipality don't determine tax rates, the taxation will be made at the rates established by Tax Code.

Having considered the requirements to form and content of decisions on establishment of the local taxes and fees accepted by local authorities, we can conclude the following:

- The federal legislator limited tax powers of local authorities not only by establishment of all the type of local taxes and fees, but also by determination all essential elements of the legal construction of local taxes and fees in Tax Code. In case of setting rates of local taxes local authorities are limited by rules of the Tax Code and they can't raise or lower tax rates randomly.
- There is priority of Tax Code over decisions of local authorities in the field of establishment of the local taxes and fees. Collisions between Tax Code and decisions of representative authorities of municipality in the field of local taxes and fees shall be resolved on the basis of this priority.

4 The Competence of Local Authorities in Granting Tax Incentives

Tax incentives can be understood as all kinds of benefits given by tax legislation for mitigation of tax liability of taxpayers. Despite the ambiguous evaluation of the role and areas of use of tax incentives, there is no doubt that tax incentives are an important mechanism for the implementation of regulatory and social functions of taxes. According to Russian tax legislation, all tax incentives can be divided into two groups:

- Taw allowances, which are the benefits provided by legislation to certain categories of taxpayers compared to all other taxpayers that give possibility not to pay tax or to pay it in a smaller amount.

- Tax preferences, which are the methods of mitigation of tax liability's fulfillment, consisting in possibility of changing the order and terms of tax payment, as well as possibility to cancel or reduce the size of sanctions for violation of tax legislation.

As for tax allowances, municipalities are entitled to establish them on local taxes that are land tax and tax on property of individuals (Art. 12 of Tax Code). Such allowances are unable to change or cancel federal tax allowances on local taxes established in Tax Code.

The practice of granting tax allowances on local taxes depends on the type of municipality[7]. Thus, as a rule, city districts with certain budget autonomy establish tax allowances for land tax for organizations and municipal districts and settlements, deprived of financial independence, are limited to establishing allowances exclusively to individuals that are socially unprotected groups of the population.

In the first case, tax allowances have simulative orientation, and, therefore, lead not only to tax expenditures of budget, but also to positive budget and economic effects. Analysis of regulatory documents in 50 city districts in 32 regions of Russia showed that the most prevalent among the tax allowances on land tax (65%) are allowances provided for municipal budgetary institutions and local governments in order to eliminate the counter financial streams from the local budgets and to provide rational use of budget funds. At the same time, in most analyzed city districts the problem of tax expenditures is not urgent at all (Official site of the Ministry of Finances of the Russian Federation).

Tax allowances on tax on property of individuals have purely compensatory orientation. Such allowances are provided for large families, pensioners, low-income individuals, some other categories, and undoubtedly are necessary for implementation of social function of taxes. It is obvious that mentioned allowances only lead to tax expenditures. Therefore, the problem of shortfall in incomes in connection with tax on property of individuals is much more urgent in municipal districts and settlements.

7 There are few types of municipalities in Russia: city district or city district with intracity division (city districts), municipal district, village or city settlement (settlements).

Thus, despite the fact that tax legislation establishes certain powers of municipalities for granting tax allowances, municipalities are not able to use them in full due to lack of budget and financial autonomy. Studies show that municipalities, especially those that receive substantial subsidies from federal budget, do not pursue an independent tax policy concerning tax allowances (Tselischeva, 2017: 42).

It should be noted that in 2014 federal legislator took a serious step towards increasing financial autonomy of municipalities that was the reform of real estate taxation of individuals. Since 1991 real estate of individuals was liable to tax based on the inventory cost of real estate. The inventory cost was often very low and did not reflect adequate value of real estate. Since January 2015 Tax Code provides taxation of individuals' real estate based on the cadastral cost. Thus, according to the Ministry of Economic Development of Russia, the cadastral cost is set above inventory cost in 3.5–10 times (Official site of the Ministry of economic development of Russia). As a result of mentioned changes, since 2016 budget revenues of municipalities are increasing. However, the increase in tax burden of taxpayers makes social tax allowances even more important.

Establishing of tax allowances are directly related to the issues of efficiency of such allowances. Undoubtedly, the problem of efficiency of tax allowances relates to all levels of taxation. It is fair to say that problems of monitoring of tax allowances and improving of their efficiency is one of the permanent goals of Russian tax policy. However, such problem is exclusively topical for local taxes, primarily for three reasons:

- Currently there is no uniform and scientifically based methodology for estimation the efficiency of tax allowances. Municipalities actively create their systems of estimation the efficiency of tax allowances, which have significant differences, often have a declarative nature and do not provide accurate estimates.
- One of directions of current tax policy in Russia is the reduction of federal tax allowances on regional and local taxes. This implies an increase in local tax allowances of both stimulating and compensatory orientation as abolition of federal allowances without introduction of relevant regional and local allowances can have a negative impact on economic activity of organizations and individual entrepreneurs as well as increase social tension in the society.

- As most municipalities receive substantial subsidies from federal budget, it is necessary to control legality and validity of their decisions that may lead to occurrence of tax expenditures of local budgets. However the appropriate system of control practically has not been formed yet.

Theoretical researches and legislative practice in the field of efficiency of tax allowances has identified three criteria of their efficiency:

- Criterion of budget efficiency that implies finding out if certain tax allowance favors the growth of budget revenues and (or) optimization of budget expenditures. Budget efficiency also reflects the excess of revenues that are connected with the use of tax allowances over the amount of granted tax allowances.
- Criterion of economic efficiency that implies finding out if certain tax allowance favors positive trends of financial and economic results of taxpayers' economic activity in the most important areas of state's activities. Among the indicators of economic efficiency – the growth in the volume of production and sales, reduce of costs, increase of profits, investment growth in fixed assets, development of new equipment and technologies, increase of number of new jobs and others.
- Criterion of social efficiency that implies finding out if certain tax allowance favors forming propitious conditions of population's living, development of social infrastructure, improvement of social protection of the population. Implications of tax allowance may also be estimated using the social importance of taxpayers' activity to society.

Stimulating tax allowances should meet criteria of economic and budgetary efficiency. Only in this case, balance between the interests of the state and businesses can be achieved.

Compensatory tax allowances should meet only criterion of social efficiency, that is, contributing the implementation of social obligations and guarantees taken on by the state. At the same time, some compensatory tax allowances may meet the criteria of economic and budgetary efficiency. However, establishment of such allowances cannot be made dependent on compliance with the criteria of economic and budgetary efficiency.

The analysis shows that municipalities often use criterion of the budget and (or) social efficiency for evaluating tax allowances. However, they often miss the analysis of economic efficiency and the impact of tax allowances on economic activity of the organizations (Zatrotskaya, 2015: 96). On the one hand, such situation is due to the fact that there is no uniform and obligatory methodology for estimation the efficiency of tax allowances. But on the other hand, it happens due to the fact that municipalities are deprived of the opportunity to control organizations that receive stimulating tax allowances. Thus, municipalities may not impose on recipients of tax allowances any obligations to report on the amount of received allowances and the ways of using released funds.

Turning to tax preferences, powers of municipalities include:

- establishment of additional grounds of recognition of arrears on local taxes, debts fines and penalties on these taxes as hopeless to collecting (Art. 59 of Tax Code);
- establishment of additional grounds and other conditions of granting for deferred payments[8] of local taxes, fines and penalties on these taxes (Art. 64 of Tax Code);
- endorsement of change of term of tax payment, in particular, when granting the investment tax credit (Art. 63, Art. 66 of Tax Code).

Unlike tax allowances, tax preferences at the municipal level represent only ability to grant certain preferences to certain taxpayers following the procedure established by Tax Code. It should be noted that mentioned powers are not widely used at the municipal level. There are no any adequate statistics that would allow determining the extent to which such powers are used and their efficiency. Moreover, there are no legislative or any other preconditions to ensure that the role of tax preferences for the municipalities is going to be changed.

8 Tax Code fixes two forms of deferred payments: one of them provides payment of full amount of the tax after the end of a period for which the deferment was granted; the other one provides payment of the tax in parts during the period for which the deferment was granted.

To sum up, we can conclude the following:

- Municipalities have sufficient rights for establishing tax allowances on local taxes. The realization of these rights is not hampered by legislative restrictions but the lack of financial independence of municipalities.
- The trend of reducing of federal tax allowances for regional and local taxes requires municipalities to develop their own policy in the field of establishing tax allowances that would take into account the interests of local budgets, population and business.
- In order to improve the efficiency of local tax allowances and reduction of unjustified budget losses it is necessary to adopt on federal level uniform and scientifically based methodology of estimation the efficiency of tax incentives, taking into account budget, economic and social criteria. In addition it would be advisable to provide municipalities the opportunity to control organizations receiving local allowances over the use of such allowances and the released funds (for example, in the form of mandatory reporting).

5 Conclusions

Conducted study proved that in Russia there is a model of distribution of competence in the field of local taxation that provides a strong centralization of tax powers at the federal level.

1. The authors described the current model with the help of the legal and economic characteristics.

   The legal characteristics are the following:

   - the federal legislator defined independently the general principles of taxation and the list of local taxes and fees in Tax Code;
   - the list of local taxes and fees established by the Tax Code is exhaustive. Local authorities do not have the right to extend or amend it;
   - the list of local taxes and fees is not extensive. This does not allow local authorities to act flexibly and take into account the economic and social specifics of their territory in full;
   - Tax Code fixes all essential elements of local taxes and fees. Local authorities implement tax competence only within the limits established by Tax Code;

- there is priority of Tax Code over the decisions of local authorities in matters of legal regulation of local taxes and fees.

The economic characteristics of current Russian model of distribution of tax competence were described on the basis of official statistics. It was proved that local taxes and fees are not the main sources of revenues of local budgets. The main part of tax revenues of local budgets is formed by distribution of the part of revenues from federal and regional taxes in favor of municipalities. At the same time, local authorities do not have any rights to carry out normative legal regulation of these taxes.

2. The study revealed the tendency of further centralization of tax competence that consists in the gradual reduction of tax competence of local authorities. However, the authors consider it necessary to develop financial and tax independence of local authorities by expanding the competence of local authorities in the field of taxation, including providing legal mechanisms of regulation of elements of local taxes and fees. At the federal level, it should be advisable to adopt normative legal acts ensuring gradual decentralization of tax powers.
3. The authors concluded that the powers of local authorities to establish local taxes and fees are the main, but not the only powers in the field of taxation. As a result of studying the procedure for establishing local taxes and fees, the authors reaffirmed the conclusion on significant restriction of tax powers of local authorities. Even when setting tax rates for local taxes and fees, local authorities have the right to act exclusively within the limits fixed by Tax Code.

   Federal legislation also gives local authorities some minor competence in the field of tax administration although, as it was illustrated, local authorities do not exercise mentioned power widely.
4. The powers of municipalities to grant tax allowances on local taxes are practically the only area of tax competence of municipalities in which they have sufficient rights. Thus, the realization of these rights is not hampered by legislative restrictions but the lack of financial independence of municipalities. At the same time, current trend of reducing of federal tax allowances for regional and local taxes requires municipalities to develop their own policy in the field of establishing tax allowances that would take into account the interests of local budgets, population and business.

The authors shown a need to adopt on federal level uniform and scientifically based methodology of estimation the efficiency of tax incentives, taking into account budget, economic and social criteria. In addition it would be advisable to provide municipalities the opportunity to control organizations receiving local allowances over the use of such allowances and the released funds.

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PART 4: LOCAL FINANCE PROBLEMS IN THE LIGHT OF EUROPEAN UNION LAW

WYBRANE PROBLEMY FINANSÓW LOKALNYCH W PRZESTRZENI PRAWA UNII EUROPEJSKIEJ

REGIONAL COMPLEMENTARY CURRENCIES AS AN ELEMENT OF REGIONAL POLICY

Damian Cyman[1]

Abstract

The article analyses the use of regional complementary currencies for the implementation of regional policy in European Union. It indicates the definition of a legal means of payment and the differences between money *sensu stricto* and its wider understanding. It presents examples of existing regional currencies models and legal regulations that may apply to its issuance as part of the performance of its own tasks by local government units. It also indicates the potential impact of local currency on the functioning of local communities and the basic obstacles related to its introduction in Poland.

Keywords: Regional Currency; Local Money; Local Currency; Regional Policy.

JEL Classification: G100, G200.

1 Introduction

The development of alternative forms of money, independent of those issued by central banks, causes that they are the subject of an increasing number of empirical and theoretical studies. From the rise of the concept of money denationalization by Friedrich Hayek (Hayek, 1990), this idea has not gained such popularity as nowadays. Since the 2008 financial crisis, more people are exploring alternative approaches to economic and money. In this context, community currencies – new types of money designed by communities to meet their specific needs – are coming to the fore. Technological possibilities, development of appropriate cryptographic tools, including blockchain-based ones, as well as acquired experience and knowledge

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allow for an attempt to assess the possibilities of using this money as part of regional policy. Many European countries have dozens of years of experience in the regional currencies issue. It is appreciated due to the integration of the community in the area of a given local government unit and support for local entrepreneurship. In Poland, these experiences are limited in principle to the issue of tokens, the primary function of which is the promotion of the region, while the impact on the local market is negligible. There are also dematerialised money systems, however, insufficient legal regulations introduce significant operational risk, hampering their development.

The purpose of this article is to present the community currencies system as an element of regional policy, with an indication of the legal framework in which this form of money functions. In the author's opinion, the phenomenon of alternative currencies and local currency may be an important object of research in economic and legal sciences. Its proper use may strengthen the territorial self-government not only in economic terms, but also by increasing the link between members of the local community. Alternative currencies undoubtedly contribute to the integration of the local community, thus improving the quality of life, creating new relationships and a different way of thinking about co-participants of economic life.

2 Money as a Constitutional Value

Money is one of the oldest and most controversial of all the institutions known to financial law. From the beginning of its creation, it has been constantly changing and shaping. It was considered that money is a universal value, a measure of value, adopted in a given community, the images of which are the individual forms of money – cash, checks, bills, etc., which in different ways and to various degrees fulfilled the particular functions of money. In economic terms and theories, money is first and foremost a measure of values used to exchange goods between members of the community (Duwendag, 1995: 43). Social theory defines money as an institution of a social nature, actively influencing the functioning of society and the relations among its members. (Simmel, 1997: 495) Money is also the object of research in the philosophical and psychological area, as a factor through which human behaviour is revealed. Finally, it is the subject of legal research and subject to legal

regulations. Each of the perspectives reveals and emphasizes a different vision of money, emphasizing its individual features or functions.

The Constitution of the Republic of Poland states that the central bank of the state is the National Bank of Poland (NBP). It has the exclusive right to issue money, as well as to set and implement monetary policy[2]. The NBP has a constitutional responsibility for the value of Polish currency. This is related to the basic objective of the central bank's operation, which is to maintain a stable level of prices (Fojcik-Mastalska, 2010: 119 et seq.). It is done by striving to maintain a balance between the money supply impacted by the NBP and demand, shaped primarily by the market. Money is therefore a value protected by the Constitution (Cyman, 2010: 642 et seq.) and its issuance can take place within a strictly defined framework. The right to issue the currency of the Republic of Poland is available only to the central bank. The banknotes and coins for zloty and grosz are the money marks in terms of the act. The notion of a 'money mark', which are banknotes and coins, differs from a 'monetary unit' which is expressed on a money mark and defines the unit of value held by these marks (Żabiński, 1967: 50).

The most important feature of the central bank's money, for which such a strong fortification of its issuance has been introduced, is connected with the fact that currency marks are legal means of payment in the territory of the Republic of Poland (Ofiarski, 2008: 359). This means that they are widely accepted throughout the country, they can be used to exempt each financial obligation, both of private and public law character, and that they cannot be denied as a means of payment (Olechowski, 2004: 67 et seq.). The payment of money leads to the cancellation of a monetary liability. This does not mean that there is a compulsion to make settlements with its use. The parties retain the right to choose the means of payment by which they want to settle their mutual obligations or to redeem the obligation in a different, agreed manner. However, fulfilling a cash payment with cash results with cancellation of a monetary liability, regardless of whether the parties have agreed on a different method of payment[3]. The NBP emphasized that

[2] Constitution of the Republic of Poland of 2 April 1997, Dziennik Ustaw of 1997, no. 78, item 483, Art. 227, para. 1.

[3] At most, *ex contracto* compensation can be claimed for breach of contract regarding the method of payment.

tokens and vouchers could be issued. The initiators of these undertakings 'should not, however, act in a way that could mislead their recipients about the legal nature of such initiatives, in particular assigning them the quality of money understood as legal means of payment'.

3 Forms of Money

Theories about money mean that its narrow understanding is distinguished, in the sense given to it by the Constitution, often called '*sensu stricto*' as money, and colloquially referred to as 'cash'. There is also '*sensu largo*' money, which limits are no longer precisely defined by the legislator and are comprised more in economic terms. Certainly, it includes electronic money, understood as a substitute of cash in the electronic environment and a means of payment in this environment. Pursuant to Art. 2 point 21a of the Act on Payment Services[4], electronic money constitutes a monetary value stored electronically, including magnetically, issued, with the obligation to buy it, for the purpose of making payment transactions, accepted by entities other than the electronic money publisher only. This provision coincides with the definition indicated in Directive 2009/110/EC[5.] Its issuance includes credit institutions, postal giro institutions, the European Central Bank and national central banks as well as Member States, their local or regional authorities, if they do not act as public bodies and electronic money institutions.

In addition to electronic money, there is a category of other instruments that can serve a payment role with varying degrees of legal regulation. Among them, one of the best known is the Bitcoin cryptocurrency based on the blockchain system. A significant increase in interest in this cryptocurrency results not only from significant fluctuations in its value and the ability to realize significant profits (or losses). The system of functioning of this cryptocurrency, its simplicity and independence from any state authority or private entities and the increasing acceptability as a means of payment made it necessary to redefine the concept of money. The discussion about

4 Act of 19 August 2011 on Payment Services, Dziennik Ustaw of 2011, no. 199, item 1175 (as amended).

5 Directive 2009/110/EC of the European Parliament and the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267/7.

new forms of money and their place and position on the financial market was refreshed. Also many questions emerged about the security of using cryptocurrencies, their impact on financial stability and the legality of issuing and using them.

According to European Central Bank, a virtual currency is a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community[6]. It is similar to virtual money, that exist only in virtual world. Virtual currency differ from electronic money, because cryptocurrency being used as the unit of account has no physical counterpart with legal tender status. The scheme of cryptocurrency doesn't involve financial institutions, the issuer of the currency and scheme owner is usually a non-financial private company. This implies that typical financial sector regulation and supervision arrangements are not applicable. As for now alternative digital currencies failed to increase its volume in real-world ecommerce, but they flourish in virtual ecommerce.

There are different cryptocurrency schemes. European Central Bank grouped them in three models:

- Closed virtual currency schemes, that have almost no link to the real economy. The virtual currency can only be spent in game's virtual world (that is why they are call in-game only schemes).
- Virtual currency schemes with unidirectional flow. This currency can be purchased directly using legal money at a specific exchange rate, but it cannot be exchanged back. That kind of currency exists in most of the social games for smartphones and tablets or in social network.
- Virtual currency schemes with bidirectional flow. Users can buy and sell virtual money according to the exchange rates with their currency. Virtual money can be exchanged for legal money, so for user, they have real value.

Most cryptocurriencies (i.e. Bitcoin) cannot be simply qualified for any of the above schemes. Without doubt it has bidirectional flow, but it can be spend in real world without need of exchange. It has it's own value, accepted by participants of the market and can be used as a mean of payment directly.

6 Virtual Currency Schemes, European Central Bank, October 2012.

4 Complementary Currency in Europe

A complementary currency is a common agreement within a community to accept something else than the official legal means of payment for exchange of goods and services. Those currencies (called in the literature as local money, alternative money, local currency) are private money, not issued by central banks but by other entities that do not have the status of an issuer of a legal means of payment. It can be issued in a material form, in the form of tokens or a paper voucher, as well as in electronic form, stored on a device that allows management of the information (a card with a microprocessor, smartphone, smratwatch, tablet, computer, etc.). In the latter case, settlements can be made using a telecommunications connection (on-line) or without this connection (off-line).

The essence and basic function of regional currency is the promotion of the region and encouraging the local community to purchase goods or services from local suppliers. This money does not intend to fulfil the function of a universally recognized measure of value, nor the nation-wide means of exchange. It neither represents nor reflects the quality of monetary sovereignty of the state and therefore does not fulfil the legal definition of money. The local currency is not intended to take over the payment function of a legal means of payment or to take-over sole rights of the central bank to issue money[7]. However, its impact on the local economy may be very important. The experience with local money that was created in Austria on 31 July 1932 in the town of Wörgl may be used as an example. The town was struggling with the effects of the crisis that had spread throughout Europe. Unemployment increased by more than 30%, and the local community did not have the resources to meet their basic needs. The town mayor decided to issue the local currency as a substitute for state money, which was called Wörgl Schiling. It was not exchangeable for other currencies, and its acceptance was limited territorially to the town area. Its introduction, however, resulted in a whole avalanche of economic consequences. The town paid with it for the coal of the mine which was the largest employer, who, in turn,

7 However, there are cases where alternatives to legal means of payment are intentionally intended for competition with it, e.g. Liberty Dollars, whose creators do not respect the monopoly of the state for the issue of coins – White: 5.

paid the salaries using it. Employees repaid debts to shopkeepers, making new purchases. Increased demand resulted in increased purchases from suppliers of goods, i.e. local farmers and craftsmen living in the municipality. The latter settled overdue local government taxes. This allowed the town to undertake new investments and increase employment, which led to the elimination of unemployment on the local market. As a result, the so-called Wörgl miracle has happened, and therefore a spectacular economic boom, in a country undergoing a severe financial crisis. To investigate the economic effects caused by this money, e.g. Prime Minister of France, Daladier, visited the town. These effects also were analysed by the leading economists, including Irwin Fischer, repeatedly referring to the 'Wörgl miracle' (Fischer, 1933). Interest was also expressed by the Central Bank of Austria, which questioned the possibility of issuing money by municipalities as violating the constitution and put the town mayor before the Constitutional Tribunal. In September 1933, after a year of operation, the project was closed and banned from the initiative of the central bank. Unemployment and poverty in the town soon returned to the previous level. The main objection against the mayor was the acceptance of municipal taxes in Wörgl Schiling. Other municipalities withdrew from the project of local money, remaining in deep crisis until 1938, when largely due to poverty the local community recognized in the plebiscite the authority of the neighbouring Germany, growing in strength (Brooke-Rose, 1971: 227 et seq.).

The above example perfectly illustrates the potential benefits that may result from the introduction of regional currency, as well as the risks that may be caused by its issuance, including entities responsible for its issue. One can notice, however, the visible increase in interest in this money, and even its recognition as one of the elements of regional policy. The voices are raised that the idea of a community currency is no longer a marginal one, the time is right for these initiatives to move into the mainstream.

There have been many initiatives in Europe related to issuing local money. In 2012–2015, the Community Currencies in Action (CCIA) project was created[8], which was a collaboration among English, French, Dutch

[8] CCIA (Community Currencies In Action). Available at: http://communitycurrenciesinaction.eu/

and Belgian partner organizations. The main aim was to promote different types of complementary currency and to bring together and expand the collective knowledge of participants. One of its distinctive features was integration of the public sector, both as promoter of complementary currencies and as target group for project publications and events. The CCIA project was 50% supported by the European Union's regional development fund Interreg IVb for North-west Europe. As a result, many local currencies have been created. Among them the most frequently mentioned is the Brixton Pound (B£). It aims to help protect jobs and livelihoods of community members within Brixton through developing a strong local economy and support and build diversity and resilience in the local Brixton economy, as well as to raise community awareness of the local Brixton economy. The goal is also to encourage and facilitate a self-help model and ethos in order to protect the social and financial futures of the residents of Brixton and to encourage local sourcing of goods to decrease CO2 emissions. It also raises Brixton's profile regionally and nationally and contributes to positive perceptions of Brixton by drawing attention to its strong community, diverse economy and capacity for innovation. The City Council of Lambeth, the borough in which the neighborhood of Brixton is situated, had recognized the impact of the Brixton Pound in term of stimulating a positive local identity and awareness of local production and local consumption.

Money with a Purpose[9], a report published by the New Economics Foundation (NEF) on behalf of CCIA, highlights the significant benefits of such projects. According to this report, services and organisations participating in community currencies programmes were able to make better use of the skills and resources in their communities. They reported improved collaboration with community groups and with individual citizens. Most users feel like they can participate more in their community, can afford to do more things and feel less isolated.

Existing regional currency systems are currently not based on a blockchain system. This is primarily due to the substantial difference between the limited area of local money use and the desire for global use of blockchain systems

[9] New Economics Foundation. Available at: http://neweconomics.org/2015/05/money-with-a-purpose/

(its creation and operation requires the cooperation of a significant number of computers). However, it seems possible to use some of the features of this money, including primarily the electronic way of settlements and the possibility of ensuring the safety of using it, resulting from the registration of individual operations carried out for the purpose of developing local money.

5 Complementary Currency in Poland

Complementary currencies issued in Poland usually forms part of the offer of tourist and commemorative products of cities and municipalities. It presents the elements referring to important local events and characters, and the projects are created by local artists. Local governments in the issuing of regional currency perceived above all the chance to attract tourists and increase the identification of residents with the region they live in. The result is that they are spent mainly during the holiday period. It is not universally accepted, usually it is treated as souvenir, although there are points in which it is accepted in exchange for certain goods or services. An example of such currency can be Dukaty (issued e.g. in Grudziądz, Rybnik, Olsztyn), denary (in Gdańsk) or referring to the names of towns – Słupia in Słupsk or Częstochy in Częstochowa. There are also currencies issued as part of time banks. In exchange for a specific service, after the time allocated to its implementation is counted, the appropriate amount of currency is allocated, which can then be used in exchange of the services provided by network participants.

There is no doubt that those currencies are not or cannot be money or its surrogate in its legal approach. Polish regulations do not provide for the possibility of issuing local money, understood as legal means of payment, neither by private entities nor local self-government bodies. However, it is fully possible to undertake various initiatives aimed at the production of tokens and vouchers. However, it cannot mislead their recipients, in particular, to assign them the attribute of money understood as legal means of payment.

Local self-government bodies may therefore issue their own currency, as vouchers or tokens, in such a way that it does not raise doubts that they are not legal means of payment, as part of carrying out their own tasks.

In the case of a municipality, these tasks are specified in Art. 7 of the Act on local government[10], listing, inter alia, matters of support and dissemination of the local government idea, including creation of conditions for the operation and development of auxiliary units and implementation of programs to stimulate civic activity, as well as promotion of the municipality.

In normative terms, local money issued in material form corresponds to the designation of the legitimation mark. It confirms the obligation to provide it to the bearer, according to the rules set out in the regulations that constitute the basis of its issuance, and by virtue of an explicit or implicit provision of parties or customs established in a specific field of relations.[11] In some respects, this money also resembles securities. The legitimation marks, unlike securities, are generally not of a circulating character, but only aim at a simplified identification of the holder of rights.

Regional currency, issued in an immaterial form, may fulfil some or all of the electronic money designations. In this case, the Act of 19 August 2011 on payment services is applied thereto[12]. Similarly, the Act is applicable in the case when the money issued does not correspond to the definition of electronic money, but its use constitutes a payment service. It is so in the case of conducting business activity involving the execution of payment transactions, for which the consent of the payer for the transaction is provided using a telecommunications, digital or IT device, and the payment is transferred to a telecommunications, digital or IT service provider acting only as an intermediary between the user ordering payment transaction and the recipient[13]. Directive 2009/110/EC excludes from its scope the issuance of a monetary value stored using specific pre-paid instruments, aimed to meet specific needs, which can only be used in a limited manner. The above exclusion may occur in the case of local money, corresponding to the needs of the local community, the issue of which is limited territorially or subjectively. A similar

10 Act of 8 March 1990 on municipal self-government, consolidated text: Dziennik Ustaw of 2015, item 1515 (as amended).

11 Regarding this feature of legitimacy marks, see the ruling of the Supreme Court of 15 January 1998, III CKN 322/97, OSNC 1998, no. 7–8, item 129, with the approval of A. Szpunar, OSP 1998, 9, item 164.

12 Act of 19 August 2011 on Payment Services consolidated text: Dziennik Ustaw of 2014, item 873 (as amended).

13 Article 3, para. 1, subpara. 7 of the Act on Payment Services.

exclusion is made in Art. 6 point 11, i.e. in the scope of services based on instruments that can be used to acquire goods or services only at the issuers of these instruments or third-party facilities related to the issuer of a commercial agreement other than the contract for a payment service, referred to in Art 3 par. 1 subpara. 5, within a limited network of service providers or with regard to a limited range of goods or services. Therefore, in such a case it is not necessary to meet all the requirements set by an electronic money institution or payment institutions.

6 Conclusion

The effects and impacts of community currency systems are multi-dimensional and varied. Alternative currencies undoubtedly contribute to the integration of the local community, thus improving the quality of life, creating new relationships and a different way of thinking about co-participants of economic life. Nowadays, both in Poland and worldwide, local currencies are not a viable alternative to official currencies. Regional currency can perform important functions aimed at the development of municipalities, especially in the area of their promotion. This also applies to their economic development, limiting the functioning of this money only to the area of the municipality causes that people using it acquire goods and services on the local market. There are many local money systems in Europe supported by the regional policy of the European Union. The undoubted advantages of introducing this form of money have been noticed. In Poland, the traditions of using local money are poorly formed. In practice, local governments are limited to issuing tokens that only function for a certain time, and their function is more to promote and attract tourists than to participate directly in the course of trade. This is due to insufficient legal regulations regarding the possibility of issuing this money, the conditions that should be met and the related legal risk for both the issuer and the people using it.

Other types of private money are most often issued by non-governmental organizations that do not cooperate with territorial self-government. They direct their activities to private individuals, whose money is to facilitate the exchange of goods and services. These systems are currently at an initial stage of their slow development. It seems, however, that they do not integrate the

local community, and the degree of their use for acquiring or offering services and goods is negligible. Also in this case, the reason is the lack of appropriate legal regulations and the existing economic and tax risks.

However, despite the lack of wider use of this money, experience primarily from Western European countries shows that regional currency can be an efficient and effective alternative to state money, and its use can positively affect the integration of local communities and their economic development. This causes that local money should be included in the area of research in both economic and legal sciences, aimed at developing efficient, effective and safe systems of this money, which would not introduce excessive operational risk in local government units.Make an obligatory conclusion. Mention how aims were met and if the hypothesis was confirmed or disproved.

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THE EUROPEAN CHARTER OF LOCAL SELF–GOVERNMENT AND ITS APPLICATION IN GERMANY

Václav Dvorský[1], *Damian Czudek*[2]

Abstract

The aim of this paper is to provide a brief analysis of the application of the European Charter of Local Self-Government in the Federal Republic of Germany, in particular the application of the Articles 4 and 9, and outline certain parallels with the Czech Republic. The paper deals with the status of the Charter under the German legal order, its impact on practice and the reservations made by Germany.

Keywords: European Charter of Local Self-Government; Constitution; Municipalities.

JEL Classification: K100.

1 Introduction

If we want to make any analysis of German public law and German institutions, firstly we have to realize that the Federal Republic of Germany is characterized by a much more complicated structure of legislation and state apparatus than the Czech Republic. As the name suggests, it is a federal state and the Länder have the task of regulating the status of municipalities. This status may be different in individual Länder and the structure of self-government and state administration may vary. The basic framework is, however, given by the German Federal Constitution, the Basic Law (German "Grundgesetz", hereafter "GG"). For reasons of certain differences, this article provides an example of the Länder Bavaria and the Länder Rhineland-Westphalia.

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2 The European Charter of Local Self-Government as a Part of the Legal Order of the Federal Republic of Germany

The European Charter of Local Self-Government is an international treaty and, as such, has to be transformed in a certain way into the national legal order. In the case of the Federal Republic of Germany, this is done by incorporation, which means that the international treaty does not lose the form of an international legal document. Pursuant to Article 59 (2) of the GG, in the case of the Charter, it is a treaty that contains matters that would be otherwise governed by national law, and both the Federal Assembly and the Federal Council have to give their consent to its ratification in the same way as they would approve the national law. According to Article 59 (1) of the GG, the ratification is carried out by the President of the Federal Republic of Germany. This was also the case with the Charter, which was published on 28 January 1987 as "Gesetz vom 22. 01. 1987 zur Europäischen Charta der kommunalen Selbstverwaltung" (Weiß, 1996: 39).

Since it is not a so-called "self-executing" treaty, its individual provisions have to be transposed into national law. Here, in the case of the Federal Republic of Germany, theoretically a problem arises. The legislation in matters of local self-government is, in principle, a matter of individual Länder, and therefore the individual provisions of the Charter have to be implemented by them. The federation is very limited to interfere their legislation and, as a rule, may interfere indirectly. This is also the case, as the Basic Law sets out certain principles and restrictions that the Länder must respect in regulating self-government.

3 Reservations

Let us briefly look at what Charter articles the German Federal Republic is bound to. Germany has made two reservations to the Charter. To the second sentence of Article 13 it states: "*In the Federal Republic of Germany, the scope of use of the Charter in the Länder of Rhineland-Palatinate is limited to municipalities, associated municipalities*[3] *and regions, and in other Länder to municipalities and regions*." Another exception is associated with Article 12 (2): "*The Federal*

[3] "Verbandsgemeinde" – It is difficult to translate the term. This is a degree between the municipality and the region typical for this Länder.

Republic of Germany is considered, with the following exceptions, to be bound by all the provisions of the first part of the Charter: 1. In the Land of Rhineland-Palatinate, Article 9 (3) does not apply to Associated Communities and Regions. 2. In other Länder, Article 9 (3) shall not apply to the regions."

What are the reasons for these exceptions? These are the differences between the various Länder and the structure of their self-government. For example, in Bavaria, apart from the municipalities and regions, there are still districts, which are, however, considerably larger than the Czech districts and are often inhabited by more than one million people and therefore a reservation has to be made so that the rules contained in the Charter do not apply to them (Weiß, 1996: 25). However, it must be acknowledged that Germany has made quite a few reservations. The Czech Republic has made six reservations, but still belongs to countries with fewer reservations. For example, Belgium, Malta and Slovakia were much more alert. Slovenia, on the other hand, did not make any reservation.

4 The Right to Self-Government and Its Enshrinement in the German Legal Order

The local self-government is defined in Article 3 (1) of the European Charter of Local Self-Government as "*the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population*". Rather more specific requirements are listed in the individual paragraphs of Article 4 of the Charter. First of all, it is stated in the first paragraph that the basic powers and responsibilities of local authorities shall be prescribed by the constitution or by act, in the second paragraph there is established that local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority, the fourth paragraph establishes that powers given to local authorities shall normally be full and exclusive and they may be limited only, if the law provides.

These requirements are met by the provisions of Article 28 (2) of the Basic Law. Here it is first mentioned that municipalities have the right to regulate all their affairs within the framework of the law and on their own responsibility.

Higher territorial self-governing units also have the right to self-government within the framework of the law. This single sentence already fulfils the provisions of Article 4 (1), (3) and (4) of the Charter. Furthermore, it is stated in Article 28 (2) that the right to self-government also includes the funds for the implementation of this right. This is further discussed in the chapter dealing with Article 9. It is also necessary to mention Article 28 (1) of the GG, from which the so-called homogeneity principle is derived. This principle guarantees that certain features common to all municipalities or other territorial units are respected in all federal states (Von Münch, 2012: 1809). For example, citizens' representatives will always come from general, immediate, free, fair and secret elections. The last paragraph of this article only states, that it is the duty of the Länder to ensure that the principles set out in the two preceding paragraphs are fulfilled.

The issues of the municipal administration are regulated by the legislation of the individual Länder. The basic rule is laid down in Article 30 GG, where it is stated that the exercise of state powers and the discharge of state functions is a matter for the Länder, unless the Basic Law provides otherwise. This article is then concretized by Article 70 GG, which deals with the division of legislative power between the Federation and the Länder. The first paragraph of this article states that the legislative power belongs to the Länder, unless the Basic Law provides otherwise. Exceptions to this rule are listed in Articles 71 to 74, but important is that they do not apply to the area of self-government and therefore its regulation remains a matter for the individual Länder. That is, however, the more important existence of the institutional guarantee in Article 28 (2) of the Basic Law (Hömig, 2016: 343).

Article 28 (2) contains a three-fold guarantee of municipal self-government. IT is an institutional guarantee already mentioned, since it establishes the municipality as a basic territorial unit, that is, as an entity. Furthermore, it is an objectively legal guarantee, since it is a rule of objective law and finally provides subjective rights to individual municipalities (Weiß, 1996: 130). On the other hand, the Basic Law does not contain any provisions on the protection of municipalities against the regions, but such a provision would be totally meaningless, since the regions cannot intervene in municipal affairs

(Weiß, 1996: 127). Furthermore, it is stated in Article 84 (1) last sentence, that the Federation may not entrust municipalities and with any tasks which the Basic Law provides to the Federation. At the first sight, it may seem that this provision exists primarily to protect municipalities from overloading by the state. In this case, however, it is primarily the protection of the individual Länder from the involvement of the Federation in its affairs. The Länder themselves determine which agenda they will entrust to (Von Münch, 2012: 1809).

Similar guarantees as defined in the Basic Law are provided by the constitutions of individual Länder. Moreover, the Basic Law itself in Article 28 (3) obliges the Federation to guarantee the constitutionality of the acts of the individual Länder. In the Constitution of the Free State of Bavaria ("Bayerische Verfassung" BV) there is a guarantee of self-government for municipalities and regions contained in Articles 10 and 11. In the case of regions, this is an institutional guarantee, but the position of the municipalities is even stronger. They are even referred to as "original territorial corporations" in Article 11 (2)[4]. The fundamental right of municipalities to self-government is reintroduced in the Bavarian Municipal Law ("Bayrische Gemeindeordnung"), while similar guarantees in the Bavarian Regional Law are lacking, but not necessary, as Article 28 (2) GG and Article 10 BV apply (Weiß, 1996: 139).

In its first article, the Land of North Rhine Westphalia ("Verfassung für das Land Nordrhein-Westfalen" hereinafter "LV NRW") states, like the Bavarian Constitution, that the municipalities and regions are part of the Länder, an integral part of public administration and an essential element of democratic order. Similar explicit provisions are rather exceptional in the constitutions of the other Länder, even if the above mentioned is assumed (Weiß, 1996: 144). This constitution therefore contains a guarantee of the existence of self-government as an institution and a public subjective right to self-government. Article 78 LV NRW states that only the Länder itself may regulate the legal status of municipalities, but that provision have to be seen in the light of Article 28 (2) of the GG, and therefore the Länder cannot exceed the basic limits laid down in this article (Weiß, 1996: 144).

4 "urspringliche Gebietskörperschaften".

In the light of the German law, there is no problem with delegated competence. Since the regulation of the status of territorial self-governing units is a matter for individual federal states, they have the possibility to transfer a certain part of their own agenda to territorial self-governing units and often use this option. Article 28 (2) GG does not contain any restrictions in this, except that sufficient resources must be provided to municipalities to carry out the tasks assigned to them, whether it is matter of state administration or self-government. This is more described in the chapter devoted to Article 9. Already above, Article 84 (1) last sentence of the GG has been mentioned. It provides that tasks that the Basic Law allocates to the Federation cannot be transferred to municipalities and regions, and therefore the direct transfer of these tasks to municipalities is not threatened.

Finally, it is necessary to mention Article 4 (6) of the Charter, which provides that "Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly." It is necessary to point out that the German language version sounds much more mildly because it does not contain the word "direct" as English, or "directement" as the French language version. Instead, the "appropriate way" in the German language version there is "uniform way",[5] which is interpreted so that there is no need to inquire each individual municipality or region, but it is possible to take steps towards them in merge (Weiß, 1996: 157).

We do not find a similar obligation in the GG, but the doctrine reintroduces it with the provisions of Article 28 (2) of the GG, since the self-governing units have so-called sovereign scheduling and have the right to oppose plans that would threaten their self-governing status (Hömig, 2016: 345). We do not find similar provisions in the constitutions of the two mentioned Länder, but for meeting the requirements of the Charter it is enough that it is present in the federal constitution (Weiß, 1996: 158).

5 Financing

In Article 9 of the European Charter of Local Self-Government, we find a requirement for financial resources of local governments. The first two

5 "In geeigneter Weise".

paragraphs deal with the amount of funds available to local governments. While Article 9 (1) contains a requirement for adequate financial resources of local authorities, the second paragraph calls for proportionality between the tasks and delegated powers (Schaffarzik, 2002: 505).

The basis of the financial independence of municipalities is found in the third sentence of Article 28 (2) of the GG, which quite clearly states that sufficient funding is a prerequisite for the functioning of the self-government. This article originally did not include this explicit regulation, but the interpretation of its first sentence could lead to the same conclusion (Epping, 2013). In 1994, the amendment added a sentence, "*The guarantee of self-government shall extend to the bases of financial autonomy*"[6], which explicitly enshrined the principle of financial autonomy of municipalities. Three years later, a part of the sentence after the semicolon was added "these bases shall include the right of municipalities to a source of tax revenues, on which the municipalities have a share"[7] which guarantees the share of municipalities in certain taxes. However, such a provision already contains, from 1969, Articles 106 and 107 of the GG. Paragraph 106 (6) of the GG sets out the budgetary designation of taxes; it is also stated in Article 106 (7) of the GG that part of the tax revenue of the Länder, the Länder shall provide to municipalities and other territorial self-governing units.

Finally, municipalities are also remembered in Article 107 (2), which states that the situation of municipalities and other territorial self-governing units should also be taken into account when assessing the amount of tax revenue is to be provided to individual Länder.

The mentioned provisions also meet the requirements of the other paragraphs of the Charter. Distribution of tax revenue established in the Basic Law is so diverse and flexible that it allows the distribution of resources according to the current needs of individual self-governing units. The financial equalisation, which is called for by Article 6 of the Charter, is enshrined in Article 107 of the GG, which, moreover, bears that name. The consultative

6 "die Gewährleistung der Selbstverwaltung umfaßt auch die Grundlagen der finanziellen Eigenverantwortung".

7 "zu diesen Grundlagen gehört eine den Gemeinden mit Hebesatzrecht zustehende wirtschaftskraftbezogene Steuerquelle".

obligation under Article 6 of the Charter can be inferred from Article 28 (2) GG rather than from those provisions.

If we want to get acquainted more precisely with the tax determination, we have to look into the so-called financial constitution, which is the tenth chapter of the Basic Law and, among other things, the mentioned articles 106 and 107. In Article 106 there is a relatively detailed distribution of taxes between the Federation and individual Länder and then the right of local governments to a certain share of funds allocated by the Länder. Article 106 (5) states that municipalities have a share of income taxes, which is calculated according to how much their inhabitants have paid. Under Article 106 (5a), the municipality also has a share of value added tax. Revenue from land and trade tax is in accordance with Article 106 (6) to municipalities. Individual states can decide whether the revenue from excise taxes and luxury taxes will be paid to municipalities or higher territorial self-governing units. Municipalities are also given the possibility to set a quotient for land and trade taxes, of course within the limits of the law. Further details are then laid down in individual laws (e.g. in the Value Added Tax Act) and in the legislation of the individual countries. According to Article 106 (7), federal countries can determine how much federal tax will be allocated to individual local and regional authorities. However, they must always provide them with sufficient resources for their operation, as is clear from Article 28 (2). In the case of land taxes, on the other hand, the Länder can determine whether they will provide the municipalities with the means to provide them.

Revenue from land tax and trade tax[8] in accordance with Article 106 (6) belongs to municipalities. Individual states can decide whether the revenue from excise taxes and luxury taxes[9] will belong to municipalities or higher territorial self-government units. Municipalities are also given the possibility to set a quotient for land and trade taxes, of course within the limits of the law. Further details are then laid down in individual laws (e.g. in the Value Added Tax Act) and in the legislation of the individual countries. According to Article 106 (7), Länder can determine how much of their tax revenue will be allocated to self-government units. However, they must

8 "Gewerbesteuer" – tax on income from self-employed, personal and capital companies.
9 "Aufwandsteuer" – e.g. a tax on dogs, a tax on horses or a tax on the second apartment.

always provide them with sufficient resources for their operation, as is clear from Article 28 (2). In the case of land taxes, on the other hand, the Länder can determine whether they will provide them to the municipalities (Von Münch, 2012: 796).

It is still appropriate to add that, if new tasks were assigned to municipalities, within their own or delegated powers, it is the responsibility of the Länder to provide them with sufficient means to carry out these tasks. All this follows from the provisions of Article 28 (2) (Von Münch, 2012: 1890).

Although the Basic Law contains the main rules, the specific implementation of securing the financing of local governments rests on the backs of the individual Länder. In the Bavarian Constitution, the financial sovereignty of municipalities and regions is enshrined in Article 83 (2), (3) and (b), where it is stipulated that taxes can be levied only on the basis of the law and then it contains few provisions regulating the revenue and expenditure side of their budget (Weiß, 1996: 206).

The Constitution of the Land of North Rhine-Westphalia contains a provision for municipal financing in Articles 78 (3) and 79. Here it is determined which activities of municipalities

The Länder is obliged to provide by the funds, as well as its obligation to assign delegated tasks to this to finance the activity (Weiß, 1996: 209).

Exploring in detail these regulations would be redundant. However, it is important to mention that the Länder can change and thereby increase or decrease the resources provided to the self-governments. However, these resources must be sufficient to fulfil the tasks of local authorities as set out in Article 28 (2) of the GG.

6 Practical Significance

The practical significance of the Charter seems to be at least limited since its individual provisions reach a considerable degree of generality, leaving the Länder a sufficient scope to adjust the system of self-government within its limits. This was done in the interest of the widest acceptance of the Charter by the member states of the Council of Europe. The Charter does not require an unrestricted, full implementation of its specific provisions,

but it also gives the parties considerable freedom in their implementation (Epping: 2013). This is linked to the aforementioned possibility to make many reservations when the member states of the Council of Europe do not have to accept the Charter in this, but they can choose which provisions to follow. That is why Article 12 (1) in German literature makes it possible for such a choice to be referred to as a-la-carte clause (Von Münch, 2012: 1897).

Another problem is the absence of any sanctions or penalty mechanism in case of violation of the individual provisions of the Charter. Furthermore, the effectiveness of the Charter limits in particular the absence of sanctions, and the absence of a judicial system designed to protect the rights it lays down. This reduces its importance, not least for the German legal system. However, a certain meaning of the Charter can be seen primarily in the creation of a pan-European standard (Epping, 2013).

As has already been said above, the German regulation of the right to self-government contained in both federal and Länder law is rather complex and to the extent that it goes far beyond the requirements set out in the Charter and is of course more specific. Above all, Article 28 (2) of the Constitution adjusts directly municipalities and regions, while the Charter does not guarantee any such institutional guarantee (Von Münch, 2012: 1897). With the fact that the Charter does not contain too many specific guarantees and these guarantees do not go beyond the limits set by national law, the case law coincides, even though the charter is always only marginal. For example, the Brandenburg Constitutional Court in one of its decisions states: "*Article 9 of the European Charter of Local Self-Government of 15 October 1985 (Federal Gazette 1987 II, 65) does not produce any more favourable outcome for the complainant and does not appear in the interpretation of Article 99, Clauses 2 and 3 of the Brandenburg Constitution. In Article 9 of the Charter, the "local government funds" principle does not contain any specific requirements as to the form of financial compensation or even its minimum amount. It does not therefore fall within the scope of Article 99 of the Brandenburg Constitution*" (Brandenburg Constitutional Court VfGBbg 28/98). Similarly, it expresses in its later decision: "*In any case, it is not possible to reject the general communal-legal principle that the decision of the municipal council is simply irreplaceable. This is also mentioned in the complainant recalled by the European Charter of Local Self-Government of 15 October 1985 (Federal Gazette*

II 1987, 65), which does not go beyond the Constitution (Brandenburg Constitutional Court VfGBbg 53/98). The fact that the Charter is at least mentioned in these decisions can still be regarded as a success, for even a reference to it is quite rare in the case law."

7 Conclusion

The European Charter of Local Self-Government was promulgated in the Collection of Laws no. 181/1999 Coll. in the form of a statement from the Ministry of Foreign Affairs. The part of the Czech legal order is from 1 September 1999. It is an international treaty which Parliament has approved and the President of the Republic ratified, i.e. an international treaty within the meaning of Article 10 of the Constitution, i.e. apart from the provisions of Article 4 (5) Article 6 (2), Article 7 (2) and Article 9 (3), (5) and (6) of the European Charter of Local Self Government to which the Czech Republic has made a reservation. This international treaty, except for the reservations made to it, is part of the legal order of the Czech Republic. The European Charter of Local Self-Government has no application priority over the laws of the Czech Republic within the meaning of Article 10 of the Constitution and it is necessary to interpret it within the meaning of Article 1 (2) of the Constitution which states*: "The Czech Republic respects its obligations under international law."*

For the proper exercise of the right to local self-government, it is not enough to embody it in the law, or even in the Constitution. The basic premise is that the municipality will be guaranteed not only the right, but also the ability to manage its affairs. That means that municipalities will be equipped with tools that will enable them to apply this right effectively in practice. Therefore, it seems somewhat strange that the Czech Republic has made half of its reservations to Article 9 of the European Charter of Local Self-Government. The Czech Republic is therefore not bound by the following provisions of Article 9 of the European Charter of Local Self-Government – paragraph 3 ("P*art at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.*"), paragraph 5 ("T*he protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution*

of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.") and paragraph 6 ("*Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.*")

These reservations point to the fact that the setting of the Czech legal order does not provide municipalities with sufficient tools to guarantee the ability to manage their affairs independently. The reservations allow the legislator to intervene arbitrarily in the manner of financing the municipalities, i.e. to determine what taxes will be used for financing the municipalities. According to the reservation on paragraph 6, municipalities may not even be invited to discuss the change that is related to the redistribution of taxes. In this respect, the Constitutional Court uses a very restrictive interpretation of the right to self-government: "*the statutory regulation of the budgetary allocation of taxes could interfere with the right to self-government only if the income of the territorial self-governing units would fall below the level that would impede the exercise of self-government*" (Decision of the Constitutional Court dated 20 November 2007, Pl. ÚS 50/06). According to the Constitutional Court's decision, the right to local self-government is limited to the "right" to manage own affairs, not the "ability" to administer. On the margins, it should be added that the Brandenburg Constitutional Court's interpretation is similar (see above).

The Federal Republic of Germany fulfils the conditions imposed on it by the European Charter of Local Self-Government. The individual provisions of this document are implemented in both federal and Länder regulations. However, this guarantee was contained in the German legislation long before the Charter was ratified, because self-government, as well as federalism, is seen in the German environment as a guarantee of democratic order. The impact of the Charter on the German legal environment was small in its entirety, which, moreover, demonstrates even a small degree of interest in the scientific circles. The Charter could be seen to some extent as one of the guarantees that the German standard of local government protection will not be curtailed, but because of its generality it is not so sure.

The situation in the Czech legal system is somewhat more complicated. In the 90 s of the last century, the territorial self-government was rebirth.

New principles and rules have been newly set up. The area not yet resolved is the financing of territorial self-government, which is complicated by the fact that the municipalities and regions in the Czech Republic, apart from the self-governing areas, also ensure the performance of state administration. This has led to a number of reservations the Czech Republic has made to the European Charter of Local Self-Government.

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BENEFICIARY OF THE EU GRANTS IN THEORY AND PRACTICE FINANCIAL LAW

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Abstract

The aim of the article is to characterize the problems existing in practice related to the interpretation of the concept "the beneficiary of the EU grants" and the characteristics of the legal position of the beneficiary. The basic problem concerns of the legal concept of the beneficiary. The definition of the beneficiary in the construction contains a disjoint alternative which leads to the ambiguity of the legal concept. Practical application of the definition of the beneficiary often involves the need for an interpretation by the court. The status of a natural person as a beneficiary of EU funds is also unclear. A problem arising from the interpretation of regulations is the determination of the status of the so-called final recipients. Although in the economic and theoretical approach to the model of EU financial flows, the final recipients are a element of this structure, the Polish legislator excluded their from the income tax exemption. This causes disputes.

Keywords: Public Expenditure; Transfer Payments; Beneficiary; Grants of the EU; Final Recipient.

JEL Classification: K39, H30, H50.

1 Introduction

In the financial perspective 2014–2020, the institutional and legal framework for implementing the cohesion policy, is set out in regulation 1303/2013 of the European Parliament and of the Council of 17. 12. 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and

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laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation 1083/2006 (OJ L 347, p. 320, hereinafter: the General Regulation[2]).

General Regulation is implemented in complementary acts: 1) the Act of 6. 12. 2006 on the principles of conducting development policy (Act no. 1376/2017), 2) the Act of 11. 7. 2014 on implementing programs in the field of cohesion policy financed in the years 2014–2020 (Act no. 217/2016). The first shapes the organisational framework enabling the division of tasks such as: partnership agreement, strategies and operational programs to be undertaken (Jaśkiewicz, 2014a: Introduction). The second concentrates on the implementation of legal and financial solutions resulting from the General Regulation (Jaśkiewicz, 2014b: Introduction). Both acts are also correlated with the solutions of the Public Finance Act of 27. 8. 2009 (Act no. 2077/2017).

Under the principle of shared management of EU funds (see Art. 59 of the regulation 966/2012 of the European Parliament and of the Council of 25. 10. 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation 1605/2002 OJ L 298, p. 1; hereinafter: the Financial Regulation), the Member State creates the institutions: managing, mediating, implementing, certifying and auditing (Act no. 1376/2017, Art. 5/2-4a; General Regulation, Art. 2 and Art.122–125). Their task is to select beneficiaries and control the correct spending of funds. The tasks of the beneficiary include the actual, economic and social implementation of the basic objectives of the functioning of the European Union. However, there are cases in which the managing authority obtains the status of a beneficiary or the beneficiary transfers funds to so-called final recipients. This causes the beneficiary's concept to be submitted. In the area of theoretical considerations, this situation creates complex legal relations. They were not examined in the current legal status. The objective of the article is to characterise the problems existing in practice related to the interpretation of the concept: the beneficiary of the EU grants and the characteristics of the legal position of the beneficiary.

2 This is an abbreviation adopted normatively.

2 The Construction of the Beneficiary's Legal Definition

The legal status of the beneficiary is determined by the regulations of General Regulation (Art. 2/10). According to the provisions, beneficiary means a public or private body and, for the purposes of the EAFRD[3] Regulation and of the EMFF Regulation only, a natural person, responsible for initiating or both initiating and implementing operations; and in the context of State aid schemes, the body, which receives the aid; and in the context of financial instruments under Title IV of Part Two of General Regulation, it means the body that implements the financial instrument or the fund or funds as appropriate.

The indicated definition contains a disjoint alternative[4]. The reason is the specific position of the beneficiary in the area of:

- public private partnerships (PPPs);
- supporting financial instruments[5];
- of the EAFRD Regulation and of the EMFF Regulation.

According to Art. 63 of General Regulation, in relation to a PPPs operation, and by way of derogation from point of Art. 2/10 General Regulation, a beneficiary may be either:

- the public legal entity body initiating the operation or
- a body governed by private legal entity of a Member State (the "private partner") selected or to be selected for the implementation of the operation.

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3 In order to improve coordination and harmonise implementation of the Funds providing support under cohesion policy, namely the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund, with the Fund for rural development, namely the European Agricultural Fund for Rural Development (EAFRD), and for the maritime and fisheries sector, namely measures financed under shared management in the European Maritime and Fisheries Fund (EMFF), common provisions should be established for all these Funds the European Structural and Investment Funds – ESI Funds.

4 Cf.: justification for the bill.

5 Financial instruments means Union measures of financial support provided on a complementary basis from the budget in order to address one or more specific policy objectives of the Union. Such instruments may take the form of equity or quasi-equity investments, loans or guarantees, or other risk-sharing instruments, and may, where appropriate, be combined with grants.

The public legal entity initiating the PPP operation may propose that the private partner, to be selected after approval of the operation, be the beneficiary for the purposes of support from the ESI Funds. In that event, the approval decision shall be conditional on the managing authority satisfying itself that the selected private partner fulfils and assumes all the corresponding obligations of a beneficiary under this Regulation. The private partner selected to implement the operation may be replaced as beneficiary during implementation where this is required under the terms and conditions of the PPP or the financing agreement between the private partner and the financial institution co-financing the operation. In that event the replacement private partner or public legal entity shall become the beneficiary provided that the managing authority satisfies itself that the replacement partner fulfils and assumes all the corresponding obligations of a beneficiary under this Regulation.

However, this solution causes a separate problem. It is difficult to determine the moment of obtaining the beneficiary status. Article 2/10 of the General Regulation provides: beneficiary is the body responsible for initiating or both initiating and implementing operations. The grammatical interpretation of this provision allows the applicant to be considered as the beneficiary. However, Art.115/3 of the General Regulation distinguishes the applicant from the beneficiary. Thus, the systemic interpretation requires that the beneficiary is an entity that has already received co-financing. Distinguishing the beneficiary responsible for initiating or both initiating and implementing operations informing only that: the beneficiary shall only submit the application for co-financing (then obtaining the beneficiary's status as a result of signing the co-financing agreement), and the project shall be implemented by a related and authorised unit. "For example, such a situation may occur when the party to the co-financing agreement is a local government unit, and the infrastructure project is implemented in a technical and organisational sense by a municipal company, which as a result of its implementation becomes the owner of the infrastructure purchased under the project" (Poździk, 2016: remarks to Art. 2).

In turn, in the area of supporting financial instruments, according to Article 38/4/c of the General Regulation, the managing authority may

undertake implementation tasks directly, in the case of financial instruments consisting solely of loans or guarantees. In that case the managing authority shall be considered to be the beneficiary as defined in of Art. 2/10.

Prima facie a natural person can be a beneficiary in area of the EAFRD Regulation and of the EMFF Regulation only[6]. However, the doctrine presents different views:

- a natural person running a business can be a beneficiary of support also from the ERDF and the EFS (Poździk, 2016: remarks to Art. 2). It can be confirmed by Art. 2/37 of the General Regulation, stating that: economic operator means any natural or legal person or other entity taking part in the implementation of assistance from the ESI Funds, with the exception of a Member State exercising its prerogatives as a public authority;
- a beneficiary may be a natural person, because it is in the broader concept of a private entity. According to the European Commission, the provisions on this issue are flexible and Member States determine who the beneficiary is. In addition, excluding private persons from the group of potential beneficiaries of support would violate the principle of non-discrimination in the project selection process (Dawydzik, 2015: 43).

Both conclusions of the theses show that the recipe is constructed in a defective manner. This problem is partially solved by the Act on the principles of conducting development policy. The Act defines the beneficiary as a natural person, legal person or organisational unit without legal personality, to which the law grants legal capacity, implementing projects financed from the state budget or from foreign sources on the basis of a decision or contract for project co-financing (Act no. 217/2016, Art. 5; General Regulation, Art. 2/10).

In addition, EU law enables one to determine against the background of the definitions, that 'bodies governed by public law' means bodies that have all of the following characteristics:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

6 During the negotiations, most Member States did not agree that natural persons could be beneficiaries of assistance from ERDF and ESF.

- they have legal personality;
- they are financed, primarily, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law (Directive of the European Parliament and of the Council 2014/24/EU of 26. 02. 2014 on public procurement and repealing directive 2004/18/EU OJ L 94 p. 65).

The definition of bodies governed by public law makes it easier to identify private entities. This definition include: natural body, bodies have legal personality, and other entities that are not governed by public law. This group of beneficiaries includes partners in a civil partnership. The civil partnership itself can also obtain the unique status of the beneficiary. This may happen in the event of contradictions or gaps in the law (cf. Supreme Administrative Court, II GPS 2/12).

3 Beneficiary and the Final Recipient

The term beneficiary is also unclear with regard to the so-called final recipients of grant. Grants may be implemented under grant programs. The purpose of grant project is implementation of tasks by final recipients, other than the beneficiary of the grant project, selected through an open recruitment by the beneficiary (Act no. 217/2016, Art. 35).

In the previous perspective, in some operational programs there were final beneficiaries (see § 2/1 of the Regulation of the Minister of Regional Development of 6. 5. 2008 on granting public aid under the Human Capital Operational Program, OJ 90, item. 557, as amended). However, they were not applicants or later beneficiaries within the meaning of Art. 2/10 of the General Regulation (WSA in Cracow: III SA/Kr 324/11). The objective was to select the best "help operator" (applicant), which would distribute it efficiently between the beneficiaries of the aid. In the financial perspective 2014–2020, the legal status of the grant recipient results from the contract for co-financing (Supreme Administrative Court: II GSK 790/11.) On theoretical grounds, it can still be called the final beneficiary. Indirectly

this confirms Article 2/12 General Regulation, stating that: final recipient means a legal or natural person receiving financial support from a financial instrument.

The separateness of the beneficiary from the recipient and the person whose beneficiary pays for the performance of certain activities with funds from non-returnable EU co-financing, and therefore also persons employed under a contract of employment or a civil law contract is also valid for tax reasons. The view that the taxpayer referred to in Art. 21/1/ 46/b of the Act of 26. 07. 1991 on personal income tax (Journal of Laws of 2016, item 2032 as amended; hereinafter: PIT), directly implementing the purpose of the program, can only be the entity that is the beneficiary of non-returnable funds designated for the implementation of a specific project and who bears full responsibility for its proper implementation (Supreme Administrative Court: II FSK 106/10; II FSK 2095/11; II FSK 1918/12; II FSK 1375/13; II FSK 2264/14). "*The legislator did not define the concept of an entity directly implementing the objective of a non-returnable program also in the tax act. Against the background of the linguistic interpretation of Art. 21/1/46 of PIT, the interpretation of the said provision is unacceptable, which amounts to the thesis that the entities covered by this tax exemption also include persons who are employees of a direct contractor* (…). *The legislator explicitly excludes from it the exemption from tax all those persons whose pay tax and directly pursues the objective of a program financed from non-returnable assistance under the contract, regardless of its type, commissioned specific activities under this program* (…). *Direct does not mean a personal obligation to perform it by the beneficiary of non-returnable assistance. It can implement a program (project) so financed with the help of other entities, including people employed by it, without losing the attribute of "directness". This means, however, that entrusting to other entities employed under a contract of employment (or a civil law contract) as part of the implementation program of particular activities making up a certain whole cannot be considered as a direct implementation of the program by these entities. The validity of such an interpretation of Art. 21/1/46/b PIT is consequence not only of the grammatical interpretation, but also of the historical, systematic and teleological interpretation.* (…). *The intention of the legislator was to include only those taxpayers, who directly implement the objective of the program financed from non-returnable aid. Only a different practice has led to the addition of the second sentence, which, in the current wording, directly states that the exemption*

does not apply to the income of natural persons whose tax pay directly implements the program's purpose; commissions, irrespective of the type of contract, to perform certain activities in connection with the program by him. The taxpayer directly implementing the program's objective can be considered only a person who, by performing activities related to this program, received for this purpose funds from the entity mentioned in Art. 21/1/46 PIT hence he is a direct beneficiary of these funds. Hence, cash means that are revenues are exempt from taxation if they are revenues of the beneficiary or a direct contractor, while the revenues of employees of these entities or persons employed by them under a civil law contract are not exempt."

4 Beneficiary in the Theory Financial Law

The funds transferred to the beneficiaries from the EU Budget, the budget of European funds and EFTA countries are of the nature of transfer expenditures. Hence, the research model adopted for the grants and taxes can be applied to the considerations (Fill, 2016: 39). It enables one to distinguish fixed and variable elements of legal and financial relations (Chojna-Duch, 1988: 11). By transferring this distinction into the sphere of EU payments, one may say that variable elements (subject, object, rates, amount and transmission mode) are necessary for the existence of this relationship. They create its legal framework. Solid elements (one-sidedness, non-returnability, lack of payment, strictly defined amount, supplementing the financial gap) determine the legal character of this category of relations (cf. Dębowska-Romanowska, 2010: 124–126). The co-financing contract (or public agreement) between the beneficiary and the managing (implementing) body is used to specify the rights and obligations of the beneficiary. Its content determines the variable elements of the relationship. To a lesser extent it enables determination of the nature of the legal bond. The form of the contract may even be misleading, because the agreement does not give one the possibility to shape relations on an equal basis. Its provisions force the beneficiary, among others to accept internal regulations in force (guidelines) and to establish financial collateral. Thus, the nature of the legal relationship between the beneficiary and the managing authority is determined mainly by generally applicable and internally binding provisions. One can also consider designating a beneficiary's legal position in the context of a binding

legal norm. Its hypothesis and sanction are based on universally and internally binding regulations, while the disposition is largely based on the provisions contained in the agreement (agreement) on co-financing. In the process of specifying the beneficiary's rights and obligations, it is possible to distinguish procedural and material-legal elements. Procedural procedures include: the procedure for applying for co-financing and specific legal means to control the correctness of this process. Material and legal elements include the rules for determining the amount of support and conditions for mobilising funds (Dębowska-Romanowska, 2000: 22).

The optional nature of raising funds does not allow for the adaptation of the tax theory of an abstract (unspecified) legal relationship in the relationship: managing authority-beneficiary. However, due to the shared management method, the construction of an abstract legal and financial relationship may serve generalisations in the transfer of funds from the EU budget to the Member States' bank accounts. The abstract legal and financial relationship covers the activities of the Commission and the Council of the EU and also the Member State in the area of planning, division, transfer and settlement of financial resources. There are no beneficiaries in this relationship (within the meaning of Art. 2/10 of General Regulation). The relationship between the Member State (acting through managing authorities) and the beneficiary serves to specify the rights and obligations.

A separate theoretical problem is related to the relationship between the beneficiary and the final recipient of grants. Due to the transferability of non-returnable European funds, arrangements for budget subsidies can also be appropriately used in this area. In German doctrine for several decades, the following has been distinguished:

- entity entitled to receiving a grant
- entity formally receiving a grant
- entity actually receiving a grant
- entity referring the real advantage (Andel, 1970: 8; Hansmeyer, 1977: 972).

This classification is also adequate for examining the legal position of the beneficiary of non-returnable EU funds. It indicates the existence of internal (instrumental) legal relations. They may involve the beneficiary

directly with the final recipient of the funds. Due to the structure of the flow of EU funds, these relations may be governed by private law or labour law. However, they can also be regulated by EU law. One may also imagine the formation of legal relations between the final recipient and the implementing institution of a functional nature, which could be defined as indirect relations (e.g. in the case of control). Within their framework, the beneficiary occupies the position of the instrumentally incorporated entity in a legal relationship. The establishment of this type of legal ties should however be considered first and foremost, on the basis of the use of financial instruments, usually of a recurring nature. In the area of non-returnable transfers, the type of indirect relationship applies to certain categories of grant recipients.

The flow of funds between the beneficiaries and various categories of non-beneficiaries within the meaning of Art. 2/10 of General Regulation may also be analysed within the framework of economic cross-media of broadly understood effects of support. This will be the case when the benefits resulting from the activities carried out by the beneficiaries will fall to the final recipients (Chojna-Duch, 1988: 74). They are called in German literature real subsidiaries or those whose economic situation as a result of support is improved (Peffekoven, 1983: 480). Moreover, in analogy to tax law, one may consider transferability of grants (Ostrowski, 1970: 146).

An important element of the theoretical differentiation of beneficiaries is the systemic contradiction, which is impossible to remove without answer to the question on the legal nature of non-returnable funds flowing through EU structures (Fill, 2016: 40). According to Art. 121 of the Financial Regulation "*Grants are direct financial contributions, by way of donation, from the budget in order to finance any of the following* [expenditure – author's note] (…)". Emphasising the immediacy of the legal relationship in the analysed definition is intended to distinguish: 1) the subsidies granted by the Commission or the EU executive agencies, 2) the payments made by the managing authorities of the Member States under shared management. According to Art.121/2/e of the Financial Regulation, in principle, such payments do not constitute grants, being the expenditure implemented under shared management and indirect management.

On the other hand, according to Art. 66 of the General Regulation, the ESI Funds shall be used to provide support in the form of grants, prizes, repayable assistance and financial instruments, or a combination thereof. Simultaneously, there is no definition of grants in the content of the General Regulation. Thus, a legal gap arises, which can be removed by explaining the legal status of expenditures called normative payments (Act no. 2077/2017, Art.187–188[7]). In Polish legal science, it is assumed that on the basis of the Public Finance Act of 2009, payments are a form of transfer of expenditures; they are not the typical grants (cf.: Miemiec, 2010: 369–371; Kosikowski, 2011: remarks to Art. 187; Kornberger-Sokołowska, 2012: 159; Chojna-Duch, 2017: 66–75, 133–137). However, since the liquidation of the so-called development grant in 2009, no one has explained the legal status of payments in the light of the above-mentioned doubts existing in EU legal solutions (cf. e.g.: Lipiec-Warzecha, 2011: remarks to Art. 187–188; Kosikowski, 2014: 83–85; Drwiłło, Jurkowska-Zeidler, 2017: 167–182; Misiąg, 2017: remarks to Art. 187–188). This situation means that it is justified to distinguish beneficiaries receiving support under contracts concluded directly with the European Commission or executive EU agencies and beneficiaries receiving payments under shared management.

5 Conclusion

Analysis of the theses indicated at the outset enabled confirmation of the existence of a number of legal problems and enabled their partial explanation. It is worth noting that there is a lack of theoretical considerations in the Polish literature regarding the position of the beneficiary in the context of a legal relationships arising as part of the transfer of EU funds.

The basic problem concerns the legal concept of the beneficiary. The definition of the beneficiary in the construction contains a disjointed alternative, which leads to the ambiguity of the legal concept. Practical application of the definition of the beneficiary often involves the need for an interpretation by the court. The status of a natural person as a beneficiary

7 The Minister of Finance is responsible for handling payments under programs financed with the participation of European funds, hereinafter referred to as "payments". The basis for making the payment to the beneficiary is the payment order issued by the institution with which the beneficiary concluded the contract for co-financing the project, and the written consent of the administrator of the budgetary part to make payments (…).

of EU funds is also unclear. In this case, contrary to the grammatical interpretation of General Regulation Art. 2/10, it can be assumed that natural person may also be a beneficiary in the framework of programs financed from ERDF and the EFS. A natural person is within the wider concept of a private entity and can be an economic operator.

A significant practical problem arising from the interpretation of regulations is the determination of the status of the so-called final recipients. At the request of the beneficiary, they implement the objectives of EU projects and most often their remuneration is paid by the beneficiary from the EU grants. Although in the economic and theoretical approach to the model of EU financial flows, the final recipients are a logical element of this structure, the Polish legislator excluded them from the income tax exemption. Due to protection of the fiscal interest of the matter, the courts consistently apply grammatical interpretation in this area.

In addition, significant theoretical doubts result in the normative differentiation of beneficiaries due to the direct or indirect nature of contracts for co-financing. Due to this criterion, pursuant to Art. 121 Financial Regulation, it is possible to distinguish grants beneficiaries of grants granted directly by the Commission or EU executive agencies and beneficiaries receiving the so-called payments under shared management. The legal nature of the payment has not been established. Such a situation affects the organisation of legal relations in which the beneficiaries participate, limiting the possibilities of theoretical systematisation.

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FINANCIAL MARKET – THE POSSIBILITY FOR LOCAL GOVERNMENT FINANCING

Michal Janovec[1]

Abstract

This contribution deals with financial market as one of the many possibilities for local government financing. It's a different, non-public way of financing, but still reasonable. Any legal entity, including the local government units have the chance to perform in different ways on the financial market and get more possible sources of own financing. Many towns and cities has used this possibility in past years and many of them has lost great amount of their own budgets after financial crisis in 2008, so it's a question whether they could use this platform of financing and how restricted they should be. The main aim of the contribution is to confirm or disprove the hypothesis that only stable financial market could be the place, where local government unit might invest its own finance. Analysis, description and synthesis are the most common scientific methods applied in this contribution.

Keywords: Financial; Market; Investing; Local Government.

JEL Classification: K 20 Regulation and Business Law.

1 Introduction

The aim of this contribution is to point out one of the possible way how to get extra source of the financing for the Local Government using the Financial Market. Financial market could be very useful place how to use own free funds to invest them and get some extra finance, but on the other way, it's also quite risky, because non-stable market could consume the invested money and then there is a lack of finance in local budged. We could see negative results after world financial crisis in 2008, where many local

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entities lost lots of their own finance using bonds of bankrupt banks like Leeman Brothers or some other financial institutions.

The main aim of the contribution is to confirm or disprove the hypothesis that only stable financial market could be the place where local government might invest some of the local budget. Analysis, description and synthesis are the most common scientific methods applied in this contribution.

It is necessary to analyse financial market and provide to possibilities how to ensure the financial market to be stable place for any investment. Local government is legal Entity as any other one and therefore is entitled to use all advantages and possibilities of private investment. Every local government deals with public money and then it is necessary to consider all risks of such investments.

2 Funding Possibilities for Local Self-Government

Funding possibilities for the Local Self-Government could be found in the area of International law (international treaties) and then in the national law order. One of the most important international document is European Charter of Local Self-Government, where the funding possibilities for Local Self-Government were declared in particular. Than the area of national law should specify or restrict the possibilities and the ways of funding. There are many other funding sources for Local Self-Government (funding through the national budget, share of the national taxes, local taxes and charges), but private investment of the public money gives the unique opportunity how to give even more independency for the Local Self-Government. In this area they became equal to standard private entities, just the responsibility must be put higher, because we still talk about public money.

European Charter of local Self-Government reflects the need of local community equipped by democratically formed executive councils with a high degree of autonomy and resources necessary to carry out its responsibility (Hendrych, Bakes, 1997: 78).

Besides many other provisions, there is an Article 9, par. 8 of the Charter, which grants the possibility "*to have an access to loan finance for capital investment. The possible sources will depend on the structure of each country's capital market.*" Nevertheless, this provision declares only local capital market,

I am convinced, that international (foreign) capital markets could be the same available destination for Local Self-Government.

Just this provision of the Charter gave through its implementation to the law on municipalities the option for municipalities to issue Municipal Bonds.[2]

There are two ways for Local Self-Government how to enter financial market. They could be issuers looking for investors (searching for extra funding by municipal bonds) or they could be issuers themselves investing extra money to other entities on capital market.

2.1 Local Self-Government as an Issuer

Municipal bonds are debt securities issued by Municipality. It entails the right of the owner to demand repayment of amounts due in nominal value. Bondholder is also entitled to receive revenues from it to a certain date. Local self-government unit has a duty to carry out these obligations (Liska, Gazda, 2004: 40).

Municipalities can issue municipal bonds themselves or through an intermediary, which is a financial institution (investment firm). Municipal authorities themselves issue the bonds, if they have experienced employees, but due to lack of skilled employees, they usually leave the emission of bonds for financial institution (Markova, 2000: 115). To perform the emission it is necessary to conclude a command contract with a financial institution that performs the emission.

For example, in the US municipal bonds have lower interest rates than taxable corporate bonds. And it is precisely because the interest municipal bonds are exempt from federal taxes Municipal bonds have, in addition to the tax exemption, another three important features: security, high marketability, diversity (Steiss, 1997–1998).

There are two major types of municipal bonds: "general obligation bonds" and "revenue bonds." (Securities and Exchange Commission, 2012: 1–2).

[2] For example legal basis of Municipal bonds in the Czech Republic could be found in §27 Act no. 190/2004 Coll.

2.2 Local Self-Government as an Investor

The other possibilities for the Local Self-Government are investments on the capital market by purchasing private shares or any other investment instruments (investment certificates, share certificates, different kinds of bonds). This possibility is clearly used only in the situation, when the local budget provide extra money, which could be invested. These kind of investment must be made with high professionality mostly using the conservative instruments and methods to lower the possibility of the loss to minimum.

3 Financial Market

This chapter of this article analyse how financial market should be set up and organised to be considered as stable financial market. Than only provides an option for local government investments or other action such as issuing the municipal bonds. This article deals with the general term of the financial market of the EU and its own conditions without any particular national law. It analysis financial market as the theoretical discipline with some practical outcome without considering any specific national legal sources.

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.

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, 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 is a market where money is provided for a period longer than one year (Sulivan, Shefferin, 2013: 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 (Sulivan, Shefferin, 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, 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 (Zucchi, 2014), 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.

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.

4 Areas of the Financial Market

Financial market 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).[3]

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.

Classification of Šoltés and Kulhánek (Šoltés, Kulhánek, 2009: 210) 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, 2009: 209–214).

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

Kotáb (Kotáb, 2012: 104) adds that the 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[4]) and terminal markets[5] (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, 2012: 214–215).

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;

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

5 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, Term: Banka/Bank). 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, 2014). For this activity it is, of course, necessary to possess a licence issued by the relevant state authority.

5 Capital Market

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. Out of all financial market disciplines the capital market is the most interesting for this article and its main topic, 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, 2014). 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 (Rejnus, 2014: 125)

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; it keeps 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.

6 Conclusion

One of the biggest problem of financing the local governments is their indebtedness, which causes problems in the economy and in turn affect the total public debt of the country. This regards the problem of municipal bonds as the special way of the municipal loan. It is very clear that the financing of local government must be very carefully set, at the same time ensured the possibility of investing in the development of the local government unit, but not in the risky way. For example issuing the municipal bonds come together only with stable income plan of the municipality, to ensure repayment without any debt trap for the future.

On the other hand, investing extra financial sources on the financial market must be done with high caution, for example without using leverages (special loans for investing) or some non-conservative methods.

Firstly it is needed to secure the financial market, secondly, it is important to create some legal restrictions for local self – government how, where and when not to invest or when not to issue any municipal bonds.

Securing the financial market is mostly in hands of European Union, which produce lots of legislature relevant to the financial market and it needs to be implemented in EU member states law order. I could conclude,

that current status of financial market regulation is very good and prevention against unstable market when next financial crisis comes, is highly developed (and there will be next financial or economy crisis).

In the area of legal borders for investments of local government is the primary role set for the legislature, which sets up the legal rules and funding opportunities. The executive power of the local government is kept independent and acts within the rules individually, but on own responsibility.

At the beginning of this article I set the hypothesis that only the stable financial market could be the place, where local self – government might invest its own finance or where it could seek for investors. I must declare that this hypothesis could be surely confirmed. All prerequisites mentioned and analyzed above must be met as a key point for stable financial market. Than only it is free for local government to invest part of its budget on financial market and get some extra finance in the public interest.

Definitely I can also conclude that the existence of this funding option is positive (although not the most important) but only when financial market is stable and therefore investing on the financial market must be performed very carefully regarding the public responsibility of the local self – government.

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EU COMMITTEE OF REGIONS CONTRIBUTION IN THE ROLE ASSIGNED FOR NATIONAL AND REGIONAL PROMOTIONAL BANKS

Rafał Płókarz[1]

Abstract

This contribution deals with the issue of National and Regional Promotional Banks (NPBs), which play more and more important role last years in the context of Investment Plan for European Union. Although divergences exist as there is a diversity of local approaches and experiences in EU countries as to the role of NPBs, common interest prevail, and the role of such institution will continue to grow.

Keywords: National and Regional Promotional Banks; Regional Policy; Financial Institutions; Financial Instruments.

JEL Classification: H71, G21, G23, R11, R58.

1 Introduction

The main aim of the contribution is to confirm the hypothesis that regional promotional banks models vary across EU countries and even regions, and it is hardly impossible to impose one and unique model for the whole EU. However, local divergences show that in some countries, especially in new member states (e.g. Poland), divergences exist as to whether the centralised or decentralised model is more efficient. Thus, local authorities express the will to have more hands-on approach on financial disbursement issues, for instance by setting up regional promotional banks, copying German, Dutch or Belgian well established models.

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Author was in 2016 responsible, as an Official Expert, for preparing and presenting, along with the Rapporteur, a special and official Opinion on NPBs, which was subsequently adopted by the EU Committee of Regions, and submitted to European Commision and European Parliament. Used in this contribution are his personal and backstage remarks, arising from multilateral consultation and draft opinion preparation process. He also analyses both official and unofficial documents on NPBs. As analysed topic is new, there is still a lack of professional literature, apart from above mentioned documents and legislation.

From the start of the financial crisis in 2007 until today, national and regional promotional banks (NPBs) across Europe have demonstrated their capacity of swiftly responding to the sharply reduced access to finance. By providing dedicated financial instruments in form of working capital loans, SME loan guarantees, global loans for partner banks, equity instruments, counter-guarantees, as well as advisory services for SMEs affected by the crisis and many others, they have contributed an important share to keeping the EU economy running during the crisis years. They have also played a key role in jump-starting investments in national, regional and municipal infrastructure projects across Europe. Financial instruments managed by public financial institutions, as opposed to direct state grants, enable to invest the available money from scarce public budgets in a way which is more efficient, thanks to their revolving nature. NPBs can ensure that public money has a multiplier effect through the use of revolving funds and professional financial management. In particular, NPBs play an active role in financing areas addressed by certain EU, national or regional development policies.

2 Working Together for Jobs and Growth: The Role of National and Regional Promotional Banks (NPBs) in the Investment Plan for Europe

On 26 November 2014, the European Commission launched its Investment Plan for Europe (Communication from the Commission, 2015), a coordinated and comprehensive effort to mobilise at least EUR 315 billion in additional public and private investment into the real economy in three years. While implementation of the plan relies mainly on the Commission and EIB

working together as strategic partners, an effective involvement of National Promotional Banks (NPBs) is necessary to enhance its impact on investment, growth and employment due to their particular expertise and their knowledge of the local context, business and investor communities as well as national policies and strategies. Member States that do not yet have an NPB may consider setting one up. In addition, investment platforms can play a key role in pooling the resources of the EIB, NPBs and private investors.

NPBs play an important role in catalysing long-term finance. In recent years, they have stepped up their activities, aiming to counterbalance the necessary deleveraging process in the commercial banking sector. In recent years, they have stepped up their activities, aiming to counterbalance the necessary deleveraging process in the commercial banking sector. They also play an important role in implementing EU financial instruments beyond the scope of the Investment Plan. A number of Member States that did not have an NPB before have decided to establish one, while others are considering setting up a new NPB.

NPBs are defined as legal entities carrying out financial activities on a professional basis which are given a mandate by a Member State or a Member State's entity at central, regional or local level, to carry out development or promotional activities, as set out in Article 2(3) of the EFSI Regulation of 2015 (Regulation (EU) 2015/1017).

Under the EU's 2014–2020 multiannual financial framework (MFF), promotional institutions may complement national and regional administrations in allocating European Structural and Investment Funds (ESIF), including financial instruments such as risk-sharing instruments, (partial) loan guarantees, equity and mezzanine finance. The use of ESIF funds for providing credit or risk capital, rather than grants, has two principal advantages: First, it can generate leverage, i.e. each euro of ESIF funds can generate multiple euros of loans or equity financing and, secondly, the financial viability requirement ensures that scarce resources are allocated to efficient uses.

A concerted effort drawing on the complementarities of the EIB, NPBs and private investors could achieve the Investment Plan's goal of mobilising at least EUR 315 billion in additional public and private investment into the real economy over the period 2015–2018.

The mobilization of private investors may well be the most important indicator of success of an innovation strategy, as some quantitative analyses and case studies appear to indicate (Grillo, Nanetti, 2016: 185).

By 1 October 2015: first EFSI guarantees have been extended to NPBs and 1 October 2015 first investment platforms was established. The completion of EFSI investment programme was due by 30 June 2018. After that date the evaluation of EFSI, including role of and cooperation among NPBs should take place.

There are examples of regional promotional banks in the EU, which play a significant role for the development of regions and cities. They have different organisational and ownership structures. In Germany for example, regional promotional banks are owned by respective states, whereas in the Netherlands, the ownership of the Bank Nederlandse Gemeenten is the following: the Dutch state owns 50% of the company, and the remaining 50% is owned by the municipalities and provinces. Promotional banks were established in various ways, e.g. being set-up as independent institutions or first as branches of public banks, which evolved into independent promotional banks. This process continues as some of the regions are about to launch operations of new institutions. The most recent developments in this field is the plan of opening the Scottish Business Development Bank and almost finalised process of launching operations of a promotional bank in Catalonia. There are also possible developments soon to be announced in the region of Lombardy, Italy. The general picture and mapping of regional promotional banks in the EU is changing however there is no good overview of the situation made available to local and regional authorities, which would help them in planning setting-up institutions in their regions. Annex I shows examples of promotional banks and other promotional financial institutions in the EU.

3 New Financial Instruments and the Role of National Promotional Banks (NPBs)

In the 2014–2020 period, there has been a general shift in EU funding approaches away from one-off grant finance towards the greater use of innovative financial instruments. The objective is to strengthen

the longer-term availability of finance for SMEs by maximising the sustainability of EU funds. This is facilitated by the revolving nature of EU financial instruments schemes (i.e. the funds can be recycled in the case of loan guarantees and in the case of equity, provided that successful exits are achieved). A further advantage is the opportunity to generate leverage on EU funds by attracting additional national public and private investment/cofinancing.

The Investment Plan for Europe also encourages more extensive use of financial instruments, instead of traditional grants in European Structural and Investment Funds (ESIF), in areas such as SME support, R & I, CO2 reduction, environmental and resource efficiency, ICT and sustainable transport.

The major EU financial instrument in which National ad Regional Promotional Banks (NPBs and RPBs) have the most extensive involvement is the European Structural and Investment Funds (ESIF) 2014–2020 and the 2007–2013 predecessor programme (the "Structural Funds").

ESIF is one of the largest areas of the EU budget (EUR 454 billion in 2014–20 period). There is expected to be an increase in expenditure on FIs by Managing Authorities to approximately EUR 19 billion). Financial Instruments (FIs) help to transform EU resources under the ESIF into financial products such as: loans, guarantees, equity and other risk financing mechanisms. ESIF encompasses a number of different EU programmes, namely the European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF), European Agricultural Fund for Rural Development (EAFRD) and the European Maritime & Fisheries Fund (EMFF).

For instance, In Poland, the NPB (BGK) has helped to implement financial instruments funded through Structural Funds in 2007–2013 at the level of individual Operational Programmes (OP) For instance, BGK served as the Holding Fund Manager in 2007–2013 in respect of the OP for the Development of Eastern Poland (central OP for 5 regions), financed through the ERDF. In addition, BGK has been involved in implementation of financial instruments at regional level by implementing the JESSICA Initiative (3 regions) where BGK operated the Urban Development Fund and also served as the Holding Fund Manager in JEREMIE (6 regions),

both of which were funded through ERDF. BGK has also played an important role as a national Holding Fund Manager in respect of financial instrument schemes using the ESF, i.e. the Financing Scheme for Entities in the Social Economy through the Human Capital OP and in respect of the ERDF (Holding Fund Manager in Guarantee Fund for the OP "Innovative Economy") and lastly as an Implementing Agency for Technology Credit (a "hybrid instrument"). According to the Centre for Strategy & Evaluation Services (CSES) analysis of survey response from BGK In 2014–2020, BGK continues implementation of similar schemes.

NPBs play also imporant role in the implementation of EU Financial Instruments devoted mainly to SMSs, instruments managed by the European Commission and the EIB Group, such as: 2014–2020 InnovFin SME Guarantee/Horizon 2020; 2014–2020 The Loan Guarantee Facility (LGF)/COSME; 2014–2020 Equity Facility for Growth/COSME; 2014–2020 Natural Capital Financing Facility (NCFF)/LIFE Programme; 2014–2020 Private Finance for Energy Efficiency instruments (PF4EE)/LIFE Programme; 2014–2020 Cultural and Creative Sector Guarantee Facility ("CCS LGF") within the Creative Europe Programme; 2007–2013 The RiskSharing Instrument (RSI).

For instance, in Poland, NPB – BGK Bank, implemented Structural Funds in 2007–2013, by managing:

- Urban Development Fund in JESSICA (3 regions);
- Holding Fund Manager in JEREMIE (6 regions);
- Holding Fund Manager in OP Development of Eastern Poland (central OP for 5 regions);
- Holding Fund Manager in Guarantee Fund – OP Innovative Economy;
- Holding Fund Manager in Social Economy Entities Financing; OP Human Capital.

All above funds derive from European Regional Development Fund (ERDF), except the last one, which derives from European Social Funs (ESF).

BGK was also an implementing Agency in Technology Credit ("hybrid instrument"), which was continued in 2014–2020 in slightly modified formula.

Bank played also role of financial intermediary in COSME and InnovFin under Horizon 2020. Polish NPB has also set up the Polish Growth Fund of Funds in conjunction with the EIF as part of the EIF's Fund of Funds programme.

NPBs have been set up in almost every EU country. They are already playing an important role in implementing EU financial instruments in the 2007-2013 and 2014–2020 programming periods, through shared management and in an intermediary capacity in the case of centralised instruments. The role of NPBs in New EU Financial Instruments is even strenghten following the adoption of the EC's Investment Plan for Europe, which emphasised their role in delivering the objectives of the European Fund for Strategic Investments (EFSI), as well as other EU programmes, notably the ESIFs (commonly called the "Structural Funds").

4 Divergences Across EU Unveiled in the CoR Draft Opinion Consultation Process

Consultations over the draft opinion among the stakeholders that took place in the Committee of the Regions (CoR) in Brussels in the first quarter of 2016 showed many divergences in approaches to the regional promotional banks.

Some countries have well-established networks of Regional Promotional Banks ("RPBs"), such as Germany, Spain and to a lesser degree Italy. In some countries, such as Germany, and Austria, NPBs do not directly market their products to SMEs but rather rely on another level of intermediation between EU financial instruments managed centrally by the EC/EIB Group i.e. commercial banks (including the important role of the savings banks / Sparkassen) and regional public banks at Länder level (Landesbanken). The representants of these countries have had more experiences and remarks to share during the consultation process.

The aim of the consultation, as displayed by the Official Expert to the Rapporteur, was to find the answers to the unexhausted list of below mentioned questions:

- What are the relations between national promotional banks and regional promotional banks?

- What role do the local/regional authorities and regional promotional banks play in or how can they benefit from the the European Investment Advisory Hub (EIAH)?
- What are the economic or political justifications (such as combatting markets failures) behind the establishment of regional promotional banks (what would be the objective rationale?)?;
- What is the impact of the ex-ante assessment requirement (as presented in the EC Communication) and its impact on the operational capacity of newly created and/or already functioning banks?

The stakeholders consulted included representative of more than 20 institutions, including: banking associations (e.g. EAPB; Polish ZBP), regional promotional banks (or equivalent non-bank institutions) in place from EU member states (Cassa Depositi e Prestiti, KfW Bankengruppe, Caisse des Dépôts et Consignations, European Long-Term Investors association – ELTI, NRW Bank), European Investment Bank, European Commission, as well as regional offices of local or regional self-governments (some Polish voivodeships, German lands, Free Hanseatic City of Bremen).

European Association of Public Banks (EAPB) confirmed that besides promotional banks, there are also various types of public agencies and financing institutions that should be taken into consideration when discussing the implementation of the Investment Plan for Europe. The establishment of new regional promotional banks could be challenging because of the resources needed and the know-how, that some well-established financial institutions already poses, but there is no size-fits-all solution and one needs to analyse carefully situation in a given country.

The past years have shown that countries and regions without NPBs which have been hit by economic turmoil could not set up the necessary promotional structure fast enough to respond to economic shocks without external help. This means that the necessary promotional institutions must be in place permanently in order to respond quickly and scale up their activities when and where necessary.

In this context EAPB underlined the strong role played by national and regional promotional banks and it underlined the different territorial levels of government involved in promotional banking. EAPB welcomed

that the opinion specifically refered to the Scandinavian and Dutch model of institutions owned by municipalities and devoted mainly to their support focusing on municipal funding as this was not sufficiently reflected in the Commission communication. This model was also inspiring new NPB models in other Members States' (e.g. France, UK).

However, when recognizing the important role of regional development banks, it should not be forgotten that supporting the regional development and municipalities is also a core task of national development banks. It should also be stressed that each Member State's promotional banking system has to take into consideration the size and the capacities of the different territorial levels. It should be considered that generally promotional banks do not require an own retail network of branches as they cooperate very efficiently with retail banks (e.g. savings banks, private banks) which usually manage the on-going relationship with SMEs and share the risks together with the national and/or regional promotional banks. In some cases regional offices may be set up to enhance the dissemination of promotional products in strong coordination with regional and local authorities.

There are numerous financial regulations at EU and national level that unnecessarily restrict the benefits that may be provided by promotional banks. For example in some Member States national authorities have chosen to excessively risk weight local and regional governments at 20% as a whole which makes their funding more difficult. The Commission and Member States should be encouraged to facilitate the work of all publicly owned institutions established to promote public policy objectives, including via a more appropriate regulatory treatment in recognition of their public-interest missions.

From the point of view of the European Long-Term Investors association – ELTI) promotional banks could bridge the gap between the public and the private sector, mobilising additional funds. Promotional banks have the capacity to assess the public value of an investment and can play advisory role in designing new projects. However, there is no one-size-fits-all model and there are different systems in several member States. It rather depends on the national history, culture and system in place. Besides, it is not necessarily a good thing to create new structures as it might be costly and

not effective. Promotional banks should not be considered as part of a hub but rather as part of a network.

The French Caisse des Dépôts et Consignations (CDC) explained that although there are no regional promotional banks in France, the CDC has local branches in all administrative regions and actively supports municipalities. There is not necessarily any conflict between the national and the regional level. Markets failures are difficult to define and the approach presented usually by the EC, DG Competition might be different than the one of other institutions, other EC Directorates General or analysts. One needs to be cautious in deciding on the scope on what counts as a market failure and advising on actions to counteract them. It is important to set up and test the functioning of the investment platforms in the framework the European Fund for Strategic Investments (EFSI).

European Investment Bank agreed that there is no one system that would answer the needs for public financing institutions in every country. The size of the country and the shape of its current system are relevant and different models, ranging from the German, though the French to the Scandinavian one should be considered when planning setting up new institutions. There are areas, namely project development, financial engineering, policies – where it is important to develop local capacities and facilitate benchmarking and the sharing of best practices. Regional banks do often have the knowledge of the local characteristics, which might be less evident at the national level, especially in relation to projects, which are already running. As for market failures, they might happen anywhere and anytime and public interventions do not necessarily solve the problem. That is why there is a large scope how to define and assess the existence of market failures. On the other hand, the ultimate assessment could be perhaps not on the existence of the market failure (ex-ante) but how an intervention helped to mobilise private funds to counteract it and what impact on the local economy it had (ex post).

5 Polish Institutions' Point of View

Polish Committee of Regions (CoR) Member, responsible, as the Rapporteur, for the CoR's Opinion preparation (Mr A. Banaszak, Member of the Kujawsko-Pomorskie Regional Assembly), stressed it is not only

national promotional banks, as outlined in the document of the European Commission (EC), but also those at the regional level, that should be seen as important actors in the implementation of the Investment Plan for Europe. Besides promotional banks, also other types pf financial institutions (e.g. regional development agencies) should be taken into consideration. They have a very similar function to promotional banks in many Member States. Additionally, the Investment Plan for Europe explicitly mentioned the role regional authorities play in supporting or managing the investment projects, making finance reach the real economy and improving the investment environment. Unfortunately, the EC document on promotional banks didn't provide for a good framework to enhance the collaboration between promotional banks and local and regional authorities. Europe's regional and local authorities are responsible for the about two thirds of public investment in the EU. Municipalities are the first investors in total amount, and regions have the highest share of investment in total expenditure. The economic crisis brought about a sharp drop of their investment capacities. To ensure that investments are made in an optimal and effective way, there is a need for a close collaboration between local and regional authorities and banks or other financing institutions at all levels. Practice however shows that often decisions are still taken without proper cooperation or consultations. For example, there was a large investment in Kujawsko-Pomorskie region in Poland (EDF Toruń heat and power plant for PLN 550 mio, open in 2017), where a large project was decided at national level, involving the Polish national promotional bank, without taking into consideration planning in the same sector of the Kujawsko-Pomorskie regional authorities.

Polish point of view was typical for new member states, where there is a lack of regional promotional banks and their functions are centralized and monopolized by the national promotional banks. This is mainly due to historical reasons (underdeveloped local financial market), but also to political ones (weak self-governements) (Mirić, 2010: 105). Also, commercial banks involvement in fostering regional development initiatives is quite new and present only after 2006, when the 2007–2013 financial perspective, with larger financial impact than before, was in place, as the example of Poland shows. (Oręziak, 2008: 82–11).

The position of the Polish Rapporteur himself represented a specific demand arising from some Polish local self-government aspirations. Namely, the Rapporteur's home region, Kujawsko-Pomorskie Voivodship, expressed a wish to set up a regional promotional bank (RPB), devoted to that Polish region's interests, and circumventing the monopolistic position of the Polish NPB, BGK. Such a RPB would better detect local needs and better react to them. It could be set up based on the equity and expertise provided by the local guarantee fund and loan fund, both of them already in place for several years. However, costs of setting up and of daily administration of such a local bank would be problematic in such a case. During the consultation process the Polish NPB (BGK) expressed skepticism towards this idea, wishing to preserve the status quo.

Polish national promotional bank, state-owned Bank Gospodarstwa Krajowego (BGK), during the consultation process underlined there is a variety of models of promotional institutions functioning currently in the EU. Development banks never have a monopoly in development financing in regions, as it is embedded in their nature that they act complementary to the existing market offer. This is supply of good projects what decides over what projects are implemented. Development banks do not generate these projects, they can only provide support in their financial structuring. Therefore, the deciding factor is whether there is regional development bank present on such market or only national one, as the regional bank will not finance good projects which do not exist. In addition to that, in various development tasks of promotional banks, also these active on the national level, the task of supporting less developed regions of the country often plays a very important role. In various evaluation studies conducted on promotional banks' activity, this type of factors are often considered, e.g. a project may gain additional point during the assessment in internal rating procedures for being located in the less developed region of the country.

Still according to BGK, it seems rational, that the model of development institutions has to function on the basis of the market needs that results, first of all, out of specificity of particular member states (e.g. from the size of their financial sector), of the role that municipalities play in stimulating the economic growth, of the coordinated end effective use of the already

existing mechanisms, good coordination of the cooperation and use of the synergies effects.

The creation of new development banks should be proceeded with an in-depth analysis of costs, as the excessive institutional growth of the development policies may lead to the unnecessary bureaucracy growth and, as an unintended effect, lead to waste of resources.

In the eyes of BGK the tasks of regional development banks are not always in line with newly created European Long-Term Investment Funds which is a specific group of funds created basing on the dedicated legal framework. In no way, these funds exhaust the group of entities (including different funds serving development purposes) that could potentially conduct such a cooperation.

6 Opinion of the European Committee of the Regions – Policy Recommendations

CoR welcomed the Commission's initiative to support promotional banks as well as the creation of investment platforms as an important element of the investment plan for Europe. At the same time, the Committee was critical of the fact that while the formal definition of national promotional banks as a rule also encompasses regional banks, in practice the Commission communication focuses purely on the role of the national level and encourages the creation of new national promotional banks alone. However, promotional banks operating at local and regional level should also be acknowledged and taken into account in the investment plan.

The definition of development banks or institutions as set out in the regulation on the European Fund for Strategic Investments, was namely: "*legal entities carrying out financial activities on a professional basis which are given a mandate by a Member State or a Member State's entity at central, regional or local level, to carry out development or promotional activities*".

Promotional banks based on different models play an important role in countering the impact of the economic and financial crisis, particularly in terms of reduced public investment at local and regional level.

In some countries nationwide banks are responsible for supporting key investments for regional and local authorities (e.g. France and Poland), some of which are co-owned by local and regional authorities (Nordic countries and the Netherlands). In other cases (e.g. German model), however, in addition to national promotional banks, regional promotional banks fully or partially owned by the competent *Land* (region) are responsible and fulfil a Land-specific promotional role. The actual nature of promotional banks varies and depends on the historical experiences and economic conditions in the respective country or region.

Promotional institutions do not always take the form of banks – in some countries they act as investment agencies, companies or funds, often along the lines of venture capital funds, and this type of non-banking institution could also play an important role in the investment plan for Europe.

Financial instruments at local and regional level are still not available in all Member States and regions, optimal use cannot be made of the available instruments and experiences, and the involvement of the private sector is often confined purely to carrying out orders, which increases the need for support for local promotional financial institutions.

Different possibilities exist for the establishment of promotional banks, as was the case when the current promotional banks were set up - they were created at the outset as independent institutions or developed out of departments of public banks.

There is a need to create promotional banks as instruments of economic, structural and social policy and for them to operate, including as a result of structural weaknesses or shortcomings in local markets (including regional markets). The difficulties inherent in a clear-cut approach to defining and evaluating market failures still exist. Thus the CoR calls for a long-term, wide-ranging interpretation of the term "market failure".

There exists significant development disparities between individual promotional systems at national level, resulting in a systemic deficit in countries and regions with a less developed culture of this type of banking. The outcome of all this could be that national promotional banks, might not always provide enough support for local authorities and enterprises. These banks should further decentralise the services they offer.

"Centralised" promotional support models, based solely on a national bank and its non-autonomous local branches, do not always fully meet the needs of local communities, particularly in less developed regions and places where the influence of local and regional authorities over the national promotional bank is very limited.

When local and regional authorities are selecting a promotional banking development model, the overarching goals and sole criteria for assessing effectiveness at each level should be: elimination of market failures, sustained increase in the number of jobs, consideration of local communities' interests and thus pursuit of public economic development objectives.

The requirement set forth by the European Commission for an ex-ante assessment of newly created promotional banks and the new financial products they offer may significantly hamper their operational capacity and complicate the actual process of creating such banks, both at national and regional level. Furthermore, in connection with the requirements of such an analysis, it is worth noting that it will often be difficult to identify market failures in less developed regions, because the socio-economic situation of the region as a whole may be indicative of market failures, when compared with the situation in more developed areas.

It should be closer cooperation between the Committee of the Regions and the European Investment Bank. The CoR calls for the creation of a complementary network of public promotional banks (contributing to the achievement of economic and social synergies). It would welcome this system becoming a forum for exchanging interregional and international experience and knowledge, while managing to avoid the risk of over-centralising practices.

7 Proposals of the European Committee of Regions

During its 117th plenary session, on the 7 April 2016, the Committee of Regions has quasi unanimously adopted the draft of the opinion, that was conceived and presented by the Rapporteur, assisted by his Official Expert, the author of these words.

In its opinion, the CoR calls for a significant increase in the role of local authorities in the creation, operation and evaluation of the impact of promotional banking in regions that do not yet have their own promotional

instruments. This can be achieved either by giving local and regional authorities a bigger say in the strategic focus and governance of national promotional banks or by complementing the services offered by national banks through the creation of regional (local) promotional banks. These would cooperate closely with the national bank.

The choice of a specific pathway for the development of a promotional banking model at regional level – the question of whether the model under which the national promotional bank plays the dominant role is sufficient or whether a decentralised model would be better, with a greater role for local and regional financial institutions or promotional banks – should be left to local and regional authorities following consultation with the national authorities, or to the national authorities depending on the legal system in the given Member State.

Decisions on the creation of new institutions should be subject to an in-depth analysis on the appropriateness of creating new institutional structures, so as to avoid any unnecessary proliferation of red tape and waste of resources.

If the European Commission and the EIB consider creating a system to support the establishment of new regional promotional banks, then the specific individual characteristics of each country and region must be taken into account and best practices in this field, including the experience of recently established banks, must be drawn upon. Applying the best institutional solutions in less developed regions while taking account of specific local circumstances also seems appropriate.

The ex-post evaluation of the effectiveness of existing and newly created regional promotional banks should be long term in nature (10–15 years) given that the investment projects financed usually have a multiannual timeframe.

There is a need for a framework for cooperation between newly created European Long-Term Investment Funds (ELTIFs) and regional promotional banks and other local financial institutions. They should be complementary and not compete against one another to raise long-term financing for investments at the local and regional level.

The CoR supported the idea of promoting the creation of investment platforms, as tools for implementing the investment plan for Europe. At the same time, the Committee stressed the importance in this connection of not including the contribution of public, national, local or regional funds to investment platforms in the Stability and Growth Pact calculations.

The European Commission and the European Investment Bank should spell out the role of regional promotional banks and other financial institutions in the system of nascent investment platforms as a tool to accomplish the Investment Plan for Europe. Regional promotional banks should cooperate with the European Fund for Strategic Investments on the basis of sectoral, but above all geographically based investment platforms.

The principle of cooperation between regional or local promotional banks and other financial institutions, on the one hand, and the European Investment Advisory Hub, on the other, should be spelt out and explored. The European Investment Advisory Hub should, in particular, support local authorities and local promotional banks in preparing projects, provide advice on financial engineering and support knowledge transfer. The advisory hub should also have the possibility of signing partnership agreements with regional banks too, not only national banks.

8 Example of NPBs Joint Activity – Marguerite I and II Funds

On 30 November 2017 Europe's leading National Promotional Banks and the European Investment Bank announced the launch of Marguerite II, a pan-European infrastructure fund with total commitments in excess of EUR 700m; ensuring continued support to key infrastructure investments in renewables, energy, transport and digital infrastructure by the Marguerite platform.

Marguerite II continues the important work of the 2020 European Fund for Energy, Climate Change and Infrastructure, known as the Marguerite Fund.

The Marguerite Fund was established in Luxembourg in 2010 by the European Investment Bank, Caisse des dépôts et consignations, Cassa Depositi e Prestiti, Instituto de Crédito Oficial, Kreditanstalt für Wiederaufbau and Powszechna Kasa Oszczędności Bank Polski as part

of the European Economic Recovery Plan. Fund is fully invested and has accomplished its initial targets, having committed over EUR 700m equity and quasi-equity capital to 20 investments in 12 member states, across all target sectors, acting as a catalyst for projects with an aggregate size of over EUR 10 billion. The Marguerite Fund backed projects including offshore wind farms in Belgium and Germany, onshore wind farms in Sweden, solar power plants in France, biomass plants in Portugal, an Energy from Waste plant in Poland, transport infrastructure in Croatia, Ireland, Italy and Spain, digital infrastructure projects in France and Italy, and support to gas transmission and storage assets in Latvia.

Like its predecessor, Marguerite II is as a pan-European equity fund which aims to act as a catalyst for new ("greenfield") and expansion to existing ("brownfield") infrastructure investments in renewables, energy, transport and digital infrastructure. These investments serve to implement key EU policies in the areas of climate change, energy security, digital agenda and trans-European networks. It will have a capacity to invest over EUR 700m in infrastructure-intensive projects across the EU and pre-accession countries. Marguerite II has a 10-year fund life (with 2 possible 1-year extensions) and is intended to be fully invested in 5 years.

The European Investment Bank will provide EUR 200m, guaranteed by the European Fund for Strategic Investments (EFSI), alongside EUR 100m each from five National Promotional Banks.

The five national public finance institutions acting as lead investors are Polish Bank Gospodarstwa Krajowego (BGK), the French Caisse des Dépôts Group (CDC), the Italian Cassa depositi e prestiti (CDP), the German Kreditanstalt für Wiederaufbau (KfW) and the Spanish Instituto de Crédito Oficial (ICO).

9 Conclusion

The analyse has confirmed the hypothesis that regional promotional banks models vary across EU countries and even regions. Imposing a unique model of functioning all over the Europe would be dangerous, not respecting local specificities and historic context. It was approved in the Opinion adopted by the Committee of Regions, to whom the author was the Official Expert.

The opinion stressed the importance of the Investment Plan and the role of NPBs in the process of economic recovery, especially for SME sector.

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LOCAL TAXATION IN THE SLOVAK REPUBLIC AND THE EU LAW

Jozef Sábo[1], *František Bonk*[2]

Abstract

The article deals with local taxes of the Slovak republic and their relation with the EU law. Under selected case law of the European Court of Justice (henceforth "ECJ") criteria that should be preserved by imposing local taxes with respect to their consistency with the EU law are identified. The aim of the article with respect to the relevant case law relies on the assessment of the legal regulation of local taxes under the law no. 582/2004 Coll. on local taxes and local charge on municipal waste and minor construction waste as amended. The method of the scientific analysis and the comparative method are mostly used in the article.

Keywords: Tax; Law; Local Taxes; European Union Law.

JEL Classification: K34.

1 Introduction

This article deals with the issue of local taxes in the context of the legal framework of the European Union (henceforth "the EU"). Local taxes are not typically connected with the harmonisation effort of the tax law at the EU level. On the other side, the issue of local taxation presents an area,

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where no collision of national legal regulation with the EU law is acceptable. From the view of the methodology, interpretation methods used in the selected case law of the ECJ will be followed and discussed in the article.

Discussing our article, the key issue lies on the concept of "*local tax*". We are of the opinion, that the concept of "local tax" presents a tax institute, that might be rather seen from many views. Compared with the other taxes in the tax system, following characteristics make local taxes different: its fiscal characteristics, competences on their imposing, territoriality and the own legal designation. Fiscal characteristic of local taxes is given by the fact that their income flows directly into the municipal budget. From the view of competences, municipal authorities decide on their own on imposing of local taxes and on the form of the decisive construction element of such a tax. From the territorial point of view local tax might be imposed only within a specified territory (particular municipality, however, the territory of the whole state might be included in the whole). Following the criterion of the legal designation, the specific label (concept) of "local tax" is used within the legally binding laws.

In some cases, national tax system had been already harmonised in the EU law (value added tax, consumption taxes, some aspects of corporate income taxation). All the measures were devoted to removing the negative effect of the national tax systems onto functioning of the single market. However, the national tax (irrespective of its characteristics or designation in the law of EU member state) cannot be in the collision with the fundamental freedoms within the EU single market and/or with the secondary EU law as well.

Two groups of tax institutes will be analysed in the article. The first one is represented by the taxes which were in the tax system of some member states presented as a local taxes and were subject of ECJ's assessment at the same time. The analysis will be however of the broader nature, since potential impact of the fundamental freedoms on the local taxation will be examined as well.

The presented article focuses in itself on the conflict/potential conflict of the national systems of local taxation and the EU law. This corresponds with the structure of the article which is divided into two chapters. The first

chapter deals with the collision of the tax law with the secondary EU law and the second chapter deals with the collision with particular freedoms within the EU single market.

2 The Collision between National Legal Regulation and Secondary EU Law

2.1 Secondary EU law

Harmonization of general consumption taxation has led to the creation of the general system of value added tax. Abovementioned is connected with the prohibition of imposing such a taxation that would be in a concurrence with respect to the value added tax in the national legislation. Such a prohibition is expressed in the Art. 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[3] (henceforth "directive on VAT"), that stipulates within its provisions: *this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes.*

With this respect, value added tax could be defined by the four essential characteristics, particularly:

- *it applies generally to transactions relating to goods or services;*
- *it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied;*
- *it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place;*
- *the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer*

  (para. 21, C-338/97 – *Pelzl*; ECLI:EU:C:1999:285)

[3] Previously Art. 33 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (sixth directive on VAT).

Abovementioned prohibition applies to all taxes that are imposed in the tax system of the member state – including local taxes. In Belgium, the local tax on organizing public performances and entertainment events (henceforth tax on public performances) had been imposed. Taxpayer of such a tax is represented by the every person who organized public performance where entrance fee for participation was charged. The tax base consists of the income without the decrease of expenses achieved from the whole amount of entry charges, from the lease of the changing room and from the sale of the program of the event.

ECJ in its ruling C-109/90 – *Giant v Overijse* dealt with potential collision on the tax on public performance with the Art. 33 in the sixth directive on VAT. The general attorney Jacobs in his opinions of 07. 02. 1991 proved many differences between tax on public performances and VAT. First of all, tax on public performances was not a consumption tax at all since it was only territorially linked. Subsequently, it has not been charged on the added value of provided supplies but rather on the whole amount achieved from the public performance (para. 12 in opinions; ECLI:EU:C:1991:54). ECJ accepted these conclusions and stressed out the fact that tax on public performances is not levied at the every stage of the supply (para. 14; ECLI:EU:C:1991:126). Based on abovementioned, the ECJ ruled that the local tax on public performances is not in collision with the Art. 33 of the sixth directive on VAT (currently Art. 401 of the directive on VAT).

The other tax that had been subject of the ECJ's ruling with regard to the Art. 33 of the sixth directive on VAT in the case C-283/06 – *KÖGÁZ and Others* was the tax on local entrepreneurship (*helyiiparűzési adó*, henceforth "HIPA").The object of the HIPA is any economic activity of permanent or temporary character. Personal scope of taxation relies on the establishment that is based within the territory of municipality. The tax base is represented by the absolute turnover of the taxpayer (*turnover*) calculated as the difference between the income achieved from the sold goods/services and the price paid for acquired goods and services (*unchanged servises* – that means services from subcontractor that are provided by taxpayer subsequently to the clients in the unchanged form).

When assessing the tax for purposes of the prohibition under Art. 33 of the sixth directive on VAT ECJ evaluates…*whether it has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT.* (Case C-200/90 – *Dansk Denkavit*; ECLI:EU:C:1992:152). Essentials of the VAT are especially important for such a comparison and the compared tax does not have to be identical with the VAT in every respect (Case C-130/96 *Solisnor-Estaleiros Navais,* para. 19, para 36; ECLI:EU:C:2007:598).

ECJ sought mainly three differences comparing HIPA with the VAT. Firstly, since the tax had been charged at the end of the taxable period, the burden of the tax that should be transferred into other customers could not have been clear to see by the taxpayer (the criterion of proportionality is therefore disturbed). Secondly, HIPA was not levied for the added value of the goods and services, since taxable supplies from the previous stages are under many special simplified mechanisms not completely deductible. So HIPA does not provide deductibility of the tax as it is obvious by the VAT. Thirdly, if the taxpayer attempts to transfer the amount of HIPA from the previous taxable period into the price of the own goods and services, this would only lead to the increase of the own tax duty in the particular taxable period (so called "tax on tax" would be actually paid). These findings led ECJ to conclude that HIPA was not in the collision with the Art. 33 of the sixth directive on the VAT, because essential elements of the VAT have not been covered.

2.2 National Legal Regulation in the Slovak Republic

Local taxes are imposed on the facultative basis in the Slovak republic (henceforth "SR"). "Local taxes had however only replaced formerly imposed local charges" (Babčák, 2015: 354). Municipalities are within their competence free to decide on imposing some of the explicitly listed local taxes in its territory under § 2 p. 1 of the law no. 582/2004 Coll. on local taxes and local charge for municipal waste and minor construction waste as amended (henceforth "the law on local taxes").

There is none local tax that would be similar to the tax on public performances in the SR. At the local level, however, the organizer might be taxed only in the case if the public area is used in a special manner by organizing

public performances. In such case, he becomes taxpayer of the tax on use of public area – if municipality levies such a tax in its territory.

The object of the tax on use of public area is therefore not the supply of goods/services but use of the public area instead. This is demonstrated under the provision § 30 p. 3 of the law on local taxes as *placement of the facility devoted to providing services, placement of the construction facility, sales facility*. The tax base is measured by the size of used public area in the m^2 (§ 32 of the law on local taxes). Abovementioned implies that such a tax is not a turnover tax so any collision of such a tax with Art. 401 of directive on VAT should be excluded.

Tax on accommodation (as a local tax) has some elements of the turnover tax. The person that is responsible to pay tax is the operator of the facility who provides temporary accommodation for a reward (§ 41 of the law on local taxes). Taxpayer of the tax is however natural person that uses services of accommodation (§ 38 of the law on local taxes). Taxpayer is thus directly the recipient of the service of accommodation in the accommodation facility. This tax is however collected together with the accommodation receipt – and is in its nature levied on the service by which temporary accommodation in the accommodation facility is provided.

Tax on accommodation is after all rather different from the essential characteristics of the VAT. At the first place, the object of the taxation is objectively and locally restricted into: *temporary accommodation under § 754–759 of Civil Code in the accommodation facility, which might be hotel, motel, botel, hostel, etc*. The second fact is that the tax base by the tax is calculated by number of overnights (§ 39 of the law on local taxes). The tax base is therefore not represented by the amount of the reward collected by the person responsible for payment of tax. Tax on accommodation is thus not proportional with regard to the price of the accommodation service in the accommodation facility. Moreover, there is no mechanism that would enable deduction of tax expenses (for example expenses connected with the operation of the facility). We could therefore conclude that tax on accommodation does not cover essentials of the VAT. Based on abovementioned it is rather obvious that neither tax on accommodation collides with the Art. 401 of the directive on VAT.

3 The Collision between National Legislation and Fundamental Freedoms that are applicable in the Single Market

ECJ in its case law already developed the doctrine under which even if certain field of tax regulation falls within the competences of member states, member states have to apply such a competence in accordance with the EU law. Such a competence does not allow member states to apply measures that are contrary with the freedom of movement. (Case C-72/09 Établissements Rimbaud; ECLI:EU:C:2010:645, para. 23). "*EU law comprises a general non-discrimination provision, Art. 18 TFEU, the free movement and residence of EU citizens under Art. 21 TFEU and the five fundamental freedoms.*"[4] (Englmair, 2010: 43). Potential collision between national rules of taxation could be of the discriminatory nature, or the measure that limits one of the fundamental freedoms (*non-discriminatory measure*).

In case of discriminatory measures as well as by restrictive measures the interference of the undisturbed performance of cross border activities arises (*cross-border activity*). "*For determining of the discriminatory measure always the performance of tertium comparationis is required, whereas restrictive measures are the concept of the absolute nature*" (Kiekebeld, Smit, 2008: 97). The concept of the restrictive measures is often used in the ECJ's case law in situations which are by their nature of the discriminatory nature. There are two groups of restrictive measures in the absolute sense: "*fist of all there are overlapping national regulations which impose a double burden on cross-border transactions, and secondly one can identify national measures which legally or in their factual consequences make the exercise of an activity protected under the different Treaty freedoms extremely difficult, if not impossible.*" (Cordewener, 2006: 27)

ECJ hence assesses national tax institute in more steps. Within the first step the comparison is made if the tax institute is not of the discriminatory nature. If there is no discriminatory nature of the tax measure ECJ assesses if the measure is not of the restrictive nature. Subsequently, assessment of the applicability of one of the fundamental freedoms in a cross

4 These freedoms are: the free movement of goods (Art. 28 TFEU), the free movement of workers (Art. 45 TFEU), the freedom of establishment (Art. 49 TFEU), the freedom to provide services (Art. 56 TFEU) and the free movement of capital (Art. 63 TFEU).

border situation is made (with the determining the particularly applicable freedom). If the tax institute is of the discriminatory nature in itself, then ECJ consequently assesses if the discriminatory measures could be justified. If no relevant reason for introduction of the discriminatory measure is present, the ECJ decides that such a measure is contrary with the EU law. If the justified reason exists, ECJ turns into assessment of the proportionality with regard to the followed purpose (Helminen, 2013: 130).

Taxation in the field of local taxes is focused on the passive legal relations. For example the ownership is connected – or the similar relation – with the particular category of things. These are: an immovable property for purposes of immovable property tax or a dog for purposes of tax on dog. Passive nature is typical as well for the object of the local tax on selling machines and the local tax on non-winning playing machines (these are placed by the publicly open places). The similar nature might be devoted to the local tax on entrance and stay of the motor vehicle in the historical part of the city and local tax on nuclear facility (§ 60; § 67 of the law on local taxes).

The taxable event is as such by local taxes not conditioned by the change in the content of the legal relation. Cross-border transactions, resp. cross-border legal relations do not emerge as situations that would be governed/covered by local taxation in the SR. Local taxes therefore do not create an obstacle against one of the fundamental freedom in the EU single market. The only case of potential collision with the EU law could be represented by introduction of the discriminatory measure.

The nationality of taxable subject is in general not differentiated by the law on local taxes. By the local tax on immovable property (that is divided into the tax on land, tax on buildings and tax on flats in flat houses) the release of the tax and the decrease of the tax is neutral from the view of the nationality of taxpayer (§ 17 of the law on local taxes).

On the other side, the municipality is entitled by the law on local taxes to differentiate the tax rate based on its own discretion (in the form of generally binding law of the municipality by which particular taxes are imposed). Criteria for distinctive tax rates are rather vague in many cases and leave broad space for the legal consideration by the tax administrator. For example under the provision § 51 of the law on local taxes by the local

tax on selling machines *municipality stipulates various tax rates under the determined criteria*. The same provision could be found by the local tax on non-winning selling machines under the provision § 59 lof the law on local taxes.

Since municipalities are free to decide on imposing as well as on construction of local tax, adoption of the tax measure of the discriminatory character may not be excluded. Such a measure could be demonstrated by the stipulation of higher tax rate for taxpayers of tax on non-winning playing machines/or selling machines who are not residents of Slovakia. Such an example is up to these days not known in our legislation.

With this respect, the principle of non-discrimination in relation with the other EU member states' taxpayers could be desirably introduced[5] (f. e. by widening the principles that are present within provisions of Tax Procedure Act no. 563/2009 Coll.). From the perspective of legally binding state, – this is in itself not entirely needed – the prohibition has its direct effect under the primary EU law. However, from the perspective of the application practice could such an incorporation of the principle *expresis verbis* mean rather the navigation for tax administrators who usually count only with national legal regulations when it comes to issues of local taxes.

4 Conclusion

Granting the competence to collect local taxes on the municipality supports the fiscal autonomy of the municipality. By that a material basis for autonomous realization of functions of municipalities are created. Municipality should be granted, under our view, possibly the broadest discretion in deciding on the construction elements of the local taxes that are collected in its territory.

On the other side, by imposing of local taxes within the local autonomy, liabilities of SR from the EU law have to be respected by tax administration. The first part of the article dealt with the secondary EU law, mostly with the limits in imposing turnover taxes as the local taxes. Even if such taxes are

5 Taxpayer of the member state of the EU is under provision § 2 t) of the law no. 595/2003 Coll. on income tax (as amended) natural person or legal person, who is taxed into the territory of this member state of the EU under the income from worldwide sources and is not tax resident in the territory of the Slovak republic.

not the part of local taxation, the EU law does not preclude the law maker to impose a similar tax – such as the tax on entrepreneurship, if such a tax does not show essentials of the VAT. In the second part of the article, the relation of the primary EU law – mostly fundamental freedoms with regard to local taxes have been demonstrated. Any collision of the law on local taxes with respect to the EU law has not been identified under current legal regulation of local taxes. Potential introduction of the discriminatory measure could be the result of the performance of autonomous competence by particular tax administrator.

Based on abovementioned, from the view of improvement of application processes by imposing local taxes, the introduction of the general principle of the prohibition of discrimination against taxpayers of EU member states was recommended.

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Zákon č. 563/2009 Z. z. Daňový poriadok v znení neskorších predpisov (Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code) and on amendments and supplements to certain laws, as amended).

Zákon č. 582/2004 Z.z. o miestnych daniach o miestnych daniach a miestnom poplatku za komunálne odpady a drobné stavebné odpady v znení neskorších predpisov (Act no. 582/2004 Coll. on Local Taxes and Local Fee for Municipal Waste and Minor Construction Waste, as amended).

MONETARY FINANCING BAN IN THE EU LAW

Johan Schweigl[1]

Abstract

Monetary financing is prohibited in most of the modern countries. The European Union bans the practice of monetary financing even in one of its core laws, i.e. in the Treaty on the Functioning of the European Union. Despite this explicit ban, some of the steps taken by the European Central Bank were considered by some as an example of the monetary financing and have been subject to review by the Court of Justice of the European Union. In this paper, the author outlined the fundamental cases dealing with the potential breach of the monetary financing in the EU. One of these cases is – at the time of finalizing this paper – still to be decided. As the CJEU decision might significantly affect the monetary policy of the Euro area, right now, till the CJEU decision will be made, the monetary policy in the EU is rather hard to predict.

Keywords: European Union; Monetary Financing Ban; Public Deficits; Monetary Policy; Sovereign Bonds; Treaty on the Functioning of the EU; Court of Justice of the EU.

JEL Classification: E4, E5, F3, H6, K0.

1 Introduction

Monetary policy, as a part of more a broader defined economic policy, always aims at some goal. Although the goals have been changing over the last century, now, most countries define it as price stability. When conducting monetary policy, the central banks choose an inflation target which they try to achieve.

Monetary policy differs from the fiscal policy, which is also part of the state's economic policy not only by the bodies that carry it, but also by the instruments, purposes and goals. Fiscal policy involves decisions about government spending and taxation.

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Although the monetary policy and fiscal policy are relatively independent (monetary policy is carried out by the central banks, whereas the fiscal policies by the governments), the two are inextricably intertwined.

Governments need to borrow the funds in order to finance their deficits. The manner in which they borrow is usually by an issuance of obligations/ sovereign bonds. Monetary financing ban prevents the central banks from direct purchases of government bonds. This idea of having the monetary financing ban has several roots, one of them is the attempt to avoid excessive inflationary pressures connected with easy borrowing by the states connected with extreme growths of money supply.

Fighting the lack of liquidity on the money markets following the financial crisis of 2007, which spread also to the EU, and combating deflation or very low inflation (way below the inflation target), the European central bank (ECB) decided to start employing a number of extraordinary monetary policy tools. To mention a few, it started using negative key interest rates on deposit facility (excessive reserves) and mainly a so-called quantitative easing (QE), which is done by means of special asset purchase programmes. Within the QE programmes, ECB buys financial assets from commercial banks and other financial market participants with a goal of supporting economic growth across the euro area and help to return to inflation levels below, but close to 2 per cent. Some of these special QE programs also involve purchases of sovereign bonds, which raised voices that ECB might be breaching the EU law, namely the monetary financing ban.

European Union (EU) law bans monetary financing. The Treaty on the Functioning of the European Union (TFEU), i.e. a part of the primary EU law, establishes the ban mainly in the Art 123.

In this paper, I first outline the monetary financing ban in the EU law. Secondly, I will present the relating legal challenges against some of the ECB's QE programmes.

2 EU Law Prohibits Monetization of Sovereign Debt

Monetary policy in the EU is carried out by the ECB, together with the national central banks of the Member States whose currency is the euro. The territory of the member states that have adopted euro is also called euro

area or Eurosystem. The ECB uses the central banks of the Eurosystem states to implement its monetary policy measures. This is important to keep in mind with respect to the below described challenges of the ECB monetary policy, which started before the national courts of the member states, namely before the German Constitutional court (Bundesverfassungsrecht).

The economic theory distinguishes several types of monetary financing. The notion of monetary financing covers a number of activities. Here, I will mention just the two most typical ones: (i) direct cash (credit) transfers by the central banks to governments, usually in the form of direct purchases of the sovereign bonds, and (ii) providing haircuts on the government debt that the central banks obtained on the secondary markets (usually as collateral when extending reserves to commercial banks).[2]

The reason why monetary financing is not a good solution for the states to obtain credit is that such a practice may often lead to hyperinflation.[3]

In the EU, the monetary financing ban shall assure that the Eurosystem's central banks do not get engaged in financing public deficits. The ban as set forth in the TFEU reads: *"Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States… in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments."* As the wording itself may not be one hundred per cent clear. As with any provision of law, its meaning is interpreted by the bodies applying the law. This provision has been thus reviewed/interpreted by the CJEU, which *"shall have jurisdiction to give preliminary rulings concerning: … the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union"*, i.e. also the acts of the ECB.[4] Aside from that CJEU *"shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties."*[5]

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2 For more on this, see, e.g. Deutsche Bank, 2016.
3 Such a situation occurred in the last years, e.g. in Zimbabwe.
4 Compare Art. 267 TFEU.
5 Compare Art. 263 TFEU.

The goal of this paper is to show the recent challenges concerning the monetary financing ban in the EU and the asserted breach of the ban by the ECB, or to be more precise by the Eurosystem's central banks.

3 The Road to Unconventional Monetary Policy

Since 2007, when the so-called financial crises emerged in the USA, the central banks around the world were more or less forced to start using other than classic/conventional monetary policy tools. In general, the core objective of the monetary policy has been developing throughout the history. As it was mentioned above, nowadays the goal is usually defined as price stability. This is to be achieved mainly by means of regulation of the *"short-term interest rates by the central bank with a view to stabilize inflation"* (Jílek, 2006: 145). Thus, setting of the key rates (for which commercial banks may either borrow from the central banks or deposit at the central banks their excess reserves) is considered to be the conventional monetary policy instrument. During the time of the crises (and the following years) the "mere" regulation of the short-term rates seem to be not sufficiently effective (the key rates often got to their effective lower bound)[6] and the central banks had to launch in unconventional monetary policy tools.

Below, there is a short overview of the unconventional monetary steps taken by the ECB. This overview will be, however, limited to the topic of this paper, as the whole list of the ECB programmes would not be relevant to the topic.

4 Unconventional Monetary Policy Instruments of ECB

In May 2010, the ECB mainly by means of the other central banks of Eurosystem started purchasing securities within a Securities Markets Programme (SMP) in order to address some tensions on the market which prevent the monetary policy transmission mechanism from proper functioning (ECB, 2010). This rather general proclamation was further detailed in 2012, when it was announced by the ECB that it might start with so-called outright monetary transactions (OMTs) and on 6 September 2012,

6 For more on this topic, compare e.g. Schmidt, 2016.

the ECB's Governing Council announced the core technical features of the OMT program.[7, 8]

In general, the ECB bundles its unconventional monetary policy measures into so-called programmes. In the framework of the respective programmes, it engaged in the purchase of the assets on which the particular programmes were aimed at. The OMT were to be carried out by means of an expanded asset purchase programme (EAPP), in which several partial programmes may be distinguished. One of these partial programmes is called public sector purchase programme (PSPP), which targets public securities, i.e. usually bonds issued by the states or other public entities, including international organizations and multilateral development banks located in the Eurosystem countries. The actual purchases were tackled in March 2015.

ECB explained the purpose of the PSPP in the following manner: the purchases shall be done in a gradual and broad-based manner, with the objective to achieve market neutrality in order to avoid interfering with the market price formation mechanism. (ECB, PSPP, 2017).

5 "First Time" before the Bundesverfassungsgericht

One the one hand, it should be kept in mind that the unconventionality of the PSPP programme, namely OMT was given by the situation in which it was drafted. On the other side, despite a difficult economic situation, EU monetary financing ban should not be breached. ECB designed the PSPP programme with belief that it complies with the EU law. There were, however, some economists and politicians who believed the OMT to be breaching the monetary financing ban. The case got first before the German constitutional court (*Bundesverfassungsgericht*), which was to decide whether the ECB had not reached its powers when it announced the OMT and whether the German Federal Government (*Bundesregierung*) had not neglect its duties when not taking any steps against the ECB announcement of OMT.

The question that the German constitutional court was to solve was rather dealing with issues of primary EU law. The constitutional court asked CJEU

7 Compare Art. 263 TFEU.

8 For more, see the ECB press release of 6 September 2012. Available at: https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html

for a preliminary question concerning the validity of the ECB's OMT declaration. It also asked for interpretation of Articles 119 TFEU, 123 TFEU and 127 TFEU and of Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank. The request for interpretation was given with respect to the extent of competences of ECB.

6 Court of Justice of the EU Decision of 2015

CJEU thus had to deal with the request for preliminary question that came from the German constitutional court. Having considered the case, CJEE first referred to its previous stance that when trying to determine whether a certain ECB's step is still within the area of monetary policy, the objectives of such a measure need to be considered. With respect to the objective, the respective monetary policy instruments shall be assessed as well. CJEU largely drew upon its former Pringle case, C370/12, EU:C:2012:756, paragraphs 53 and 55.

Having found that PSPP falls within the area of monetary policy (C-62/14, item 57), CJEU kept on to consider whether the OMT complied with the EU law or not. Considering the process of the monetary policy, the monetary financing ban cannot ban the ESCB banks to purchase (or accept as a collateral) any sovereign bonds fully. It rather sets certain limits on such "purchases" (C-62/14, item 95, 97). The conditions to be met when engaging in the purchases are, however, strict. It is clear that the sovereign bonds cannot be bought on the primary markets by the central banks, but only on the secondary ones. However, even when purchasing the bonds on the secondary markets, the issuing states should have no certainty that the bonds be purchased by the ESCB. Such purchases should also not be on for good, but should be limited in time – only when it is necessary for adjustment of transmission mechanism.

7 Bundesverfassungsgericht's Decision of 2016

Having answered the preliminary questions by CJEU, the German Constitutional court was the one to make the decision about the constitutional complaint brought before it. On 21 June 2016, (case No 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13),

the German Constitutional Court issued a decision in which the core principles arising from the CJEU decision C-62/14, were embodied. The *Bundesverfassungsgerincht* described the principles in the following way:

The German Central bank (Bundesbank) shall only take part in an implementation of the PSPP if

- purchases of sovereign bonds are not announced,
- the volume of the purchases is limited from the outset,
- there is a minimum period between the issuing of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,
- only government bonds of Member States are purchased that have bond market access enabling the funding of such bonds,
- purchased bonds are held until maturity only in exceptional cases, and
- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

Thus, in 2016 it seemed that the single monetary policy of the euro area had been cleared, i.e. the PSPP carried out by the Eurosystem complied with the EU law, mainly it did not breach the monetary financing ban set forth in the article 123 TFEU.

8 The 2017 Challenge of the Eurosystem's Monetary Policy

In August 2017, there was a new proceeding open before the *Bundesverfassungsgericht* (case No 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15).[9] In the constitutional complied based on which the proceedings were opened, it was again claimed that the PSPP breaches the EU law, namely the monetary financing ban.

The *Bundesverfassungsrecht* again stayed the proceedings and send the case to the CJEU with a couple of questions for a preliminary ruling. The German Constitutional court decided to do so because it found significant indications that PSPP – in the way it has been carried out – was breaching the monetary financing ban. The core reasons that let the respective senate

[9] The German Constitutional Court informed public about these proceedings via its press release No 70/2017 of 15 August 2017. It was published both in German and English on the court´s website.

of the German constitutional court to the assumption that there were significant indication of the EU law breach are that the details of the purchases were announced in a manned that could create certainty about such purchase, it is not possible to verify whether there is the required minimum period between the issuance of the debt and its purchase. Aside from that, the bonds purchased under the PSPP were usually held till maturity.

The *Bundesverfassungsrecht* asked the CJEU to make its decision within a short time, as this issue is very crucial. Nevertheless, by the time of finalizing this paper, i.e. February, 2018, CJEU has not issued a decision in this case.[10]

9 Conclusion

The case in hand it to affect both the monetary and fiscal policy of some of the EU member states. If CJEU finds that the way in which Eurosystem carries out the PSPP contradicts the EU law, we might see consequences that are now almost impossible to predict. What will happen with the bonds purchased within the framework of PSPP by the Eurosystem? Will they have to be sold within a certain period of time? Although the CJEU decision will only apply to the respective proceedings before the *Bundesverfassungsgericht*, it will have de facto much wider consequences, touching the monetary policy steps of all the Eursystem central banks.

The amount in quest are extremely high, As of 26 January 2018, ESCB's PSPP holdings were (at amortised cost) € 1,908,035,000,000.[11] At the end of 2017, ECB signalled that it would start to tighten its monetary policy,[12] thus it will gradually limit the PSPP purchases, but they still go on.

Currently, the future ECB's monetary policy heavily depends on how the CJEU will understand the steps taken by the Eurosystem when realizing the PSPP and how it interprets the monetary policy ban.

10 The CJEU case No is C/493/17.

11 This is just a rounded number, published by ECB at: https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html#pspp

12 Compare, for instance, Speech by Yves Mersch, Member of the Executive Board of the ECB, at the 32nd International ZinsFORUM, Frankfurt am Main, 6 December 2017. Available at: https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp171206.en.html

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REGISTRATION OF SALES – PRACTICAL PROBLEMS[1]

Petra Snopková [2]

Abstract

This contribution focuses on Registration of Sales as one of the possible instruments for controlling and stabilizing the field of income tax. Particular attention will be paid to the possibilities of Financial Administration to control the data reported in tax assessment and to use data from the Registration of Sales for these controls. Finally, the conclusions of the plenum of the Constitutional Court set out in the recent finding of 12 December 2017, file no. Pl. ÚS 26/16, will be discussed because of some problems that can cause in application of the Act on Registration of Sales in praxis.

Keywords: Tax; Income Tax; Registration of Sales; Finding of Constitutional Court.

JEL Classification: K340.

1 Introduction

The Registration of Sales (hereafter referred to as "Registration"), which was slightly inaccurately presented in the media as "Electronic Registration of Sales", was introduced into Czech law by means of Act No. 112/201 Coll., on Registration of Sales, as amended, effective from 1 December 2016 (hereafter referred to as the "Act").

Introducing of Registration was led above all by the effort to prevent tax evasion based on the reduction of revenues (especially those received in cash). Registration is one of the forms of controlling compliance with the tax obligations of tax subjects. Unlawful sales reduction is typically committed when a mandatory entry in the registration book states a figure

1 This article is the outcome of the research project MUNI/A/1017/2017 (Selected aspects of direct taxes and their interpretation and application in case law II).

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lower than the actual payment, and the subsequent control, carried out after few months or years, is often not sufficient to reveal this reduction in revenue. In order to prevent such undesired manipulation, an obligation to register revenues online (via the Internet) with the Financial Administration of the Czech Republic (hereinafter referred to as "Financial Administration") has been introduced (Hajdušek, 2017).

Registration can be further defined as a system in which the entrepreneur receives in real time the data on the current payment by the data message via an Internet-connected device to the Financial Administration from which the entrepreneur receives an acknowledgment of receipt with the unique code, so-called Fiscal Identification Code (FIC). Subsequently, the entrepreneur will issue a receipt to the customer, which will be accompanied, in addition to other legal requirements[3], by the Fiscal Identification Code. The entrepreneur is obliged to offer this receipt to the customer, who can subsequently verify it because of the Fiscal Identification Code on the Financial Administration portal. If the customer does it, he will receive information whether his payment has registered by the Evidence. Revenues registered for his name can then be verified by the entrepreneur himself on the web interface too (Methods of Registration of Sales and the Receipt, 2016).

One of the main reasons chosen by the author for the purposes of this contribution (in addition to levelling the playing field for entrepreneurs) is the targeting tax inspection and, therefore, less administration by the Financial Administration. In particular, it means non-burdening of fair entrepreneurs by random tax inspections and administrative restrictions associated with them, or the possibility of using registered data for other purposes of the entrepreneur (obtaining a better overview of inputs and outputs, goods, improving the possibility of controlling possible fraudulent behaviour by employees, etc.) (Why the Registration of Sales?, 2016).

The aim of this contribution is to find an answer to the hypothesis whether the Registration is an effective and legal instrument of control even in the shadow of the recent plenary finding of the Constitutional Court dated 12 December 2017, no. Pl. ÚS 26/16 (hereinafter referred to as "the Plenary

3 See the provision of the Article 20 of the Act.

finding"). Author will explain conclusions made in the Plenary finding by using them on some practical problems.

2 Limits of Financial Administration Tax Inspections

With respect to the aim set above, it is necessary first to demarcate the possibilities of the Financial Administration in the area of inspections of tax claims of tax subjects. Recently, the institution of tax fraud is often mentioned in connection with taxes, which is worrying not only Czech legislators. The European Union institutions have also come up (and are still coming) with other and other tools to fight against tax fraud effectively. However, most of these instruments are focused on one area, namely Value Added Tax. Here can be mentioned, for example, the so-called reverse charge, the tax liability, shorter tax period than one year, the non-reliable payer or the non-reliable person, the payer's register, the VIES system, etc.[4] Its place in the sun among all these control tools (and many others) has obtained a VAT Control Statement. Also, this instrument of inspection was subjected to constitutional review by the Constitutional Court, which subjected this institute itself to the proportionality test to which it had "successfully passed".[5]

However, in the area of income taxes for natural or artificial legal persons (in sum hereinafter referred to as "income tax"), effective control instruments were missing[6] (and so did instruments to fight against tax frauds on these taxes), despite the fact that the revenue from these taxes for the year 2016 is basically comparable with revenues from Value Added Tax on the same period (Annual Report of the Financial Administration 2016, 2017). In the case of Value Added Tax, the Financial Administration should therefore have more and more effective instruments for controlling, in particular,

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4 In this area, it is also important to mention the so-called Action Plan of the European Commission, which also deals extensively with the issue of tax fraud and the fight againts them.

5 As in the case of the Registration, the VAT Control Statement was first reviewed by the Constitutional Court as an institute itself. Since neither institute was found unconstitutional, the Constitutional Court subsequently dealt with the possible unconstitutionality of its individual provisions. In detail see Liška, Snopková, 2017.

6 One of the few activities at the level of the European Union that is being paid attention is the fair taxation of companies, in particular through intensive coordination and sharing of information between the tax administrations of individual Member States.

entitle to a tax deduction under Act No. 235/2004 Coll., on Value Added Tax, as amended (hereinafter referred to as "the VAT Act").

Generally, the Financial Administration uses for controls of tax assessments of tax subjects especially instruments anchored by Act No. 280/2009 Coll., the Tax Code, as amended (hereinafter referred to as "the Tax Code"), which includes a local investigation, a procedure for the elimination of doubts and tax inspection. These institutes, which are part of the so-called search activity of the tax administrator, allow the Financial Administration to collect sufficient number of data to verify the data reported in tax assessments. Subsequently, there will take place "the verdict", whether the taxpayer bore the burden of assertion (together with the burden of proof) and stated in the tax assessment the data corresponding to the facts (or it could be said to reality). As shown by the data published by the Financial Administration, above-mentioned institutions are widely used, but there is still necessary to make controls and control plan more effective, also for capacitive reasons. Registration and its introducing to the praxis should also be helpful for this situation. The Act itself came into effect on 1 December 2016, so it is the date from which data collected from taxpayers by the Registration may be used by the Financial Administration, which will be explained in detail in the next chapter.

3 Control Made by the Registration

As mentioned above, due to the functioning of Registration, the Financial Administration has real-time access to data sent by taxpayers to its data server, where are stored the legally established data on each outgoing payment[7] (or each registered by the taxpayer) that has two basic characters:

- Material character, and at the same time.
- Formal character (Explanatory note to the Government Bill of the Act on Registration of Sales, 2016).

The formal character, which means that the payment has been completed in the law-prescribed manner, will be fulfilled in accordance with the Act

7 However, it should be noted that the provisions of Article 12 of the Act define revenues that are not subject to the Registration (revenues of state, territorial self-governing units, banks, insurance companies, public transport vehicles, inflight sales revenues or revenues from operating public toilets).

in cases where the payment is made in cash, by card transactions (credit cards)[8], by check, by promissory note or by another similar form (virtual currency, meal vouchers, gift cards). Payments made directly from a bank account to a bank account is not subject to the Registration.

In the case of a material character, that is to say, that the payment was made under the law established circumstances, the Act No. 586/1992 Coll., on Income Taxes, as amended (hereinafter referred to as "the Income Tax Act") was used. Income arising from the business which is subjected to income tax (certain simplification was made by the author), is subjected to the registration duty. Thus, to the registration duty there are not subject, for example, revenues from dependent activity or rental incomes. Likewise, it is not necessary to registrate a payment that is rare in terms of revenue typically received.

On the basis of this, it should be stated that if the Registration were 100% effective for all liable taxpayers, the tax administrator should have a comprehensive overview of the amount of revenues which are subjected to the Registration of each of these taxpayers.

Due to the upcoming deadline for submitting proper tax assessments for income taxes for the tax period of 2017, it comes to the full use of data from Registration. In particular, for entities subject to Registration from the 1st phase (since 1 December 2016), in example entrepreneurs in accommodation and catering services, the Financial Administration may subsequently use the data of the individual entities to check amounts stated in tax assessments and compare them with data of received revenues in these assessments mentioned. As already mentioned, income from business subject to income tax under the Article 7 of the Income Tax Act is subject to registration duty, so the data received can also be used to control the resulting

8 Regarding the question of recording the revenues paid by card transactions, the Constitutional Court also expressed its opinion in the Plenary finding, which essentially summarized that: *"The purpose of the law is to improve the traceability of cash and similar payments. This may relate in particular to those forms where the payment does not (or may not) have any trace in electronic form. However, this does not apply to payments made by noncash transfer, to which the customer gives order either through a payment card operator or his bank, and through a trader who is a taxpayer and he has to register the payment in accordance with the Act currently under review. The Constitutional Court therefore proceeded to the annulment of Article 5 letter b) of the Act, since the payments arising from non-cash transfers are relatively well traceable and therefore is not a strong enough and legitimate interest of the state for their evidence."*

tax liability stated in the tax assessment. This can also be used in the case of entities in the 2nd phase of the Registration, in example from 1 March 2017, but it is possible to take the sales data only as a supporting document, as it maps "only" ten months of the previous tax period of income tax.

Another possible option is to use data from Registration to compare "admitted" revenues of 2017 (through the Registration) with data stated by taxpayer in earlier tax assessments. At the moment when there will be a significant increase in revenues of some taxpayer after he will be fulfilling his obligations under the Act (in example registered payments), this may be an incentive for the Financial Administration to eventually control this taxpayer. The inspection can be made at the current date, in example the tax administrators will conduct a local investigation in which they check whether the taxpayer fulfills his obligations under the Act. On the other hand, the question is whether the tax administrator can check the data for the earlier tax period. Provision of the Article 143 of the Tax Code also makes it possible to deduct the tax ex officio, while the legal force of the existing tax assessment decisions is not an obstacle to it. However, it may only be possible to deduct tax ex officio on the basis of the result of a tax inspection, therefore, when a tax authority discovers new facts or evidence beyond the tax inspection (as would be the case here), on the basis of which it can be reasonably assumed that the tax will be deducted, tax administrator should proceeds in accordance with provision of the Article 145 paragraph 2 of the Tax Code.[9] This provision states that: *"If it can be reasonably assumed that the tax will be deducted, the tax administrator may call the taxpayer to file an additional tax assessment and set a substitute period. If the taxpayer fails to comply with this call within the set deadline, the tax administrator may deduct the tax by tax aids."* Thus, the tax administrator may also call the taxpayer to file an additional tax assessment on the basis of the Registration.

Discrepancies in the data submitted by taxpayers within the Registration or in comparison with tax assessments can also be applied at the beginning of the above-mentioned one of the main objectives of Registration, namely the targeting of controls. The Financial administration can use data from Registration to eliminate inspections on taxpayers who are

9 See the provision of the Article 143 paragraph 3 od the Tax Code.

not subject to any fluctuations or inconsistencies within the Registration, data stated in tax assessment agree with data send to tax administrator within fulfilling its duties connected to Registration, etc. As a result, the Financial Administration may make more effort to control taxpayers whom can be considered that everything is not quite right. This can be done either by the control instruments introduced by the Act (for example, by checking the fulfillment of obligations under this Act through the socalled control purchase) or by the tax institutes mentioned above (for example, tax inspection where the data from the Registration will be used as one of evidence for the correct assessment of the tax).

4 The Plenary finding

The Plenum of the Constitutional Court decided in the plenary finding on the proposal of a group of 41 deputies of the Chamber of Deputies of the Parliament of the Czech Republic to abolish the Act as a whole or possibly some of its provisions and decided to partially accept the proposal of the deputies. The Constitutional Court abolished part of the Act with effect from 28 February 2018, respectively 31 December 2018, and Government Regulation no. 376/2017 Coll., on excluding some receipts from the Registration of Sales also from 31 December 2018 too. The remainder of the proposal has been rejected.

The Constitutional Court concluded in the plenary finding that there was a procedural error in the process of adopting the Act, but it did not reach the intensity of the unconstitutionality and for that did not abolish the law as a whole. The Constitutional Court also confronted the system of Registration of sales itself with the alleged breach of fundamental rights (in particular the right to self-determination, enshrined in the Article 10 paragraph 3 of Resolution no. 2/1993 Coll., on the proclamation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic [hereinafter referred to as "the Charter"], the right to protection of property in the Article 11 of the Charter and the right to business in Article 26 of the Charter), and concluded that the Act as a whole is not unconstitutional. As unconstitutional, however, the Constitutional Court found some partial provisions of this law.

Interesting, according to the author, is the Dissenting opinion of the judges Vojtěch Šimíček, Jaromír Jirsa, Tomáš Lichovník, Kateřina Šimáčková and David Uhlíř (hereinafter referred to as "Judges") to the verdict no. IV. (in example the rejection of the remainder of the petition) since they consider that the proposal should have been complied with and the Act should be abolished as unconstitutional. Judges have pointed out in their dissent that the state should always well appreciate the introduction of any new obligation that hinders entrepreneurs from doing business, and in this implementation the legislator should carefully assess whether this additional duty is really necessary and whether it does not unduly detract from the business environment, where these measures should not be considered in isolation, but in the context of restrictions already existing. With this statement it can be agreed in a general sense because the state really should not take new measures without trying to integrate it into the existing system in such a way that the new duty simply does not impose greater administrative burdens on entrepreneurs. If, for example, there was one central authority that would sum up all responsibilities to not only new entrepreneurs (when, what, and to whom to do), it would be possible to stick to the current state of adopting new measures and simply adding to existing ones. Otherwise, however, it is almost impossible for entrepreneurs to be aware of all their obligations that flow from it for business in the current legal order. What the author does not agree with is the fact that only because of that the Registration were accepted as another instrument should be abolished the Act as a whole. In practice, there has been no abnormal increase of administration connected to the Registration, as taxpayers can already use the existing devices they have at their disposal and "only" uploads software to register received payments.

The author is therefore inclined to the decision of the majority of the plenum of the Constitutional Court, which correctly abolished certain provisions of the Act by the proposal (for example the obligation to state the tax identification number of the taxpayer who is a natural person on the receipts, receipts paid by card transaction etc.). It can also be agreed that the Constitutional Court did not find the Act as a whole unconstitutional.

5 Some Possible Practical Problems

However, this landmark decision of the Constitutional Court can cause some problems in the subsequent application of the law in practice, which we can show in the following case. On 3 December 2017, the Financial Administration will carry out a control purchase on a taxpayer and will find a breach of obligations under the Act (the taxpayer has not provided his tax identification number on the receipt). The administrative infraction will be committed before the issue of the Plenary finding. Subsequently, the administrative authority will initiate the administrative hearing of administrative infraction, which will end with the issuance of a decision of the administrative infraction, within the time limits stipulated in the provision of Article 94 of Act no. 250/2016 Coll., on the responsibility for administrative infractions and the administrative hearing of them (hereinafter referred to as the "the Infraction Act"), in this case on 31 January 2018. The decision of the administrative infraction will be delivered to the accused on 5 February 2018. An appeal may be filed against the decision of the administrative infraction, but the Infraction Act does not specify the time limit for filing the appeal, therefore it is based on Act no. 500/2004 Coll., the Administrative Code, as amended (hereinafter referred to as "the Administrative Code"), which stipulates a deadline of 15 days, in example in our case it can be filed by 20 February 2018. The administrative authority will most likely move appeals to the Appellate authority, the Appellate Financial Directorate, which will decide on the appeal. It is, therefore, certain that the appellate authority will not be able to decide on the appeal before 28 February 2018. The appellate authority faces a decision on how to apply, respectively to take into account, the plenary finding or not, while two possible solutions opened before it.

In the first place, the appellate authority may take into account the time link that the accused committed the administrative infraction by failing to state the tax identification number on the receipt, since the Act in force at the time of its breach imposed such an obligation on him. In the decision of appeal, therefore, the appellate authority finds the accused guilty and the impact of the Plenary finding justifies within the amount of the fine imposed, whether the stated unconstitutionality of the provisions takes into

account as a mitigating circumstance and the fine imposed by the administrative authority may reduce proportionately.

The second option for the appellate authority is to take into account the incidental retrospective of the Plenary finding, in example to assess its intertemporal effects and the impact on the case being investigated. As mentioned above, the Constitutional Court in the Plenary finding stated that the obligation to state the tax identification number of a taxpayer is unconstitutional, as it in accordance with the provision of the Article 130 of the Tax Code consists inter alia of the personal identification number in case of natural person. The personal identification number is a personal data according to Act no. 101/2000 Coll., on the Protection of Personal Data, as amended. It follows from the Plenary finding that according to the Act, each taxpayer is sufficiently identified by several codes introduced by the Act itself – the taxpayer's security code and the taxpayer's signature code, respectively also a fiscal identification code. According to the Constitutional Court's point of view, therefore, the obligation to indicate the tax identification number on the receipt is not a sufficiently gentle solution to the right to protect against unauthorized collection, disclosure or other misuse of personal data under the provision of Article 10 paragraph 3 of the Charter so it does not stand in the proportionality test. In this case, the appellate authority will therefore take into account the Plenary finding and the conclusions made thereon on the issue of the guilt itself, where, on the basis of the declared unconstitutionality of the provision, it establishes that the accused did not commit the administrative infraction and will therefore annul the decision of the administrative infraction made by the administrative authority.

From the above, it is clear that the appellate authority must take into account the Plenary finding in the course of its decision on appeals against the decision of the administrative infraction, but it is only a question of whether it is the decision on the amount of the sentence or even the decision on the guilt itself. The author is inclined to the second option, in example that the appellate authority should take the decision of the Constitutional Court into account in the decision about the guilt for the administrative infraction committed.

The question is, what would be the situation where the administrative infraction was decided with legal force before 28 February 2018. According to some opinions, the appellate authority could in this case take into account the conclusions made by the Constitutional Court only on the question of the amount of the sentence, but in the opinion of the author such a decision lacked the substantive substance of the matter under consideration.

6 Conclusion

It can therefore be concluded that the Registration is an effective tool of control, especially on income taxes, which can be more effectively controlled by the Financial Administration and thus they can help stabilize the tax system. Furthermore, despite the dissent of Judges, with whom it is possible to agree to some extent, the Registration is also a legal instrument, as it "succeeded" in the proportionality test applied by the Constitutional Court, where he emphasized that the Registration as a whole in not unconstitutional. The hypothesis set out in the introduction to this contribution has thus been confirmed.

The author would like to point out that, in her opinion, the adoption and introduction of Registration into the legal order of the Czech Republic was the right step, apart from the very system of its operation, also taking into account the two main objectives – the targeting of controls and the reconciliation of the business environment. However, only time can show how effective the Registration can be. But it has to be said that the Plenary finding could cause some problems in application of the Act in praxis. Both, administrative and appellate authority, has to take the conclusions made in the Plenary finding into account in every situation, at least in time immediately following.

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THE EVOLUTION OF EU REGIONAL POLICY

Tomasz Sowiński[1]

Abstract

Regional policy in the European Union is more and more important every year. Particularly the recent years are very significant. According to the EU experience, the most effective structural and other programs are realized in the regions, for the regions and through the regions.

The position of the regions in the EU with practical aspects are stronger every year. Next years will be more intensive in terms of work and participation in the EU budget for the regions. It is obvious that there will be more programs and structural funds given to the regions.

All that would be not possible if in the EU were not people who looking on future, can build of the fundaments the regional policy, like for example Paul Henri Spaak or Jacques Dellors.

Author have written about evolution of EU regional policy. First article it was look at the financial aspect of the regional policy (Sowiński, 2016). This article work is about beginning of the regional policy and a lot of problems which are during the first fourty years of the regional policy.

Keywords: Regional Government; EU Regional Policy; Structural Funds.

JEL Classification: H5, R0, N9.

1 Introduction

If we want to trace back the shaping and development of the regional policy in the European Union, we should also look into the regions of the Members States. And there is, indeed, something to look into, because there are as many systemic solutions, as there are countries, when it comes to administrative division of the states, as well as the tasks and competences

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or the degree of independence both in terms of internal relations as well as the relations of countries and regions with the European Union. The position of regional authorities and offices in the public administration system of individual EU Member States is significantly diverse. Countries with strong regions and those where there is high dependency of regions on the central authorities can be indicated (Rydlewski, 2007: 123). A separate issue is the problem of ratification or non-ratification of the European Charter of Local Self-government by the countries of the European Union[2] and the degree and scope of its implementation.

For the past few years a lot has been going on in the EU regional policy and it is usually for the better. Naturally, having in mind its increasing importance in the Union, the degree of its empowerment, the position in the general European Union policy. Numerous solutions that had been submitted for many years entered into force to a higher extent than had been postulated by their initiators. Those accused in the 1960's and 1970's of paying homage to the utopian ideas, or at least lack of realism, turned out, however, to be the visionaries of the future or rather the current Europe of regions. Today, we are reaping the harvest of the workings of Paul H. Spaak[3] or Jacques Delors in two ways[4].

The Committee of the Regions (CoR), supporting, among others the development of transportation, communication, environment protection; The Cohesion Fund, enabling the support of such actions and the office of the Commissioner for Regional Policy are the three pillars of the EU regional policy that supports the development and significance of the regions within the Member States and the EU itself. This whole regional portal to the European Union is crowned with the regions

2 European Charter of Local Self-government, developed in Strasbourg on 15 October 1985, Dziennik Ustaw of 1994, no. 124, item 607 (as amended), was adopted by Poland in its entirety.

3 Paul H. Spaak, the Minister for Foreign Affairs of the Kingdom of Belgium; directed the international team that prepared the Roman treaties; an ardent advocate of the developing European regional policy.

4 Jacques Delors, the chairman of the European Commission in the years 1985–1995; led to the adoption of the Single European Act; acted in support of the creation of the single European market, and in the so-called Delors Report initiated the concept of creating an economic and monetary union with a single currency Euro; he was also an ardent advocate of the development of regional policy and the increasing importance of regions within the European Union.

of Member States that are based on those three pillars. If we want to characterize the regionalism in the EU we are faced with an extremely difficult task, resulting from the significant difference in the legal, organizational, administrative, competence, systemic, etc. solutions with regard to the regions (Sowiński, 2007: 64).

Additional chaos is caused by Member States submitting to NUTS[5] non-existent institutions administratively created only for the purposes of the statistics or for other, most commonly, pragmatic reasons. This does not facilitate the proper understanding of the actual condition of the regionalization of our continent and the progress of it becoming increasingly dependent on local governments. That state of the matter is deepened by diverse nomenclature of regions, as well as other units of territorial division, which bear names that often totally do not correspond to one another in individual countries. Something that is understood as a region in one country, is called a district, a county, a precinct in another; or some concepts of the same name serve a different function in various countries, have disparate competences or are only an artificial, administrative creation for the purposes of NUTS (Sowiński, 2005: 71).

In such realities one cannot focus on a specified or at least an EU-preferred model of an existing region, primarily because such a model does not exist.

This difficulty is deepened by the lack of applicable legal solutions present in the EU legal heritage that would regulate the status of a region. The introduction of NUTS was a tentative attempt of the EU administration to systematize and define the types of regions, as well as the relationships between them. However, although the significance of NUTS is more than statistical, its nature and application does not exceed the policing and auxiliary functions. It undoubtedly constitutes, however, a step towards the ordering of the status of regions within the EU, defining clearcut relations between them, and thus also at least the framework of their preferred aspect, status and scope of competences as administrative units. For now, there is nothing more for us left than getting to know the types and statuses

5 *The Nomenclature of Territorial Units for Statistics* – Nomenklatura Jednostek Terytorialnych do celów Statystycznych; Kozak, Pyszkowski, Szewczyk, 1997. More on the topic of NUTS see Sowiński, 2006.

of regions for each EU member state individually. The knowledge of NUTS is also very useful for the practical functioning of regions and the shaping of relations between the European Commission and the regions in individual EU countries (Sowiński, 2006: 41).

If we want to get the picture of the regional Europe, we should get to know the EU regions through the legal and structural statuses they have in individual Member States.

The EU regional policy is undergoing constant transformations. They can be undoubtedly defined as the development of the regional thought used to reinforce the status, role and significance of the regions. Numerous faults, inconsistencies, lack of uniformity of concept and vision of the region within the EU, as well the Member States themselves can be observed. No harmonization of the administrative division or at least its harmonized formal interpretation for individual member states, and thus the entire EU.

An interesting solution is the Polish model, reproduced by some countries, especially from the Central Europe. Poland has relatively transparently resolved not only the issue of status, competences and organization of regions (voivodeships), but also, as one of the few EU countries, has simultaneously implemented a significant part of the ECLSG, combining in a relatively skillful fashion those two visions: regionalism and self-governance. By this I am referring to the primary assumptions of changes from 1998 and their envisaged continuation. Unfortunately, politics can damage and degenerate even the best solutions, although I am not claiming they were that perfect. That is what partially happened with the essential reform of public administration, which was a milestone on the way to a more profound degree of state self-governmentalization and also to the construction of a civil state.

2 The Shaping of Regions in Europe

The concept of region cannot be identified with the regional policy, however, by tracing its objectives, pursuits and the long-term process of gaining shape and increasing importance, participation in means and shaping of the current EU policy, we can get closer to the image of the region, which would be most optimal for fulfilling all objectives, aims and possibilities it offers.

The regional policy after the entire, growing complex of issues related to economy, shaping of the market, including the agricultural market, but also the technical standards, environment quality and protection, the complex of social issues – from civil rights, through employees' rights, social rights, free movement of people, equal treatment of the sexes, to uniform economic insurance and consequent, although slow strive for the uniformity of social security, is the third large route which the uniform and consistent development of the united Europe is and must follow.

It must take place with the participation and through the regions themselves, which certainly entails reflections. The analysis of the legal and administrative status of the regions in individual Member States and a brief investigation of the shaping of the regional policy development with reference to the regions' role, shape, tasks, which they are to execute and aims they are to achieve and which the EU wants to achieve through the regions, may enhance the proper understanding of the regional policy and the proper shaping of the relations between the regional policy and the entire EU policy (Sowiński, 2006: 25–26).

3 The Treaty of Rome

In the entire process of the unification of Europe there were hardly any negotiations or talks that did not involve the discussion on issues related to regional policy. The records relating to the coordination of the common regional policy contained in the Spaak Report[6] were not included (Głąbicka, Grewiński, 2003: 35) in the final wording of the Treaties of Rome.

The emerging EEC was not yet ready to deal with the regional policy, or it would rather be more appropriate to say that the importance of the regional issues was not recognized with reference to the huge changes that occurred on 25 March 1957 in Rome.

However, records can be found in the Treaty that established the EEC talking about the necessity to create conditions for an undisturbed competition and the abolition of all forms of protectionism. This was to cause

6 The Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC), signed on 25 March 1957, entered into force on 1 January 1958.

a natural equilibration of the discrepancies between the regions, as well as the social inequalities, and also ensure a balanced development of the Communities. Unfortunately, the actions of the invisible hand of the market did not match the expectations, and so did the effects of the actions of the newly established EIB[7].

The common regional policy was for many years present mainly in the realm of declarations and various reports indicating its non-existence, the necessity to implement it, and even claiming that European integration does not facilitate regional development.

A landmark event was the establishment of the Conference of Local Authorities by the Council of Europe on 1958. Three years later, the European Commission organized the first conference dedicated to the regional issues and after three more years the regional policy was for the first time included in the Medium-term Economic Policy Program. In a similar program from 1971, even a record was included on the precedence of some priorities of community importance over the national ones[8].

The 1960's were abundant in events facilitating the development of regional policy, as a result of which during the Paris Summit in 1972 a decision was made to establish the European Regional Development Fund (ERDF), which was to support weak and poor regions within the EEC member states and in the countries that were about to join the EEC[9].

Changes were also introduced to the functioning of the European Social Fund, which was to strengthen especially the problematic regions and in the functioning of the European Agricultural Guidance and Guarantee Fund, also in order to strengthen the regions, however, to a small extent.

Although the EAGGF was after many perturbations established only in March 1975, it initiated the necessity for a completely different approach

7 The European Investment Bank was established pursuant to Art. 198 of the EEC Treaty, however, a small equity (ca. 1 billion German mark) and discrepancies in the exchange rates caused the EIB possibilities not to be used at the beginning.

8 The Third Medium-term Economic Policy Program from February 1971. It is possible that the reason for such radical records was the Werner Report from 1970, which indicated the dangers on the way to achieve the economic and monetary union due to large discrepancies between the regions.

9 In 1973 EEC was enlarged by Great Britain, Ireland and Denmark and the regional fund was to be established by the end of 1973.

of the EEC to the regional issues, which was reflected at least in the establishment, only four months later, of the Regional Policy Committee.

The new quality that emerged was a transition from general sentences and declarations tackling the regional issues as a whole to addressing the problems of each individual region together with its conditioning, but also the diversification of the legal and organizational approach to region as an administrative unit[10].

First problems and disputes with regard to the assessment of regions occurred, between them and the Member States, which submitted them to various program, but were also interested in obtaining funds by them. The difficulties with comparing regions and finding the appropriate relations between them (e.g. the German states of Bremen and Bavaria), their representativeness, defining the entity that represents them, the role of the state and the role (if any) of the region. Numerous discussions were conducted on the model of the region, criteria for defining its legal status, whether it is to be the subject of the regional policy, or only the object – an instrument facilitating the execution of tasks and objectives, which are fulfilled more easily, simply and effectively through the region. Region apart from generally signifying a certain space, territory, on which the problems foreseen by the EU programs are present, started to be perceived also as an administrative product with its own law, structure, organization, authorities, having specified competences and possibilities action, and also a specified degree of independence, often self-governance.

It may be said that although the concept of regionality has been under construction for 20 years, after the establishment of EAGGF and its subsequent modifications, only within a few years something of a revolution took place in the Community regional policy.

10 Apart from the institutions already mentioned, the attention should be paid to the activity of the following ones: the Local Authorities Conference, developing regular reports, as well as the European Commission, and in particular the European Parliament, which apart from publishing the already mentioned Werner Report from 1970, published also the Motte Report from 1960, in which the proposal for creating a consultive committee dealing with regional issues was included; The Birkelbach Report from 1963, which indicated the appropriateness of transferring funds to the regional policy of the European Committee and the Rossy Report from 1964, which indicated the commonness of the regional policy. See also Głąbicka, Grewiński, 2003: 36.

During the implementation of the Integrated Mediterranean Programme the regional authorities started to take an active part alongside the state authorities in the consultations with the European Commission. This was another breakthrough and a significant progress, both in the development of Community regional policy, as well as, above all, in the defining of the legal status of the region.

Irrespective of the detailed legal solutions that define the region status within a country, it became the subject of the regional policy implementation (Sowiński, 2015: 561–562).

4 The Delors Package

On 17 February 1986 the Single European Act was signed in Luxembourg[11], which entered into force on 1 July 1987. It constitutes another significant stage of the regional policy development, including a whole new title on the economic and social cohesion, facing the Community with the objective of decreasing the breadth of the development of regions.

The instrument for achieving that objective were the structural funds, the operating principles of which and assigned tasks were clearly changed within the Single European Act[12]. Among others, the experiences from the implementation of the Integrated Mediterranean Program were used.

Obtaining funds under programs and projects was decentralized, at the same time comprehensively strengthening the financial policy by simplifying the management of resources, enhancing monitoring and introduction of clear principles of control and evaluation of programs implementation. The use of funds and raising financial resources from all funds was also made more flexible.

The principle of regions' participation in negotiations on the acceptance and method of financing projects was upheld. Also the principle of compliance of objectives and tasks of the regional policy with other policies of the Community was introduced, which opened the possibility for direct

11 The Single European Act, signed on 17 February 1986 (Luxembourg) and on 28 February 1986 (Hague), Dziennik Ustaw of 2004, no. 90, item 864, entered into force on 1 July 1987.

12 I. Pietrzyk believes even that the reform of structural funds, prepared as a result of signing of the Single European Act, was a real breakthrough in the European Union regional policy. See more Pietrzyk, 2003: 92.

communication with the regions above the state structure, and, in any case, independent of it.

Further modernization of the structural funds principles of operation, especially in terms of striving for their even more perfect and effective intervention, significantly accelerated the process of empowerment of the regions and the extension of the scope of regional policy.

It all took place at a time when Jacques Delors, exceptionally devoted to the idea of extending and strengthening the EU regional policy, was the president of the European Commission for two terms. He believed that the objective of the European integration was not only the common sharing of costs but also the common sharing of benefits it brought. He wanted to harmonize and improve the operation of the regional policy also through strengthening its finances. The Report from 1987 named the Delors Package pointed to the existence of significant, deepening differences between regions and to the necessity of the strengthening the financing of the Community, so that it would be adequate to the level of development of the Member States. The report's effect was the doubling of resources in the structural funds.

The feature of Delors's actions, although invaluable, today rarely found, was comprehensiveness. The search for methods and ways of solving particular problems was concentrated not only in the technical (organizational) administrative space, but most of all dealt with the conceptual layer, principles of conduct, defining objectives and indicating the priorities of tasks. During his presidency, the most far-reaching changes to the regional policy were made, including (Sowiński, 2006: 29) the preparation and implementation of the regional policy included in the Maastricht Treaty[13].

5 The Regional Policy Reform – the Maastricht Treaty

A number of significant changes took place in the EU regional policy under the Maastricht Treaty. The Committee of Regions was created[14], the most

13 The Treaty on European Union, signed on 7 February 1992 (consolidated text: Journal of Laws EU C 326 of 26 October 2012, p. 13), entered into force on 1 November 1993.

14 The Committee of Regions is a consultative committee of an opinion-giving nature. At the beginning it consisted of 222 and now 350 members appointed for a four-year term at the request of the Member States.

important task of which is to support the development of road, railway and trans-European communication networks infrastructure and the investments related to environmental protection, and also new structural funds and the Cohesion Fund were established[15].

The Committee of Regions is only of an opinion-giving nature, for the opinions of which the Council or the interested Committee might turn to, but there are also cases foreseen in the Treaty in which the Committee of Regions issues such an opinion obligatorily and it can also issue an opinion on its own initiative. An opinion is not a law, however, it is hard to disregard it, and the Committee of Regions includes, in majority, members appointed by countries, but who are still generally the regions' representatives. They can present their stances, conclusions and opinions directly in the structures of the EU (Sowiński, 2006: 30).

A crucial argument in favour of maintaining or even financial strengthening of the current EU regional policy, is also the fear of significant uncontrolled migration within the Union, for which the stable, strong countries will not want to allow, accepting even the increase of structural funds. Thanks to this, it will be possible to strengthen the weak regions and create workplaces within them, thus preventing migration. It will also be facilitated by the necessity to assign significant funds for the environmental protection, executed mainly in the regions, and for the communication infrastructure. An important and costly task executed not necessarily by the regions, but surely within the regions, will be adjusting agriculture and the rural areas to the EU standards and solutions.

The appointment of the Commissioner for Regional Policy was a landmark event after the enlargement of the European Union. The creation of a ministerial position and a ministry dealing with the regional policy is a huge step in the development of the EU regional policy.

Still, different views on the topic of participation of regions in the execution of EU tasks can be noticed. Regardless of them, postulates have been submitted to the European Commission regarding the harmonization of law and principles of operation of regions within the Member States,

15 The Cohesion Fund is generally considered to be a structural fund, because this is its application, although it does not belong to the structural funds.

even for the clarification of the allocation of resources and avoidance of conflicts related to that.

6 Conclusion

The European Union regional policy since the development of the Treaties of Rome to the present day has undergone a huge, not so much an evolution, but rather a revolution.

From regions mentioned only at the margin of community regulations, the regional policy became one of the pillars of the development of the European Union, equipped with financial instruments in the form of structural funds.

The above considerations showed the tedious development of an important concept from the phase of practical rejection to the phase of implementation and intensive operation. They shed light on people, who, having a vision of the regional policy and its significance for the EU, were able to act and convince others to join them.

Today, no one has any doubts regarding the weight and significance of the regional policy within the EU. It is interesting how many more such ideas are present in the European Union.

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The Treaty on European Union, signed on 7 February 1992 (consolidated text: Journal of Laws EU C 326 of 26 October 2012, p. 13), entered into force on 1 November 1993.

THE ROLE OF LOCAL AUTHORITIES IN DISTRIBUTION OF FINANCIAL SUPPORT TO FAMILIES, UNEMPLOYED AND PERSONS IN NEED FROM THE LOCAL BUDGET AND EU FUNDS

Marek Tyrakowski[1]

Abstract

This contribution concerns the role of local authorities in the distribution of the funds to provide financial support to families, the unemployed, and those in need identifies the forms of various types of support, the sources of financing the aid, and most of all the local authorities which pursue individual programmes. The analysis reveals that the role of the local authorities is absolutely vital, one could even say it is paramount. Moreover, all entities are engaged in support actions, each focusing on the type of support characteristic of it. The study was conducted under the analytical method.

Keywords: Local Authorities; Assistance; Financing; European Social Fund; Unemployment; Social Exclusion; Financial Support.

JEL Classification: Health, Education, and Welfare: I3.

1 Introduction

The constitutional principle of subsidiarity obliges the state to support families and persons unable to fend for their needs unassisted, threatened with poverty and social exclusion. This is frequently linked to being jobless and low activity in the labour market. Therefore, public law entities, the state, and local governments implement the principle by reaching for a number of legal solutions and actions ensuing therefrom. In this way, they strive to support the development of families and individuals, also financially.

Considering the core principles first laid down in the very preamble to the Constitution, particularly the principle of common good, the democratic

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state of law which embodies the principles of social justice and the said principle of subsidiarity, one can say they are intended to serve as direction signs for the actions of central and local governments. Their goal consists in restoring the dignity and activating families and individuals (Kawecka, 2015: 20–21).

Local authorities of all levels face specific own tasks, as well as tasks imposed on them in the area of supporting families and individuals (Parish Government Act, Art. 7/1/6, Art. 7/1/6a/, Art. 16; County Government Act, Art. 4/3, Art. 4/3a, Art. 17; Act on the Provincial Government, Art. 11/2/9, Art. 14/4-5, and Art. 14/15). The funds earmarked for pursuing them originate from the central budget, the local government budgets, and the European Union Funds, particularly the European Social Fund.

The analysis below attempts to arrive at answers to the following questions: are all levels of the local government engaged in distribution of financial support to families, the unemployed, and persons in need; and if so, what is the degree of their engagement and what forms of aid do they employ? What is the role of the actions taken by the local authorities in the process? The study makes use of the analytic method.

2 The Family Benefits Paid by Parishes [gminy]

The Constitution of the Republic of Poland ensures state protection of the marriage, family, maternity and paternity (Constitution of the Republic of Poland, Art 18 and Art. 71/1; cf. Borysiak, 2014: 20). Consequently, protection of, care for, and support to the family are inherently incorporated in the tasks of the public law entities.

The body in charge of the process and actually paying family benefits is the parish head officer *[wójt]* or mayor *[burmistrz]* (president *[prezydent]* of a city) (Family Benefits Act, Art. 3/11). The tasks falling within the scope of family benefits rank among the those imposed by and resting within the duties of the central administration (Family Benefits Act, Art. 20; cf Regulation on the way and mode of proceeding in matters concerning the granting of family benefits and on the scope of the information to be given in the application, certificates, and declarations requesting the verification of the entitlement to family benefits, cl. 11).

The family benefits are: a one-off child birth allowance, family allowance and supplements to family allowance; dependency benefits: carer's allowance, special attendance allowance, and nursing allowance, parental benefit, financial aid, and benefits paid by the parishes *[gminy]* (Family Benefits Act, Art. 1–2).

One should stress that the parish council *[rada gminy]* may adopt a resolution increasing the amounts of the supplements to family allowance. In the situation, the amount increase is financed from the parish's own funds (Family Benefits Act, Art. 15a).

In addition, the parish council may grant child birth allowance to the residents of its administrative area. The detailed principles of granting the allowance are laid down in the council resolution. The allowance is financed from the parish's own funds.

Moreover, responding to the local need for family benefits, the parish council may adopt family benefits other than those specified in the Act of Law offered to the residents in its administrative area. The detailed principles of granting the benefits and their amounts are specified in the resolution. The benefits are financed from the parish's own funds (Family Benefits Act, Art. 22a, Art. 22b).

Family benefits are paid monthly. Their financing is governed by the regulations of the Public Finance Act. Benefits and their processing costs are financed in the form of an earmarked grant from the state budget. The processing costs amount to: 3% of the grant received to finance family benefits, though no less than PLN 6000 a year. The issuing cost of a parental benefit administrative decision is PLN 30. The parish produces substantive and financial reports on its attainment of the tasks and submits them with the governor of the relevant province *[wojewoda]* (Family Benefits Act, Art. 26/1 and Art. 33).

In the year 2016, Poland had 1921.0 thousand beneficiaries a month on average receiving family benefits aimed at supporting the family financially. Compared to the year 2015, the number of the beneficiaries paid family benefits went up by 6.1%. Over the year 2016, they were paid benefits totalling PLN 9.3 billion, i.e. 24.6% more than in the preceding year. The family benefit expenditure was clearly dominated by expenses borne on aid intended for families with children, i.e. family allowances with supplements,

child birth allowances, and parental allowances – 59.9% of total expenditure. The expenses earmarked for aiding the disabled on the other hand, i.e. dependency benefits, accounted for 40.1% of total expenditure[2].

3 Child Support Benefit

Child support benefit represents a type of systemic family support. The purpose of the benefit is to cover the expenses related to bringing up a child, at least in part. Eligible for the child support benefit are: the mother, father, etc. until the day the child turns 18 years old. The benefit stands at PLN 500 per child. In principle, the benefit is granted for the second and every further child. However, if the family income per head does not exceed PLN 800, the first child qualifies for the benefit too. The same applies to the situation when the child is disabled and the family income per head does not exceed PLN 1 200 (Act on State Assistance in Upbringing of Children, Art. 4–5).

Child support benefit is paid monthly as a task entrusted with the parish by the central administration. Its financing is governed by the regulations of the Public Finance Act. The financing is provided in the form of an earmarked grant from the state budget. The processing costs amount to 1.5% of the subsidy received. The parish produces substantive and financial reports on its attainment of the tasks and submits them with the governor of the relevant province (Act on State Assistance in Upbringing of Children, Art. 2/11, Art. 13, Art. 21/1, and Art. 29–30)[3].

4 Benefits for Families and Individuals in Hardship, Ensuing from the Social Assistance Act

The objective of social assistance is to prevent situations unsurmountable for families or individuals. The needs of individuals and families using

[2] Available at: http://stat.gov.pl/obszary-tematyczne/dzieci-i-rodzina/rodzina/beneficjenci-swiadczen-rodzinnych-w-2016-roku,2,4.html [cit. 5. 2. 2018, 21.18].

[3] One should also emphasise that the programme is in line with the heretofore EU practice of coordinating social security systems. In the event the applicant or family member named in the application is staying abroad, in an EU state or country of the European Economic Area, and the leave is dictated by job seeking, the parish forwards the application and the documents appended thereto to the marshal of the province [*marszałek województwa*] to consider and make sure it does not fall under the EU social security coordination regulations. This is to prevent the situation unacceptable in the EU regulations where one and the same person collects similar benefits in two EU/EEA states at the same time. Available at: https://www.mpips.gov.pl/wsparcie-dla-rodzin-z-dziecmi/rodzina-500-plus/rodzina-500-plus-w-ue/ [cit. 19. 1. 2018, 00.05].

the assistance should be seen to, if in line with the objectives and the financial capacity of the welfare services.

Social assistance is organised by agencies of central and local administration which in this respect cooperate on partnership terms with social and non-governmental organisations, the Catholic Church, other churches and religious organisations, and the like (Social Assistance Act, Art. 2–4).

The financial benefits paid from social assistance funds include e.g.: a regular allowance, temporary allowance, earmarked allowance, and special earmarked allowance, as well as cash loans for building economic independence, aid for gaining such independence, and assistance for continuing education (Social Assistance Act, Art, 36/1). One should note that the parish council may resolve to increase the minimum amounts of the temporary and earmarked allowances (Social Assistance Act, Art. 8/2 and Art. 38).

Non-financial benefits, on the other hand, include e.g.: free meals, necessary clothing, shelter, premiums for retirement and pension insurance, a credited ticket, social work, intervention in crisis, and in-kind support, the latter aimed e.g. at the attainment of economic independence (Social Assistance Act, Art. 36/2).

Social assistance benefits are in principle granted in administrative decisions. Financial social assistance is granted and paid for the period of a calendar month (Social Assistance Act, Art. 102 and Art. 106)[4].

The social assistance tasks are entrusted to social welfare centres in parishes, county family assistance in the county *[powiat]*, and regional social policy centres in the province *[województwo]*. In pursuing the entrusted tasks which fall within the scope of duties of the central administration the parish follows the guidelines provided by the governor *[wojewoda]*. When pursuing the parish's own tasks in this respect, social welfare centres follow the guidelines laid by the parish head officer *[wójt]* (mayor, or president of a city) (Social Assistance Act, Art. 110, Art. 112–113).

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4 The granting of benefits in the forms of: intervention in crisis, social work, counselling, participation in mutual-aid club meetings (also for the mentally disturbed), day and night shelter, seeing to the burial, and credited ticket does not require an administrative decision.

The differentiation between own and imposed tasks is of particular importance from the point of view of their financing. Own tasks are financed by the local authorities out of their own income or subsidies. As for the commissioned tasks, the local authorities receive funds from the state budget in the form of grant. The financing rules are the function of not only the type of the task pursued, but also the organisational and legal form of the agency of local authorities; for instance, Parish Social Welfare Centres *[Gminne Ośrodki Pomocy Społecznej]* are financed from: their own funds and the state budget.

Table 1: The scale of involvement – particularly of the parishes – in redistribution of social assistance funds is pictured in e.g. the following brief fragment of the report for 2016

SECTION 2 B. BENEFITS PAID – PARISH OWN TASKS

Forms of Assistance		Number of Beneficiaries Granted Benefits in Decisions	Number of Benefits	Amount of Benefits, in PLN	Number of Families	Number of Family Members
0		1	2	3	4	5
TOTAL 3)	1	**1 595 746**	**X**	**3 529 515 539**	**1 056 065**	**2 559 902**
REGULAR ALLOWANCES – TOTAL	2	**214 074**	**2 146 889**	**1 069 452 823**	**211 307**	**286 173**
including: own funds	3	**X**	**X**	**6 369 142**	**X**	**X**
grant	4	**X**	**X**	**1 063 083 681**	**X**	**X**
including those granted to an individual: (of line 2) living alone	5	**172 341**	**1 754 844**	**945 302 021**	**172 341**	**172 437**
living in a family	6	**43 779**	**392 045**	**124 150 802**	**40 966**	**115 964**

Source: Ministry of Family, Labour, and Social Policy, Department of Social Assistance and Integration, MPiPS-03-R report for Jan.-Dec. 2016

All lines of section 2 B state the number of beneficiaries granted a benefit in a decision, the number of families, and the number of their family members,

according to the principle that a person (family) is ONLY mentioned once, irrespective of the number, amount, or frequency of the benefits received.

5 The Granting and Paying Benefits out of the Maintenance Fund

Supporting individuals in financial difficulties because of their inability to enforce the payment of alimony should be combined with actions aimed at deepening the sense of responsibility in those obliged to provide such support. Hence, maintenance fund constitutes a system of supporting those entitled to financial support from the state budget, though the fund is not a 'fund' as construed in the public finance regulations (Act on Assistance to Persons Entitled to Alimony, Art. 1).

The granting and paying maintenance fund benefits and taking actions with respect to the alimony debtors represent a task imposed on parishes but belonging to the duties of the central administration and is financed in the form of an earmarked grant reserved in the state budget. The actions taken with respect to the alimony debtors, and the costs of processing the maintenance fund benefits are financed from a grant earmarked for family benefits in the state budget, and from the parish's own income[5]. The costs of the actions taken with respect to alimony debtors and the costs of processing maintenance fund benefits account, in principle, for 3% of the grant received for the maintenance fund benefits (Act on Assistance to Persons Entitled to Alimony, Art. 31).

6 The 'State Aid to Feeding' Programme for the Years 2014–2020, Implemented by Parishes [*gminy*]

The Programme is an element of the state's long-term social policy (Public Finance Act, Art. 136/2)[6] in the area of financial support from parishes in their pursuance of own, though compulsory tasks, raising the living standard of families on low income, improving the health status of children

5 Art. 27/1 and Art. 4 stipulate that the alimony debtor is obliged to repay the debt to the authority competent for the creditor in the amount of the benefit paid out of the maintenance fund to the entitled beneficiary, increased by statutory default interest. 40% of the amount credited comes from the parish's own income relevant for the authority competent for the creditor.

6 This is a long-term programme, as construed in the Public Finance Act.

and teenagers, and developing proper feeding habits (Social Assistance Act, Art. 17/1/3 and Art. 14)[7].

The Programme is coordinated by: the Minister of the Family, Labour, and Social Policy, the governor of the province *[wojewoda]*, and parish head officer *[wójt]* (mayor, president of a city). At the parish level, the Programme is pursued by social welfare centres with other organisational entities of the parish engaged. The Programme is financed from the state budget. The aggregate amount of the funds allocated to the Programme for the whole term of its execution is PLN 3 850 000 thousand. The strategic goal of the Programme is to mitigate the phenomenon of malnutrition among children and teenagers from families on low income or in difficult financial position, especially pupils from areas affected by high unemployment and from rural areas, as well as adults, particularly solitary people, the elderly, ill, or disabled.

The parish can receive a grant to co-finance the actions envisaged in the Programme, provided that the share of the parish's own funds is no less than 40% of the anticipated costs of completing the task. In response to a written and reasonable request from the parish head officer *[wójt]* (mayor *[burmistrz]*, city president *[prezydent miasta]*), the governor of the province *[wojewoda]* may consent to increase the grant, though the share of the parish's own funds must not be less than 20% of the anticipated costs of completing the task. The grant is extended by the governor on request from the parish head officer (mayor, president of the city) (Announcement of the President of the Council of Ministers of 21 August 2015 on publication of the consolidated text of the Council of Ministers' resolution on establishing a long term financial support programme for parishes in feeding assistance: 'State Aid to Feeding' for the years 2014–2020).

7 Parish Social Welfare Centres as Entities Supporting the Pursuance of the Food Assistance Operational Programme 2014–2020 from the Fund for European Aid to the Most Deprived

The Food Assistance Operational Programme (PO PŻ) 2014–2020 is a national operational programme co-financed from the Fund for European

7 This relates to own tasks of compulsory nature.

Aid to the Most Deprived pursued based on Regulation (EU) no. 223/2014 of the European Parliament and of the Council on the Fund for European Aid to the Most Deprived. Aid under the PO PŻ Programme is addressed at those individuals and families who are unable to provide themselves/their families with appropriate food (meals) because of low income.

Although the Programme is pursued via various types of partner organisations, to name the Polish Red Cross *[PCK]* for instance, it is of high significance that many parish social welfare centres continue to be involved as local partner organisations (about 23% in the national scale). It needs to be highlighted that especially in the case of small parishes having no operating non-governmental organisations capable of dealing with direct distribution of food among those most in need, the centres frequently resolve to join the Programme in order that their poorest dwellers can be provided with food assistance. In this way, the distribution network is complemented so that all beneficiaries eligible for the aid can receive food assistance. From the perspective of a social welfare centre the engagement frequently translates to the assumption of additional duties and the need to employ staff (Annual report on execution of the Food Assistance Operational Programme 2014–2020 in 2016: 7–8)[8].

8 The Pursuance of the Parish's Tasks Related to the Granting of the Large Family Card

The right to hold the Card is enjoyed by members of families with many children. The Card is granted by the head officer *[wójt]* of the parish *[gmina]* the member of a family with many children lives in and on request from the concerned (Large Family Card Act, Art. 4 and Art. 9).

The pursuance of the parish's tasks connected with the granting of the Card rests within the duties of the central administration. The cost of the parishes' implementing the Act of Law with respect to the granting of the Card is financed from the state budget. The distribution of the earmarked state budget grant among the parishes rests with the governors of the provinces *[wojewodowie]* (Large Family Card Act, Art. 23 and Art. 23). The rights

8 Available at: https://www.mpips.gov.pl/pomoc-spoleczna/programy/program-operacyjny-pomoc-zywnosciowa-2014-2020-popz/sprawozdania/ [cit. 5. 2. 2018, 15.20].

enjoyed by the holder of a large family card include e.g. discounts for railway tickets – 37%, single-travel tickets, and a 49% discount for monthly tickets, free entrance to national parks, free tickets to the cinema, theatre, various exhibitions, and museums, etc.

9 The Local Governments of the County [*powiat*] and Province [*województwo*] in Combatting Unemployment

Poverty and social exclusion in Poland are closely related to being jobless and inactive in the labour market, and unemployment represents one of the major causes of reaching for social welfare services. That is why it is of utter importance to create conditions facilitating broader access to jobs. This is an effective method of counteracting the phenomenon of social exclusion and overcoming the situation of social and vocational helplessness.

The state tasks with respect to promoting employment, mitigating the effects of unemployment, and activating the concerned in the labour market are pursued by the institutions of the labour market. These include e.g. public employment services, made up by the employment authorities hand in hand with the county and provincial labour offices (Act on Employment Promotion and Labour Market Institutions, Art. 1 and Art. 6).

The range of the tasks the provincial government *[województwo]* faces in terms of the labour market policy is very broad. They include e.g. the distribution of the Labour Fund at disposal (Act on Employment Promotion and Labour Market Institutions, Art. 103 and Art. 106)[9], or initiation and conducting of surveys and analyses used in the operations of the labour offices. The tasks are entrusted with the provincial labour office as the organisational unit of the provincial government.

The tasks of the county government *[poviat]*, on the other hand, pursued by the county labour offices, include e.g.: registering the unemployed, assisting those seeking jobs via job centres, offering vocational counselling, granting and paying allowances and other unemployment benefits,

9 The Labour Fund is a state earmarked fund put at disposal of the Minister of Family, Labour, and Social Policy. The income of the Labour Fund comes from: mandatory premiums to the Labour Fund, subsidies from the state budget, funds from the European Union budget, designated to co-finance projects financed from the Labour Fund.

and pursuing projects which promote employment, including those aimed at counteracting unemployment (Act on Employment Promotion and Labour Market Institutions, Art. 8–9)[10].

The objectives of the offices of both levels further include mitigating the effects of unemployment and stimulating activity of the unemployed in the labour market by planning and pursuing tasks executed with the co-financing from the Structural Funds, specifically the European Social Fund (ESF) (Regulation (EU) no. 1303/2013 of the European Parliament and of the Council of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund, and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund, and repealing Council Regulation (EC) no. 1083/2006)[11]. Based on monies from the Fund, the Operational Programme Knowledge, Education, Development 2014–2020 (PO WER) was set up. The Programme is of vital significance, as it addresses the need of reform in the areas of employment, social inclusion, education, etc.[12] The Programme is arranged into five priority axes. The main actions of the labour market area under the PO WER Programme are pursued by the county and provincial labour offices and include e.g.: supporting the young in the regional labour

[10] To read more on the unemployment issues go to: Chudzicka-Czupała, 2004; Kabaj, 2000; Panek, 2011.

[11] For the period of 2014–2020, the EU designated more than EUR 80 billion for the European Social Fund, which is nearly one fourth part of its expenditure on the regional development policy. Out of the pool, Poland has been allocated ca. EUR 13.2 billion. This is much more than in the years 2007–2013, when he had slightly above EUR 11 billion at our disposal. The monies of the European Social Fund will be used at two levels: national and regional. At the national level, there is one Operational Programme – Knowledge, Education, Development (PO WER) allocated EUR 4.4 billion, i.e. about 34% of all monies. The other part amounting to more than 66% has been distributed among 16 regional programmes. This management decentralisation is intended to bring the project financing decisions closer to their prime beneficiaries, so that the needs of the regions and their communities can be best satisfied. Available at: https://www.funduszeeuropejskie.gov.pl/strony/o-funduszach/europejski-fundusz-spoleczny/przeczytaj-o-europejskim-funduszu-spolecznym/ [cit. 7. 2. 2018, 14.16].

[12] Available at: https://www.mpips.gov.pl/fundusze-europejskie/europejski-fundusz-spoleczny/program-operacyjny-wiedza-edukacja-rozwoj-na-lata-2014-2020/ [cit. 7. 2. 2018, 13.43].

market, providing individual support to the young aged 15–29[13], enabling the young up to the age of 29 to acquire and perfect the social skills important in the labour market. In executing the indicated tasks, the provincial and county labour offices play prevailingly the function of intermediaries, alternatively the beneficiaries. The ultimate beneficiaries, though, are young people (Detailed description of the Priority Axes, Operational Programme Knowledge, Education, Development 2014–2020).

10 Conclusion

The above analysis reveals that the activities of the local authorities are immersed in the constitutional idea of protecting and caring for the citizens.

Entities of local authorities of all levels are actively engaged in distributing support by pursuing numerous programmes in family benefits, child support benefits, food assistance, or counteracting unemployment. The activities pursued by the parishes *[gminy]* are absolutely important, as the parish, being the basic unit of local authorities, pursue most of them. One should highlight the fact that parish social welfare centres, in their capacity of support entities, are also engaged in the pursuance of the Food Assistance Operational Programme 2014–2020 co-financed from the Fund for European Aid to the Most Deprived, even though the task does not belong to their statutory duties. Concluding, one can say that without active participation of the parishes distribution of assistance would be severely limited. One should also point to the special importance of the county and provincial governments in counteracting the phenomena of unemployment and social exclusion. Direct engagement of the counties is here of immense significance. Hence, the analysis reveals that individual levels of the local authorities are mutually complementary in their actions. Thanks to such distribution of the tasks the support provided by public law entities to families and individuals in need does bear fruit.

Basically, their participation in the distribution applies to the central funds which finance the largest number of national aid programmes. However,

[13] Here, focus is oriented especially on the jobless who are neither in education or training (the so-called NEET youths) under the European Youth Employment Initiative (YEI).

local authorities can increase their support from their own budgets, e.g. as in the case of family benefits paid by parishes.

The funds from the EU budget are by no means less important; here, we mean particularly one of the Structural Funds, i.e. the European Social Fund. Alongside providing tangible financial support aimed at mitigating the effects of unemployment and activating the unemployed in the labour market, they play the role of stimulants contributing to increasing support from national funds and seeking for new opportunities of gaining financing from non-EU funds.

Lack of information can still be identified as the fundamental problem. Many people learn about a chance for obtaining assistance not from institutions, but by word of mouth or from the Internet.

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THE CHALLENGES OF LOCAL GOVERNMENT FINANCING IN THE LIGHT OF EUROPEAN UNION REGIONAL POLICY
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